BAND 64 NOMMER 1 FEBRUARIE 2001

JOURNAL OF CONTEMPORARY ROMAN-DUTCH LAW

THR

Tydskrif vir Hedendaagse Romeins-Hollandse Reg

Redakteur
GRETCHEN CARPENTER BA (Hons) LLB

Assistent-redakteurs
CJ Nagel BA LLD
JC Knobel BLC LLD
Mervyn Dendy BCOM LLB

Butterworths

BAND 64 NOMMER 1 FEBRUARIE 2001

THRHR

BAND 64 NOMMER 2 MEI 2001

THRHR

BAND 64 NOMMER 3 AUGUSTUS 2001

THRHR

REDAKSIONEEL

ARTIKELS

AANTEKENINGE

VONNISSE

BOEKE

BAND 64 NOMMER 4 NOVEMBER 2001

THR HR

INLIGTING AAN OUTEURS

Bydraes vir publikasie en korrespondensie met die redakteur moet gestuur word aan professor G Carpenter, Die Redakteur THRHR, *Regsfakulteit, Unisa, Posbus 392, Pretoria 0003; e-pos carpeg@unisa.ac.za. Inskrywings op die blad en advertensies moet gerig word aan Butterworths, Posbus 4, Mayville 4058.*

Die redakteur moet volledig ingelig word indien 'n publikasie reeds elders in die geheel of gedeeltelik gepubliseer is, of vir publikasie voorgelê is.

Outeurs word versoek om manuskripte so ver moontlik volgens die styl van die *Tydskrif* voor te berei. Volledige riglyne aan outeurs verskyn in 1985 *THRHR* 122-126. Die algemene riglyne wat op hierdie bladsy verskyn en 'n onlangse uitgawe van die *Tydskrif* kan ook in geval van onsekerheid geraadpleeg word. Die redakteur kan bydraes op vertroulike grondslag aan kundige arbiters voorlê om geskiktheid vir publikasie te bepaal. Die redaksie sal manuskripte wysig om met die styl van die *Tydskrif* ooreen te stem, taalfoute reg te stel en waar nodig duidelikheid te bevorder.

Artikels moet in die reël nie langer wees nie as 7 000 woorde (ongeveer 20 bladsye getik soos hieronder voorgeskryf). 'n Artikel moet voorsien wees van die outeur se voorletters en van, sy akademiese kwalifikasies, 'n beskrywing van sy betrekking en die naam van die instansie waaraan hy verbonde is, en 'n kort *opsomming* (ongeveer 300 woorde) in Engels as die artikel in Afrikaans geskryf is, en omgekeerd. Die opsomming moet ook van 'n vertaalde titel voorsien word. *Voetnote* moet op aparte bladsye (dws nie onderaan die bladsy waarop hulle betrekking het nie) getik word.

Aantekeninge, vonnisbesprekings en boekresensies: Die outeur se naam en die instansie waaraan hy verbonde is, moet voorsien word. Voetnote moet glad nie gebruik word nie – alle verwysings moet in die teks, tussen hakies, ingewerk word. *Vonnisbesprekings* word ook van titels voorsien, met die naam van die vonnis as subtitel. By *boekbesprekings* dien die titel van die boek wat geresenseer word, as titel. Die naam van die boek se outeur, uitgawe (indien nie die eerste uitgawe nie), uitgewer, plek van uitgawe, jaar van publikasie, getal bladsye en die prys (harde- en sagteband waar nodig) moet verskaf word. (Raadpleeg 'n onlangse uitgawe van die *Tydskrif*.)

Die volgende geld vir alle manuskripte:

Formaat Manuskripte moet dubbelgespasieerd getik wees op net een kant van A4-grootte papier. Dit geld ook vir die opsomming, aanhalings en voetnote. Bydraes moet ook óf op skyf ("stiffie") óf per e-pos ingedien word.

- *Afkortings* verskyn nie in die teks nie; in *voetnote* (en gedeeltes tussen hakies wat dieselfde doel as voetnote dien) soveel erkende afkortings moontlik. Geen punte word by afkortings gebruik nie. Sowel aanmekaargeskrewe as aparte woorde word sonder spasie afgekort: bv, asb, km, tap, tov, aw, VSA, *THRHR*, RSA, BA, LLB, Unisa, *SALJ*. *Voorbeelde*: a vir artikel(s), bl vir bladsy(e), ev vir en volgende, par vir paragraaf(we), 2e uitg vir tweede uitgawe, R vir regter, AR vir appèlregter, RP vir regter-president, WnAR vir waarnemende appèlregter, HR vir hoofregter, reg vir regulasie, hfst vir hoofstuk, vgl vir vergelyk, WnR vir waarnemende regter.
- *Aanhalings* word presies soos in die oorspronklike weergegee, dit wil sê met die kursiverings, hoofletters, punte ensovoorts onveranderd. Enige verandering of invoeging in 'n aanhaling word tussen reghoekige hakies aangebring, byvoorbeeld "[I]n . . ." Outeurs word versoek om aanhalings noukeurig te kontroleer.
- *Hoofletters* Die gebruik van hoofletters in Afrikaanse bydraes word sover moontlik beperk: die regter, die appèlhof, die parlement, die minister, die hof, die regter-president. Alle voetnote begin met 'n hoofletter.
- *Opskrifte* Raadpleeg hierdie uitgawe vir voorbeelde.
- *Aanhalingstekens* Gebruik dubbel aanhalingstekens, met enkel aanhalingstekens *binne* 'n aanhaling. By volsinaanhalings kom die aanhalingsteken ná die punt; by ander aanhalings vóór die komma, dubbelpunt, kommapunt ensovoorts.
- *Kursivering* Aanhalings (ook uit Latyn) word *nie* gekursiveer (onderstreep) nie; woorde en uitdrukkings uit 'n ander taal as dié van die bydrae word gekursiveer: *dolus, fait accompli, Grundnorm, rule of law.*

Verwysings

- *Vonnisse* Die name van die partye en die v daartussen word gekursiveer (of onderstreep). Die woorde "and another", "en ander", "NO" ensovoorts word weggelaat. Die Engelse verwysings vir voor-1947-vonnisse word ook in Afrikaanse bydraes gebruik. Voorbeelde: *Botha v Botha* 1979 3 SA 792 (T); *Talbot v Von Boris* 1911 1 KB 854; *Ex parte F* 1963 1 PH B9 (N); *Re Waxed Papers Ltd* 1937 2 All ER 481 (CA); *Shatz v Josman* 1935 NPD 142.
- *Boeke* Dit is onnodig om die voorletters van 'n boek se outeur(s) te verskaf (behalwe as die weglating tot verwarring kan lei). Die titels van boeke word gekursiveer (onderstreep). Net die eerste woord begin met 'n hoofletter, behalwe waar eiename (ook as byvoeglike naamwoorde) in die titel voorkom. Slegs die datum van die uitgawe kom tussen hakies: Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989).
- *Artikels* Titels van artikels word tussen aanhalingstekens geplaas. Soos by boeke, begin net die eerste woord met 'n hoofletter: Joubert "Aspekte van die aanspreeklikheid van vennote" 1978 *THRHR* 291.
- *Tydskrifte* Name van tydskrifte word gekursiveer (onderstreep) en volledig uitgeskryf (behalwe *LJ*, *LR* en *Univ*): *Harvard LR, Yale LJ, De Rebus, De Jure.* Maar: *THRHR, SALJ, TSAR, CILSA, SASK, SA Merc LJ, LQR, TRW.* Die bandnommer word weggelaat (behalwe waar die bladsynommers van 'n tydskrif nie jaarliks deurlopend is nie – soos by *Codicillus*): 1971 *THRHR* 12; 1979 *SALJ* 307; 1987 (2) *Codicillus* 13.
- *Wetgewing* Die naam en nommer van 'n wet word nie gekursiveer nie en word só weergegee: Die Wet op Prokureursordes 71 van 1975; die Maatskappywet 46 van 1926. Verwysings na wette in die loop van die teks kan egter ook informeel wees (sodra dit vir die leser duidelik is na watter wet verwys word): die 1926-wet, die Maatskappywet van 1926.
- *Ou bronne* Sien 1985 *THRHR* 125.

Butterworths-prys *Die Butterworths-prys – regsboeke ter waarde van R1 000 – word elke jaar deur die uitgewer beskikbaar gestel aan die outeur van die beste* eersteling-artikel *in die* Tydskrif. *Die artikel moet die eerste substansiële bydrae wees wat die skrywer vir publikasie in 'n regstydskrif aanbied. Dit moet by voorkeur oor 'n onderwerp van die Suid-Afrikaanse reg handel. Die redaksiekomitee behartig die beoordeling na afloop van die kalenderjaar. Die redaksiekomitee behou hom die vryheid voor om die prys nie toe te ken nie indien die artikels wat ontvang is, na sy mening toekenning nie regverdig nie. Verskeie bydraes van 'n besondere outeur kan gesamentlik in aanmerking kam.*

REDAKSIONELE KOMMENTAAR

Die nuwe Suid-Afrika en die nuwe millennium stel ongekende uitdagings aan bykans elke sfeer van menslike aktiwiteit. Universiteite moes byvoorbeeld gewoond raak aan die verskynsel van die sogenaamde massifikasie in tersiêre onderrig, wat beteken dat universiteitsopleiding nie meer net vir die sosiale en intellektuele elite beskore is nie. Meer spesifiek moes regsfakulteite aanpas by die gedagte van die vierjarige LLB, met gepaardgaande besinning oor presies watter kennis en vaardighede vir voornemende regspraktisyns onontbeerlik is en wat bloot as "nice-to-have" geklassifiseer kan word. Regspraktisyns moes hulle versoen met die gedagte dat prokureurs in die hooggeregshof kan verskyn en dat regters nie meer amper uitsluitlik uit die geledere van praktiserende advokate aangestel word nie.

Regstydskrifte het nie hierdie transformasieproses vrygespring nie. Soos byvoorbeeld in 'n vorige redaksionele kommentaar opgemerk is (sien die Mei 2000-uitgawe van die *THRHR*), moet tradisionele akademiese tydskrifte die elektroniese aanslag die hoof bied. Die massifikasie wat hierbo genoem word, bring verder mee dat studente nie meer in dieselfde mate uit gegoede ekonomiese agtergronde kom nie, wat die kwessie van bekostigbaarheid van leesstof sterk na vore bring.

Bo en behalwe die probleme waarmee alle regstydskrifte in Suid-Afrika gekonfronteer word, is daar veral twee wat, hoewel nie uniek aan die *Tydskrif* nie, tog besondere afmetings vir die *Tydskrif* aanneem. Tradisioneel is die *Tydskrif* eerstens 'n "heenkome" vir diegene wat Afrikaans as voertaal wil gebruik; tweedens is die *Tydskrif* per definisie 'n tydskrif vir "hedendaagse Romeins-Hollandse reg", wat daaraan 'n besondere karakter verleen het. Vandag sien die *Tydskrif* egter heel anders daar uit: daar word in die loop van 'n bepaalde jaar heelwat meer Engelse as Afrikaanse bydraes geplaas, en die inhoud van die meerderheid bydraes kan deesdae beswaarlik as "Romeins-Hollandse reg" (nie eers van die byderwetse soort nie) aangemerk word.

Daar kan wel geargumenteer word dat die gedaanteverwisseling van die *Tydskrif* niks te doen het met die nuwe Suid-Afrika nie, aangesien dit baie jare lank al aan die gang is. Dit moet inderdaad toegegee word. (In elk geval was die *Tydskrif* nooit in 'n eng Romeins-Hollandse of privaatregtelike nis vasgevang nie.) Die feit bly egter staan dat die *Tydskrif* van vandag heel anders daar uitsien as dié van vyftig jaar gelede.

Die vraag is eintlik of die toekomstige ontwikkeling van die *Tydskrif* aan die toeval oorgelaat moet word, en of 'n bepaalde toekomsvisie noodsaaklik is. In 'n mate is daar reeds aan 'n toekomsvisie begin werk – as 'n mens dit so kan stel. Ek verwys na die twee pryse wat in die afgelope jaar of twee ingestel is: die prys vir die beste bydrae oor 'n grondwetlike aangeleentheid, en die prys vir die beste Afrikaanse bydrae. By die eerste oogopslag lyk dit ietwat paradoksaal om enersyds 'n spesiale prys uit te loof vir die beste bydrae in 'n veld wat (in sommige oë) eintlik inbreuk maak op die beginsels van ons Romeins-Hollandse erfenis, veral op die gebied van die privaatreg, en andersyds 'n prys vir die beste bydrae in die taal waarvoor die *Tydskrif* in die lewe geroep is. Hierdie oënskynlike skisofrenie tussen die tradisionele en die "nuwe" beeld van die *Tydskrif* is egter myns insiens heeltemal verklaarbaar.

Aan die een kant is dit noodsaaklik dat die *Tydskrif* tred hou met die huidige realiteite in Suid-Afrika. Dit ly geen twyfel nie dat die koms van 'n oppermagtige Grondwet die belangrikste enkele gebeurtenis is wat ons regstelsel in die twintigste eeu getref het. Erkenning hiervan versterk die beeld van die *Tydskrif* as 'n dinamiese "hedendaagse" publikasie wat kwaliteitdiens aan sowel die akademie as die regspraktyk lewer. Aan die ander kant moet die instelling van 'n prys vir Afrikaanse bydraes nie as 'n ideologies reaksionêre stap gesien word nie. Soos in die redaksionele kommentaar in die Februarie 2000-uitgawe van die *Tydskrif* verduidelik word, gaan dit inderdaad oor die verdere ontwikkeling en uitbouing van Afrikaans as regstaal, veral in die lig van die "globalisering" van ons hele regstelsel en die al wyer gebruikmaking van buitelandse en internasionale bronne. Dus is dit uiters belangrik dat bydraes wat vir hierdie prys oorweeg word van uitstaande gehalte moet wees – nie net linguisties nie maar veral ook inhoudelik.

Die pryse wat uitgeloof word, vergelyk nou nie juis met die Nobel-prys wat geldwaarde en prestige betref nie. Hulle moet eerder gesien word in die lig van die doelstellings en "missie" (as 'n mens verplig word om jou tot 'n gonswoord te wend!) van die *Tydskrif* in die 21ste eeu. Hierdie doelstellings sal ongetwyfeld deurentyd heroorweeg moet word om by omstandighede en ontwikkelinge aan te pas. Die enigste ding wat nie toegelaat kan word nie, is selftevredenheid en verstarring.

GRETCHEN CARPENTER
Redakteur

Guidelines on medical research ethics, medical "experimentation" and the Constitution

Christa van Wyk
BA LLB LLM LLD
Professor, Department of Jurisprudence
University of South Africa

OPSOMMING

Riglyne vir mediese navorsingsetiek, mediese "eksperimentering" en die Grondwet

Artikel 12(2) van die Grondwet van Suid-Afrika bepaal dat elkeen die reg het op liggaamlike en psigiese integriteit, waarby die reg inbegrepe is om nie sonder sy of haar ingeligte toestemming aan mediese of wetenskaplike eksperimente onderwerp te word nie. Die betekenis van die woord "eksperiment" word in hierdie artikel ondersoek en daar word tot die gevolgtrekking gekom dat dit die voor die hand liggende betekenis van "navorsing" dra. So 'n interpretasie sou egter meebring dat geen navorsing meer in Suid-Afrika gedoen mag word op jong kinders en geestesgebrekkige persone wat nie self kan toestem nie – selfs nie eens navorsing oor siektetoestande wat tipies onder sulke persone voorkom nie – tensy sodanige navorsing geskied ingevolge algemeen geldende regsvoorskrifte wat voldoen aan die vereistes wat artikel 36 van die Grondwet vir die beperking van regte stel. Daar word verder tot die gevolgtrekking gekom dat bestaande Suid-Afrikaanse riglyne vir mediese navorsing, wat voorsiening maak vir sowel terapeutiese as nie-terapeutiese navorsing op mense wat nie in staat is om self toestemming te gee nie, as algemeen geldende regsvoorskrifte beskou kan word. Daar word egter aan die hand gedoen dat sodanige riglyne hersien behoort te word sodat die beperking van regte wat hulle oplê, ooreenkomstig artikel 36 redelik en regverdigbaar in 'n oop en demokratiese samelewing gebaseer op menswaardighied, gelykheid en vryheid, en in ooreenstemming met internasionaal aanvaarde norme vir navorsing sal wees. In oorweging word gegee dat spesifiek wat betrek die graad van risiko waaraan navorsingsubjekte onderwerp mag word, die bestaande riglyne nie aan internasionale norme voldoen nie.

1 INTRODUCTION

Section 12(2) of the Constitution of the Republic of South Africa[1] provides that "everyone has the right to bodily and psychological integrity, which includes the right – (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific *experiments* without *their* informed consent".[2]

---

1 108 of 1996.

2 My emphasis. Subs 1 provides that "(e) veryone has the right to freedom and security of the person, which includes the right – (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way".

Some comments have been made on this section, notably by Van Oosten and Strauss. According to Van Oosten, "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". He remarks that in this respect section 12(2)(c) is clearly out of step with current local and international medical research ethics.[3]

If this statement by Van Oosten is taken to its logical consequences, it would imply that *all* medical research, whether therapeutic[4] or non-therapeutic,[5] invasive (intrusive)[6] or non-invasive (non-intrusive),[7] clinical[8] or non-clinical,[9] would be covered by section 12(2)(c). Put differently, this would mean that all medical research would need the informed consent of the research subject/participant himself or herself. However, Van Oosten submits that therapeutic research could in some instances be allowed without the informed consent of the research subject. Without subjecting the Mental Health Act[10] to constitutional scrutiny in terms of the limitation clause – which I submit needs to be done[11] – he concludes that therapeutic research seems to be included under the notion of "medical treatment of or operation on" mentally ill patients, for which proxy consent can be given in terms of section 60A of the Mental Health Act.[12] As far as the provisions of the Child Care

---

3 Van Oosten "The law and ethics of information and consent in medical research" 2000 *THRHR* 5 9.

4 Ie an intervention or procedure that holds out the prospect of direct benefit for the individual subject. This includes interventions/procedures that hold potential diagnostic or therapeutic value for the patient. Cf art II.6 of the Declaration of Helsinki; Levine "The need to revise the Declaration of Helsinki" 1999 *NEJM* 531 532; the South African Medical Research Council *Guidelines on Ethics for Medical Research* (hereafter MRC *Guidelines*) (1993) 1 3 1. Cf fn 47 *infra*.

5 Ie an intervention or procedure that is not expected to provide benefit to individual subjects, but may provide benefit to society. Cf art III 2 of the Declaration of Helsinki; Levine 1999 *NEJM* 531; MRC *Guidelines* 1.3.1. Levine argues that the distinction between therapeutic and non-therapeutic research is a false one and that the distinction has been rejected by policy-making agencies in the US and Canada since the 1970s.

6 Ie research which involves interference with the subject (psychological intrusion, including intrusion on privacy or physical invasion) (MRC *Guidelines* 4 10 3 ii).

7 Ie research which involves making observations without any direct interference with the subject, such as research involving the use of personal records (MRC *Guidelines* 4.10.3). Cf fn 47 *infra*. It could probably be argued that even such research constitutes an invasion of privacy.

8 Ie medical research combined with professional care (*Revising the Declaration of Helsinki: A Fresh Start* Workshop Report 1999-09-3–4).

9 Ie non-therapeutic biomedical research involving human subjects (*Revising the Declaration of Helsinki: A Fresh Start* (fn 9).

10 18 of 1973.

11 Cf s 36(1) of the Constitution. S 36(2) provides that "no law may limit *any* right entrenched in the Bill of Rights" except as provided in subsection (1).

12 This section provides that if a patient is on account of his mental illness not capable of consenting to medical treatment to, or an operation on, himself, the curator appointed by the court to the person or property of the patient, the patient's spouse, parent, major child or brother or sister may consent. The persons enumerated have precedence in this order, unless the consent is being withheld unreasonably, or the operation or treatment is urgent and the person having precedence cannot, with due regard to the urgency of the medical treatment or operation, be found timeously. In that event the person following in precedence may consent. If there are none of the persons enumerated, or if such person(s) cannot be found after reasonable enquiry, the superintendent of the institution where the patient finds himself, may consent, provided that the superintendent is on reasonable grounds of the opinion that the life of the patient is being endangered or that his health is being seriously threatened by his condition and that his condition

continued on next page

Act[13] are concerned, he argues that, for the medical treatment of or operations on children under the ages of 14 and 18 respectively, the substitute consent of their parents or guardians is acceptable,[14] provided that such treatment or operation is of a therapeutic nature.[15] His conclusion is that surrogate consent to medical research on incompetent minors and mentally ill patients is possible only in respect of therapeutic research, even if this effectively renders non-therapeutic research on such minors or mentally ill patients, who are legally incompetent to give their informed consent,[16] impossible. (The same, of course, would hold true for unconscious patients.) He justifies this view by referring to the potential abuse of such persons for research purposes. The only non-therapeutic research which he would allow, would be that which involves no risk or danger at all, for example where unlinked and anonymous information is gathered about a person by means of questionnaires or by means of the examination of specimens taken from such a person. The conclusion can be drawn that he equates prohibited "experiments" in terms of section 12(2)(c) with non-therapeutic research which involves some risk.[17]

Strauss[18] is essentially of the same view:

> "Where a mentally handicapped person is not competent to give consent and the research is of a non-therapeutic nature, there is no provision in our law which enables another person to give consent on his behalf. However, if the procedure is of a therapeutic nature, ie may be of direct benefit to the patient himself, consent may be given by a representative in accordance with the provisions of section 60A of the Mental Health Act."[19]

Strauss further agrees with the view that "South African courts will in all probability never consent to non-therapeutic experimentation on mentally ill subjects".[20] He interprets section 12(2)(c) of the Constitution as creating a prohibition of a "purely" experimental procedure not with the intent to endeavour to cure or alleviate the plight of the subject himself, in the case of persons who are incapable of consenting to the procedure. He further submits that even placebo trials involving patients

---

necessitates the treatment or operation in question. It is clear from the wording of s 60A that the treatment or operation should be directed at the mentally ill person's interests in his or her own life or health, in other words, that it should be therapeutic in nature.

13 74 of 1983.

14 S 39(1) and (2) provides that the minister, or the medical superintendent of a hospital may give consent in lieu of parents where the operation or treatment is "necessary" or where the life or health of the child is endangered.

15 S 39(4) provides that children who have attained the age of 14 years are legally capable of consenting to medical treatment of themselves and their children, and that minors who have attained the age of 18 are legally capable of consenting to medical operations upon themselves. Children under these ages, whose parents consent on their behalf, must also assent to treatment to the extent that they are mentally able to comprehend the issues involved.

16 Mentally ill persons may in fact be able to decide, and indicate, whether they wish to take part in research. With additional time, patience and assistance it may be possible to ensure that such persons understand the procedure envisaged and the implications thereof and may give voluntary, informed consent.

17 Van Oosten (fn 3) 16.

18 "Clinical trials involving mental patients: Some legal and ethical issues" 1998 (1) *South African Practice Management* 20.

19 Cf fn 12 *supra*.

20 Cf Van der Vyver "Legal dimensions of human experimentation" in *Attitudes to clinical experimentation in South Africa* (eds Oosthuizen, Shapiro and Strauss (1985)), quoted by Strauss (fn 18) 20.

whose mental disorder is so severe that it renders them incapable of consenting to it themselves, will offend against section 12(2)(c), but adds that

> "it may perhaps be argued that because of the interest of the mental patient himself or herself in the discovery of an eventual cure or alleviation of his or her own condition, legislation which permits placebo trials of the kind described should be regarded as a permissible limitation of the right ensconced in section 12(2)(c)".

2 THE NATURE AND ETHICS OF RESEARCH

Scientific research has produced substantial social benefits and has made an enormous contribution to human progress. However, medical science often confronts society with difficult ethical problems. The possibilities of abuse of the individual in scientific investigation, and of the misuse of biology and medicine, remain real.[21] On the one hand, there is increasing recognition and application of the ethical principles that underpin medical and scientific endeavours,[22] but on the other hand, medical research has become a big industry which is highly organised and well-funded. It has been remarked that

> "(i)n this climate ... the use of our most vulnerable citizens – institutionalized children, the mentally retarded and prisoners – came to be seen as a sacrifice entirely justified by the national interest in the 'war' against disease".[23]

The challenge to research ethics is to balance the need to respect the dignity of the human being as an individual and as a member of the human race with the need to accelerate development and progress in biology and medicine for the benefit of present and future generations.

The three basic principles which are particularly relevant to the ethics of research involving human subjects, are set out in *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research* (hereafter referred to as the *Belmont Report*).[24] These principles lead to consideration of the following requirements in research: informed consent, risk/benefit assessment, and the selection of research subjects. They are the principle of respect for persons, the principle of beneficence (which is sometimes complemented by the corollary principle of non-malfeasance – do no harm) and the principle of justice. It is evident from the following brief discussion that these principles are not necessarily in

---

21 Cf abuses during the Nazi era; the notorious Tuskegee syphilis study (from the 1940s until 1973) in the USA during which disadvantaged, rural black men were used to study the untreated course of the disease long after effective treatment had become available; and the study of immune reactions to live cancer cells injected into mentally disabled persons carried out in New York in 1963 (Ijsselmuiden and Faden "Research and informed consent in Africa – another look" 1992 *The New England Journal of Medicine* 830).

22 Editorial "Declaration of Helsinki – Nothing to declare?" *The Lancet* (1999-04-17).

23 Arras and Steinbock "Experimentation on human subjects" *Ethical issues in modern medicine* (1995) 517 519.

24 Report of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (1979) (FR Doc 79–12065 Filed 1979-04-17) 3 *et seq*. This report is probably the best rendition of research ethics in the US, although it was not intended by its drafters (the National Commission) to be peculiarly American. It was seen to be consonant with the major traditions of Western ethical, political and theological thought (Levine "Informed consent: some challenges to the universal validity of the Western model" Fall-Winter 1991 *Law, Medicine and Health Care* 207 208). Cf also Barry "Ethical considerations of human investigation in developing countries" 1998 *The New England Journal of Medicine* 191 and *Contemporary issues in bioethics* (3rd ed) (ed Beauchamp and Walters) 28–34 for a discussion of the various ethical principles.

harmony with one another, and that difficult choices have to be made when they come into conflict with each other.

Respect for persons means that individuals should be treated as autonomous agents[25] and as ends in themselves (according to Kantian ethics), and that people with diminished authority are entitled to protection. Respect, for example, requires that research subjects/participants, to the degree that they are able, be given the opportunity to choose what will or will not happen to them. This means, for example, that children's assent should be sought when they are capable of providing this, and that research will not be carried out on them if they indicate that they do not wish to take part. It also means that "vulnerable subjects" should not to be used as a means to an end, and that the individual should not be abused for the sake of society. In terms of this principle human dignity is of paramount importance.

Beneficence, in short, requires that the possible benefits of research should be maximised and the possible harms be minimised, not only for the individual research participant, but also for society at large. The problem is, of course, to decide when it is justifiable to seek certain benefits despite the risks involved, and when the benefits should be foregone because of the risks. (The term "risk" refers to a possibility that harm may occur. It usually refers both to the chance (probability) of experiencing harm and the severity (magnitude) of the envisioned harm.)[26] The principle of beneficence extends to the entire enterprise of research. It recognises that longer term benefits may result from the improvement of knowledge. For example, effective ways of treating childhood diseases are benefits that justify research involving children, including infants – even when individual research subjects are not direct beneficiaries. The risk associated with such research is justified by the potential benefit to the human subjects involved, or by the potential contribution to human knowledge and the relief of human suffering.[27] If such research were to be inadmissible, it would rule out much research promising great benefit to children in the future.[28] A difficult ethical problem arises, however, where research presents more than minimal risk without the immediate prospect of direct benefit to the children involved. ("Minimal risk" means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.)[29]

---

25 The word "autonomy" comes from the Greek words "autos" (self) and "nomos" (rule or law). An autonomous, moral agent is an individual who is capable of forming a rational plan of life, of rational deliberation about alternative plans of action with the aim of making choices that are compatible with his or her life plan, and who assumes responsibility for the consequences of his or her choices (Levine (fn 24) 208).

26 *Belmont Report* 7; cf also the MRC *Guidelines* 5 4.

27 Cf background note in the CIOMS/WHO *International Ethical Guidelines for Biomedical Research Involving Human Subjects* (1993) 5. Brennan "Proposed revisions to the Declaration of Helsinki – Will they weaken the ethical principles underlying human research?" 1999 *NEJM* 527–531 argues that the proposed revisions stress utilitarian efficiency aligned with marketplace values to the detriment of the rights of research subjects.

28 Burchell "Non-therapeutic medical research on children" 1987 *SALJ* 213–214 has remarked 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".

29 Par 46 103 of *Title 45 Code of Federal Regulations Part 46 – Protection of Human Subjects* 56 FR 28003, 1991-06-18, revised 1994. Cf also CIOMS *Guidelines* Guideline 5 and commentary on this guideline.

The principle of justice requires "fairness in distribution" of the benefits and burdens of research, for example that the poor should not be exploited as research subjects if the benefits of the research will not be affordable to them.

The question arises as to the extent to which the benefits from research may outweigh considerations of individual dignity and autonomy. The utilitarian approach, which is often considered as part of the principle of beneficence, stresses efficiency and the fact that general good can be obtained by research. However, it is clear that this approach poses a danger to, and comes into conflict with, the autonomy of the individual research participant/subject and may give rise to the idea that society has a right to carry out medical research on people for the benefit of society, and that people have a duty to submit to research. In this respect it has been observed that "people can be wronged even if they are not harmed" and that to carry out perfectly benign studies on human beings without their consent would wrong them because their right to self-determination is violated. In the absence of their granting informed consent, research subjects would be treated as a mere means to the ends of others, as objects or instruments rather than as persons worthy of respect.[30]

3 INTERNATIONAL AND LOCAL GUIDELINES ON ETHICS

As was pointed out by Van Oosten, an interpretation of section 12(2)(c) of the Constitution which rules out all medical research without the consent of the research subject, is fundamentally out of step with current local and international medical research ethics. However, even the interpretation favoured by Van Oosten and Strauss, which equates "experiment" with non-therapeutic research and finds unacceptable non-therapeutic research on research subjects who are legally incompetent to give consent, is out of line with most international and local guidelines for ethical research with the notable exception of the *Nuremberg Code*.[31] That all modern guidelines make provision for both therapeutic and non-therapeutic research on incompetent research subjects, usually with the proviso that no more than minimal or low risk[32] should be involved, is evident from the examples which follow.

3 1 International ethics guidelines

The *Declaration of Helsinki*[33] provides under "basic principles" that 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

---

30 Macklin *Against relativism: Cultural diversity and the search for ethical universals in medicine* (1999) 193.

31 The *Nuremberg Code* (cf fn 87 *infra*) does not provide for proxy consent. The code sets standards for permissible medical "experimentation" on humans, eg that the persons involved should have legal capacity to give consent, should be able to exercise free power of choice and should have sufficient knowledge and comprehension to enable them to make an understanding and enlightened decision. Christakis and Panner "Existing international ethical guidelines for human subjects research: some open questions" (fn 24) 214 215 regard it as a primary deficiency in the *Nuremberg Code* that it lacks consideration of the participation in research of less than fully autonomous subjects, namely those with "legal incompetence".

32 Variously defined. Cf text to fn 29 *supra*, and the text to fn 37 *infra*.

33 This declaration was adopted in 1964 by the World Medical Association as a measure further to the *Nuremberg Code* to protect society against possible abuses. It is essentially a document written by physicians for physicians. It has since been revised a number of times, most recently in 1996 by the 48th General Assembly of the World Medical Association in Somerset West, South Africa. It is currently again under review.

impossible to obtain informed consent, or when 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 consent, the minor's consent must be obtained in addition to the consent of the minor's legal guardian.[34]

The *International Ethical Guidelines for Biomedical Research Involving Human Subjects*, prepared by the Council for International Organisations of Medical Sciences (CIOMS) in collaboration with the World Health Organisation (WHO)[35] (hereafter referred to as the CIOMS/WHO Guidelines), make provision for research on people who are not capable of giving informed consent. In such a case, the proxy consent of a properly authorised representative must be obtained.[36] In research involving children, the purpose of the research must be to obtain knowledge relevant to the health needs of children. The investigator must ensure that a parent or legal guardian of the child has given proxy consent; that the consent (assent) of each child to the extent of the child's abilities is obtained; that the child's refusal to participate is respected, and that the risk presented by the interventions is low. The risk of interventions that are not intended to be of direct benefit to the child-subject must be justified in relation to anticipated benefits to society (generalisable knowledge). In general, the risk from such intervention should be minimal, that is, no more likely and not greater than the risk attached to routine medical or psychological examination of such children; if the object of the research is sufficiently important, slight increases above minimal risk may be permitted.[37] Provision is also made for research involving persons with mental or behavioural disorders with similar conditions being set.[38]

The *Harmonised Tripartite Guideline for Good Clinical Practice of the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals* (hereafter referred to as the ICH *Guideline*)[39] provides that when a clinical trial (therapeutic or non-therapeutic) includes subjects who may be enrolled in the trial only with the consent of the subject's legally acceptable representative (eg minors, or patients with severe dementia), the subject should be informed about the trial to the extent compatible with the subject's understanding and, if capable, the subject should sign and personally date the written informed consent.[40] Non-therapeutic trials may be conducted on subjects with the consent of a legally acceptable representative, provided that the objectives of the trial cannot

---

34 Article I 11. However, under the heading of "non-therapeutic biomedical research involving human subjects (non-clinical biomedical research)" it provides that research subjects should be volunteers – either healthy persons or patients for whom the experimental design is not related to the patient's illness. The division of the *Helsinki Declaration* into three different sections and the incoherent approach have created difficulties.

35 These guidelines were issued in 1982 for the effective application of the *Nuremberg Code* and the *Declaration of Helsinki*, particularly in developing countries. They have since been revised. The current 1993 edition is again under review. Cf also the CIOMS *Guidelines for Ethical Review of Epidemiological Studies* (1991).

36 Guideline 1.

37 Guideline 5.

38 Guideline 6.

39 (1996). This guideline provides a unified standard for the European Union, Japan and the United States, as well as Australia, Canada, the Nordic countries and the WHO. It has been developed since 1989 with the aim to provide global guidelines and to bridge differences and avoid duplication. It takes into consideration the current good clinical practices of the above countries.

40 Par 4.8.12.

be met by means of a trial on subjects who can give informed consent personally; the foreseeable risks to the subjects are low; the negative impact on the subject's well-being is minimised and low; the trial is not prohibited by law; and the approval/favourable opinion of the institutional review board or institutional ethics committee is expressly sought on the inclusion of such subjects, and the written approval/favourable opinion covers this aspect. Unless an exception is justified, such trials should be conducted on patients having a disease or condition for which the investigational product is intended.[41]

The European Convention for the Protection of Human Rights and Dignity of the Human Beings with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine[42] is the most detailed of the various instruments under discussion, and lays down the strictest conditions for non-therapeutic research carried out on research subjects who are unable to give consent. It provides, *inter alia*, that research on a person without the capacity to consent may be undertaken if the intervention is for his or her direct benefit or if the results of the research have that potential; if research of comparable effectiveness cannot be carried out on individuals capable of giving consent; if the representative of the individual gives authorisation and the individual concerned takes part in the authorisation procedure as far as possible; if the risks which may be incurred by that person are not disproportionate to the potential benefits of the research; and if the person does not object.[43] In exceptional circumstances, research may be authorised which has no potential to produce results of direct benefit to the health of the person concerned. Then the following additional conditions have to be met: the research must have the aim of contributing, through significant improvement in the scientific understanding of the individual's condition, disease or disorder, to the ultimate attainment of results capable of conferring benefit to the person concerned or to other persons in the same age category or afflicted with the same disease or disorder or having the same condition; and the research must entail only minimal risk[44] and a minimal burden for the individual concerned.

3 2 American guidelines

The *Belmont Report*,[45] which is probably the best rendition of research ethics in the United States, states that research involving children is justified by benefits such as effective treatment of childhood diseases – even if individual research subjects are not direct beneficiaries. Research also makes it possible to avoid the harm that may result from the application of previously accepted routine practices that on closer investigation turn out to be dangerous. It nevertheless concedes that a difficult ethical problem remains when more than minimal risk[46] is involved without immediate prospect of direct benefit to the children involved.

---

41 Par 4.8.14. "Low risk" is not defined.

42 Council of Europe, Strasbourg 1996. Cf also the Universal Declaration of Human Rights (1948), the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the European Social Charter (1961), The International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) and the Convention on the Rights of the Child (1989).

43 Cf arts 5, 16 and 17.

44 Which is not defined in the Convention.

45 Cf fn 24 *supra*.

46 "Minimal risk" means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests. Cf fn 29 *supra*.

3 3 South African guidelines

The MRC *Guidelines*,[47] (based with permission on, *inter alia*, reports from the Royal College of Physicians in Londen and CIOMS), make provision for therapeutic and non-therapeutic research on children. Non-therapeutic research may be carried out if no worse than minimal risk is involved and the consent of a parent or guardian is sought where these are available. Where obtaining parental consent might impede the research, the approval of an ethics committee to dispense with parental consent could be sought. The younger the child, the more desirable it is to seek parental consent.[48] According to the MRC *Guidelines* the term "minimal risk" covers two types of situation. The first is where there is a small chance of a recognised reaction which is in itself trivial, for example a mild headache or a feeling of lethargy. The second is where there is a very remote chance of serious injury or death, comparable to the risk of flying as a passenger on a scheduled aircraft.[49] "Negligible risk or less than minimal risk" is defined as "that risk which is equal to the probability and magnitude of physical or psychological harm that is normally encountered in the daily lives of people *in a stable society*, or in the routine medical or psychological examination of healthy subjects".[50] "More than minimal risk" is not defined, but examples are volunteered, and include procedures such as spinal taps, biopsies and behavioural interventions likely to cause psychological stress.[51] It has to be noted that "minimal risk" according to the MRC *Guidelines* differs significantly from the definition given in, for example, the CIOMS/WHO *Guidelines* and the *Belmont Report* discussed above. The MRC *Guidelines* consider the chance of serious injury or death, even though it is remote, as a mere "minimal risk".[52] The meaning of the terms "less than minimal risk/negligible risk" as defined in the MRC *Guidelines* is more in line with that given to the term "minimal risk" in these international guidelines referred to.

The MRC *Guidelines* do not provide for proxy consent to non-therapeutic research on mentally ill patients,[53] but they do provide that the research ethics committee considering the research proposal may grant ethical clearance when it 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. No patient who refused, or if incapable of refusing, resisted, should be included in or continue in research".[54]

---

47 These guidelines were published by the MRC in pursuance of the South African Medical Research Council Act 58 of 1991. S 17(1) states that the MRC Board must regulate and control research on or experimentation with humans, animals, or human material performed by employees of the MRC; or persons performing such research or experimentation for or on behalf of the MRC, or with research aid by the MRC. S 17(2) states that the Board may for the purposes of subs (1), determine ethical directives which must be followed in such research and experimentation and take such control measures as it may deem necessary in order to ensure that the ethical directives are complied with. The latest (1993) edition is currently being revised.

48 Cf MRC *Guidelines* 1 4 3 and 8 4 3.

49 Cf MRC *Guidelines* 5 4 3 2.

50 Cf MRC *Guidelines* 5 4 3 1: Examples are physiological experiments involving exercise on healthy volunteers, procedures such as collecting urine by normal voiding, taking measurements of weight and height, collection of nail clippings or small samples of hair, developmental assessment, routine physical examination, observation of behaviour or changes in diet, or obtaining a single peripheral venous blood sample from an adult or a bigger child.

51 Cf MRC *Guidelines* 5 4 3 3.

52 Cf also Van Oosten's remarks in this respect ((fn 3) 12).

53 The MRC *Guidelines* refer to the fact that there is no provision in South African law for one individual to act as proxy in matters relating to consent to non-therapeutic research.

54 Cf MRC *Guidelines* 8 6.

It should be noted that the guidelines do not state the level of risk considered when research is found to be acceptable by the research ethics committee.

A draft document recently prepared by the Department of Health entitled *Guidelines for Good Clinical Practice in the Conduct of Trials in Human Participants in South Africa*[55] also provides for research on children, even if it involves greater than minimal risk with no prospect of direct benefit to the child. There should, however, be a high probability that such research will provide generalisable knowledge about the subject's disorder or condition that is of vital importance for the understanding or amelioration of the subject's disorder or condition. In addition, the risk must represent only a minor increase over minimal risk and the intervention or procedure should present "experiences to participants that are reasonably commensurate with those inherent in their actual or expected medical, dental, psychological, social or education settings". In all cases, assent from both children and permission from their parents or legal guardians must be sought. No other caregiver can provide consent on behalf of a child to participate.[56] The proposed guidelines do not distinguish between therapeutic and non-therapeutic research on people with mental disabilities. They provide that "if participants are unable to understand . . . then an appropriate individual, able to consent on their behalf must be sought". They do not state who such individual would be. It is furthermore provided that no more than minimal risk should be involved and that the risk should be outweighed by the anticipated benefits of the study for the participants and the importance of the knowledge which will emanate from the research.[57] Although the proposed guidelines do not give a definition of "minimal risk", they refer to the CIOMS/WHO *Guidelines* as a guiding document, and it may be inferred that the term "minimal risk" will be interpreted in accordance with the meaning given in the latter guidelines.

It is clear from the above that neither the international guidelines, nor the South African ones, contain a blanket prohibition on non-therapeutic research carried out on individuals who cannot themselves consent. It is also clear that the various guidelines differ in some important respects, most notably as to the level of risk that will be allowed in non-therapeutic research and as to the people who may give permission for research to be carried out.

The following questions arise: Is a prohibition of non-therapeutic research the correct interpretation of section 12(2)(c) of the Constitution? Can such an interpretation be reconciled with international practice, or should we accept that the Constitution has brought about a dramatic change in the way medical and scientific research is to be practised in South Africa?[58] Can the Constitution be interpreted in a way that will balance the rights of incompetent people with the needs of society and its interest in medical endeavour and progress? And finally, to what extent should the MRC *Guidelines* and the *Guidelines* proposed by the Department of Health be revised to bring them in line with section 12(2)(c)?

---

55 Version 0 3 of January 2000. The guidelines are produced as a reference text for researchers, research sponsors, the general public and all those who have an interest in clinical trials research in South Africa. They provide guidance on minimum standards that are acceptable for the conducting of trials in South Africa (preamble to the document).

56 Cf proposed guideline 2 3.

57 Cf proposed guideline 2 3 7.

58 The Declaration of Helsinki states emphatically that physicians are not relieved from criminal, civil and ethical responsibilities under the laws of their own countries (par 8, Introduction).

4 THE INTERPRETATION OF SECTION 12(2)(c)

The Constitution is supreme. Judges are bound to interpret, uphold and protect the Constitution and the fundamental rights entrenched in it. They should protect the rights of individuals against incursion by the majority, even, if necessary, against the public interest.[59] There is therefore a vast difference between statutory and constitutional interpretation. In a constitutional system the interpreter's notion of seeking the intention of the legislature does not apply, "for the simple reason that the Constitution is sovereign and not the legislator".[60]

> "A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye on the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind."[61]

The Constitution itself provides that when a court, tribunal or forum interprets the Bill of Rights, it: (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

4 1 The first stage of constitutional inquiry

Whenever a constitutional provision is interpreted, and the *first* of the two-stage approach to constitutional scrutiny is entered,[62] the first question to be addressed is the following: What is the content of the right that appears on the face of it, to have been infringed? Section 12(2)(c) must be interpreted by answering the following questions: Which constitutional values are entrenched in this right, which interests does this section of the Constitution aim to protect, and what is the purpose of this guarantee? In short, what are the content, ambit and boundaries of the right not to be subjected to medical or scientific experiments without one's own informed consent?

4 1 1 A value-based versus a literal approach to interpretation

In accordance with the value-based or purposive approach,[63] section 12(2)(c) must be interpreted in a way that gives effect to the values inherent in the Constitution.

> "This analysis is to be undertaken, and the purposes of the right or freedom in question is to be sought by reference to the character and *larger objects* of the [Constitution] itself, to the *language chosen* to articulate the specific right or freedom, to the *historical origins* of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is

---

59 Kentridge AJ in *S v Mhlungu* 1995 3 SA 867 (CC) 904.

60 Froneman J in *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 4 SA 592 (SE) 597F.

61 *Hunter v Southam Inc* (1985) 11 DLR (4th) 641 649.

62 Cf Chaskalson *et al Constitutional law of South Africa* (1999) 12–48 *et seq* for a discussion of the "two-stage approach". Cf also *S v Manamela* 2000 3 SA 1 (CC).

63 Cf also the originalist theory, where interpretation seeks the drafters' original intention, and the political process theory, where interpretation seeks to remedy dysfunctions in the political process and to protect the interests of those individuals who are otherwise excluded from the political process because they are not powerful enough to make their voices heard (Chaskalson (fn 62) 11–17).

> *associated within the text* of the [Constitution]. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the [Constitution's] protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the [Constitution] was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophical and historical contexts."[64]

A purposive interpretation will not always coincide with a liberal and generous interpretation. The purposive approach to the interpretation of rights may at times require a narrower or specific meaning to be given to the provisions of the Constitution.[65]

The Constitution itself does not define the term "experiments" used in section 12(2)(c), and does not indicate whether it means "research" or "non-therapeutic research". However, in the dictum quoted above the *language chosen* has been indicated as an important tool in the interpretative process. There is strong support from the Constitutional Court for the notion that the words used in the Constitution are the first place to look in attempting to discern its meaning[66] and that the discipline of the written instrument should be adhered to:

> "While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean . . . If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."[67]

The linguistically plausible interpretation is to be followed, and the language of the text is not infinitely malleable:

> "[T]here are some provisions, even in a constitution, where the language used, read in its context, is too clear to be capable of sensible qualification. It is the duty of the courts, in terms of s 35, to promote the values which underlie a democratic society based on freedom and equality. In the long run, I respectfully suggest, those values are not promoted by doing violence to the language of the Constitution in order to remedy what may seem to be hard cases."[68]

The notion is further that the Constitution is a legal instrument and that respect should be paid to the traditions and usages which have given meaning to the language used in the Constitution. This entails that use may be made of old rules of statutory interpretation and of interpretation in general, such as seeking for the ordinary meaning of words in dictionaries.

However, medical dictionaries are consulted with little success. "Experiment" is defined in the following ways: a procedure done in order to discover or demonstrate some fact or general truth;[69] a scientific procedure in the form of a practical test under conditions previously determined by the operator, either to elicit some fact not

---

64 *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 359–60 – the *locus classicus* in purposive interpretation. It was cited in *S v Zuma* 1995 2 SA 642 (CC) 651F. The emphasis is mine.

65 O'Regan J in *S v Makwanyane* 1995 3 SA 391 (CC) 506B.

66 Cf *S v Zuma* 1995 2 SA 642 (CC) 652I; cf also Kriegler J: "It (the Bill of Rights) says what it means and it means what it says" in *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 918F.

67 Per Kentridge AJ in *S v Zuma* 1995 2 SA 642 (CC) 652–653; cf Chaskalson (fn 62) 11–28.

68 Per Kentridge AJ in *S v Mhlungu* 1995 3 SA 867 (CC) 905A.

69 *Dorlaud's pocket medical dictionary* (22nd ed).

already known or to demonstrate some known principle;[70] a trial or test, or a procedure undertaken to discover some unknown principle or effect, to test a hypothesis, or to illustrate a known principle or fact.[71] "Research" is defined as scientific investigation; the establishment of facts and their significance by experiment; and the scientific collection and analysis of data. "Clinical research" is defined as the collection and analysis of data and experimentation at the bedside, rather than in the laboratory.[72] It is further to be noted that "research" may employ either observation (behavioural research) or physical, chemical or psychological intervention. It may also either generate records or make use of existing records containing biomedical or other information about individuals who may or may not be identifiable from the records or information.[73] The dictionaries consulted seem to make little or no clear distinction between "experiments" and "research".

Other existing South African legislation, such as the South African Medical Research Council Act,[74] is also of little help. The latter Act refers to both research and experimentation, but defines only "research",[75] while the Human Tissue Act,[76] which provides for the donation or the making available of human bodies and tissue for the purposes of, *inter alia*, medical research and the advancement of medicine,[77] defines neither.

The Constitutional Court has also held that, since constitutional interpretation differs vastly from statutory interpretation, the words used cannot be in themselves definitive. Fidelity to the most linguistically plausible interpretation of the text is conditional upon that interpretation according with the fundamental purposes and values of the Constitution.[78] The duty of the court is to determine and to give effect to the values of the Constitution, as expressed in the actual wording used by the drafters of the Constitution. Interpretation should recognise the character and origin of the instrument, and the court should be guided by "the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which a Constitution commences".[79] As an alternative to the above "literal" interpretation, it is held that force and effect should be give to the fundamental objectives and aspirations of the Constitution and that the preferred interpretation is one that is in harmony with the Constitution as a whole.[80]

---

70 *The British medical dictionary* (ed Macnalty).

71 Blakiston's *Gould medical dictionary* (ed Osol).

72 *The British medical dictionary* (22nd ed).

73 Cf CIOMS/WHO *Guidelines* 12.

74 58 of 1991.

75 Ie the "creation, preservation, accumulation and improvement of knowledge by means of scientific investigations and methods in the field of the medical and related sciences as well as those sciences the application of which is important for the promotion of health or the combatting of disease, and includes the acquisition, development and transfer of expertise and technology, and 'researcher' has a corresponding meaning" (s 1). The MRC *Guidelines* made in terms of the Act define research as "an activity involving a patient with the prime purpose of testing a hypothesis and permitting conclusions to be drawn with the intention of contributing to medical knowledge" (2 3 2).

76 65 of 1983.

77 Cf the preamble to the Act.

78 Mahomed DP in *Du Plessis v De Klerk* 892–898 discusses this in general.

79 *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) [1979] 3 All ER 21 32E–G cited with approval in *S v Zuma* 615A; cf also Chaskalson (fn 62) 11–10A.

80 Mahomed DP in *S v Mhlungu* 876E.

The purposive approach is closely allied to the *contextual* approach,[81] which "attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspect of any values in competition with it".[82]

With regard to its *historical origins*, it is worthwhile noting that section 12(2)(c) echoes article 7 of the International Covenant on Civil and Political Rights[83] which states:

> "No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific *experimentation*."[84]

It is clear from the wording of article 7 that unauthorised medical or scientific experiments fall within the ambit of cruel, inhuman and degrading punishment.

4 1 2 International law as interpretative tool

The International Covenant on Civil and Political Rights is an important source of international law, which *must* be considered in the interpretation of the Bill of Rights.[85] In this respect it should further be kept in mind that, when interpreting the Constitution, the inquiry is not limited to treaties to which South Africa is a party or to customary rules accepted by South African courts. Public international law, as a tool of interpretation, would even include non-binding law, such as reports of "specialised agencies", of which the WHO is an example.[86]

The word "experiment" is used in the *Nuremberg Code*, the prototype of many later codes.[87] This code contains extensive directives for "human experimentation" such as that the voluntary consent of the human subject is absolutely essential and it refers throughout to "experimental subject" and "experiment",[88] but does not define the concept. The *Declaration of Helsinki* lays down ethical guidelines for research involving human subjects.[89] This declaration uses a totally different vocabulary and refers almost exclusively to "biomedical[90] *research*" involving

---

81 Cf the dictum quoted above and text to fn 64.

82 *Edmonton Journal v Alberta (Attorney General)* (1989) 64 DLR (4th) 577 583–584.

83 The UN General Assembly by Res 2200A(XI) of 1966-12-16 adopted and opened the Covenant for signature, ratification and accession and it was entered into force on 1976-03-23. South Africa ratified this convention after apartheid had been abandoned.

84 My emphasis.

85 S 39(1)(b) of the Constitution.

86 Chaskalson P in *S v Makwanyane* 1995 3 SA 391 (CC) 414; Brierly *The law of nations* (6th ed) 118. The Declaration of Helsinki and the CIOMS/WHO *Guidelines* are referred to by many regulatory bodies involved in formulating ethical guidelines or regulations for biomedical research. Van Oosten (fn 3) points out that although they are not directly enforceable, they are considered as binding by South African research ethics committees and failure to observe them may render a medical practitioner liable to disciplinary action and/or civilly and/or criminally liable.

87 The *Nuremberg Code* was adopted in 1947 to prevent any repetition of atrocities committed and experiments carried out on concentration camp prisoners by Nazi physicians, revealed at the Nuremberg War Crimes Trials. This code was endorsed in the World Medical Association's *Declaration of Helsinki.*

88 The observation is made that this code focused on principles of voluntary consent of human subjects participating in *research* which is regarded as essential (*The ethics of clinical research in developing countries: A discussion paper* Nuffield Council on Bioethics (1999) 6).

89 Cf fn 31 *supra.*

90 Proposals for the current revision are to replace "biomedical" with "medical research", cf the *Report on the Revision of the Declaration of Helsinki* by the Workgroup established in April 1999.

human subjects.[91] In a few instances, however, reference is made to "experimentation".[92] It may be noted that these two documents have, to a large extent, been superseded by new developments, which may render their use of language inapplicable to modern circumstances.[93]

The CIOMS/WHO *Guidelines* do not once refer to "experiments" but refer exclusively to "research".

4 1 3 Foreign law as interpretative tool

Foreign law *may* be considered when interpreting the Bill of Rights.[94] According to the one example of American ethics discussed so far, namely the *Belmont Report*, departures from standard practice are often called "experimental" when the terms "experimental" and "research" are not carefully defined; "research" designates an activity designed to test an hypothesis, permit conclusions to be drawn, and thereby to develop or contribute to generalisable knowledge; and the fact that a procedure is "experimental" in the sense of new, untested or different, does not automatically place it in the category of research. According to the US Code of Federal Regulations,[95]

> "research means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalisable knowledge".

4 1 4 Experiment interpreted to mean research

It is evident from the above that the distinction, if any, between "experiment" and "research" is unclear. One is left with the idea that the two are interlinked, that research may include one or more experiments, and that while the word research is currently more acceptable than the word experiment (probably owing to the latter's links with atrocities of the past) they could perhaps be used interchangeably.[96]

---

91 It states, eg that in any research on human beings, each potential subject must be adequately informed of the aims, methods, anticipated benefits and potential hazard of the study and the discomfort it may entail. Proposals for current revision are to replace "hazards" throughout with the word "risks". Cf the *Report on the Revision of the Declaration of Helsinki* by the Workgroup established in April 1999.

92 It states that medical progress is based on research which ultimately must rest in part on experimentation involving human subjects (par 5 of the Introduction). It acknowledges that it is essential that the results of laboratory experiments be applied to human beings to further scientific knowledge and to help suffering humanity (par 8 of the Introduction). It states that biomedical research involving human subjects must conform to generally accepted scientific principles and should be based on adequately performed laboratory and animal experimentation (par 1 of Basic Principles). It provides that the design and performance of each experimental procedure involving human subjects should be clearly formulated in an experimental protocol and considered by an independent committee which should conform to the laws of the country in which the research experiment is performed (par 2 of Basic Principles).

93 The *Nuremberg Code* was intended by its authors to be limited in scope and was essentially a document written by lawyers for lawyers. The evolving definition of research (eg that research could also include looking at patients' medical records) was to be catered for in other documents. The *Declaration of Helsinki* effectively rules out research in pathogenesis, pathophysiology and epidemiology and does not provide for controlled clinical trials.

94 S 39(1)(c) of the Constitution.

95 *Title 45 Code of Federal Regulations Part 46 – Protection of Human Subjects* par 46.102.

96 Cf the definition of *research* given by Christakis ("Ethics are local: engaging cross-cultural variation in the ethics for clinical research" 1992 *Social Science and Medicine* 1079): "Critical and exhaustive investigation has at least two aims: (1) the discovery of new facts about the human body through systematic observation of *experimentation,* and (2) the correct interpretation of these facts and the testing of new hypotheses about health and disease." The emphasis is mine.

The question now is which interpretation can be given to the term "experiment". The first option equates "experiment" with research, whether it is of a therapeutic or non-therapeutic nature. This seems to be the straightforward, *literal* meaning, which is also compatible with most of the sources dealing with research ethics quoted above. It is also in keeping with a purposive, generous interpretation of the right not to be subjected to research without one's own consent, in that it gives effect to the right to personal dignity, integrity and autonomy in its widest sense. When section 12(2)(c) is read *in context* with the whole of section 12 – which deals with the freedom and security of the person – the conclusion is the same. Section 12 includes the right to make decisions concerning reproduction,[97] the right to security and control over one's body,[98] and the right not to be subjected to medical or scientific experiments without one's own consent.[99] It deals with freedom from *direct* physical abuse in three of its most fundamental senses (freedom from violence, torture, cruel and degrading treatment and medical and scientific experimentation). Of paramount importance are the right to autonomy, bodily and psychological integrity and the underlying *constitutional* values of dignity, equality and freedom.

The second interpretation is to equate "experiment" with non-therapeutic research, which approach is implicit in the articles by Van Oosten and Strauss.

The third interpretation is to equate "experiment" with cruel, inhuman and degrading treatment, which is the approach adopted in the International Covenant on Civil and Political Rights. This approach would mean that section 12(2)(c) is designed to "make certain that individuals of diminished intellectual capacity are not treated like animals for the purpose of scientific experimentation".[100]

The literal interpretation, the contextual approach and the value-based interpretation all point in the direction of the protection of human dignity, equality and human rights and freedoms in their broadest and most generous sense. This approach, set out in the first option above, is consonant with the deepest commitments of the Constitution; that of human dignity, equality and freedom. Whether one sees the clarity of language as conclusive of the meaning of the provision, or whether one sees language as the outer perimeter within which the expression of constitutional values is ultimately confined,[101] the outcome is the same: What is protected is the right not to be subjected to medical and scientific research, in its broadest meaning, without one's own informed consent.

4 2 The second stage of the constitutional inquiry

At the *second stage* of the inquiry the limitation of the right is analysed. It is investigated whether the *prima facie* infringement on or limitation of the right (allowing research without the research subject's own consent) is reasonable and justifiable in terms of section 36(1) of the Constitution, in other words whether it is a "permissible" limitation under section 36 of the Constitution.

---

97 S 12(2)(a).
98 S 12(2)(b).
99 S 12(2)(c).
100 Chaskalson (fn 62) 39–33. However, brutal or inhumane treatment of human subjects is never morally (or legally) justified, even with their informed consent (*Belmont Report* 7). This would therefore not seem to be the correct interpretation.
101 Cf Chaskalson (fn 62) 11–30.

Section 36(1) provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. Section 36(2) provides that no law may limit any right entrenched in the Bill of Rights except as provided in subsection (1) or in any other provision of the Constitution.

Section 36(1) therefore provides a "mechanism which permits the government or some other party to undertake actions which, though *prima facie* unconstitutional, serve pressing public interests".[102] This means that the importance of the constitutional values guaranteed by the right in question is now tested against the strength of the justification offered for the infringement, namely the social objectives.[103] The values that section 12(2)(c) seeks to protect are those of human dignity and autonomy and of freedom and security of the person. They are of paramount importance, forming the basic values on which the democratic state of South Africa is founded, and it may be argued that, because they are so fundamental, they will not readily permit a serious limitation.[104] However, "it is well established that s 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".[105] The "law of general application" which is subjected to constitutional scrutiny will warrant the limitation of the right, if the objective or *purpose* of the limitation is sufficiently and indubitably important and consistent with the values of an open and democratic society based on human dignity, equality and freedom.[106] It was pointed out above that most international ethics guidelines provide for therapeutic and non-therapeutic research which limits the autonomy, dignity and freedom of research subjects. It may be accepted that they were adopted after weighing the various interests at stake and were found to be reasonable and justifiable.[107] They apply in countries (notably the USA and in Europe) which are considered to be "open and democratic societies based on human dignity, equality and freedom". It would follow that when such guidelines are adopted in South Africa, they can be regarded as being "consistent with the values of an open and democratic society based on human dignity, equality and freedom". They are justified by the promise of important new knowledge which will be of benefit to science and mankind [108] and the assurance that the rigours of science will be adhered to.

The next question is whether the means employed to realise this objective are rationally connected to the achievement of the objective, and whether the government or some other party defending the law at issue could have used some means less invasive, extensive and restrictive of the rights of the aggrieved party to achieve

---

102 Chaskalson (fn 62) 12–47.

103 Chaskalson (fn 62) 11–32 *et seq*.

104 Cf the remarks made by Kriegler J in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 4 SA 623 (CC) 664E.

105 Kriegler J in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 666B–C.

106 Sachs J in *Mistry v Interim National Medical and Dental Council of South Africa* 1998 4 SA 1127 (CC) 1143–1144.

107 Cf the remarks made by Kriegler J in *S v Dlamini; S v Dladla;S v Joubert; S v Skietekat* 660C.

108 Burchell (fn 28) 213–214.

the purpose; in other words, whether other means less damaging to the right in question could achieve the desired end.[109] The law must impair the right no more than is necessary to obtain the desired purpose.

At this stage a "balancing" of competing rights takes place. The competing rights of others must be considered. In the context of the right not to be subjected to medical research without one's own consent, these may include others' right to life,[110] human dignity[111] and access to health care services.[112] However, as Chaskalson *et al* point out,[113] it may be quite difficult to "balance" constitutional rights because they are so incommensurable. Often a choice must be made between competing visions of the world and the ways society should be arranged. Situations may even arise – and I submit that the problem under discussion is one such example – which may force the sacrifice of a "primary" commitment to a "subordinate" one and to choose a world view that would enable science to progress, even though it would mean a limitation of the research subject's/participant's rights to autonomy and dignity. At the ethical level this would be a classic example of where a choice has to be made between the principles of beneficence and autonomy.

The Mental Health Act,[114] the Child Care Act,[115] the MRC *Guidelines* and the Department of Health's proposed guidelines all provide for therapeutic research without the consent of the research subject/participant. Although the main focus of this article is the constitutionality of South African research ethics guidelines, it may be mentioned in passing that the legislative provisions[116] which provide for proxy consent (or rather permission) for therapeutic interventions will probably withstand constitutional scrutiny. This is so since the incompetent individual's rights to autonomy and dignity are curtailed with the purpose of advancing his or her own health or saving his or her own life. In view of the fact that section 36(2) provides that "no law may limit *any* right entrenched in the Bill of Rights" except as provided in section 36(1) and in view of the dangers of paternalism,[117] all laws which infringe rights – even if the individual's rights need are not poised against the rights of *others* – should be subjected to judicial scrutiny.[118]

---

109 Chaskalson (fn 62) 12–47.

110 S 11 of the Constitution. Eg children suffering from a similar fatal disease as the research subject may rely on this right.

111 S 10 of the Constitution.

112 S 27(1)(a) of the Constitution.

113 Chaskalson (fn 62) 12–61; 12–63; cf Lamore *Patterns of moral complexity* (1986) as quoted by Chaskalson (fn 62) 12–58 for a description of the problems associated with the balancing of competing rights and the attempt to adopt a hierarchy of rights.

114 S 60A.

115 S 39(4).

116 The Human Tissue Act 65 of 1983 makes provision for research on the bodies and tissues of deceased persons, even without the prior donation of the deceased person or close family (s 2). Whether these provisions will offend against s 12(2)(c) of the Constitution will not be discussed here. Suffice to say that deceased persons cannot be the bearers of constitutional rights.

117 Where a parent-like decision by a professional overrides an autonomous decision of a patient, and prefers one fundamental right above another without further reflection.

118 The problem of paternalism is generated by a conflict between principles of respect for autonomy and beneficence, each of which can be conceived as being the overriding principle in cases of conflict (*Contemporary issues in bioethics* (ed) Beauchamp and Walters) 32. South African law will not always prefer the right to life to that of autonomy. Cf the South African Law Commission's *Report on Euthanasia and the Artificial Preservation of Life* Project 86 (1998) 40 115 where it is pointed out that the individual's right to life is not absolute, but has

continued on next page

In this context, the question arises whether "law of general application" would include directives[119] and guidelines issued by government agencies or statutory bodies, such as the Medical Research Council.[120] The MRC *Guidelines* are generally respected and relied upon in South Africa, also by researchers who do not fall within the provisions of the Medical Research Council Act. Although views on the binding character of ethics guidelines differ,[121] it is generally accepted that doctors who follow these guidelines will not be regarded by the South African courts as acting in an unlawful manner. It may be safely assumed that in the event of a dispute on human experimentation becoming the subject of litigation in a South African court, the court will almost certainly, in reaching a conclusion, also be guided by the MRC *Guidelines*.[122] There would seem to be no reason why the MRC *Guidelines* cannot be regarded as "law of general application". The Constitutional Court has held that an overly technical approach to the interpretation of "law of general application" should not be adopted, as this would unduly reduce the types of rule and conduct which can justify limitations. Such an exclusion may adversely affect the proper interpretation of the scope of fundamental rights.[123] The tests of generality, non-arbitrariness, publicity, and precision (which are usually met by statutes, regulations and the common law,[124]) are also met by the MRC *Guidelines*. They are codified rules which affect the rights of individuals. They are capable of ascertainment and are publicly accessible, precise, general and non-arbitrary.

6 CONCLUSION

It is submitted that the MRC *Guidelines* are to be considered as "law of general application". The next question is whether they will, to the extent that they provide

---

to be weighed against other constitutional rights, such as his or her right not to be deprived of control over the body. The *adult patient of sound mind* may choose to die and the right to self-determination is regarded as paramount. The patient who is not autonomous, however, needs greater protection.

119 Cf Chaskalson (fn 62) 12–62 for the view that directives are included under laws of general application.

120 The MRC was created by statute. S 17 of the South African Medical Research Council Act empowers the MRC to determine ethical directives for the purpose of the regulation and control of research on or experimentation with humans, animals or human or animal material performed by employees of the MRC or persons performing such research or experimentation for or on behalf of the MRC, or with research aid by the MRC. Cf fn 47 *supra*.

121 Cf Benatar 1990 *SAMJ* 1 who considers ethical guidelines as no more than advice, while Taitz 1990 *SAMJ* 29 30 regards them as a binding code of conduct.

122 Cf Strauss (fn 20). Van Oosten (fn 39) points out that the MRC is a national institution and that its *Guidelines* have statutory authority. Cf also the discussion in Van Wyk *Aspekte van die regsproblematiek rakende VIGS* LLD thesis (1991) Unisa 413 *et seq*. A South African court of law, in deciding the issue of wrongfulness in an unchartered area of common law, where there is no direct judicial precedent, would base its ruling on the *boni mores*, ie the current juristic convictions prevailing in society (*Minister van Polisie v Ewels* 1975 3 SA 590 (A)). Strauss mentions that the court interprets the *boni mores* to the best of its ability and that the MRC's published *Guidelines* provide a good reflection of the *boni mores* pertaining to human experimentation research. The *Guidelines* will, according to him, be of considerable persuasive value.

123 Cf Mokgoro J in *President of RSA v Hugo* 1997 4 SA 1 (CC). Chaskalson (fn 62) (12–29) indicates that Canadian and South African authority is divided on the matter. Cf De Ville "The right to administrative justice: an examination of s 24 of the Interim Constitution" 1995 *SAJHR* 254 275.

124 Chaskalson (fn 62) 12–29; *De Lille v Speaker of the National Assembly* 1998 3 SA 430 (CC).

for non-therapeutic (as well as therapeutic) research, be able to withstand judicial scrutiny in terms of section 36 of the Constitution. If the legislation referred to above withstands judicial scrutiny – and it is submitted that it will – the MRC *Guidelines* that provide for therapeutic research will withstand scrutiny too, since the latter are based on the existing South African legislation. However, when regard is had to the MRC *Guidelines* that provide for non-therapeutic research, it is clear that they need thorough revision to bring them in line with the provisions of section 36 of the Constitution and with international guidelines.[125] If, for example, the MRC *Guidelines*' definition of "minimal risk" is compared to that of the *Belmont Report* and of the CIOMS/WHO *Guidelines*, it is cause for concern that they differ so substantially. It is submitted that the current MRC *Guidelines* impair the right to autonomy more than is necessary to achieve their purpose, and that they have a disproportionately severe effect on incompetent research subjects. It must be kept in mind that although incompetent people are not really in a position to make autonomous decisions, they have the right to dignity and to bodily and psychological integrity. They have the right to be protected against physical abuse, and to be free from violence and degrading treatment. It is submitted that the limitations on the rights of such people which are imposed by the MRC *Guidelines*, especially as regards the risks to be tolerated (ie a remote chance of serious injury or death)[126] are not justifiable and impose burdens upon incompetent research subjects which far outweigh the benefits that may be said to flow to other members of society.[127]

> *Meanings only become perspicuous against a background of interpretive presumptions in the absence of which reading would be impossible. A meaning that seems to leap off the page, propelled by its own self-sufficiency, is a meaning that flows from interpretive assumptions so deeply embedded that they have become invisible.*
>
> *Stanley Fish* Doing what comes naturally. Change, rhetoric and the practice of theory in legal studies (1989) 358.

125 A certain amount of circular reasoning is involved here. International law is used as a tool of interpretation and as a measure against which the limitation of a right is tested in terms of s 36, being the measure adopted by open and democratic societies based on human dignity, equality and freedom. However, many of these instruments refer back to national law. The *Declaration of Helsinki*, eg, provides that physicians should be guided by this declaration, but that they are not relieved of criminal, civil and ethical responsibility under the laws of their own countries (par 8, Introduction).

126 Cf discussion in par 3 3 *supra*.

127 Chaskalson (fn 62) 12–51. Cf also Roscam Abbing "Medical research involving incapacitated persons; what is legally permissible?" Report to the Legal Directorate of the Council of Europe (1994); "Non-therapeutic research involving incompetent subjects should not be carried out if it involves either a greater than minimal risk or more than a minimal burden to the individual." She makes this statement (on 33 of the Report) with specific reference to art 7 of the UN Covenant, referred to above par *4 1 1*, the language of which is echoed by the South African Constitution.

'n Oorsig oor die ontwikkeling van kinderregte met verwysing na die benaderings van die sogenaamde *kiddie libbers* en *kiddie savers**

Liezl C Haupt
BIuris LLB LLD
Pretoriase Balie
JA Robinson
BIuris LLB LLD
Sentrum vir Kinderreg, Departement Privaatreg, PU vir CHO

SUMMARY

An overview of the development of children's rights with reference to the approaches of the so-called *kiddie libbers* and *kiddie savers*

Legislation, here and elsewhere in the world, has in the past vacillitated between what can be described as either a *kiddie-libber* or a *kiddie-saver* approach (and in fact still does so). Section 28 of the Constitution, read with the provisions of the Convention on the Rights of the Child (1989), makes it clear that children are considered to be true bearers of fundamental rights even though they need particular protection. The Constitution conveys neither a *kiddie-libber* nor a *kiddie-saver* approach, but indeed one which acknowledges that children need parental or family care. Section 28 creates a fundamental right protecting the parent-child relationship within which the child's physical, mental, emotional and religious welfare must be protected.

1 INLEIDING

Die ontwikkeling en erkenning van kinderregte word internasionaal gekenmerk deur twee hoofstrome, naamlik die *savers* en die *libbers*.[1] Die uitgangspunt van die *kiddie savers* is kenmerkend gefokus op die beskerming van die kind se welsyn deur kinderbeskermende wetgewing. Die daarstelling van statutêre maatreëls ter beskerming van die kind se welsyn en belange dien tipies as die meganisme om beskermende resultate te bereik. Ingevolge hierdie benadering word daar eerder op die kind as beskermingsbehoeftige, en nie as selfstandige draer van gelyke en besondere

---

* Die artikel is 'n verwerking van 'n tema uit eersgenoemde outeur se ongepubliseerde proefskrif getiteld *Die reg van die kind op oorlewing, ontwikkeling en beskerming* PU vir CHO (1998). Geldelike bystand gelewer deur die Sentrum vir Wetenskapsontwikkeling (RGN, Suid-Afrika) vir hierdie navorsing, word hiermee erken. Menings uitgespreek en gevolgtrekkings waartoe geraak is, is dié van die outeur, en moet nie noodwendig aan die Sentrum vir Wetenskapsontwikkeling toegeskryf word nie.

1 Vgl ter illustrasie Price Cohen "Children's rights: An American perspective" in Franklin (red) *The handbook on children's rights: Comparative policy and practice* 165 ev. Uiteenlopende menings bestaan oor die vraag of daar in werklikheid enige verskil tussen die benadering van die *kiddie savers*- en die *kiddie libbers*-denkskole ten aansien van die verbetering van die kind se regsposisie bestaan. Sonder om die argumente van die sogenaamde *kiddie savers* en *kiddie libbers* enigsins te ontleed, word met die mening volstaan dat die onderskeie benaderings in wese gelykduidend is. Vgl meegaande teks tot vn 26 *infra*.

menseregte nie, gekonsentreer. Hierteenoor staan die *kiddie libbers*-benadering die bevordering van kinders se regte voor. Die *kiddie libbers* beklemtoon nie net die kind as beskermingsbehoeftige nie, maar ook sy reg op selfbeskikking.

Oorhoofs staan hierdie denkskool 'n benadering voor wat die kind eerder as 'n selfstandige draer van menseregte beskou en nie net as 'n regsubjek wat beskerming nodig het nie.

Internasionaal sowel as nasionaal word die erkenning van kinderregte gekenmerk deur 'n evolusie van 'n *savers* na 'n *libbers*-benadering enersyds, en andersyds die harmonisering van die kind se welsyn met die beginsel van die kind as volwaardige draer van regte.

2 DIE BEHOEFTE AAN SPESIALE REGTE VIR DIE KIND

Fundamentele regte is in wese ook op die kind *qua* mens van toepassing.[2] Daar bestaan etlike volkeregtelike ooreenkomste ingevolge waarvan fundamentele regte beskerm word. Die posisie van kinders word tipies nie uitdruklik in sodanige ooreenkomste vermeld nie aangesien hierdie ooreenkomste nie primêr met die spesiale behoeftes van kinders voor oë opgestel is nie.[3] Voorts is die konsep en omvang van kinderregte omvattender en meer gedetailleerd as die enkele toevallige regte wat op kinders betrekking het wat wel in hierdie ooreenkomste vervat is. Die eiesoortige behoeftes en kwesbaarheid van kinders het egter toenemende druk op die internasionale gemeenskap geplaas om spesifiek aan besondere menseregte in die vorm van kinderregte in volkeregtelike ooreenkomste gestalte te gee.

Die konsep van kinderregte word dikwels gekritiseer as bloot 'n morele aanspraak wat geen waarborg vir die bekamping van die verwaarlosing en mishandeling van kinders bied nie.[4] Verder is daar ook diegene wat argumenteer dat dit nie nodig is om kinderregte as sodanig in 'n handves van regte te erken nie aangesien internasionale menseregte-ooreenkomste en nasionale wetgewing voldoende beskerming aan kinders kan bied.[5] Sodanige argumente is gewoonlik op een van twee uitgangspunte gebaseer en vertoon opmerklik paternalistiese vertrekpunte. Die eerste benadering idealiseer tipies die ouer-kind-verhouding en aanvaar ongekwalifiseerd dat volwassenes, in besonder die ouers van kinders, altyd die beste belang van kinders op die hart dra. Dienooreenkomstig word 'n *laissez faire*-houding teenoor die posisie van die gesin ingeneem.[6] Freeman kritiseer hierdie uitgangspunt soos volg.[7]

---

2 De Lange "The meaning of human rights for children" in Freeman en Veerman (reds) *The ideologies of children's rights* (1992) 256 257; Van Bueren *The International law on the rights of the child* 17.

3 Vgl Cantwell "The origins, development and significance of the United Nations Convention on the Rights of the Child" in Detrick *The United Nations Convention on the Rights of the Child: A guide to the "travaux préparatoires"* 29.

4 Vgl in die algemeen Mosikatsana "Children's rights and family autonomy in the South African context: A comment on children's rights under the final Constitution" 1998 *Michigan J of Race and Law* 356; Freeman *The moral status of children: Essays on the rights of the child* 389–395 (hierna Freeman *Moral status*).

5 Vgl bv Freeman "The limits of children's rights" in Freeman en Veerman (reds) (vn 2) 30 31 (hierna Freeman *Limits*); Mosikatsana (vn 4) 355 356; Freeman *Moral status* 85 vn 13. Hierdie uitgangspunt is sprekend van 'n *kiddie savers*-benadering.

6 Voorbeelde van die navolging van hierdie benadering is te vinde in die Engelse *Children Act* (1989), die Nieuw-Seelandse *Children, Young Persons and their Families Act* (1989) en ook in Goldstein, Freud en Solnit *Beyond the best interests of the child* 1 ev. Volgens hierdie skrywers aw 18 is die enigste kinderreg wat 'n kind moontlik kan hê, die reg op outonome ouers.

7 Freeman *Limits* 30; Freeman *Moral status* 85.

> "It is somewhat unfortunate that in an age when so much abuse is being uncovered that governments and writers should cling to the 'cereal packet' image of the family."

Die ander benadering aanvaar kind wees as die beste jare van 'n mens se lewe, vol onskuld, vreugde en sonder die kwellinge van die volwasse lewe. Daar word geargumenteer dat aangesien die verantwoordelikhede en probleme van die volwasse lewe tydens die kinderjare ontbreek, dit nie nodig is om die kind se regsposisie in terme van kinderregte te omskryf nie.[8] Hierdie utopiese siening van kind wees, staan egter in skerp kontras met statistiese gegewens oor byvoorbeeld kindermishandeling.[9]

Beide gemelde variasies paternalisties gefundeerde vertrekpunte lei daartoe dat daar prakties van die verwesenliking van kinderregte nie veel tereg kom nie. Trouens, dit kan die posisie van kinders eerder verswak deurdat kinders as 'n besonder kwesbare minderheidsgroep verder marginaliseer word.[10]

3 KINDERREGTE AS BESONDERE VERSKYNINGSVORM VAN MENSEREGTE

Die ontkenning van die bestaan van en behoefte aan spesiale regte wat net op kinders gerig is, is 'n ontkenning van die werklike behoeftes van kinders.[11] Vanweë uniek-persoonlike eienskappe eie aan kinders, het hulle spesifieke beskerming nodig. Uiteraard verdien die feit dat die kind 'n selfstandige regsubjek is, ook erkenning. Kinderregte as 'n besondere verskyningsvorm van fundamentele regte is bykomend tot die fundamentele regte wat kinders *qua* draers van fundamentele regte toekom. Artikel 28 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 dien in dié verband as bewys aangesien hierdie regte wat spesifiek op die kind gerig is, nie inhou dat kinders nie ook draers is van die ander fundamentele regte wat in die Handves van Regte vervat word nie.[12]

Vanselfsprekend beperk die algemeen-verwoorde fundamentele regte en kinders se spesifiek gemelde regte nie mekaar nie. Dié regte vul mekaar eerder aan ten einde

---

8 Freeman *Limits* 31.

9 Tussen Januarie en Oktober 1995 is 7760 kinders in Suid-Afrika verkrag. Meer as 500 seuns was die slagoffers van sodomie; bloedskande is met sowat 200 meisies gepleeg en bykans 5000 kinders is aangerand, waarvan 1700 ernstige aanrandings was (Nelmapius *De Kat* Maart 1996 74–78, 76 kol 3). Uit 'n opname deur Nedkor, in samewerking met MarkData en die RGN, oor misdaad, geweld en belegging in Suid-Afrika het dit geblyk dat verkragting 37,3% van die misdaad teen kinders uitmaak. Anon *Beeld* 1996-03-09 11 kol 1. Die Kinderbeskermingseenhede het in 1995 28482 misdade teen kinders ondersoek en in die eerste twee maande van 1996 6058, waarvan 2321 verkragtingsake was. Anon *Beeld* 1996-04-12 4 kol 3.

10 Die neem van besluite en die uitoefening van regte namens 'n ander persoon word in literatuur as "paternalisme" beskryf. Paternalisme is gebaseer op die welmenende uitgangspunt dat 'n meerderjarige persoon beter toegerus is om na die kind se belange om te sien en namens die kind op te tree op 'n wyse wat die belange van die kind dien. Regsfilosowe soos Locke, Hobbes en Mill regverdig die bestaan van paternalisme in hul filosofieë. Vgl in hierdie verband Freeman *The rights and wrongs of children* 52–54 (hierna Freeman *Rights and wrongs*); De Villiers "The rights of children in international law: Guidelines for South Africa" 1993 *Stell LR* 292 vn 14–19. Sien ook in die algemeen Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law" 1995 *SAJHR* 408.

11 Vgl Freeman *Moral status* 86: "Rights are important because possession of them is part of what is necessary to constitute personality. Those who lack rights are like slaves, means to others' ends, and never their own sovereigns."

12 SA Regskommissie *Review of the Child Care Act* 20.

'n groter bewussyn van die eiesoortige aard en behoeftes van kind wees te skep.[13] Dit is juis in hierdie opsig dat kinderregte versoenbaar is met die uitgangspunt onderliggend aan leerstukke aangaande fundamentele regte, naamlik dat kinders inderdaad besondere sorg en beskerming nodig het, maar eweneens ook oor 'n wye reeks vryhede en regte beskik in ooreenstemming met hulle fisiese en intellektuele vermoëns en sosiale omstandighede.[14]

Spesifieke regte vir kinders is noodsaaklik aangesien daar, ten spyte van die erkenning van kinders as draers van menseregte, inderdaad steeds standpunte bestaan wat kinders nie as volwaardige individuele regsubjekte erken nie.[15] Origens dien die erkenning van kinderregte as teenvoeter vir magsmisbruik en ongekwalifiseerde paternalisme.[16] Daar word ter oorweging gegee dat die uitgangspunte onderliggend aan die erkenning van spesifieke kinderregte en paternalisme nie wedersyds uitsluitend is nie, maar inderdaad met mekaar versoenbaar is in dié mate wat paternalistiese sienings met betrekking tot kinderregte deur onder meer die omstandighede van die besondere geval en die kind se emosionele volwassenheid gekwalifiseer word.

Kinderregte as voortvloeisel van fundamentele regte omvat ook die beginsel dat kinders 'n reg op deelname behoort te hê aan besluite wat hulle raak.[17] Aansluitend hierby berus kinderregte kenmerkend ook op beginsels soos die erkenning van kinders se outonomie, hulle reg op selfbeskikking en die erkenning van kinders as volwaardige regsubjekte. Dus, soortgelyk aan fundamentele regte, is die vertrekpunt by kinderregte die *gelykheid van mense* (ons beklemtoning) deurdat die reg op gelykheid alle mense toekom ongeag hul ouderdom.

4 DIE ONTWIKKELING VAN 'N *KIDDIE SAVER*- NA 'N *KIDDIE LIBBER*-BENADERING

Die feit dat kinders ook draers van regte is, het eers in die laaste helfte van die negentiende eeu formeel beslag begin kry. Stigtings soos die *Society for the Prevention of Cruelty to Children* (1875) in die Verenigde State van Amerika het in beduidende mate bygedra tot die bewusmaking van die kwesbaarheid van kinders. Vanaf die negentiende eeu speel die staat 'n aktiewer rol in die beskerming van die kind se belange:

> "By the end of the 19th century ... public authorities and private organisations became very much concerned about neglected, mistreated and exploited children. After a period in which children were considered the property of their fathers or parents, who could do what they wanted, laws were introduced to protect children against neglect or mistreatment by their parents ... Care for children became a public concern and the state felt responsible for children and could, as *parens patria*, interfere in certain families to protect the interest of the child, deprive parents of their parental custody and take their children away. This state interference in the family and in many social policy areas has grown immensely during this century."[18]

---

13 Vgl De Villiers (vn 10) 305 307; De Lange (vn 2) 257.

14 Sloth-Nielsen (vn 10) 408.

15 McGillivray "Reconstructing child abuse: Westem definition and Non-Westem experience" in Freeman en Veerman (reds) (vn 2) 218.

16 Sien in die algemeen Melton en Limber "What children's rights mean to children: Children's own views" in Freeman en Veerman (reds) (vn 2) Sloth-Nielsen (vn 10) 404.

17 Verhellen "Changes in the images of children" in Freeman en Veerman (reds) (vn 2) 80 81.

18 De Lange (vn 2) 255.

Na 'n tydperk wat gekenmerk is deur die beskouing van kinders as eiendom van hulle ouers, is beskermende wetgewing deur verskeie state ingestel.[19] Arbeidswetgewing ter regulering van kinderarbeid en verbeterde onderwysgeleenthede vir kinders is enkele voorbeelde in dié verband.

Teen die middel van die negentiende eeu was kinderregtebewegings se funksies gerig op die beskerming van kinders.[20] Hierdie benadering is sprekend van dié van die *kiddie savers*-denkwyse. Die uitgangspunt was dat kinders vanweë hulle kwesbaarheid teen uitbuiting beskerm moes word en dat daar van regsweë na hulle spesiale behoeftes omgesien moes word. Aanvanklik is die klem oorwegend op regte van beskermende aard geplaas. Internasionale menseregte-ooreenkomste was gevolglik aan die begin eerder gerig op die beskerming van kinders se welsyn en verbetering van hulle lewenskwaliteit.[21] Só byvoorbeeld beklemtoon die *Deklarasie oor die Regte van die Kind* (1924) die kind se materiële welstand. Artikel 25 en 26 van die *Universele Verklaring van Menseregte* (1948) verwys na die spesiale sorg en bystand aan moeders en kinders en die belang van onderwys. Die Verenigde Nasies se *Deklarasie oor die Regte van die Kind* (1959) het ook riglyne van morele aard ten opsigte van die beskerming van kinders se welsyn neergelê. Hierdie internasionale ooreenkomste het bloot riglyne gebied en het gevolglik nie bindende krag gehad nie.[22] Voorts het hierdie ooreenkomste van die paternalistiese standpunt uitgegaan dat 'n ander party, hetsy die ouers of die staat, vir en namens kinders sou besluit wat in hulle beste belang is.

Die beklemtoning van gelykheid was kenmerkend van die sestiger- en sewentigerjare van die 20ste eeu.[23] Internasionale ooreenkomste, soos die *Internasionale Verdrag oor Ekonomiese, Sosiale en Kulturele Regte* (1966) en die *Internasionale Verdrag oor Burgerlike en Politieke Regte* (1966) illustreer dié tendens. Artikel 24 van laasgenoemde verdrag verwys byvoorbeeld uitdruklik na elke kind se reg op beskerming ongeag die geslag, nasionaliteit, sosiale herkoms, taal, kultuur, ras en geboorte van die kind. Gedurende hierdie tydperk is 'n klemverskuiwing van die kind as beskermings- en sorgobjek (die *kiddie savers*-benadering) na die kind as volwaardige regsubjek met eiesoortige regte duidelik waarneembaar.[24] Die klemverskuiwing van die kind se behoeftes na die kind se regte sou tiperend van die *kiddie libbers*-benadering wees.

Die *kiddie libbers* het erkenning verleen aan die veranderende beeld en posisie van die kind en het die kind se reg op selfbeskikking voorgestaan. Europese state soos Duitsland was aan die voorpunt van die ontwikkeling vanaf die beskouing van die kind as beskermingsbehoeftige na die kind as volwaardige draer van alle fundamentele regte asook besondere fundamentele regte (kinderregte) vanweë die

---

19 Vgl in die algemeen De Lange (vn 2) 255; De Villiers (vn 10) 290; Bevan *Child law* 11.

20 Bevan (vn 19) 11–13; Bainham en Cretney *Children: The modern law* 77–82.

21 Vgl Van Bueren (vn 2) 6–12 en 16–21 vir detailbesprekings van die genoemde internasionale ooreenkomste en deklarasies.

22 Sien in die algemeen De Villiers (vn 10) 293, 294; Sloth-Nielsen (vn 10) 401; Schurink "Foundations for a culture of children's rights" 1998 *In Forum Focus* 5 kol 1.

23 De Graef "Rights of children in a changing world" in Freeman en Veerman (reds) *Ideologies of children's rights* 115.

24 Reid "Children's rights: Radical remedies for critical needs" in Asquith en Hill (reds) *Justice for children* 19 20; McCurdie "Children's rights" in *Developing Justice Series* nr 9, UCT 3; Grude Fiekkoy "Attitudes to children: their consequences for work for children" in Freeman en Veerman (reds) (vn 2) 137; Freeman *Moral status* 51 ev.

kind se spesiale behoeftes. Die erkenning van die kind se reg om gehoor te word in aangeleenthede wat hom of haar raak en die omskrywing van ouers se verantwoordelikhede teenoor die kind wat betref sorg eerder as gesag lê in dié verband voor die hand.

5 GEVOLGE VAN DIE EVOLUSIE IN DIE BESKOUING VAN KINDERREGTE

Die ontwikkeling van 'n *kiddie saver-* na 'n *kiddie libber*-benadering het tot die erkenning van kinders as volwaardige draers van fundamentele regte gelei. Hierdie erkenning is in ooreenstemming met die moderne neiging om behoeftes eerder met verwysing na regte te omskryf. Die talryke bepalings wat in internasionale ooreenkomste en konvensies vervat word, het die klemverskuiwing na die beginsel van gelyke regte vir *almal,* ook vir kinders, versterk.[25] Verder is die ontwikkeling van 'n *kiddie saver-* na 'n *kiddie libber*-benadering ook aanduidend van die harmonisering van die welsyn van kinders met die beginsel van spesifieke fundamentele regte vir kinders. Freeman stel dit soos volg:[26]

> "It is not a question of whether child-savers or liberationists are right, for they are both correct in pointing out part of what needs recognising, and both wrong in failing to see the claims of the other side. To take children's rights seriously requires us to take seriously *nurturance and self-determination,* demands of us that we adopt policies, practices and laws which both protect children and their rights." (Ons kursivering.)

Vir die beskerming van die kind in die breë gesien, is die konsep van regte uiteraard ook van belang. Leerstukke aangaande menseregte en die positiefregtelike vergestalting daarvan in internasionale ooreenkomste en nasionale wetgewing, het groter bewustheid meegebring van die regte wat elke mens toekom.[27] Hierdie bewussyn dra by tot die vestiging van 'n menseregtekultuur waarin mense mekaar se regte wedersyds erken en respekteer. Op soortgelyke wyse vestig die konsep van kinderregte die aandag op die universaliteit van kinders se aansprake op sowel beskerming as selfbeskikking.[28] Die positiefregtelike vergestalting van kinderregte in die internasionale en nasionale reg dra by tot die erkenning van die besondere behoeftes van kinders, en ook tot die gepaardgaande respek en begrip vir hierdie behoeftes.

Die VN Konvensie is 'n besondere voorbeeld van die harmonisering van die *kiddie savers- en kiddie libbers*-benadering. Die bepalings van dié Konvensie is gerig op die gelyke behandeling van persone bo en onder die ouderdom van 18 jaar, maar terselfdertyd met inagneming van die inherente kwesbaarheid wat kind wees meebring. Veral die strekking van die bepalings in artikels 3(1) en 12(1) is insiggewend:

> "3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 12(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

---

25 De Lange (vn 2) 256; Bevan (vn 19) 13; Veerman *The rights of the child and the changing image of childhood* 57.

26 Freeman *Limits* 39.

27 Cantwell (vn 3) 30.

28 Daar kan met Bainham en Cretney (vn 20) 80 se opmerking saamgestem word: "Indeed, it has been said that a necessary feature of children's rights is that they be genuinely universal, appropriate for children everywhere . . ."

Hierdie bepalings weerspieël die Konvensie se uitgangspunt dat die beskerming van die kind in balans moet wees met die besorgdheid oor die kind se ontwikkeling na persoonlike onafhanklikheid en die respek vir sy regte as individu.[29]

6 SUID-AFRIKA

Ontwikkelinge in die Suid-Afrikaanse reg met betrekking tot die regsposisie van kinders dui ook op 'n geleidelike evolusie van 'n *kiddie saver*- na 'n *kiddie libber*-benadering. Ofskoon die regte van kinders reeds gemeenregtelik en statutêr op direkte en indirekte wyse erkenning geniet het, is die feit dat kinderregte tans spesifiek in die Grondwet, as bron van hoogste reg, vervat is, 'n aanduiding van die belang van die erkenning van kinders as volwaardige regsubjekte.

6 1 Gemeenregtelike en statutêre beskerming

Alhoewel die verskansing van kinderregte in 'n grondwet 'n nuwe verskynsel in die Suid-Afrikaanse regsorde is, het beide die gemene- en statutêre reg reeds vroeg bepaalde beskerming aan kinders gebied. Die eerste wetgewing ter beskerming van kinders is in 1856 deur die destydse Kaapse Parlement aanvaar.[30] Dit blyk dat dié wetgewing eerder van 'n *kiddie saver*-benadering spreek en dat die klem op die kwesbaarheid van kinders en hulle behoefte aan beskerming geplaas is.

Die Wet op Kindersorg 74 van 1983 soos gewysig deur die Wysigingswet op Kindersorg 86 van 1991 en die Wysigingswet op Kindersorg 96 van 1996 dien as die primêre statutêre beskermingsmeganisme vir die algemene welsyn van kinders.

Hierdie wet bevat bepalings oor kinderverwaarlosing en -misbruik, die reg van die kind van ongehude ouers op onderhoud en om te erf, aanneming, die verbod op die indiensneming van kinders onder 15 jaar, die verpligting op die persoon in wie se sorg 'n kind is om voldoende sorg en kos vir die kind te voorsien, 'n omskrywing van die "kind in besondere moeilike omstandighede" en sosiaal-maatskaplike probleme soos straatkinders en kinders in konfliksituasies.

Voorts het die Hoë Hof uit hoofde van die gemenereg wye bevoegdhede om na die belange van alle minderjariges om te sien en om met die uitoefening van die ouerlike gesag in te meng.[31] In buitengewone omstandighede, waar die belange van kinders dit vereis, kan die hof 'n ouer of albei ouers hulle ouerlike gesag geheel en al ontneem of die kinders uit die bewaring van die ouers verwyder en in alternatiewe sorg plaas.[32]

Alhoewel die Suid-Afrikaanse gemene- en statutêre reg vir die spesiale beskerming van kinders voorsiening maak, skep hierdie maatreëls nie die raamwerk vir 'n pro-aktiewe en progressiewe stelsel van kinderregte nie.

---

29 Asquith en Hill (vn 24) 13, 14.

30 Vir verdere besonderhede kan Swanepoel en Wessels *'n Praktiese benadering tot die Wet op Kindersorg* 1–6 geraadpleeg word.

31 Raadpleeg Labuschagne "Die Hooggeregshof as oppervoog van minderjariges: 'n historiese perspektief" 1992 *TSAR* 353–357; Hawthorne "Children and young persons" par E41 in Schäfer en Clark *Family Law Service*; Bosman en Van Zyl "Children, young persons and their parents" in Robinson (red) *The South African law of children and young persons* 52 ev; Eiselen "Children and young persons in private international law" in Robinson (red) 201–203 vir 'n verdere bespreking hieroor.

32 Die hof sal net so optree wanneer die ouers se optrede 'n gevaar skep vir die kind se lewe, gesondheid of sedes (*Calitz v Calitz* 1939 AD 56). Die beste belang van die kind is altyd die oorwegende faktor (*Petersen v Kruger* 1975 4 SA 171 (K)).

6 2 Pre-27 April 1994-verwagtinge oor kinderregte

Die kinderregtebeweging in Suid-Afrika spruit voort uit die deelname van kinders in die pre-27 April 1994 politieke stryd.[33] As gevolg van die aanhouding van kinders tydens die noodtoestande in 1986 is 'n beduidende aantal kinderregte-organisasies gestig. Tydens 'n konferense in 1997 in Harare onder die tema *Children, Repression and the Law in Apartheid South Africa* is erkenning verleen aan kinders se aanspraak op spesiale regte wat uiting gee aan hulle besondere behoeftes. Hierdie bewegings is in beduidende mate deur die latere ratifikasie van die VN Konvensie gestimuleer en het 'n handves van kinderregte vir Suid-Afrika met 'n duidelike *kiddie libber*-grondslag voorgestaan.[34]

Die pre-verkiesingsverwagtinge oor kinderregte word in Sachs se standpunt oor kinderregte saamgevat.[35] Hierdie verwagtinge het onder andere behels:

- dat alle diskriminerende wetgewing teen kinders in die algemeen of op grond van ras, kultuur of etnisiteit afgeskaf word;
- dat die funksies van die weermag, polisie, korrektiewe dienste en ook die regstelsel hervorm moet word om as die beskermers van kinderregte te dien;
- dat bestaande wetgewing wat kinders beskerm, kindgesentreer moet wees, op alle kinders van toepassing moet wees en gelyksoortig afgedwing word;
- dat nasionale programme met die nodige arbeidskrag en finansiële steun ingestel word om aangeleenthede soos behuising, lewensomstandighede, onderwys en skoolvoedingskemas te verbeter;
- dat kinderorganisasies wat aan die implementering van kinderregte toegewyd is die gepaste ondersteuning en beskerming van die regsorde geniet; en
- dat die moontlikheid van 'n kinderombudsman wat oor bevoegdhede beskik om kinderregte-aangeleenthede te ondersoek en aanbevelings daaroor te maak, oorweeg word.

Die verskansing van kinderregte in die Grondwet het in 'n beduidende mate aan hierdie verwagtinge voldoen. Die aangeleentheid van 'n kinderombudsman is egter nie in die Handves geopper nie.

6 3 Grondwetlike beskerming

Die Handves van Regte soos vervat in hoofstuk 2 van die Grondwet, omvat fundamentele regte en artikel 28 bevat spesiale regte wat uitsluitlik op persone onder die ouderdom van 18 jaar gerig is. Met die inwerkingtrede van die Grondwet is parlementêre soewereiniteit beëindig en is 'n bedeling van grondwetlike soewereiniteit ingelui. Artikel 1(c) en 2 van die Grondwet bevestig die oppergesag van die Grondwet as die hoogste reg van die Republiek.[36]

---

33 Vgl in die algemeen McCurdie (vn 24) 9; Cockrell "The law of persons and the Bill of Rights" in *Butterworths Bill of Rights Compendium* 3E–9 3E–12.

34 Vir die teks van die *Children's Charter of South Africa* van 1992-06-01 raadpleeg *International Conference* 213 ev.

35 Vgl Sachs *Protecting human rights in a new South Africa* (1990) 64–89; McCurdie (vn 24) 13 14.

36 Vgl in die algemeen Malan *Fundamentele regte: Temas en tendense* par 2 1 1; Rautenbach "Introduction to the Bill of Rights" par 1A30 in *Bill of Rights Compendium*.

Artikel 28 van die Grondwet bring 'n progressiewe raamwerk van kinderregte tot stand wat oorhoofs beskou, op die beginsels van die VN Konvensie berus. Regte wat in die Konvensie aan die orde is, soos die reg op privaatheid en vryheid van godsdiens, oortuiging en mening, wat nie spesifiek in artikel 28 genoem is nie, word ondervang deur gelykluidende bepalings in die Handves van Regte.[37] Kinders is nie net die draers van artikel 28-kinderregte nie, maar is ingevolge artikel 9 inderdaad beklee met al die fundamentele regte soos dit in die Handves verskans is.

In artikel 9 word die beginsels van gelykheid en elke persoon se reg op gelyke beskerming en voordeel van die reg beklemtoon. Artikel 9(3) plaas ook 'n verbod op diskriminasie op grond van onder andere 'n persoon se ouderdom. Aansluitend hierby bepaal artikel 1(a) dat menswaardigheid, gelykheid en die uitbou van menseregte en vryhede die basiese grondwetlike waardes is. Dit spreek dus vanself dat 'n kind ingesluit word in die "elkeen" waarna die bepalings van die Grondwet verwys.[38]

Kinders is draers van al die regte – insluitend spesifieke kinderregte – soos dit in hoofstuk 2 van die Grondwet verskans word. Enige beperking op kinders se grondwetlike regte deur geldende regsvoorskrifte is uiteraard ook onderworpe aan artikel 36 van die Grondwet. Dié artikel bepaal naamlik dat beperkings van enige van die regte verskans in die Handves redelik en regverdigbaar moet wees in 'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid.[39]

Dit blyk dus duidelik dat, ewe as die bepalings van die Konvensie, die strekking van die bepalings in artikel 28, saamgelees met ander relevante verskansde fundamentele regte, tot die harmonisering van die *kiddie savers*- en *kiddie libbers*-benadering meewerk. Die gevolg is dat daar enersyds erkenning aan die spesiale beskermingsbehoeftes van die kind, en andersyds erkenning aan die kind as volwaardige regsubjek en draer van fundamentele regte, verleen word.

7 GEVOLGTREKKING

Vroeëre wetgewing hier en elders het dikwels geswaai tussen wat tipies as 'n *kiddie libber*- en 'n *kiddie saver*-benadering aangemerk kan word. Die bepalings van artikel 28 van die Grondwet gelees met die voorskrifte van die Konvensie beredder hierdie gebrek aan eenduidigheid deur op ondubbelsinnige wyse kinders as volwaardige draers van fundamentele regte te beskou, maar tegelykertyd ook erkenning te verleen dat kinders, juis vanweë hulle kind wees, eiesoortige beskerming benodig. Die Grondwet vergestalt nie óf 'n *kiddie libber*- óf 'n *kiddie saver*-benadering nie, maar inderdaad 'n benadering wat erken dat kinders *qua* draers van fundamentele regte steeds ouerlike en of familie sorg benodig. Artikel 28 skep vir kinders 'n fundamentele reg op die beskerming van die ouer-kind verhouding waarbinne hulle fisiese, emosionele, godsdienstige en intellektuele welsyn van owerheidsweë beskerm word.

---

37 Vgl ter illustrasie *SA Convention Report* hfst IV.

38 Sien in die algemeen Cockrell (vn 33) 3E–20 vn 5 6; Woolman "Application" in Chaskalson *et al Constitutional law of South Africa* (par 10.2(c)).

39 Sien Van der Vyver "Constitutional protection of children and young persons" in Robinson (vn 31) 276–282.

Interim orders: Should they revive when appeal is noted against their discharge?

Roshana Kelbrick
BA LLB LLM LLD
Professor, Department of Criminal and Procedural Law, University of South Africa

OPSOMMING

Tussentydse bevele: Moet hulle herleef wanneer appèl teen hul afwysing aangeteken word?

Daar heers lankal teenstrydige opvattings oor die vraag of 'n tussentydse bevel wat op die keerdatum afgewys is, kan herleef indien appèl teen die afwysing aangeteken word. Die verwarring is te wyte aan Hofreël 49(11), wat bepaal dat "waar appèl aangeteken is . . . word die werking en tenuitvoerlegging van die betrokke bevel opgeskort hangende die beslissing van die appèl . . .". Hierdie reël is oënskynlik gebaseer op die gemeenregtelike reël dat die *status quo ante* gehandhaaf moet word tot tyd en wyl die appèl afgehandel is. Die reeks sake waarin beslis is dat 'n tussentydse bevel herleef hangende 'n beslissing in appèl word nagegaan en vergelyk met dié waarin beslis is dat 'n tussentydse bevel slegs van krag bly totdat 'n beslissing op die keerdatum gegee word, en derhalwe nie kan herleef nie al word appèl teen die afwysing aangeteken. Daar word tot die gevolgtrekking gekom dat die antwoord in Reël 6(12)(c) gesoek moet word: "Iemand teen wie 'n bevel in 'n dringende aansoek in sy afwesigheid toegestaan is, kan by kennisgewing die saak ter rolle plaas vir heroorweging van die bevel." Hierdie reël is 'n toepassing van die *audi alteram partem*-beginsel, een van die hoekstene van ons regstelsel. In die afwesigheid van 'n uitdruklike bepaling dat 'n tussentydse bevel wel herleef, moet klem eerder gelê word op die *audi alteram*-beginsel waarvolgens 'n bevel wat in iemand se afwesigheid uitgereik en daarna afgewys word, nooit deur die eensydige handeling van die ander party kan herleef nie.

"I think it would be most inconvenient if a litigant, by merely noting an appeal, could, in effect, revive an interdict founded on a necessarily incomplete view of the facts."[1] No doubt most lawyers would agree with this statement by Judge Dowling, especially if it is borne in mind that the interdict referred to is an interim interdict which was discharged, after full consideration of the facts, on the return day. Yet a later court, referring to the above quotation, held that it "cannot agree with such a simplistic approach".[2]

The following statement, on why the operation and execution of an order should be suspended pending an appeal, also seems unarguable: "[Otherwise,] when the appeal comes to be heard the only issue upon which the Appeal Court's judgment could have any practical effect would be that of costs . . .".[3] Yet in a

1 *Ismail v Keshavjee* 1957 1 SA 684 (T) 687.
2 *Du Randt v Du Randt* 1992 3 SA 281 (EC) 287.
3 *Levin v Felt and Tweeds Ltd* 1951 1 SA 213 (C) 668.

recent decision, when the applicant sought continuation, pending determination of the appeal, of an interim attachment order which had been discharged on the return day, the court held that "there is no merit in this argument. A party is generally entitled to deal with its property as it wishes and should not be prevented from doing so unless good grounds in law and fact exist for a court to interfere with such right".[4]

These quotations all deal with orders which might be automatically suspended by the noting of appeal, and more specifically with the question whether an interim order which was discharged on the return day, is revived by an application for leave to appeal. At first glance, it does seem illogical that an interim order, which a subsequent court refused to confirm after hearing evidence and argument, again becomes valid merely because an appeal has been noted. But the issue is more complex, as is evidenced by the various conflicting decisions on the subject. In the last four years alone, there have been four single bench decisions on the point, two holding that an interim interdict is revived by an application for leave to appeal,[5] the other two that it is not.[6]

1 THE CURRENT RULE

This confusion results from the rule that the noting of appeal suspends the operation and execution of the order against which appeal is noted. The question then arises whether the suspension of this order revives a previous order. Uniform Rule 49(11) does not deal with this question, but merely provides:

> "Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a Court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the Court which gave such order, on the application of a party, otherwise directs."

2 THE POSITION AT COMMON LAW

Our then Appellate Division has held that Rule 49(11) "does not appear to add to, or detract from, the common law position".[7] Statements such as "by the Roman-Dutch law the execution of all judgments is suspended upon the noting of an appeal . . ."[8] and "at common law the noting of an appeal suspends the operation of the order appealed against . . .",[9] are found in the bulk of judgments on suspension of execution pending appeal. But in each instance, the position at common law is expressed slightly differently. The following examples suffice:

> "[T]he general effect of the noting of an appeal is that thereafter no results can flow from that judgment which would place the parties in a position different from that which they enjoyed immediately before judgment was given."[10]

---

4 *Chrome Circuit Audiotronics (Pty) Ltd v Recoton European Holdings Inc* 2000 2 SA 188 (W) 191.

5 *Interkaap Ferreira Busdiens (Pty) Ltd v Chairman, National Transport Commission* 1997 4 SA 687 (T); *MV Triena: Haji-Iannou v MV Triena* 1998 2 SA 938 (D).

6 *Lourenco v Ferela (Pty) Ltd (No 2)* 1998 3 SA 302 (T); *Chrome Circuit infra.*

7 *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1997 3 SA 534 (A) 544. See also *MV Triena* 941.

8 *Reid v Godart* 1938 AD 511 513.

9 *Ismail* 688B.

10 *Alexander v Jokl* 1948 3 SA 269 (W) 278.

> "[T]he noting of an appeal against that discharge deprived the judgment of any effect which would bring about any change in the *status ante quo*."[11]
>
> "[T]he principle . . . that the noting of the appeal restores the *status quo*, ie the legal rights of the parties from the time the appeal is noted remain such as they were immediately prior to the order appealed against."[12]
>
> "[D]aarvolgens het notering van appèl die wyer effek om tot afhandeling van die appèl die bevel self sy krag te ontneem; alhoewel die bevel bly staan het dit geen werking nie."[13]
>
> "[A] proper consideration of the common law and Rule 49(11) . . . generally the effect of the noting of an appeal is to revive an interim order which has been discharged through the operation of the order appealed against . . ."[14]
>
> "[T]he principles of the common law as to the effect of the noting of an appeal are essentially reiterated by the provisions of Rule 49(11) . . ."[15]

Does our common law in fact say all of this?

Voet 49 7 1 is generally quoted as the common-law authority for Rule 49(11). This passage reads as follows: "The effect of an appeal is that the decision is suspended, that all things must be left in their original condition and that no new step can be taken in terms of the heading of this title."[16] The *Digesta*, under the heading "Nothing new is to be done once the appeal has been lodged" reads as follows:

> "Once an appeal is lodged, whether it was accepted or not, nothing new must be done in the meantime; this is because the appeal has now been accepted, if it has, or, if it has not been accepted, in order to avoid any prejudice to the consideration of whether the appeal should be accepted or not. Once the appeal has been accepted, however, nothing new may be done until a decision has been pronounced on the appeal."[17]

This general statement is followed by a long list of examples, all of which relate to appeals against matters affecting status, or criminal convictions.[18]

Jansen J (as he then was) considered the correctness of invoking Voet as authority for the position in Roman-Dutch law. He dealt at length with other Roman-Dutch writers, and came to the conclusion that Voet had been describing the position in Roman law:

> "It seems (with respect) at least questionable whether in some of our cases a not too great importance has been attached to statements of the Roman law such as are found in *Voet* 49.7.1, and whether those statements have not too easily been assumed to be a true reflection of the practice of the Dutch courts."[19]

---

11 *Reid* 513.
12 *Du Randt* 286.
13 *Sirioupoulos v Tzerefos* 1979 3 SA 1197 (O) 1201.
14 *Interkaap Ferreira* 693.
15 *MV Triena* 941.
16 Voet J *Ad Pandectas* (Gane's translation).
17 *Digesta* IV 49 7 1 (Mommsen's translation).
18 Scott *The Civil Law* vol IX *Digesta* 49 7 1, translating the same passage, heads it "No change shall be made after the appeal has been interposed" and says: "After an appeal has been interposed, whether it is received or not, nothing must be altered in the meantime, if the appeal is received, for this reason; but if it is not received, in order that nothing may be prejudiced while it is being decided, whether the appeal should be received or not. (1) If the appeal is received, no change shall be made until a decision has been rendered with reference to the appeal."
19 *Ruby's Cash Store (Pty) Ltd v Estate Marks* 1961 2 SA 118 (T) 123.

He reached this conclusion after a study of the Roman-Dutch "clause van *inhibitie*" or prayer for suspension of execution, which was filed together with the *mandament van appèl* prosecuting the appeal.[20] As he correctly points out, this clause would not have been necessary if suspension was automatic.

Van der Linden, dealing with appeal procedure, also describes this clause by which execution is stayed "to prevent any steps being taken in the case pending appeal; and if that has already happened, to reinstate everything in its former position".[21]

Huber, writing about Friesian law, has also been cited as a common-law source on the effect of the noting of appeal.[22] This passage reads as follows:

> "The effect of making an appeal is that the judgment delivered remains suspended, and is considered as though it had never been pronounced, so that the losing party cannot be prejudiced by anything which can be put forward as an effect of the judgment. But that which has nothing in common with the judgment is not prohibited . . ."[23]

It must be noted that elsewhere Huber is not as definite in his views. The next section reads:

> "If the judge, from whom the appeal is brought, should nevertheless insist on putting the judgment into execution, it would not be open to the appellant to resist him with force, but in this matter also he would have to resort to the superior judge."[24]

The first sentence of this chapter on appeals states that "[t]he execution of the sentence is often stayed by appeal".[25] This does not necessarily imply a generally accepted prohibition on execution pending appeal.

When the quotations from decided cases on what the common law is, are compared with the translations set out above, it is clear that the two do not necessarily coincide.

Two matters are of particular relevance to the problem dealt with in this article. First – when is the *status quo ante* determined? Decided cases hold that it is immediately before the judgment appealed against is given. This is not necessarily so in terms of the common law. Voet refers to periods of time such as "original condition" and "no new step";[26] the *Digesta* to "nothing new" and "no change"; Huber states that the judgment "remains suspended" while Van der Linden talks about "original state" and "former position". It is suggested that the "original state" referred to is more likely to be the period before litigation commenced than the period between the grant of an interim order and its subsequent discharge.

---

20 121–122.

21 Johannes van der Linden *Institutes of Holland* (Juta's translation) 3 1 5 3.

22 *Du Randt* 285.

23 Ulrich Huber *Heedendaegse Rechtsgeleerthheyt* (Gane's translation) V 45 36.

24 V 45 37.

25 V 45 1.

26 It could be argued that his statement in 49 7 3 that an order for inhibition "puts everything back into the same condition as that in which it was at the very moment of delivery of the decision . . ." is contrary to this view. But here, he continues by contrasting the distinction between *inhibitie* and *surcheantie*, where the order "merely preserves the matter in the condition in which it is at the time when the order [for *surcheantie*] is made, but things performed or done previously are not annulled".

Secondly, does anything in the common law indicate that the question whether an interim order should revive pending appeal, was ever considered? Common-law sources do not say that the judgment against which appeal has been noted, ceases to exist or becomes invalid. Neither do they say that an interim order revives: Voet merely says that the judgment is suspended, while Huber says the same, adding that the judgment is considered "as though it had never been pronounced". It appears that the possibility of a previous order becoming operative was never considered.

It seems clear from the above that the different decisions all provide their own conflicting versions of the common law. Neither the Supreme Court of Appeal nor the Appellate Division has ever considered this issue and, when discussing the common law on suspension, the latter dealt with matters such as furnishing security when an order was suspended[27] or the onus when leave to execute is sought,[28] not the revival of interim orders. In *South Cape Corporation* the court, referring to the *Ruby's Cash Store* decision in which Jansen J argued that automatic suspension was not the position at common law, held that

> "whatever the true position may have been in the Dutch courts . . . it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto . . ."[29]

Although the court was not considering the problem addressed in this article, it is interesting that no mention is made of any *status quo ante*, or of any revival of prior orders.

3 PREVIOUS LEGISLATION

Can the predecessors to Rule 49(11) provide an answer?

In the Cape, legislation of 1896 held that the court could order execution or suspension "as to such Court may in each case appear to be most consistent with real and substantial justice".[30] This phrasing was repeated in the Transvaal proclamation of 1902.[31] A similar provision also appeared in the Free State Ordinance[32] and was perpetuated in subsequent Cape legislation.[33] In Natal, execution was not automatically stayed by the noting of appeal.[34] The Magistrates'

---

27 *Reid supra*.

28 *South Cape Corporation supra*.

29 *Idem* 545A.

30 S 36 Better Administration of Justice Act 35 of 1896 reads as follows: "It shall be lawful for the Court . . . to direct that the judgment, decree, or order appealed against shall be carried into execution, or that execution thereof shall be suspended pending the said appeal, as to such Court may in each case appear to be most consistent with real and substantial justice."

31 S 36 of the Administration of Justice Proclamation no 14 of 1902 requires the "Court to direct that the judgment decree or order appealed against shall be carried into execution or that execution thereof shall be suspended pending the said appeal as to such Court may in each case appear to be most consistent with real and substantial justice."

32 S 15 Ord 13 of 1904, amending the Administration of Justice Ordinance of 1902.

33 S 4 The Better Administration of Justice Act 9 of 1905.

34 S 62 Act 39 of 1896 (Natal) provided that noting or prosecution of appeal does not stay execution of the order or judgment appealed against unless the appellant gives security for the due performance of the order or judgment appealed from; or the court orders that execution be stayed.

Courts Act of 1944 continues to provide for suspension or execution at the direction of the court.[35]

It was only when the Uniform Rules were promulgated in 1965 that statutory provision was made for the automatic suspension of an order pending appeal in Rule 49(11).[36] Before this period, all legislation left the decision on whether the order should be suspended or executed in the court's discretion. In *South Cape Corporation* Corbett CJ stated that there is no material difference between the established rule of practice (automatic suspension), unless application is made for execution, and previous legislation which gave the court the discretion to decide whether execution or suspension was "consistent with real and substantial justice".[37] It is submitted that this ignores the difference between the onus that now rests on a respondent wishing to obtain execution, and the previous more neutral position, where the onus rested on the party approaching the court for assistance.[38]

4 JUDICIAL INTERPRETATION

Not only is previous legislation of no assistance: it also shows that Rule 49(11) is a statutory innovation, not a restatement of the common law or of prior legislation. How have the courts interpreted this rule and previous legislation, in the context of the revival of interim orders?

The first reported decision in which the issue was pertinently considered was *Ismail v Keshavjee* in 1956. The matter was decided in terms of section 36 of Proclamation 14 of 1902, which gave the court a discretion to order suspension or execution. The court held that it had the statutory discretion to allow execution of an ejectment order, despite the existence of an interim interdict restraining execution of an ejectment order, in respect of which absolution had been granted, and against which appeal had been noted. So the court's further opinion that noting of an appeal does not automatically revive an order granted *pendente lite*, and its view that such orders are intended to remain in force only until judgment has been given, can be seen as *obiter*.[39] Despite this, it is widely cited as authority for the view that interim orders do not revive on noting of appeal.

The *Thirlwell* decision (1961) was decided in terms of the common law, since the Supreme Court Act of 1959 had come into effect but the Uniform Rules had not yet been promulgated. The court cited a number of cases stating that at common law, execution was suspended pending appeal, and held that "the noting of the appeal has had the effect of preserving the *status quo ante*, and maintaining

---

35 S 78 Act 32 of 1944.

36 Between 1959, when the Supreme Court Act 59 of 1959 suspended previous legislation, and 1965, when the rules were promulgated, it was accepted that the common-law position of automatic suspension was applicable. See *Thirlwell v Johannesburg Building Society* 1961 4 SA 665 (D) 667.

37 547.

38 According to Margo J in *Sambo v Milns* 1973 1 SA 451 (T), the practical effect of legislation granting courts the discretion whether to order execution or suspension, was that "the person in whose favour a judgment was granted had his judgment and was entitled to execution unless the other party showed that there were special circumstances justifying the contrary", while "under the common law, the onus rests on the party seeking leave to execute to prove that he is entitled thereto" (455).

39 *Ismail v Keshavjee* 1957 1 SA 684 (T) 687–688.

the position as it was immediately prior to the order discharging the rule".[40] For this reason it held that an interim interdict restraining transfer had revived on noting appeal, despite its setting aside on the return day. The court did not refer to *Ismail*.

The question of the duration of interim orders was raised by Corbett J in the 1968 *SAB Lines* decision. He held that a rule *nisi*, granting interim relief, "is always intended to operate pending the decision of the application on the return day of the rule *nisi*".[41] He justified this on the basis that "the purpose of such an order is to ensure that, pending a full investigation of the matter by the court the wrong complained of should not be committed and continued".[42] Because the interim relief (restraining removal of a vessel pending payment of an amount due) had come to an end when discharged on the return day, the appeal could not perpetuate it.

In *Sirioupoulos v Tzerefos*, a full bench of the Free State Provincial Division held that an appeal against the discharge of a provisional sequestration order did not revive it and that the provisional order was intended to remain effective only until the court made or refused a final sequestration order.[43]

The *Du Randt* decision, also by a full bench, decided otherwise. The court cited Voet and Huber, holding that "[t]hese principles are enshrined in Rule 49(11)",[44] and refused to follow *Ismail* and *SAB Lines*, because they had not referred to common-law authority. It then held that *Sirioupoulos* was not applicable and relied on *Thirlwell* as authority for holding that an interim order, in a family matter relating to property allegedly donated subject to a usufruct, remained operative despite its discharge on the return day, if appeal was noted.[45]

In the late 1990s, a flurry of decisions on the issue were handed down. In the first of these, *MV Snow Delta*, an order granted *ex parte* for the attachment of a ship was set aside on the return day. After leave to appeal had been granted, the respondent sought a declaration that the ship was no longer under attachment and could leave the court's jurisdiction. The court held, following *SAB Lines*, that an *ex parte* order was not revived by the noting of appeal and that the effect of the setting aside of the attachment order was analogous to the attachment having been unsuccessfully sought for the first time on the return day.[46]

Two important decisions on the point were heard in the Transvaal in 1997. In *Interkaap Ferreira*, the court was asked to declare that an interim order prohibiting a government body from disclosing the result of a licence application, had lapsed, despite the noting of appeal against the dismissal of the application pending which the interim order had been granted. The issue of whether the interim order had been extinguished by the dismissal of the application and whether notice of appeal revived it, was canvassed fully by all parties. The court, after hearing argument and reviewing previous decisions, held that, on a proper consideration of the common law and Rule 49(11)

---

40 *Thirlwell* 670.
41 *SAB. Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd* 1968 2 SA 535 (C) 537.
42 *Ibid*.
43 *Sirioupoulos v Tzerefos* 1979 3 SA 1197 (O) 1204.
44 *Du Randt* 286.
45 288.
46 *The MV Snow Delta: Discount Tonnage Ltd v Serva Ship Ltd* 1996 4 SA 1234 (C) 1235.

> "generally the effect of the noting of an appeal is to revive an interim order which has been discharged through the operation of the order appealed against unless the interim order was of limited duration whether *ex lege* or with reference to the terms of the interim order itself".[47]

The court held further that, from a practical point of view, this was neither unfair nor inconvenient, since it made a fresh application for an interdict by the appellant unnecessary, and, if irreparable harm would result to the party with judgment in his favour, he could approach the court for relief.[48] Here the court viewed the party whose interim order had been discharged on the return day, as more deserving of assistance than the party with judgment in his favour.

The other judgment of that year was given by Southwood J, who had set aside an extremely onerous *Anton Piller* order that had been granted *ex parte* in the form of a rule *nisi*. He also ordered the applicants to return the documents and other items removed in the execution of the order. Instead of doing so, the applicants filed an application for leave to appeal against the setting aside order. The respondents then applied for a declaratory order that the filing of application for leave to appeal did not have the effect of reviving the *Anton Piller* order. The court held that the rule *nisi* was intended to be of limited duration and to remain in force only until the return day or until reconsideration of the order in terms of Rule 6(12)(c). It was definitely not intended to remain in force pending the finalisation of proceedings for substantive relief and thus could be viewed as falling outside the general rule stated in *Du Randt*.[49]

The following year, in the *MV Triena* decision, a Durban court, setting aside an *ex parte* order for the arrest of a vessel to provide security for a claim instituted in an English court, held that a request for leave to appeal against the setting aside order had the effect of reviving the *ex parte* arrest order. Meskin J considered two previous judgments which had dealt with the attachment of vessels. In *SAB Lines* an interim interdict, preventing the ship from leaving port until payment of the amount due had been made, was discharged when the applicant failed to prove the existence of a valid lien.[50] Meskin J, while agreeing with Corbett J's view that the noting of appeal did not automatically revive an order which the court had not intended to operate beyond a particular date, stated that the matter before him could be distinguished because the court in *SAB Lines* was not faced with an interim attachment order but with an interim interdict.[51] Meskin J also considered the *MV Snow Delta* decision and stated that it was unclear whether that court had considered the language of the original *ex parte* attachment order to decide whether it could revive on the noting of appeal, or whether it had held that attachment orders do not revive, regardless of the language in which they are couched. If the latter, he disagreed with the *MV Snow Delta* decision.[52] It is unclear why Meskin J distinguished between an *ex parte*

---

47 *Interkaap Ferreira* 693.

48 *Ibid.*

49 *Lourenco* 309. The court also held that, because *Anton Piller* relief is purely interlocutory, the order setting aside the rule *nisi* did not have the attributes of a judgment or order as described in *Zweni v Minister of Law and Order* 1993 1 SA 523 (A) 532 (point 8) and was therefore not appealable (310).

50 *Cape Tex Engineering Works (Pty) Ltd v SAB. Lines (Pty) Ltd* 1968 2 SA 528 (C) 534.

51 *MV Triena* 943.

52 *Idem* 944.

interim attachment order for security such as found in *MV Triena* and an *ex parte* interim interdict ordering a vessel not to depart until the due amount had been paid, as was the case in *SAB Lines*.

The most recent decision on the issue, *Chrome Circuit*,[53] dealt with an *ex parte* attachment order to found or confirm jurisdiction, which was subsequently set aside. The applicant had filed a notice of application for leave to appeal and then sought an order stating that this notice had the effect of reviving the *ex parte* attachment order, relying on the *MV Triena* judgment. Goldblatt J held that this judgment was "clearly wrong"[54] and approved and followed the "clear and lucid" reasoning of Southwood J in the *Lourenco* judgment.[55] He held that it was formalistic to view an *ex parte* order and a subsequent order setting this aside as two separate and distinct orders, as this did not reflect the fact that the second order is the final order of court and the first order has no independent existence after the grant of the second.[56]

The decisions discussed above reveal two distinct viewpoints, one that interim orders should automatically revive if appeal is noted against their setting aside, unless the wording indicates a contrary intention, the other that interim orders are merely reconsidered on the return day and have no separate existence and therefore, cannot revive unless a specific intention that they should do so is shown. Are these viewpoints reconcilable and, if not, which is correct?

5 BASIS FOR THE RULE AGAINST EXECUTION

Voet gave as reason for the common-law principle that execution should be suspended pending appeal "so that no prejudice may be caused".[57] Older South African textbooks dealing with this passage state that "the rights of the parties must not be changed".[58] The position in terms of previous legislation was that the court had to decide whether the order should be suspended or executed "as . . . may in each case appear to be the most consistent with real and substantial justice".[59] In all these instances, the rights of both parties were considered. But in *Reid v Godart*, the then Appellate Division stated that the "foundation of the common-law rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant . . .".[60] This phrase was repeated in later decisions, including the leading *South Cape Corporation* Appellate Division decision on suspension in general.[61]

This coincided with the statutory change from a position where the court had to determine where "real and substantial justice" lay, to the current position where the rights of the appellant enjoy priority.

This change in emphasis is not in accordance with our common law. In any event, while it can be argued that an appellant is entitled to protection so that an

---

53 *Supra* fn 4.
54 190.
55 *Ibid.*
56 *Ibid.*
57 Voet 49 7 1 (Gane's translation).
58 Van Zyl *The theory of the judicial practice of the Colony of the Cape of Good Hope* (1902) 540.
59 See eg s 39 Proc 14 of 1902 (Tvl).
60 *Reid v Godart* 513.
61 545.

order on appeal will not be rendered nugatory by a respondent's actions pending appeal, this would normally entail a retention of the *status quo ante* before litigation commenced, not the revival of an order given in haste and in secret. The general statements made about the reasons for suspension of execution pending appeal do not necessarily hold true when suspension implies the revival of an interim order, and should not be given undue weight.

6 RECONCILIATION OF DIFFERENT DECISIONS

As stated above, two views exist on the revival of interim orders.

The first is that an interim order revives when appeal is noted against its discharge. The cases in which this view was held are analysed below.

In the *Thirlwell* decision (1961), decided in terms of common law, the court found support for its decision in a number of judgments which dealt with suspension of execution pending appeal in general terms, not in relation to the revival of a previous order. All these judgments had been decided in terms of the common law, not any statutory enactment, and repeated the accepted view that at common law noting of appeal suspended execution.[62] In *Thirlwell*, immovable property would have been transferred before the appeal was heard if the court had not found that the interim order had revived. It held that the noting of appeal against the discharge of the interim interdict prohibiting transfer "deprived the judgment of any effect which would bring about any change in the *status ante quo* (sic)"[63] and that the position should therefore be maintained as it was immediately prior to the order discharging the interim interdict, that is, transfer was prohibited. On the particular facts, the decision accords with "real and substantial justice", but this does not mean that its legal basis holds true in other situations.

The *Du Randt* decision (1992) had an equally persuasive set of facts. A father had donated all his property and business interests to his son, allegedly subject to a verbal life usufruct. Dissent followed and when the son denied the existence of the usufruct, the father wished to have the donation set aside on the ground of ingratitude. The parties agreed to the grant of an urgent interim interdict restraining the son from dealing with the property. This was set aside on the return day because the court held that the alleged verbal usufruct was invalid, and should have been in writing.[64] It was possibly because of these facts that the court held that the common law principles enshrined in Rule 49(11) required that the *status quo* had to remain as it was "immediately prior" to the order appealed against and so the interim interdict, to which the son had consented, should remain in force. The court's reasoning for this decision is problematic. It held as follows:

> "Had the interim order been confirmed on the return day, and had respondent noted an appeal against such order, the *status quo* in terms of the interim order would undoubtedly have remained in force pending the appeal. Logically I cannot appreciate why a different situation should exist where the interim order is set aside."[65]

---

62 *Thirlwell* 667–669.
63 670.
64 *Du Randt* 282–283.
65 287.

In addition, while the court was justified in feeling that the respondent could hardly object too strenuously to an interim order granted by consent, the following argument for allowing a rule *nisi*, granted before a respondent has put his version before the court, to revive on appeal, seems to ignore the realities:

> "[A] rule *nisi* should not be granted merely for the asking therefor, leaving the matter to be determined on the return day, but . . . the Judge hearing the initial application should be fully satisfied that a rule *nisi* is warranted on the papers."[66]

The *Interkaap Ferreira* (1997) introduced a new version of the common law and Rule 49(11). The court considered all decided cases on the issue. It refused to follow the decisions in *Ismail*, *SAB Lines* and *MV Snow Delta*, on the ground that those courts had not considered the effects of noting an appeal.[67] It held that *Foley* and *Sirioupoulos* were distinguishable because they both dealt with sequestration proceedings, found the reasoning in *Du Randt* convincing, and held as follows:

> "[G]enerally the effect of the noting of an appeal is to revive an interim order which has been discharged through the operation of the order appealed against unless the interim order was of limited duration either *ex lege* or with reference to the terms of the interim order itself."[68]

This exception to the general rule was pertinently mentioned here for the first time but has been cited in most subsequent judgments. It was repeated in the final decision in which an interim attachment order was held to revive on appeal. In *MV Triena*, the court first held that the effect of Rule 49(11), read together with the common law, was that if the operation of an order was suspended, so that no effect could be given to it, the previous order became "automatically operative" once appeal was noted and that "any other conclusion is simply logically impossible".[69] This was because, where no effect could be given to the discharge order as it was suspended, it was inevitable that the arrest order again became automatically operative. Any other contention meant that the *status quo ante* the setting aside order was not restored.[70] Although on the facts it is understandable that the court sought to assist the applicants by preventing the vessel from leaving its jurisdiction, the court's argument is not persuasive on any more general basis.

The court stated that this was subject to a proviso, and distinguished *SAB Lines* because there the principle was applied that an earlier order did not automatically revive if the court granting it "never intended it to be operative beyond a particular date or the occurrence of a particular eventuality".[71]

The court then held that the "logically unexceptionable" legal position was that noting of an appeal did not bring an earlier order into operation if the court that granted such order did not intend this, and that to determine the court's intention "each particular case entails a consideration of what the intention of the Court was with regard to the duration of the order . . .".[72] and found support for this view in the *Interkaap Ferreira* decision.

---

66 289.
67 *Interkaap Ferreira* 691.
68 693.
69 *MV Triena* 942.
70 *Ibid.*
71 943.
72 *Ibid.*

It can be argued that this "general rule plus exception" is a solution to the problem posed in this article. But although this view is logically unexceptionable, it is rather impractical. Must each application for leave to note appeal and for ancillary relief then be accompanied by debate about the intention of the court that granted the interim order? The argument that the parties should request the court to indicate the intended duration of an interim order is not tenable. Such orders are usually granted *ex parte*, and thus the party who most needs the imposition of a time limit will not be present to make such a request. It is unlikely that an applicant will ask a court to set a time limit on the assistance it has granted, unless forced to do so. The onus will then lie on the court to itself spell out the duration of any interim order it grants.

Is the other point of view, that an interim order is merely reconsidered on the return day, has no separate existence and thus cannot revive unless a specific intention that it should do so is shown, more acceptable?

This line of cases started with the *Ismail* decision in 1956. The court was asked to grant leave to execute an interim interdict against ejectment pending appeal. The matter was decided in terms of previous legislation which required the court to allow or suspend execution in its discretion.[73] The court held that an interdict granted *pendente lite* was one granted "pending determination of the action" and intended to remain in force until judgment was given in that action. It rejected the argument that the interdict was to remain in force until "final" determination of the action, in other words, until judgment in the appeal.[74] The court reasoned that when judgment was given, the issues would have been determined on evidence which might disclose that the temporary interdict should not have been granted at all, and so an interdict founded on a necessarily incomplete view of the facts should not revive automatically.[75]

Ten years later, Corbett J gave the *SAB Lines* decision. The court was asked to rule that the noting of appeal against the discharge of an interim interdict did not perpetuate it. The interim interdict had prohibited a vessel from leaving harbour pending payment of an amount due to the applicant. The court held that the purpose of the grant of an interim interdict as adjunct to a rule *nisi* was to ensure that, pending full investigation, the wrong complained of was not committed or continued. This meant that an interim interdict was always intended to operate pending the decision on the return day of the rule *nisi*, not until a final determination on appeal.[76] Thus the vessel was free to leave harbour.

The *Sirioupoulos* decision can be distinguished because it dealt with an interim sequestration order, not an interdict. The court held that, although two orders were made, only one sequestration came into effect, and that the duration of an interim sequestration was only until the court granted or refused a final order.[77] The unilateral behaviour of one party could not create an order of longer duration than the court had intended.[78]

---

73 S 36 Proc 14 of 1902.
74 *Ismail* 687.
75 *Ibid.*
76 *SAB Lines* 537.
77 *Sirioupoulos* 1204.
78 1206.

The *MV Snow Delta* decision took the reasoning in the *Sirioupoulos* decision a step further. The court held that the setting aside of an *ex parte* attachment order was analogous to the attachment having been unsuccessfully sought for the first time on the return day, as the law treated such a matter as a reconsideration of the application. As such, it did not revive if appeal was noted against its discharge.[79] Here, Selikowitz J viewed this form of interim order as a step in the process towards the grant or refusal of relief, rather than as an earlier but distinct order.

The *Lourenco* decision dealt with the question of whether an *Anton Piller* order revived if appeal was noted against its discharge. Southwood J held that an *Anton Piller* order is purely interlocutory relief and that the rule *nisi* which was granted, although of immediate effect, was intended to be of limited duration and remain in force only until the return day. As such, an *Anton Piller* order fell within the qualification referred to in the *Interkaap Ferreira* decision and so did not revive if appeal was noted against its discharge.[80]

The recent *Chrome Circuit* decision follows the reasoning in *MV Snow Delta*. Goldblatt J was asked to decide whether an *ex parte* attachment order which had been set aside, was revived by the noting of leave to appeal. He held that

> "the formalistic treating of these orders [an *ex parte* order and a subsequent order setting this aside] as two separate and distinct orders of court does not truly reflect the fact that the second order is the final order of the court and that the first order has no independent existence after the granting of the second order".

As the court pointed out, a different decision would result in the respondent being subject to an order granted in its absence even after it had persuaded the court that the order had not been correctly granted in the light of all the facts.[81] The court emphasised the fact that an order made on the return day of an *ex parte* order is not a new order or a further order but a reconsideration. The *ex parte* order could not be revived by the noting of leave to appeal as it no longer existed: its duration was limited to the date of its reconsideration.[82] The court found support for this view in Uniform Rule 6(12)(c) which reads as follows:

> "A person against whom an order was granted in his absence in an urgent application may by notice set the matter down for reconsideration of the order."

The court reached its conclusions on two bases. The first was that, in terms of the qualification stated in *Interkaap Ferreira*, the original *ex parte* order was of limited duration *ex lege* Uniform Rule 6(12)(c) because of the use of the word "reconsideration", and so did not revive on noting of leave to appeal. The second, and more universal basis, was the *audi alteram partem* principle. The court held that Rule 6(12)(c) was a recognition of the "paramount importance of the *audi alteram* principle in our legal system"[83] and that the revival of an order granted *ex parte* would be "contrary to one of the most basic principles of our law and contrary to any concept of fairness and natural justice".[84]

---

79 *MV Snow Delta* 1235.
80 *Lourenco* 309.
81 *Chrome Circuit* 190.
82 *Ibid.*
83 *Ibid.*
84 *Ibid.*

If this argument is sound, it follows that no urgent *ex parte* order is capable of automatic revival if leave to appeal is noted against its discharge or reconsideration on the return day. It is submitted that this approach offers the solution to the problem posed in this article. The argument that at common-law appeal suspends execution, which is quoted as justification for the revival of an interim order discharged on the return date, has been shown not to be as clearcut as traditionally thought. In contrast, the *audi alteram partem* principle is the common-law foundation of our legal system and must always be complied with. Uniform Rule 49(11) gives no indication of any other view – it does not state that interim orders revive if appeal is noted, the time at which the *status quo ante* must be fixed, or any other indication of what is intended in such a situation.

7 CONCLUSION

An analysis of the common law, legislation and decisions has illustrated the extent of confusion surrounding the question of whether an interim order is revived if appeal is noted against its discharge. Common-law authors offer no definite answers but make it clear that at common law, the rights of both parties were taken into account. Previous legislation also sought "real and substantial justice". The current rule does not deal pertinently with the question and court decisions are contradictory.

The solution lies in the reference to the *audi alteram partem* principle, a basic of our common law repeated in Rule 6(12)(c). It is contrary to justice that an order granted against a party in his absence and subsequently found to have been incorrectly granted, can be revived by the unilateral action of the other party. On a more legalistic basis, statutory interpretation requires that the Rules must be reconciled where possible, and the interpretation placed by Goldblatt J on the relationship between Rules 49(11) and 6(12)(c) does this. If a party would be prejudiced by the non-revival of interim relief, he is always free to approach the court for such relief pending appeal.

8 POSTSCRIPT

An appeal was noted to the Supreme Court of Appeal against the *MV Snow Delta* decision. Harms JA approved the *ratio* of the decision by Selikowitz J and stated that the correct approach is that an interim order cannot be revived by the noting of appeal (*MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 4 SA 746 (SCA) 751). He stated that the criticisms expressed against this reasoning in decisions such as *Du Randt* and *Interkaap Ferreira* were based on a misunderstanding of the concept of suspension of execution. Where an interim order is not confirmed, the application is effectively dismissed and there is nothing that can be suspended. He approved the statement in *Chrome Circuit* that an interim order has no independent existence but is conditional upon confirmation by the same court in the same proceedings after having heard the other side (752), and pointed out that any other conclusion would give rise to an unacceptable anomaly:

> "If an applicant applies for an interim order with notice and the application is dismissed, he has no order pending the appeal; on the other hand, the applicant who applies without notice and obtains an *ex parte* order coupled with a rule *nisi* and whose application is eventually dismissed, has an order pending the appeal" (*ibid*).

Aanspreeklikheid vir 'n besering in die loop van 'n gholfspel, of -oefening of -vertoning opgedoen*

JMT Labuschagne
MA DPhil LLD
Professor, Universiteit van Pretoria

SUMMARY

Liability for an injury suffered in the course of a golfing contest, practice or demonstration

In contrast to, for instance, soccer and rugby, golf is not a combat sport ("Kampfsport; strydsport"). The ball is always hit from a stationary position, with enough time to consider and evaluate every shot. It appears from the relevant jurisprudence of several legal systems that ordinary negligence suffices for delictual liabilty in respect of an injury sustained in the course of a golfing contest, practice or demonstration. Not only competitors are protected against intentional or negligent conduct of other competitors, but also caddies, spectators and officials and employees at the golf course and those involved in organising a golfing contest or exhibition. Compliance with the rules of the game does not in itself exclude a finding of negligence.

1 INLEIDING

In 'n saak wat op 13 Januarie 1997 voor 'n *Oberlandesgericht* (OLG) te Hamm[1] in Duitsland gedien het, het die volgende feitestel na vore getree: E en V was lede van dieselfde gholfklub. Op 17 September 1995 het beide deelgeneem aan 'n toernooi wat deur hulle klub aangebied is. E het eers saam met twee ander dames die negende speelbaan ("Spielbahn") (ook in Afrikaans genoem die negende putjie) aangedurf. Daarna het hulle in die rigting van die tiende putjie beweeg. Die toernooibestuurder het tussen die negende en tiende putjies 'n verversingstalletjie ingerig. Terwyl E daar vertoef het, is sy deur 'n gholfbal, wat deur V geslaan is, op die hand getref as gevolg waarvan sy 'n besering opgedoen het. V was lid van 'n groep, bestaande uit drie mans, wat na E-hulle die negende putjie gespeel het. Hy het die bal afgeslaan in die rigting van die negende putjie wat ongeveer 120 tot 130 meter ver was. Die bal het egter ongeveer 40 tot 50 meter van die beoogde slaanlyn afgewyk. W, die werkgeefster van E, het in die lig hiervan die vervanging van loon- en verwantekoste wat sy moes dra van V geëis. E het daarbenewens genoegdoening van V geëis.

---

* '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 te München (Duitsland) onderneem. Die menings hierin uitgespreek, word nie noodwendig deur dié instellings gedeel nie.

1 *Versicherungsrecht* (*VersR*) 1998, 67. Sien ook Reschke *et al Handbuch des Sportrechts* (1999) 21 par18.

In die *Landgericht* (LG) het V geargumenteer dat E op eie risiko deelgeneem het. Hy het ook aangevoer dat sy optrede nie wederregtelik en skuldig was nie, aangesien dit dikwels by gholf voorkom dat 'n bal van die beoogde slaanrigting afdwaal. Hy het toe hy van die afwykende rigting van die bal bewus geword het, onmiddellik met 'n waarskuwingsroep gereageer. Die LG het V gelyk gegee en die eis van die hand gewys. E en W beroep hulle vervolgens op die OLG.

Teen die agtergrond van die beslissing van die OLG in dié saak word die vraag na die aanspreeklikheid vir 'n besering in die loop van 'n gholfspel, -oefening of -vertoning opgedoen, eerstens in die Duitse reg onder die loep geneem. Daarna word die regsposisie in die VSA en ook in Suid-Afrika van nader betrag. Die onderhawige bydrae moet voorts as 'n glos gelees word op 'n artikel[2] wat skrywer vroeër oor die juridiese aanspreeklikheid vir sportbeserings in die algemeen geskryf het. Onnodige duplikasie van inligting en argumente word doelbewus hier vermy.

2 DIE UITSPRAAK VAN DIE OLG BINNE KONTEKS VAN DIE DUITSE REG

Die OLG wys ten aanvang daarop dat V op 'n onregmatige en skuldige wyse aan E 'n liggaamsbesering berokken het deurdat hy die betrokke hou uitgevoer het toe sy haar binne reikwydte daarvan bevind het. Die kousaliteitsvereiste word nie betwyfel nie. Die liggaamsbesering, die benadeling ("die Schadensfolge") kan derhalwe aan V toegereken word. Dat 'n gholfbal verslaan en 'n ander deelnemer daardeur getref kan word, is nie onwaarskynlik en heeltemal ongewoon nie. Artikel 823 van die Duitse Burgerlike Wetboek (*Bürgerliches Gesetzbuch*; *BGB*) het ten doel om alle vorme van skending van liggaamsintegriteit te dek en sluit nie sodanige skending in die konteks van sport uit nie, tensy dit binne die aard van 'n spesifieke sport val.

Die OLG vind ook geen probleem met die onregmatigheidsvraag nie. Dat bloot uit E se deelname aan sodanige gholftoernooi afgelei kan word dat sy tot besering toegestem het, is in stryd met die aard van die sportsoort gholf. Gholf behoort nie tot die strydsportsoorte ("Kampfsportarten") waar liggaamskontak en beserings deel van die normale gang van die beoefening daarvan is nie.[3] Gholf ressorteer onder die parallel-beoefende sportsoorte. Gholfopponente speel naamlik in dieselfde rigting en nie teenoor mekaar nie. Die besering wat E opgedoen het, is nie tipies te wagte by deelnemers aan 'n gholftoernooi nie.[4] In dié verband kan ook verwys word na 'n beslissing van die OLG te Nürnberg van 12 Julie 1990.[5] In dié saak was eiseres en verweerder deel van 'n viergroep-gholfspel. Dit was hulle eerste gholfondervinding. By die sesde putjie het verweerder 'n bal verslaan wat eiser teen die voorkop getref het. Sy het onmiddellik bewusteloos neergeslaan. 'n Wond aan die voorkop het na heling 'n 2×2 cm groot kruisvormige roof agtergelaat. As gevolg van die neerslaan het 'n verskuiwing in haar nekwerwelkolom plaasgevind en het sy ook skedelkneusing opgedoen. Eiseres was 'n handelsverteenwoordiger wat vir twee maande nie kon werk nie. Sy stel 'n eis van DM4859,09 vir verlies van inkomste

---

2 "Straf- en delikteregtelike aanspreeklikheid vir sportbeserings" 1998 *Stell LR* 72. Sien ook Labuschagne "Die rol van die spelgang by bepaling van aanspreeklikheid vir 'n besering in 'n hokkiewedstryd opgedoen" 1999 *THRHR* 469.

3 Sien Dölling "Die Behandlung der Körperverletzung im Sport in System der strafrechtlichen Sozialkontrolle" 1984 *Zeitschrift für die gesamte Strafrechtswissenschaft* (*ZStW*) 36 38; Teichmann "Art 823 BGB und Verletzung eines anderen im Sport" 1979 *Juristische Arbeitsblätter* 293 348–349.

4 Sien ook Storch "Rechtliche Behandlung von Sportverletzungen beim Golfspiel" 1989 *VersR* 1131.

5 *NJW-RR* 1990, 1503.

asook vir DM10,000 genoegdoening in en vra ook vir 'n bevel vir 'n herstelplig ten aansien van toekomstige skade. Die LG, die hof *a quo*, het 'n derde skuld aan verweerders toegeskryf en DM3239,36 vir inkomsteverlies toegeken asook DM3300 as genoegdoening. By hoër beroep gaan die OLG van die alleenskuld van die verweerder uit en verhoog, benewens die bedrag vir verlies van inkomste soos geëis, die genoegdoeningsbedrag tot DM5000. Die OLG wys daarop dat die verweerder, as beginner in die gholfspel, hom nie daarop kon verlaat dat, volgens sy spelervaring, die bal in die beoogde rigting sou trek nie. Die bal het in 25 tot 30cm hoë gras gelê en dit het derhalwe om 'n moeilike hou gegaan. Hy het nie by die uitvoering van dié hou met die nodige sorgsaamheid opgetree nie. Eiseres kon haar daarop verlaat dat verweerder in ooreenstemming met die spelreëls sou optree en die bal slegs sou speel as ander deelnemers buite die reikwydte is of totdat hulle hulle op 'n veilige plek bevind het. Sy kon ook verwag het dat hy, voordat hy die bal sou slaan, haar gewaarsku het. Die OLG wys daarop dat die straatverkeergeldende vertrouensbeginsel ook binne die konteks van parallel-beoefende sportsoorte aanwendbaar is.[6] Storch, voorsittende regter van die LG te Mannheim, verwys in sy artikel na die volgende saak[7] wat in 1989[8] voor hulle gedien het. Eiser en verweerder was jarelange aktiewe lede van 'n gholfklub en was goed bekend met die spelreëls. Een namiddag, ongeveer vyfuur, het hulle op die volbesette gholfbaan gespeel. Eiser het alleen gespeel terwyl verweerder in 'n driegroep gespeel het. Eiser het laasgenoemde groep ingehaal sonder dat hulle dit agtergekom het. Eiser se bal wat hy van die derde bof afgeslaan het, het in die ruveld beland, ongeveer twee meter van die skoonveld af en ongeveer in die middel van die derde en vierde speelbane. Terwyl eiser sy bal gaan soek het, het verweerder van die derde bof afgeslaan. Nadat hy die eerste hou verslaan het, het hy ook die daaropvolgende hou verslaan. Laasgenoemde bal het meer as 45° na regs getrek in die rigting waar eiser sy bal, ongeveer 100 meter verder, gesoek het. Eiser was agter 'n bos verskuil sodat hy en verweerder mekaar nie kon sien nie. Die bal het eiser teen sy linkeroog getref, as gevolg waarvan hy, nieteenstaande meerdere operasies, in dié oog blind geword het. Eiser eis vervolgens van verweerder genoegdoening en vergoeding van materiële skade gely.[9] Storch[10] verduidelik dat die toepassing van die klassieke dogmatiese aanspreeklikheidsbeginsels van die Duitse deliktereg in dié verband die volgende oplewer:

(1) Deur die verslane bal is eiser se liggaamsintegriteit geskend. Die benadeling wat veroorsaak is, kan verweerder ook toegereken word. Die vertrekte of verslane bal het naamlik die benadeling veroorsaak. Dit veronderstel nie besondere eienaardige, onwaarskynlike omstandighede wat in die gewone verloop van sake buite rekening gelaat moet word nie. Trouens, dit kan met enige speler gebeur dat 'n bal nie die gewensde vlugrigting neem nie, maar in 'n ongekontroleerde rigting wegskram wat 'n ander kan benadeel.

(2) Verweerder het die liggaamskending van eiser ook onregmatig veroorsaak. Volgens die Duitse hoërhof (*Bundesgerichtshof*; *BGH*)[11] bestaan onregmatigheid van liggaamskending, ooreenkomstig artikel 823(1) *BGB*, wanneer daar geen

6 1989 1131–1132.

7 1504. Vgl Storch 1131: "Der Golfspieler darf einen Ball nur dann spielen, wenn er im Rahmen seiner Möglichkeiten zur Kontrolle von Richtung und Entfernung sicher sein kann, andere nicht zu gefährden."

8 Wat blykbaar nie amptelik gerapporteer is nie.

9 Ooreenkomstig a 823 en 847*BGB*.

10 1989 1131–1132.

11 Urt v 13/3/1979, *BGHZ* 74, 9 14ff.

verweer ter beskikking van die verweerder is nie. Verweerder kan hom nie op die beginsel beroep dat sy optrede verkeersmatig of sosiaal adekwaat was nie. Geen (ander) regverdigingsgrond was teenwoordig nie. Die *BGH*[12] beslis dat 'n deelnemer aan die pad- en spoorverkeer wat verkeersreëlmatig (korrek) handel nie onregmatig optree nie. Hierdie reël kan nie sonder meer op die veroorsaking van 'n sportbesering oorgedra word nie, aangesien sportreëls nie aan staatlike reg, soos verkeersreëls, gelyk gestel kan word nie.[13] In die lig hiervan is dit vir beoordeling van onregmatigheid nie van belang of die tradisionele waarskuwingsroep deur verweerder gegee is of nie. Dit is bloot 'n spelreël waaraan geen regstatus toegeken kan word nie. So 'n spelreël kan slegs die rang van 'n regsreël verwerf indien dit in 'n algemeen geldende gewoonteregsreël ontwikkel het.[14] Eiser het onteenseglik ook nie tot die besering toegestem nie. Toestemming tot besering word selfs nie eens by strydgeoriënteerde sportsoorte veronderstel nie. Dit geld des te minder vir sportsoorte wat parallel beoefen word. Trouens, toestemming tot sodanige besering deur eiser sou in iedere geval nie die onregmatigheid daarvan ophef nie.[15]

(3) Die besering wat eiser opgedoen het, is ook op 'n skuldige wyse deur verweerder veroorsaak. Daar rus 'n plig op 'n gholfspeler om sorg te dra dat, wanneer hy die bal speel, ander persone nie binne trefwydte, vir sover dit moontlike afstand en rigting betref, daarvan is nie. Verweerder het in dié verband nalatig opgetree aangesien, toe hy die bal geslaan het, hy daarmee rekening moes hou dat dit van die beoogde vlugbaan sou kon afwyk en dat daar ander spelers was wat daardeur getref sou kon word. Verweerder kan hom ook nie daarop beroep dat dié sorgsaamheidsvereistes sulke hoë eise stel dat die effek daarvan sou wees dat die gholfspel nie meer beoefen sou kon word nie. By die afweging van aan die een kant die reg op liggaamlike integriteit en gesondheid, en aan die ander kant die reg op vrye sportbeoefening, moet eersgenoemde voorrang geniet. 'n Ander benadering is nie met die beskermingsdoel van artikel 823*BGB* versoenbaar nie.[16]

In die beslissing van die OLG te Hamm van 13 Januarie 1997, waarmee die onderhawige bespreking ingelei is, word na die hierbo bespreekte beslissing van die LG te Mannheim verwys en word beslis dat V nalatig opgetree het. Gewone nalatigheid is voldoende; growwe nalatigheid word nie vereis nie. Gholf behoort, volgens die OLG, tot daardie sportsoorte, anders as die teenoor-mekaar-gerigte strydsportsoorte ("Kampfsportarten"), waar ligte reëlskending nie as deel van spel in koop geneem word nie.[17] Opponente of medespelers kan in gholf op nakoming

12 Beschl v 4/3/1957, *BGHZ* 24, 21.

13 1132: "Denn Voraussetzung für die Anwendbarkeit des Grundsatzes über das verkehrsgerechte Verhalten ist, daß eine Rechtsregel vorliegt, die der Vorschrift des § 823 Abs. 1 BGB gleichrangig gegenübergestellt werden kann. Der vom Bundesrecht gewährleistete Schutz der Lebensgüter kann nämlich nicht durch von Verbänden aufgestellte Spiel- und Verhaltensregeln, denen sich die Spieler unterworfen haben, abbedungen werden, weil den Regeln der Sportverbände der Rang staatlich gesetzten Rechts fehlt."

14 1132: "Rechtsrang könnten sie nur dann beanspruchen, wenn sie sich zu einem allegemein geltenden Gewohnheitsrecht entwickelt hätten. Davon kann jedoch nicht ausgegangen werden. Denn ihnen fehlt der für das Gewohnheitsrecht bedeutsame, durch ständige Übung manifestierte Rechtsgeltungswille."

15 Deutsch "Die Mitspielerverletzung im Sport" 1974 *VersR* 1045 1046–1048; Dölling 1984 *ZStW* 50.

16 Storch 1132.

17 Fleischer "Reichweite und Grenzen der Risikoübernahme im in- und ausländischen Sporthaftungsrecht" 1999 *VersR* 785 790–791.

van al die reëls onder alle omstandighede vertrou. Dit word as 'n algemene reël by gholf aanvaar dat 'n bal slegs gespeel mag word as ander spelers buite reikwydte is. Dit was nie in dié saak die geval nie. Dit kan hier interessantheidshalwe bloot vermeld word dat die OLG aan E 'n bydraende skuld van 25% toegeken het, aangesien sy in die betrokke omstandighede redelikerwys haar uit die moontlike reikwydte van V se bal moes verwyder het. Sy moes bewus daarvan gewees het dat die speelgroepe vinnig na mekaar gespeel het en dat die betrokke groep, waartoe V behoort het, so gou moontlik wou vorder.[18] Die bedrag wat aan V toegeken is, word egter nie in die hofverslag genoem nie.

Dit blyk dat die Duitse howe nie bereid is om by gholf, in teenstelling met (teenoor-mekaar-spelende) strydsportsoorte,[19] die algemene sorgsaamheidsvereiste wat vir nalatigheid gestel word te verslap nie. Die rede daarvoor is voor die hand liggend: by gholf word die bal telkens van 'n stilstaande posisie en berekend gespeel, anders as by 'n sportsoort soos sokker waar nalatige reëlskending uit, byvoorbeeld, oorywer, opgewondenheid en speltempo reëlmatig voorkom.[20]

3 DIE REGSPOSISIE IN DIE VSA

Anders as in Duitsland, is daar in die VSA 'n groot hoeveelheid gewysdereg rondom aanspreeklikheid vir gholfbeserings opgebou. In dié verband kan onderskei word tussen aan die een kant beserings deur 'n gholfstok, en aan die ander kant beserings deur 'n gholfbal veroorsaak.

3 1 Besering deur 'n gholfstok veroorsaak

Peterson[21] vat die algemene uitgangspunt en houding van die howe in die VSA in dié verband soos volg saam:

> "Although the game of golf is not generally considered a hazardous undertaking, many accidents result from the playing of the game of golf or mere use of a golf club in ways related or unrelated to the game, whether by an adult or minor, in which a person swings the golf club and strikes and injures another. The most obvious person to seek damages from in this situation is the one swinging the golf club. Although the one swinging the club may be found negligent, in many situations the person struck by the club may be either contributorily negligent or found to have assumed the risk of the injury. As to the assumption of risk, it is generally held that one assumes the risk incident to the playing of the game of golf, but does not assume the risks of the negligent behaviour, of the one swinging the club."

Teen dié agtergrond het die volgende uitgekristaliseer:

3 1 1 Opwarmswaai of lughou met 'n gholfstok[22]

In dié verband word onderskei tussen daardie gevalle waar die hou uitgevoer word weg van die afslaanbof ("tee") en daardie gevalle waar dit op die afslaanbof uitgevoer word.

---

18 68.

19 Sien ook BGH, Urt v 21/2/1995, *NJW-RR* 1995, 587; Deutsch 1051.

20 BayOLG, Urt v 3/8/1961, *NJW* 1961, 2072 2073; OLG Düsseldorf, Urt v 10/2/1995, *VersR* 1996, 73; Schönke-Schröder-Stree *Strafgesetzbuch. Kommentar* (1997) 1644.

21 "Liability to one struck by golf club" (1988) 63 ALR 4th 221, 225 (annotasie tot *Thurston Metal and Supply Company, Inc v Taylor* 230 Va 471, 339 SE 2d 538, 63 ALR 4th 207 (SC Virginia, 1986).

22 Peterson (1988) 63 ALR 4th 232–234.

3 1 1 1 Weg van die afslaanbof

In *Phares v Carr*[23] wat in 1952 voor die appèlhof van Indiana gedien het, was die feite soos volg: Shank, 'n besoeker by 'n oefen-afslaanstrook ("driving range") het vanuit 'n beskutting waar hy 'n gholfstok uitgesoek het, gekom en 'n volle swaai met die stok uitgevoer en P, 'n verbyganger wat haar oë op die grond voor haar gehou het aangesien daar klippe en rowwe plekke was, getref en beseer. S het met sy rug na haar toe gestaan en sy het nie die stok in sy hande gesien nie. P eis genoegdoening van die eienaar van die fasiliteit. In sy uitspraak stel hoofregter Achor,[24] namens die hof, die regsposisie soos volg:

> "It is urged that the circumstance of this case brings it within the class of cases which generally hold that under the doctrine of assumed risk, the proprietor of an athletic field or golf course is not liable for damages sustained by participants or spectators by reason of injuries which are reasonably incidental to the particular athletic events . . . We do not so construe the facts in this case. Appellant's injury did not result from participation in an athletic event by either Shank or the appellant. The injury occurred as the result of the negligence on the part of Shank when both he and appellant *were outside the area* provided for active participation of the sport."[25]

In *Brady v Kane*[26] wat in 1959 voor 'n distriksappèlhof in Florida gedien het, het die volgende feite navore getree: B was een van vier persone wat as 'n groep gespeel het. Op die negende afslaanbof het een van die vier afgeslaan terwyl B agter hom gestaan en in die rigting van die betrokke putjie gekyk het. K, wat agter B gestaan het, het 'n oefenswaai (lug- of windhou) uitgevoer en B teen die kop getref. B stel vervolgens 'n eis vir kompensasie teen K in. In sy uitspraak wys hoofregter Carroll daarop dat K se optrede deur 'n oefenswaai in teenwoordigheid van verskeie medespelers, in die beperkte ruimte wat deur hulle beset is en op 'n tydstip toe dit nie gepas was nie, uit te voer, wat andere waarskynlik kon benadeel en benadeling inderdaad ingetree het, nalatigheid daarstel. Op K het 'n plig gerus om sy oefenswaai op so 'n wyse uit te voer dat hy nie 'n niksvermoedende medespeler beseer nie. Ten aansien van die geopperde verweer van risiko-aanvaarding merk hoofregter Carroll soos volg op:[27]

> "A member of a golfing foursome assumes certain obvious and ordinary risks of the sport by participating therein with knowledge of its normal dangers, but a player does not assume a risk which cannot reasonably be anticipated, and which may be the result of improper and unauthorized negligent action of another player."

Hieruit blyk duidelik dat gewone nalatigheid voldoende is. Dit blyk ook duidelik uit 'n 1970-beslissing van 'n appèlhof van Georgia in die saak *Askew v Carroll*.[28]

3 1 1 2 Op die afslaanbof

In *Thurston Metals and Supply Company, Inc v Taylor*[29] wat in finale instansie in 1986 voor die Supreme Court (SC) van Virginia gedien het, was die feite soos volg: Taylor, die eiser, is in 1980 ernstig beseer terwyl hy gholf gespeel het te Wintergreen in die Nelson County. Hy is naamlik in die gesig getref deur 'n gholfstok wat in beheer was van ene Thurston, 'n werknemer van Thurston Metals and Supply

---

23 106 NE 2d 242 (AC Indiana 1952).
24 244.
25 Hof se kursivering.
26 111 So 2d 472 (Fla App D3 1959).
27 474.
28 121 Ga App 305, 173 SE 2d 463 464 (CA Georgia 1970).
29 230 Va 475, 339 SE 2d 538, 63 ALR 4th 207 (SC Virginia 1986).

Company, Inc. Thurston, toe 44 jaar oud, wat reeds vir 16 jaar gholf gespeel het, 'n 30 voorgee gehad het en selde 18 putjies onder 'n honderd houe gespeel het, het nadat hy nog 'n swak hou gespeel het, 'n verdere hou, maar sonder 'n bal, in die lug geslaan. Hy het egter by die bopunt van sy swaai as gevolg van sy eienaardige gewrigsaksie beheer oor die stok verloor. Taylor, ten tyde 33 jaar oud, het ongeveer 20 voet linksagter Thurston gestaan en is deur die stok getref. Taylor het uiteindelik sy een oog verloor wat deur 'n prostetiese toestel vervang moes word. Regter Compton, wat namens die hof uitspraak lewer, verduidelik die regsposisie soos volg:[30]

> "The basic rule of law applicable to golfers is that a player upon a golf course must exercise reasonable care in playing the game to prevent injury to others. Fulfilment of that duty is measured by the surrounding facts and circumstances of each case . . . Under the circumstances of this case, Thurston had the duty to exercise reasonable care in controlling his golf club so that it would not fly from his hands in the course of a swing . . . Thurston, not an expert golfer, possessed a golf swing that was frantic, unconventional, and violent . . . Nevertheless, aware of this propensity, Thurston performed a 'practice swing' without a ball in place, using as much velocity and gusto as he had employed when he was attempting to strike the two balls. In the course of the 'practice' movement, Thurston violated the customary requirement that a golfer maintain control of the club throughout the swing . . . Under these circumstances, the plaintiff established a prima facie case of negligence when he showed that a golfer of Thurston's limited ability, who possessed an unorthodox and vigorous swing, released the club during practice 'through his wrist action,' after hitting two balls into nearby woods. It could be reasonably inferred from this evidence that the incident occurred because Thurston, irritated after hitting two shots astray, flailed at an imaginary ball without excercising proper care to maintain a firm grip on the club."

Dit blyk hieruit nie net dat gewone nalatigheid voldoende is nie maar ook dat subjektiewe faktore, soos die beperkte vermoëns van die betrokke speler asook sy onortodokse en kragtige swaai, by bepaling van nalatigheid in aanmerking geneem kan word.

In finale instansie is kompensasie van $200,000 toegestaan.[31] Dit is aansienlik meer as dit waartoe die Duitse howe bereid is. Interessantheidshalwe kan hier ook verwys word na die opmerking wat regter Compton maak dat gholfetiket, -reëls en -gebruike nie aangeleenthede van sodanige algemene kennis is dat jurielede 'n voldoende intelligente en akkurate opinie daaroor kan vorm nie.[32] Daarom is dit wenslik dat deskundige getuienis daaroor aangebied word.

3 1 2 Besering opgedoen ten tyde van of volgende op 'n demonstrasie oor hoe 'n gholfstok vasgehou of gebruik moet word

In *Potts v Amis*[33] was die feite dat A, eienaar van 'n somerhuis ("summer home"), aan P, 'n gas, wou toon hoe 'n gholfstok hanteer behoort te word. A het aanvanklik verskeie verkorte oefenhoue uitgevoer, maar toe P nie die instruksie begryp het nie, het hy 'n volledige kragtige swaai uitgevoer. P is met die opswaai teen sy kakebeen getref en beseer. P eis vervolgens kompensasie van A. Die eis word egter deur die verhoorregter afgewys. By appèl wys regter Rosellini, namens die hooggeregshof van Washington, daarop dat die besering wat P opgedoen het voorsienbaar was en dat hy nie behoorlik sorg aan die dag gelê het om dit te vermy nie. A het gevolglik nalatig opgetree. P was geregtig om kompensasie te eis.[34] Uit dié uitspraak blyk

30 215–216.
31 220.
32 216.
33 384 P 2d 825 (SC Washington 1963).
34 831.

duidelik dat gewone nalatigheid as voldoende geag is. In verskeie sake het die vraagstuk van risiko-aanvaarding pertinent ter sprake gekom. In *Tannehill v Terry*[35] het die hoggeregshof van Utah met die volgende feitestel te doen gekry: Tannehill (vervolgens: Ta) het glad nie gholf gespeel nie en was slegs bekend met die wyse waarop 'n bal met die stok geslaan word. Terry (vervolgens: T), die verweerder, het pas begin gholf speel. Toe Ta by T op besoek was, het laasgenoemde 'n mat op die grasperk geplaas en 'n plastiekbal met 'n gholfstok geslaan. T het vir Ta gevra of hy ook 'n hou wou slaan. Hy het ingewillig en gereed gemaak om die bal te slaan toe T die stok by hom gevat het en hom meegedeel het dat hy na links moes staan en hom dophou wanneer hy verduidelik hoe die stok vasgehou moet word. T het vervolgens Ta beveel om weg te staan en sonder om te kyk waar hy hom bevind het, het hy die stok geswaai. Met die deurswaai is Ta in die gesig, aan die linkerkant van sy neus, getref. Sy gesig en sinus is ernstig beseer. Hy het ook agteroor op die trappe, wat na die huis lei, geval en sy rug beseer. Ta se eis teen T is in die verhoorhof afgewys. Hy beroep hom vervolgens, hoewel onsuksesvol, op die hooggeregshof van Utah en voer aan dat die volgende instruksies wat die hof aan die jurie gegee het, misleidend was:[36]

> "One is said to assume a risk when he voluntarily assents to dangerous conduct and voluntary exposes himself to that danger, or when he knows, or in the exercise of ordinary care should know, that a danger exists in the conduct of another, and voluntarily places himself, or remains, in a position of danger. One who has thus assumed the risk is not entitled to recover for damages caused to him without intention, and which results from the dangerous condition or conduct to which he thus exposed himself."

In sy uitspraak namens die hof merk regter McDonough op dat dié instruksie nie die jurie kon mislei het nie.

In *Nesbitt v Bethesda Country Club, Inc*[37] het 'n Marylandse appèlhof die standpunt gestel dat die risiko's inherent aan oefenhoue wat op 'n afslaanstrook ("driving range") geslaan word groter is as dié op 'n speelveld geslaan. Die rede daarvoor is geleë in die feit dat in eersgenoemde geval deelnemers naby mekaar staan, wat 'n verhoogde risiko inhou dat 'n ander met 'n gholfstok raakgeslaan kan word. Op die speelveld van 'n gholfbaan staan deelnemers buite trefstand van mekaar en die spelers slaan die een na die ander, terwyl op 'n oefenstrook deelnemers in geen spesifieke volgorde die balle slaan nie. Die hof het ook opgemerk dat die doel om balle op 'n oefenstrook te slaan juis is om die vermoë te verfyn om die bal *kragtiger* te slaan, sonder om akkuraatheid in te boet.

In *Morrison v Sudduth*[38] het M, 'n 13-jarige seun, aan sy 11-jarige vriend, S, gewys hoe mens 'n gholfstok moet vashou. M is terwyl hy uit die pad uit beweeg het deur die hou van S getref. Hy het ernstige hoofbeserings opgedoen en sy hand- en spraakvermoë is aangetas. Hy het S egter nie dopgehou nie aangesien hy sy oë gehad het op voorwerpe op die grond wat hy wou vermy. M se eis vir kompensasie[39] word deur 'n federale appèlhof te Texas bevestig. Nalatigheid is aan S toegeskryf.[40] Die

35 11 Utah 2d 368, 359 P 2d 911 (SC Utah 1961).
36 911–912.
37 20 Md App 226, 314 A 2d 738 (Maryland AC 1974); Peterson (1988) 63 ALR 4th 235–236.
38 546 F 2d 1231 (CA 5 Tex 1977).
39 $50000 plus mediese uitgawes is toegeken.
40 1233: "In this case, considering all of the evidence with all reasonable inferences for the plaintiff, we find that reasonable men could disagree about the negligence of John and Gregg. During the trial Gregg admitted knowing at the time of the accident that a person should not swing a golf club when another is near. He also admitted not looking for John and not warning him of the

vervolg op volgende bladsy

hof noem verder dat daar nie in dié geval van 'n onvermybare ongeluk sprake was nie, aangesien die seuns nie so jonk was dat skuld nie aan hulle toegeskryf kon word nie.[41]

3 2 Besering deur 'n gholfbal veroorsaak

Holliday,[42] wat 'n intensiewe studie van Amerikaanse sake in dié verband onderneem het, kom tot die volgende samevattende konklusie:

> "It is established that the mere fact that a person is struck by a golf ball driven by one playing a game of golf does not constitute proof of negligence on the part of the golfer who hit the ball, and that a golfer is only required to exercise ordinary care for the safety of persons reasonably within the range of danger of being struck by the ball. Although a golfer about to hit a ball must, in the exercise of ordinary care, give an adequate and timely warning to those who are unaware of his intention to play and who may be endangered by the play, this duty does not extend to those persons who are not in the line of play, if danger to them is not reasonably to be anticipated. Additionally, where a person is in a place where he should be reasonably safe from the danger of being struck by a golfer's shot, and he is aware of the golfer's intention to play, there is no duty to warn since an oral or audible warning would be superfluous. Recovery for injuries by a person struck by a golf ball may also be barred because the person assumed the risk of injury ordinarily incident to the game of golf, which was obvious or foreseeable. However, one does not assume the risk of being struck by a golf ball as a result of the negligence of another, although recovery may be precluded because of the injured person's contributory negligence."

Die bespreking wat volg moet binne konteks van dié algemene agtergrond gelees word.

3 2 1 Besering aan 'n lid van dieselfde speelgroep

In *Cook v Johnston*[43] wat in finale instansie voor 'n appèlhof van Arizona gedien het, was die feite soos volg: C, die eiser, was lid van 'n viergroep-gholfspel ("golfing foursome"). J, die verweerder, was ook lid daarvan. Laasgenoemde was bekend daarvoor dat hy die geneigdheid gehad het om hakskeenhoue – in Engels "shanking" – te slaan, dit wil sê die bal word getref terwyl die gesig van die stok oop is, met die gevolg dat die bal ver regs van die beoogde slaanlyn trek.[44] Toe J die bal by die negende putjie geslaan het, was C blykbaar onbewus daarvan. J het toe hy sien dat die bal skeef trek, "fore" geskree. C het vervolgens sy kop in die rigting van J gedraai. Hy is in sy oog getref en het 'n ernstige en permanente besering opgedoen. C eis vervolgens kompensasie van J.

---

impending swing. With such evidence the jury could reasonably have found that Gregg was negligent. Regarding John, the evidence indicated that he began to move out of the way as soon as he handed Gregg the club. He did not watch Gregg only because he was watching his steps to avoid tripping over a light. With such evidence the jury could reasonably have found that John was not contributorily negligent."

41 Vgl ook die New York-saak *Fresk v Stinson* 7 App Div 2d 1027, 184 NYS 2d 717 (2d Dept 1959); die Iowa-saak *Foust v Kinley* 254 Iowa 690 698–699, 117 NW 2d 843 848 (1962); die Connecticut-saak *Lubitz v Wells* 19 Conn Supp 322, 113 A 2d 147 (1955); die Georgia-saak *Poythress v Walls* 151 Ga App 176, 259 SE 2d 177 178 (1979); die Nebraska-saak *Brahatcek v Millard School Dist* 202 Neb 86, 273 NW 2d 680 686–688 (SC Nebraska, 1979).

42 "Liability to one struck by golfball" (1987) 53 ALR 4th 282, 289–290 (annotasie tot *Baker v Mid Maine Medical Center* (1985 Me) 499 A 2d 464, 53 ALR 4th 271).

43 141 Ariz 589, 688 P 2d 215 (Ariz App 1984).

44 Hathaway R (216) verduidelik in dié verband: "The shank is the result of hitting the ball while the face of the club is open, sending the ball in a straight line far to the right of the intended line of flight. It is distinct from the slice in that the slice produces a shot which sends the ball on a gradual curve to the right. Professional golfers have difficulty preventing the occasional occurrence of these two errant shots."

In sy uitspraak namens die hof wys regter Hathaway daarop dat, om die bestaan van nalatigheid te bewys, C moet aantoon dat J aan hom 'n sorgsaamheids- of versigtigheidsplig ("duty of care") verskuldig was en dat hy dit geskend het. Die algemene reël is dat 'n plig op 'n gholfspeler rus om andere te waarsku dat hy die bal gaan slaan indien hulle in die gevaarsone is en hulle onbewus daarvan is dat hy op die punt staan om die bal te slaan. Hierdie voorsorgmaatreël is gefundeer in die feit dat gholfspelers weet dat balle skeef kan trek.[45] In *Allen v Pinewood Country Club, Inc*[46] beklemtoon regter Landry van 'n Louisiana-appèlhof dat 'n waarskuwing sonder om voldoende tyd en geleentheid aan andere te gee om daarop te reageer, in effek geen waarskuwing daarstel nie. In *Jenks v McGranaghan*[47] verklaar regter Breitel van 'n appèlhof van New York onomwonde:[48]

> "The mere fact that a ball does not travel the intended course does not establish negligence. [E]ven the best professional golfers cannot avoid an occasional 'hook' or 'slice'... Thus, generally, there is no duty to warn persons not in the intended line of flight on another tee or fairway of an intention to drive."

In *Cook v Johnston*[49] het C aangevoer dat J se geskiedenis van hakskeenhoue tot gevolg het dat die gevaarsone, dit wil sê die gebied waarin sy hou voorsienbaar van die beoogde slaanlyn sou kon afwyk, verbreed word en dat J, aangesien C onbewus daarvan was dat die bal geslaan gaan word, 'n plig gehad het om hom vooraf in te lig. Aangesien dit nie betwis is dat C onbewus daarvan was dat J op die punt gestaan het om die bal te slaan nie, was die vraag wat die hof moes beantwoord of C naby genoeg aan die beoogde vluglyn van die bal was om binne die gevaarsone te wees. Die omvang van so 'n gevaarsone is deur verskeie howe aangespreek. In *Boozer v Arizona Country Club*[50] is opgemerk dat 'n skeidslyn tussen 0 en 90 grade bestaan waarbuite 'n bevinding van nalatigheid uitgesluit is. In *Allen v The Pinewood Country Club, Inc*[51] het 'n appèlhof van Louisiana 'n beslissing ten gunste van verweerder waar die beoogde vluglyn 30 tot 40 voet links van eiser was, ter syde gestel. Ongeveer een uit elke drie houe wat J met 'n sewe-nege yster gespeel het, het 45–50 grade van die beoogde slaanrigting afgewyk. C se eis word deur die Arizona-appèlhof toegestaan.[52]

In *Kelly v Forester*[53] het 'n appèlhof in Kentucky met die volgende feitestel te doen gehad: F het gepoog om 'n gholfbal om 'n boom te haak. Die bal het egter met 'n onverwagte hoek getrek en K, wat ongeveer reghoekig tot die geantisipeerde vluglyn en ongeveer 40 tot 50 tree vanaf F gestaan en die hou dopgehou het, getref. K het aangevoer dat, al was hy nie binne die direkte lyn van die beoogde hou nie, F, wat 'n moeilike hou uitgevoer het wat 'n groter moontlikheid van wegskrammimg gehad het, hom pertinent moes gewaarsku het. K steun in dié verband op *Toohey v Webster*,[54] 'n beslissing van die *New Jersey Court of Errors and Appeals* (NJCE and A). In dié saak het W 'n hou uit die ruveld gespeel wat T, 'n joggie van 'n speler van

---

45 *Allen v Pinewood Country Club, Inc* 292 So 2d 786 790 (La App 1974).
46 *Supra* 790. Sien ook *Oakes v Chapman* 322 P 2d 241 (DCA California).
47 30 NY 2d 475 477, 334 NYS 2d 641 643, 285 NE 2d 876 878 (1972).
48 Met verwysing na *Nussbaum v Lacopo* 27 NY 2d 311 319, 317 NYS 2d 347 353, 265 NE 2d 762 767.
49 *Supra* 217.
50 102 Arizona 544, 434 P 2d 630 633–634 (1968).
51 *Supra* 789.
52 Sien ook die beslissing van die Washington-appèlhof in *Wood v Postelthwait* 6 Wash App 885, 496 P 2d 988 (CA Washington 1972).
53 311 SW 2d 547 (CA Kentucky 1955).
54 97 NJ 545, 117 A 838, 23 ALR 440 (NJCE and A 1922).

'n ander groep, in die oog getref het. W is aanspreeklik gehou op grond daarvan dat T feitlik direk in lyn met W se hou gestaan het en, volgens 'n verskeidenheid skattings, tussen 35 en 75 treë weg was. Die hof beslis dat W in dié omstandighede redelike sorg aan die dag moes lê voordat hy sy hou uitgevoer het en, indien iemand in die rigting van die hou was, 'n behoorlike waarskuwing moes rig. Volgens K moes F hom ook sodanig gewaarsku het. Regter Milliken van die Kentucky appèlhof wys "spottenderwys" daarop dat F, byvoorbeeld, sou moes sê:[55] "Everybody get back. I'm going to try a hook, and goodness knows where the ball will go." Hy verwys vervolgens na die Pennsylvania-saak van *Benjamin v Nernberg*[56] waarin regter Drew die volgende opgemerk het:

> "It is well known that not every shot played by a golfer goes to the point where he intends it to go. If such were the case, every player would be perfect and the whole pleasure of the sport would be lost. It is common knowledge, at least among players, that many bad shots must result although every stroke is delivered with the best possible intention and without any negligence whatever."

Regter Milliken, met beroep op *Stober v Embry*,[57] verduidelik dat die slaner van 'n gholfbal 'n sorgsaamheidsplig het teenoor persone wat redelikerwys binne die gevaarsone is en hulle behoorlik moet waarsku. Die onmoontlike kan egter nie verwag word nie. 'n Speler kan beslis nie die presiese rigting en bestemming van die bal beheer nie. F was, in die lig hiervan, nie verplig om K te waarsku nie aangesien hy geweet het dat die bal geslaan gaan word en 'n mondelinge of hoorbare waarskuwing gevolglik in elk geval oorbodig sou wees.[58]

3 2 2 Beseerde nie lid van dieselfde groep as die slaner van die bal nie

In *Neumann v Shlansky*[59] was die feite soos volg: N is deur 'n bal getref wat deur S, 'n 11-jarige seun, geslaan is. S het die bal geslaan vanaf die afslaanbof in die rigting van die putjie wat ongeveer 170 treë ver was. N het so pas die setperk verlaat en oor 'n voetbrug, ongeveer 150 tot 160 treë vanaf die afslaanbof, gestap toe die bal wat S geslaan het hom op sy knie getref het. Daar was getuienis dat S "fore" geskree het. Die hof wys egter daarop dat dié waarskuwing nie nalatige en roekelose gedrag verskoon nie.[60] S kon volgens die hof 'n paar sekondes gewag het voordat hy die bal geslaan het. Hy het egter, in stryd met die sorgsaamheidsplig wat op hom gerus het, besluit om die hou voortydig te speel. Die hof staan N se eis vir kompensasie toe. Dit is insiggewend om daarop te wys dat 'n appèlafdeling van die hooggeregshof van New York[61] die volgende kategoriese bevinding oor die standaard van sorgsaamheid wat vir 'n kind geld, gemaak het:

---

55 549.
56 102 Pa Super 471, 157 A 10, 11 (SC Pennsylvania 1931).
57 243 Ky 117, 47 SW 2d 921 922.
58 Sien ook die Connecticut-saak *Walsh v Macklin* 128 Conn 412, 23 A 2d 156, 138 ALR 538 (Conn SCE 1941), die Florida-saak *Rindley v Goldberg* 297 So 140 (Fla App D3 1974) en die Iowa-saak *Bartlett v Chebuhar* 479 NW 2d 321 (SC Iowa 1992).
59 58 Misc 2d 128, 294 NYS 2d 628, 312 NYS 2d 951 (SC New York AT 2d Dept 1970). Sien ook *Barrett v Fritz* 212 Ill 2d 529, 248 NE 2d 111 (SC Illinois 1969).
60 Sien ook *Jackson v Livingston Country Club, Inc* 55 App Div 2d 1045, 391 NYS 2d 234 235 (4th Dept 1977): "A participant in a sporting event generally assumes the risks inherent in the sport, but he does not assume the risk of another participant's negligent play which enhances the risk."
61 63 Misc 2d 587, 312 NYS 2d 951. Vgl verder die Missouri-sake *Take v Orth* 395 SW 2d 270 273 (CA Missouri St L Dist 1965) en *Hoffman v Polsky* 286 SW 2d 376 (SC Missouri 1965); die Massachusetts-saak *Reardon v The Country Club at Coonamessett* 234 NE 2d 881 (SJC Mass 1968).

> "In short, when an infant participates with adults in a sport ordinarily played by adults, on a course or field ordinarily used by adults for that sport, and commits a primary tortious act, he should be held to the same standard of care as the adult participants."

Uit die feitestel van *Everett v Goodwin*[62] wat in finale instansie voor die hooggeregshof van North Carolina gedien het, blyk die rede waarom dit (soms) nodig is om ag daarop te slaan of die beseerde en die slaner van die bal tot dieselfde speelgroep behoort het of nie. E is naamlik getref deur 'n bal wat G, behorende tot die volgende driegroep, geslaan het. 'n Veiligheidsreël by die betrokke gholfklub het vereis dat die volgende groep eers mag afslaan nadat die vorige groep reeds twee houe gespeel het. Die doel van dié reël was juis om te verhoed dat 'n speler raakgeslaan word. Daar was, hoewel nie afdoende nie, getuienis dat dié twee groepe in effek saamgesmelt het. Regter Brodgen verklaar in dié verband:[63] "Obviously, a different rule of liability would apply if there was a merger of the two matches . . ."

Hierdie opmerking het 'n baie elementêre rasionele basis: die voorste groep speel as 't ware voortdurend met hulle rug na die groep wat op hulle volg. Spelers wat in dieselfde groep speel, is, daarteenoor, bewus van mekaar se posisies of behoort dit te wees. In dié saak maak regter Brodgen[64] ook 'n klassieke opmerking oor die aanspreeklikheid van die eienaar van 'n gholfbaan:

> "Manifestly, it is the duty of the owner to exercise ordinary care in promulgating reasonable rules for the protection of persons who rightfully use the course, and furthermore, to exercise ordinary care in seeing that the rules so promulgated [are observed]. The owner of a golf course is not an insurer, nor is such owner liable in damages for mishaps, accidents, and misadventures not due to negligence."[65]

---

62 201 NC 734, 161 SE 316 (SC North Carolina 1931). Vgl *Carrington v Rousell* 177 NJ Super 272, 426 A 2d 517 (SC New Jersey AD 1981).

63 318. Vgl ook *Boynton v Ryan* 257 F 2d 70 73 (CA 3 Pa 1958): "While few players know all the rules of golf, there are three rules and customs which all golfers know: (1) It is the duty of every player to give timely and adequate warning . . . usually by the word 'fore'. . . of a shot which he is about to make and which he has reasonable grounds te believe may strike another player, caddy or spectator, either on the same hole or on a different hole . . . (2) A player assumes the risk or is guilty of contributory negligence and want of due care if he intentionally or carelessly walks ahead of or stands within the orbit of the shot of a person playing behind him; and (3) It is negligence for a player to drive, without warning, another ball when his prior drive is on the fairway or apparently within bounds."

64 318–319. Dieselfde beginsels geld vir die persoon in beheer van 'n openbare gholfbaan – sien die Louisiana-saak *Petrich v New Orleans City Park Improvement Association* 188 So 199 (CA Louisiana 1939); die Illinois-sake *Campion v Chicago Landscape Co* 295 Ill App 225, 14 NE 2d 879 (AC Illinois 1938); en *McRoberts v Maxwell* 40 Ill App 3d 766, 353 NE 2d 159 (AC Illinois 1976); en die Michigan-saak *Johnson v City of Detroit* 79 Mich App 295, 261 NW 2d 295 (CA Michigan 1977).

65 Vgl verder oor dié onderwerp die Tennessee-saak *Slotnick v Cooley* 166 Tenn 373, 61 SW 2d 462 (SC Tennesee Nashville 1933); die New York-sake *Bray v Burke* 36 Misc 2d 292, 232 NYS 2d 625 (SC New York 1962); *Noe v Park Country Club of Buffalo* 115 AD 2d 230, 495 NYS 2d 846 (SC New York AD 4 Dept 1985); die Michigan-saak *Danaher v Patridge Creek Country Club* 116 Mich App 305, 323 NW 2d 376 (CA Michigan 1982); die Delaware-saak *Houston v Escott* 85 F Supp 59 (USDC Delaware 1949); die Wisconsin-saak *Rasmussen v Richards* 7 Wis 2d 22, 95 NW 2d 791 (SC Wisconsin 1959); die Massachusetts-saak *Mazzuchelli v Nissenbaum* 244 NE 2d 729 (SJC Mass 1969); die Louisiana-sake *Baker v Thibodaux* 470 So 2d 245 (La App Cir 1985) en *Lavier v Machellan* 247 So 2d 921 (CA Louisiana 1971); die Illinois-sake *Dann v Gumbiner* 29 Ill App 2d 374, 173 NE 2d 525 (AC Illinois 1961); *Cornell v Langland* 109 ILL App 3d 472, ILL Dec 130, 440 NE 2d 985 (AC Illinois 1982); en *Koltes v St Charles Park* 293 Ill App 3d 171, 687 NE 2d 543 (AC Illinois SD 1997); die Georgia-saak *City of Atlanta v Mapel* 121 Ga App 567, 174 SE 2d 599 (CA Georgia 1970); en die Kaliforniese saak *Plaza v City of San Mateo* 266 P 2d 523 (DCA California 1954).

In *Duke's GMC, Inc v Erskine*[66] het 'n appèlhof van Indiana 'n beslissing bevestig van 'n jurie ten gunste van E, eiser, waar 'n gholfbal wat deur die president, P, van die verweerdermaatskappy, D, geslaan is, hom getref het, as gevolg waarvan hy die sig in sy oog verloor het. D het die president se gholffooie betaal aangesien dit deel van sy verpligtinge was om besigheidsverhoudinge by die klub aan te knoop. In sy uitspraak wys voorsittende regter Hoffman daarop dat geen speler die risiko van 'n ander se nalatigheid aanvaar nie. Hy wys verder daarop dat P verskeie van die spelreëls van gholf oortree het.[67] Teen dié agtergrond verduidelik hy vervolgens:[68]

> "The recognized rules of a sport are at least an indicia of the standard of care which the players owe each other. While a violation of those rules may not be negligence per se, it may well be evidence of negligence. Neither player in this instance was a novice golfer and both parties were aware of the rules and etiquette of the game."

3 2 3 Die posisie van die gholfjoggie

Benewens spelers is joggies 'n (bykans) permanente deel van die persone by gholf betrokke. Waar hulle in regsgedinge betrokke raak, is dit meesal in die rol van 'n eiser wat kompensasie eis vir 'n besering opgedoen. In *Lineberry v Carolina Golf and Country Club*,[69] wat in finale instansie die appèlhof van North Carolina bereik het, was die feite egter soos volg: die eiseres L, lid van 'n driegroep, het gholf by die verweerder-gholfklub gespeel. Terwyl sy op die tweede speelveld was, is sy deur 'n bal op haar heup getref wat deur verweerder, Garfield Washington, geslaan is. Laasgenoemde en ander joggies het van die joggiemeester toestemming verkry om met stokke om die joggiehuis rond te speel. Hulle het almal balle oor die speelveld geslaan. L was op die tweede speelveld toe Garfield Washington 'n bal oor die eerste speelveld geslaan het. Hy was bewus daarvan dat daar persone op die tweede speelveld was maar sy uitsig was deur bome belemmer. Die hof beslis dat hy nie in diens van die klub was nie en dat laasgenoemde nie vir sy optrede verantwoordelik gehou kan word nie. Joggies is werknemers van die gholfspelers en nie van die klub nie.[70]

In *Povanda v Powers*[71] het die hoggeregshof van New York (New York County) beslis dat 'n joggie 'n reg op kompensasie het teen 'n speler wat sy tweede hou, sonder om 'n waarskuwing ("fore") te roep, uit die ruveld gespeel het en die joggie van 'n ander speler getref wat ongeveer 35 tree verder, waar sy werknemer se bal

---

66 447 NE 2d 1118 (CA Indiana 1983). Sien ook *Hampson v Simon* 345 Ill App 582, 104 NE 2d 112 (AC Illinois 1952); *Outlaw v Bituminous Insurance Co* 357 So 2d 1350 (CA Louisiana 1978).

67 Hy verwys met goedkeuring na die Illinois-saak *Nabozny v Barnhill* 31 Ill App 3d 212 215, 334 NE 2d 258 260–261 (AC Illinois 1975): "This court believes that when athletes engaged in an athletic competition; all teams involved are trained and coached by knowledgeable personnel; a recognized set of rules governs the conduct of the competition; and a safety rule is contained therein which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule. A reckless disregard for the safety of other players cannot be excused. To engage in such conduct is to create an intolerable and unreasonable risk of serious injury to other participants."

68 1124. Vgl ook *Cleghorn* v *Oldham* (1927) 43 TLR 465.

69 16 NC App 600, 192 SE 2d 853 (CA North Carolina 1972).

70 854–855.

71 152 Misc 75, 272 NYS 619 (SC New York 1934).

gelê het, gestaan het. Regter Lauer wys daarop dat 'n speler wat 'n ander tipe stok vir 'n hou gebruik as wat normaalweg gebruik word, soos om 'n dryfstok in die ruveld te gebruik, nie as sodanig nalatig is nie. Hy wys ook daarop dat die blote feit dat verweerder in 'n sewegroep gespeel het nie as sodanig nalatigheid daarstel nie en vervolg:[72]

> "It is true that the recognized standard of match playing is a 'foursome' and it is customary to play in 'foursomes' or less. I believe that as the number of players increases, the ordinary, reasonable and prudent man playing in such increased numbers would take extra precautions and care in discerning the whereabouts of his fellow players and their respective caddies. The greater the number of players, the greater the risk to his fellow players and their caddies. Consequently, a greater degree of care is necessary inasmuch as the likelihood of hitting someone has been increased. The players and their caddies are entitled to that degree of care which has been thoroughly established and settled by legal authority and which requires a person about to play his golf ball to give a timely and adequate warning to any persons in the general direction of his drive."

Verweerder was volgens die hof nalatig, aangesien hy nie vroegtydig en bevredigende waarskuwing aan eiser, wat binne die vlugrigting van die bal was, gegee het nie. Die feit dat sy eie joggie "fore" geskree het, kan nie verweerder se nalatigheid kondoneer nie.[73]

Uit 'n verskeidenheid ander sake wat oor die posisie van joggies in die loop van 'n gholfspel beslis is, blyk dat hulle, as deel van die spel, dieselfde regte en, waar van toepassing, verpligtinge, binne deliktuele verband,[74] as spelers het.[75]

---

72 622–623. Sien ook tav 'n afslaanstrook ("driving range") *Katz v Gow* 75 NE 2d 438 (SJC Mass 1947) en *Salamoff v Godfrey* 182 NE 2d 482 (SJC Mass 1962) tav 'n binnenshuise afslaanhok.

73 623: "This negligence consisted in his failure to give a timely and adequate warning to the plaintiff who was in the general direction of the defendant's drive. The defendant before he took his second shot should have called 'fore', or given some other audible admonition before hitting the ball. A golf ball is ordinarily a harmless thing. When it is struck a hard blow by a golf club it assumes the nature of a dangerous missile. There are a few players capable of accurately and invariably controlling the flight of a golf ball. 'Hooks' and 'slices' are common occurrences. It is this very uncertainty of the game which makes golf intriguing. Defendant testified that he was not an expert golfer, and played 'at' the game. He 'duffed' his first shot. He was playing in a seven-some and knew, or should have known, that there were other players and caddies about him. He should have looked about before addressing the ball and should have given warning to any person reasonably within range of danger. The fact that his caddy hollered 'fore' at the time the ball was struck does not condone the defendant's negligence."

74 Sien die Florida-sake *Jesters v Taylor* 105 So 2d 569 (SC Florida 1958) en *Miller v Rollings* 56 So 2d 137 (SC Florida 1952); die New Jersey-saak *Toohey v Webster* NJL 545, 117 A 838, 23 ALR 440 (New Jersey CE and A 1922); die New York-sake *Simpson v Fiero* 188 NE 20 (CA New York 1933) en *Ramsden v Shaker Rigde Country Club* 18 NY 2d 886 (CA New York 1966); die Massachusetts-saak *Pouliot v Black* 170 NE 2d 709 (SJC Mass, 1960); die North Carolina-saak *McWilliams v Parham* 273 NC 592, 160 So 2d 692 (SC North Carolina 1968); die Ohio-saak *Gardner v Heldman* 80 NE 2d 681 (CA Ohio HC 1948); die Missouri-saak *Gant v Hanks* 614 SW 2d 740 (CA Missouri 1981); die Washington-saak *Berry v Howe* 235 P 2d 170 (SC Washington 1951); die Minnesota-saak *Holliabeck v Downey* 261 Minn 481, 113 NW 2d 9 (SC Minnesota 1962); en die Pennsylvania-saak *Taylor v Churchill Valley Country Club* 425 Pa 266, 228 A 2d 768 (SC Pennsylvania 1967).

75 Dieselfde geld vir die baanopsigter – *Robinson v City of Miami* 177 So 718 (DCA Florida 1965); ander werknemers of beamptes wat daar werk verrig, asook deurgangers en betreders waarvan kennis gedra word – *La Carce Country Club, Inc v Waldron* 396 So 2d 804 (DCA Florida,

vervolg op volgende bladsy

3 2 4 Besering van 'n toeskouer

In *Grisim v TapeMark Charity Pro-Am Golf Tournament*[76] het die volgende feitestel voor die appèlhof van Minnesota gedien: G en 'n vriend het op 30 Junie 1984 'n gholftoernooi bygewoon. Nadat hulle gekyk het hoe verskeie spelers die eerste nege putjies gespeel het, het hulle slegs een viergroep vir die laaste nege putjies gevolg. Nadat hierdie groep die 18de putjie voltooi het, het G na die linkerkant van die setperk gestap en onder 'n groot boom gaan sit. Sy was ongeveer 30 tot 50 voet vanaf die rant van die setperk en ongeveer 10 tot 15 voet vanaf die stam van die boom. Kort nadat sy onder die boom gaan sit het, het K sy bal in die rigting van die 18de putjie – 'n drie-syfer-putjie – geslaan. Hy het die bal links gehaak en G in haar linkeroog getref. Die gevolg hiervan was dat haar oog chirurgies verwyder moes word. Kompensasie hiervoor vorm die grondslag van die onderhawige geding. G het nie gehoor dat K "fore" geskree of 'n ander waarskuwing gegee het nie. Sy het ook geen toue, versperrings of tekens gesien wat toeskouerterreine aangedui het nie. Daar was ook nie beamptes teenwoordig wat toeskouers behulpsaam kon wees nie.

In sy uitspraak namens die appèlhof van Minnesota wys regter Huspeni daarop dat primêre risiko-aanvaarding verband hou met die vraag of die aanbieders van die gholftoernooi enige plig gehad het om G te beskerm. Die hooggeregshof van Minnesota het in 1993 in *Wells v Minneapolis Baseball and Athletic Association*[77] beslis dat in geval van 'n inherent gevaarlike spel, soos bofbal, die organiseerders daarvan slegs 'n beperkte plig het om toeskouers te beskerm:[78]

> "We believe that, as to all who, with full knowledge of the danger from throw or batted balls, attend a baseball game the management cannot be held negligent when it provides a choice between a screened in and an open seat; the screen being reasonably sufficient as to extent and substance. Once this limited duty has been satisfied, the spectator who chooses to use unprotected seating area primarily assumes the risk for his or her own safety and there is no further duty on the part of the management or sponsor."

Die hooggeregshof van Minnesota beslis verder in dié saak dat welke voorsorg van die redelike persoon ("ordinary prudent person") wat so 'n byeenkoms aanbied, vereis sou word om toeskouers te waarsku en te beskerm, 'n vraag vir beslissing deur die jurie is. Hierdie vraag is nie in die *Grisim*-saak aan die jurie gestel nie. Die verhoorhof het bloot aanvaar dat G die risiko aanvaar het dat sy deur 'n gholfbal getref sou kon word.[79] Die vraag of voldoende voorsorg ter beskerming van toeskouers getref is, asook of K hulle moes gewaarsku het, moet aan die jurie vir beslissing gestel word. Die saak word vervolgens na die verhoorhof terugverwys. Regter Huspeni[80] wys ook daarop dat die verhoorhof fouteer het deur dieselfde

---

1981); *Schlenger v Weinberg* 180 A 434, 69 ALR 738 (NJ, 1930); *Fink v Klein* 186 Kan 12, 348 P 2d 620 (SC Kansas 1960); *Lysak v City of Detroit* 351 Mich 230, 88 NW 2d 596 (SC Michigan 1958); *Kirchoffner v Quam* 264 NW 2d 203 (SC North Dakota 1978); *Robinson v Meding* 163 A 2d 272, 82 ALR 2d 1176 (Delaware 1960).

76 394 NW 2d 261 (CA Minnesota 1986).

77 122 Minn 327 331, 142 NW 706 708 (1913).

78 332, 708.

79 264: "It reached this conclusion despite evidence presented by Grisim that various golf associations have set standards for crowd control at golf tournaments that include the use of barricades and/or marshals. The trial court noted the absence of either barricades or marshals here. In addition, despite the lack of further evidence regarding the sufficiency of the seating provided for those who might have wanted to take advantage of it, the court concluded that indeed, safe seating had been provided."

80 264.

sorgsaamheidsplig ("duty of care") van K en die organiseerders te vereis. Geen gholfspeler, in welke toernooi ook al, word van sy sorgsaamheidsplig onthef nie.[81] Hierdie benadering blyk myns insiens sinvol te wees aangesien die speler ten aansien van elke hou wat hy speel 'n verpligting teenoor andere het, terwyl organiseerders nie vooraf presies weet, of kan voorspel, waar die bal sou lê en wat die spesifieke omstandighede van elke hou sou wees nie.[82]

In *Baker v Mid Maine Medical Center*[83] is 'n spelende toeskouer by 'n gholfvertoning, waar 'n beroemde beroepspeler, Tom Watson, saam met ander persone wat daarvoor betaal het, deur 'n gholfbal – die slaner waarvan nie vasgestel kon word nie – getref is toe hy Watson dopgehou het terwyl hy op soek na sy bal 'n bosgebied binnegegaan het. Die bal het hom op sy bors getref, presies op die plek waar hy enkele maande tevore 'n snywond weens hartchirurgie opgedoen het. As gevolg van die impak van die bal het hy 'n bykomende besering opgedoen. B spreek vervolgens die betrokke gholfklub en die borg van die toernooi vir kompensasie aan. In sy uitspraak wys regter Scolnik van die Supreme Judicial Court of Maine eerstens daarop dat toeskouers by gholfvertonings duidelik onderworpe is aan erkende risiko's wat in die onderhawige geval by implikasie deur die verweerders erken is deur die aanstelling van veiligheidspersoneel om diegene teenwoordig te beheer en te beskerm en vervolg:[84]

> "The crucial issue then becomes whether the defendants had reason to expect harm to the plaintiff from this obvious risk in circumstances where the plaintiff's attention would be distracted from such risk causing him to forget, or to protect himself against it. The evidence here sufficiently generates for the jury's consideration the factual question whether the defendants should have reasonably foreseen that spectators at a golfing exhibition featuring a renowned professional golfer, would focus their attention on the celebrity with resulting inattention to the other golfers playing along with him . . . If such inattentiveness was reasonably foreseeable, the jury must then determine whether the defendant's failure to warn that a player was about to atempt a shot exposed the plaintiff to an unreasonable risk of harm."

Die moontlike optrede van toeskouers, en ook toeskouende spelers, in teenwoordigheid van 'n selebriteit is hiervolgens 'n relevante faktor by bepaling van nalatigheid. Regter Scolnik wys ook daarop dat duidelik uit die feite blyk dat

---

81 Sien *Hollinbeck v Downey* 261 Minn 481 486, 113 NW 2d 9 12–13 (SC Minnesota 1962): "If [defendant] knew, or in the exercise of ordinary care should have known, that plaintiff was in a zone of danger and was unaware of [defendant's] intention to hit, [defendant] should have given him a warning or desisted from striking the ball until plaintiff was in a place of safety. It is our opinion that it was a question for the jury to pass upon." (*Grisim*-saak 264.)

82 Sien ook die Colorado-saak *Knittle v Miller* 709 P 2d 32 34–35 (Colorado CA 1985) per Smith R: "Although there is no appellate court ruling in Colorado on the issue of a golfer's duty to warn other players or spectators, the general rule followed in other jurisdictions is that a golfer has a duty to warn those persons within the foreseeable ambit of danger of his intention to strike the ball . . . The complementary general principle is that one who is outside the zone of danger or who is aware of the impending shot is not entitled to any such warning, and that if such a person is hit by a golf ball, the driver of the ball will not be liable for failing to give any warning before he makes the shot . . . These rules are predicated on the fact that golfers and golfing spectators know many shots go astray from the intended line of flight, and that such fact is a risk all such persons must accept . . . To hold a golfer negligent merely because his golf ball did not travel in the direction he intended, would be imposing a greater duty of care on the golfer than is realistic."

83 499 A 2d 464, 53 ALR 4th 271 (SJC Maine 1985).

84 278.

een van die spelende toeskouers die bal moes geslaan het en nie Watson nie. Die nie-vasstelbaarheid van die slaner van die bal onthef nie as sodanig die organiseerders van aanspreeklikheid nie. Die saak word vervolgens terugverwys vir beregting daarvan deur (onder andere) aanwending van dié riglyne.[85]

4 DIE SUID-AFRIKAANSE REG

In Suid-Afrika is daar slegs een gerapporteerde saak oor deliktuele aanspreeklikheid weens 'n besering in die loop van 'n gholfspel opgedoen. In *Clark v Welsh*[86] was die feite soos volg: C, die eiseres, en W, verweerderes, asook 'n gemeenskaplike vriendin, M, het aan 'n gholfspel in Johannesburg deelgeneem. Al drie was beginners wat slegs vir 'n paar maande gespeel het. W was die meer ervare en het met 'n maksimum voorgee, naamlik 36, gespeel. W het eerste van die tweede bof afgeslaan. Toe sy afslaan, het die bal wyd van die beoogde slaanrigting afgewyk. Die bal het C in haar oog getref wat sodanig beseer is dat dit verwyder moes word. Die vraag wat die hof moes beantwoord, was of dié besering deur die nalatigheid van W veroorsaak is. Uit die uitspraak van waarnemende regter Van Reenen blyk dat W nie nalatig was nie aangesien die rigting waarin die bal getrek het so seldsaam was dat geen redelike persoon dit sou voorsien het nie.[87] W het by die slaan van die hou die voorsorg getref wat redelikerwys verwag kon word en haar aandag op die behoorlike uitvoer daarvan gevestig. Waarnemende regter Van Reenen verwys ook na sekere veronderstellings waarvan die slaner kan uitgaan:[88]

> "It appears that a participant in a game or competition is entitled to expect a spectator to have such knowledge of the activities and vigilance for his own safety as might reasonably be expected to be had by a person who chooses to watch the event. *A fortiori* I am of the view that a participant is entitled to expect that a co-participant will have such knowledge (which in fact the plaintiff in this case was proved to have had) and vigilance for his own safety . . . In particular would this be the case when playing with beginners who, beknown to the other participants, are incompetent and unskilled strikers of the ball. The plaintiff knew that all three players, including defendant, were beginners and were wild and erratic in their playing. I am further of the view that a participant in a game may regulate his conduct on the general assumption of correct behaviour by others . . . And, more particularly, may a golfer about to play a shot do so since his co-players must be assumed to know that, for some appreciable time before the actual execution of the stroke, that player's whole attention will be directed to the proper execution of the stroke. It must be remembered that, at the time of playing the shot, the player and the ball are stationary and etiquette requires all others near should also be stationary, so that a person in the plaintiff's position is never called upon to act rapidly or without premeditation nor to take difficult or extraordinary precautions. The watchers have plenty of time to position themselves safely. And the player about to strike the ball can, in my view, legitimately assume that they would have done so."

Wat hieruit duidelik na vore tree, is dat kennis wat spelers van mekaar se spel en vaardighede het relevant is by bepaling van nalatigheid. Die nalatigheidstandaard

---

85 Sien ook die Illinois-saak *Duffy v Midlothian Country Club* 92 Ill App 3d 193, 47 Ill Dec 786, 415 NE 2d 1099 1103–1104 (AC Illinois 1980) en die Virginia-saak *Alexander v Wrenn* 158 Va 486, 164 SE 715 (SCA Virginia 1932).

86 1975 4 SA 469 (W). Sien ook die Engelse krieketbal-saak *Bolton v Stone* [1951] 1 All ER 1078 (HL).

87 482.

88 483.

moet myns insiens, om elementêre geregtigheid te bevredig, 'n subjektiewe basis hê. Die opmerking wat waarnemende regter Van Reenen maak dat "the law of negligence is concerned less with what is fair than with what is culpable"[89] is nie korrek nie. Billikheid (regverdigheid) en toerekenbaarheid staan nie, binne konteks van die nalatigheidsbegrip teenoor mekaar nie.

5 KONKLUSIE

Uit bogaande bespreking sou die volgende sentrale gevolgtrekkings gemaak kan word: Gholf is nie, soos byvoorbeeld rugby en sokker, 'n strydsportsoort nie. Dit is ook nie 'n sportsoort wat gespeel word met 'n vinnige tempo, waarin besluite dikwels in 'n breukdeel van 'n sekonde geneem moet word nie. Trouens, die bal word altyd vanaf 'n stilstaande posisie geslaan. Anders as by strydsportsoorte[90] word gewone nalatigheid vir aanspreeklikheid vir 'n besering in die loop van 'n gholfspel, -oefening of -vertoning (-demonstrasie) opgedoen as voldoende beskou. In die Duitse reg, so wil dit voorkom, geld in dié verband bykans skuldlose aanspreeklikheid. Hoewel die nie-nakoming van die spelreëls van wesenlike belang by bepaling daarvan is, is nalatigheid moontlik selfs waar geen spelreël geskend is nie. Soos uit VSA-gewysdes blyk, is by bepaling van nalatigheid van belang of eiser en verweerder tot dieselfde speelgroep behoort het of nie. Dieselfde geld vir die grootte van die groep. Nalatige gedrag aan die kant van die eiser word nie, as sodanig, verskoon deur die tradisionele waarskuwingsroep "fore", of ander tipe waarskuwing, nie. Dit blyk uit bogaande uiteensetting dat subjektiewe faktore, soos die vaardighede en vermoëns van die betrokkenes, by bepaling van nalatigheid in aanmerking geneem word.[91] Uit VSA-gewysdes blyk dat aan jeugdiges, wat saam met volwassenes deelneem, dieselfde sorgsaamheidsvereistes gestel word.[92] Nie net spelers word teen opsetlike en nalatige optrede van medespelers (of ander spelers) beskerm nie, maar veral ook joggies ten opsigte van wie in 'n groot mate sorgsaamheidsvereistes gestel word en 'n (permanente) deel van die gholfopset geword het. Dieselfde geld vir ander werknemers en beamptes by die gholfterrein en -spel betrokke, asook vir toeskouers.

Nie een van dié konklusies sou as onversoenbaar strydig beskou kon word met die aanspreeklikheidsvereistes, hier in besonder ten aansien van die nalatigheidsbegrip, wat in ons reg gestel word nie.[93] Ons howe sou gevolglik met vrug hiervan kon kennis neem.

---

89 478–479.

90 Labuschagne 1998 *Stell LR* 86.

91 'n Aanpassing van die SA positiewe reg (gewysdereg) sou, om hiermee te sinchroniseer, gemaak moes word – sien *Kruger v Coetzee* 1966 2 SA 428 (A) 430; *Weber v Santamversekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 410–411; Neethling Potgieter en Visser *Law of delict* (1999) 129 en Singh *Tertiary sport and recreation: Playing it safe* (D Phil-proefskrif UP 1999) 60–64 en, daarteenoor, Labuschagne "Dekriminalisasie van nalatigheid" 1985 *SASK* 213.

92 Vgl Scott "Die reël imperitia culpae adnumeratur as grondslag vir die nalatigheidtoets vir deskundiges in die deliktereg" in Joubert (red) *Petere fontes. LC Steyn-gedenkbundel* (1980) 124. Die reël wat Scott noem, sou moontlik by wyse van analogie uitgebrei kon word tot jeugdiges wat saam met volwassenes deelneem.

93 Sien ook Labuschagne "Deliktuele aanspreeklikheid van 'n afrigter vir 'n besering deur 'n gimnas opgedoen" 1999 *THRHR* 132; Labuschagne en Skea "The liability of a coach for injury of a sport participant" 1999 *Stell LR* 158 171–174 en verwysings daarin opgeneem.

Introductory perspectives on travel agency in South African law*

PHG Vrancken
LLD
Professor and Director of the Tourism Law Unit, University of Port Elizabeth

OPSOMMING

Die toerismebedryf is 'n onontbeerlike onderdeel van die Suid-Afrikaanse ekonomie en reisagente is die belangrikste element in die bemarking van toerismedienste. Die regsbewind van reisagente is moeilik definieerbaar, omdat reisagente verskillende tipes aktiwiteite verrig met uiteenlopende regsimplikasies. Hierdie onderwerp is nog nie sistematies in Suid-Afrika bestudeer nie en hierdie artikel bied enkele regulerende, kontraktuele en deliktuele perspektiewe van 'n inleidende aard.

1 INTRODUCTION

The tourism industry is a vital component of South Africa's economy.[1] Its development is a high priority in all spheres of government mainly because the industry is labour-intensive and has the potential to attract much-needed foreign currency.[2] The marketing of travel services to the general public was initially undertaken directly by the supplier of such services.[3] However, although it is still possible to purchase travel services in such a way,[4] today most travel services are acquired through a large number of retail travel agents.[5] As a result, "[f]rom the standpoint of both consumers and suppliers the retail travel agent is the most important element in the marketing of travel services".[6]

The legal regime of travel agencies is difficult to define because travel agents perform various kinds of activities, with varying legal implications. Those include

> "providing tickets for the transportation of people (with their luggage) by aeroplane, railway, ship; reserving seats, making reservations for hotels and apartments; helping

* I am greatly indebted to Frans Marx and André Mukheibir for their comments on a draft of this paper. I naturally remain entirely responsible for any error of commission or omission.

1 See World Travel and Tourism Council *South Africa's travel and tourism. Economic driver for the 21st century* (1998) 4.

2 See White Paper *The Development and Promotion of Tourism in South Africa* (1996) and *Tourism in GEAR* (1998).

3 This was predominantly the case prior to the 1940s. See Dickerson *Travel law* (1998) 5–6.

4 For instance at airlines' counters in airports.

5 Dickerson (fn 3) 5–17.

6 *Idem* 5–97.

> to bring about contracts with insurance companies or with other travel agents or tour operators; arranging for the clients to participate in excursions and visits to various events and entertainments; advising clients about destinations, means of transport, and about choosing between tour operators who offer more or less the same product; giving information on passports, visa and health requirements".[7]

Somewhat surprisingly, only two cases dealing with travel agents have thusfar been reported in South Africa and this only during the last few years.[8] Legal writers have also not dealt with the subject, except for a few cursory words here and there.[9] This paper aims at starting to fill this vacuum by providing a few introductory perspectives on the legal regime of travel agency in South African law. It will first deal with regulatory, then contractual and finally delictual aspects.

2 REGULATORY PERSPECTIVES

The first South African enactment regulating this sector of the tourism industry was the Travel Agents and Travel Agencies Act.[10] The adoption of the Act followed a Commission of Inquiry which was constituted as a result of the South African government being urged by the Universal Federation of Travel Agents Association, in the light of international experience, to "take steps to establish by law some form of control over the activities of travel agents and to secure a high standard of professionalism".[11] Consequently, the Act was enacted to "promote the sound development of the South African travel agency industry",[12] so that the traveller, as consumer, is "assured, when dealing with a South African travel agent, of a professional service which maintains high standards".[13] The Act aimed at achieving this purpose in three ways. First, it provided for the establishment of a Travel Agents Board. Such an autonomous statutory board was considered to be "the appropriate body to enable the travel agency industry to regulate itself and ensure high professional standards". The industry was strongly represented on the board and this amounted "to a form of self-regulation, which was strongly advocated by the industry as a whole and endorsed by the commission and the Government".[14] Secondly, the Act provided for the registration of travel agents and the licensing of travel agencies. Before the Act's enactment,

> "any person [was] free to open a travel agency without any supervision. Knowledge or experience of the travel industry or of tourism, as well as the question of whether or not the person is financially sound, [did] not enter the picture. There [was] no protection for the consumer against losses which may arise if the agent handling his travel arrangements becomes insolvent or is unable, as a result of some omission or other, to provide the consumer with what he has paid for".[15]

---

7 Yaqub and Bedford (eds) *European travel law* (1997) 115.
8 See below.
9 See for instance Kerr *The law of agency* (1991) 11 and 159.
10 58 of 1983.
11 1983 *Hansard* 5860.
12 Long title.
13 1983 *Hansard* 5853.
14 *Idem* 5854.
15 1983 *Hansard* 1401–1402.

Thirdly, the Act provided for the establishment of a Travel Agents Fidelity Fund.[16] The Fund was intended to protect the consumer in circumstances where he suffered loss as a result of the agent's failure to perform his duties.[17]

The Travel Agents and Travel Agencies Act was repealed by section 29 of the Tourism Act,[18] "in accordance with the Government's policy of deregulation".[19] The only provision of the Tourism Act dealing with travel agents states that

> "[a]ny person who in the course of his business sells facilities for a journey to any destination in a foreign country shall when selling such facilities offer . . . to the buyer thereof his assistance in order to enable such buyer to obtain insurance which would be sufficient to enable the buyer to obtain alternative travelling facilities for his return journey to the Republic in any case where the person who in terms of the agreement in question is obliged to provide such facilities should fail or should for any reason be unable to do so".[20]

The travel agent complies with this duty by merely exhibiting in his place of business a notification reading:

> "NOTICE TO CLIENTS
>
> Assistance to obtain travel insurance in terms of section 22 of the Tourism Act, 1993 is available on request."[21]

This very limited statutory protection is complemented by the Consumer Affairs (Unfair Business Practices) Act.[22] The Act established a Consumer Affairs Committee[23] with the power to investigate business practices[24] and to recommend that action be taken.[25] The Committee "has devised or approved a number of industry-specific consumer codes"[26] among which a Consumer Code for Travel Agencies issued in 1994. The Code is not intended to interpret, qualify or supplement the law of the land, and does not replace the legal relationship and whatever rights or remedies a consumer may have by virtue of any agreement, statutory law or the common law. The Code is rather to be viewed as a statement of policy by the Committee about the desired conduct of travel agents. This means that the Committee has regard to the provisions of the Code when assessing whether conduct complained of constitutes a harmful business practice. Should this be the case, the Minister of Trade and Industry can take a wide range of actions, including the appointment of a curator to realise the assets of the travel agency concerned as well as take control of and manage the whole or part of its business.[27]

In terms of the Code, all travel agents are expected to ensure that any interim or year-end audit of financial statements is done. They must also ensure that their accounting records are current, in good order and reflect fairly and accurately the

---

16 *Ibid.*
17 See 1983 *Hansard* 5856 and s 35 of the Act.
18 72 of 1993.
19 1993 *Hansard* 6845.
20 S 22.
21 Reg 2 of the Regulations under the Tourism Act (*GG* No 15808 of 1994-06-24).
22 71 of 1988.
23 S 2(1).
24 S 4(1)(c) and 8(1).
25 S 10(2).
26 McQuoid-Mason *Consumer law in South Africa* (1997) 128.
27 S 12(1)(d).

financial state of affairs and financial condition of the travel agent.[28] Travel agents are also expected:

- to maintain an ethical and professional approach towards meeting customers' needs;[29]
- to provide accurate and detailed information to customers regarding travel products;[30]
- to give immediate attention to customers' requests;[31]
- to provide written confirmation of, and information on, the status of a booking, when requested, as well as maintain a complete record of each booking;[32]
- to bill relevant and reasonable service charges, when applicable;[33]
- to act on the basis of absolute integrity in the handling and remittance of customers' funds;[34]
- to make a recommendation to each customer to take out comprehensive insurance;[35]
- to meet and comply with the promises and offers made in any advertising, the latter having to comply with the Committee's Advertising Code as well as the Code of the Advertising Standards Authority;[36]
- to make available a brochure, leaflet or other publication for each inclusive tour or package product, and/or travel related product produced, such publications having to contain minimum information.[37]

The Code further expects travel agents to publish and bring their conditions of business to the attention of their customers.[38] Those conditions must:

- be easy to read and understand;[39]
- state whether a sole proprietor, partnership, private company, public company or close corporation owns the travel agency;[40]
- include the conditions of payment and all other costs that may be incurred in a transaction;[41]
- state general conditions of cancellation over and above those made by other parties;[42]
- provide that all transactions are treated as confidential;[43]

---

28 A 1 1.
29 A 1 5(b).
30 A 1 5(c).
31 A 1 5(d).
32 A 1 5(e), (f) and (j).
33 A 1 5(g).
34 A 1 5(h).
35 A 1 5(i).
36 A 2 1.
37 A 2 2.
38 A 3 1.
39 A 3 1(a).
40 A 3 1(b).
41 A 3 1(c).
42 A 3 1(d) that adds that penalty clauses must be fair and agreed to by both parties.
43 A 3 1(e) and (h).

- in the case of tour arrangements, define the extent of the responsibilities of all the parties involved as well as the limits of liabilities;[44]
- direct attention to relevant terms and conditions of other parties, if applicable.[45]

On the other hand, these conditions may not exclude the travel agent's responsibility for negligence[46] or lay down a predetermined time after which complaints will not be considered.[47]

The Code is supported by the Association of South African Travel Agents (ASATA). ASATA was formed in 1956. Its objectives are, *inter alia*:

- to further and secure the interests of its members[48] by, for instance, considering any legislation or proposed legislation affecting or likely to affect the travel industry[49] and taking such action as considered necessary;[50]
- to reflect the consensus of its members and present their views to all sectors of the public, the government and the business community;[51]
- to act on behalf of its members in deliberations and negotiations with other sectors of the travel industry;[52]
- to continually assess and evaluate the needs of its members with a view to providing them with meaningful services and benefits;[53]
- to consider and promote the highest standards of professionalism and ethics in its members in their dealing with the public and each other.[54]

The membership of ASATA is divided into five categories: the Retail Travel Agents section,[55] the Tour Operators Members Section,[56] the Incoming Tour Operator Members Section,[57] the Travel Partners Section[58] and the Association Members Section.[59] The sections are in turn divided into regions.[60] Each section is represented and administered by a council composed of elected members of that section.[61] In the case of the Retail Travel Agents Section, the council comprises the chairpersons of each region plus one additional member of each region's committee for each fifty members or part thereof within that region.[62] The functions of the councils include the following:

---

44 A 3 1(f).
45 A 3 1(i).
46 A 3 1(f).
47 A 3 1(g).
48 C 2 1 1 of ASATA's constitution.
49 "Travel industry" means "the industry, the participants in which are those who are engaged in serving the public by way of selling the services of travel and tourism" (c 3).
50 C 2 1 7.
51 C 2 1 2.
52 C 2 1 3.
53 C 2 1 4.
54 C 2 1 5.
55 C 7 1 2.
56 C 7 1 3.
57 C 7 1 4.
58 C 7 1 5.
59 C 7 1 6.
60 C 7 1 1. These are: North West and Northern Province; Gauteng and Mpumalanga; Free State and Northern Cape; Western Cape; Eastern Cape and KwaZulu-Natal.
61 C 3.
62 C 7 1 1 of the Section's Terms of Reference.

- prescribing the form, method and terms of application for membership;[63]
- waiving, varying or making more onerous any of the qualifications for membership;[64]
- considering applications for membership;[65]
- managing the affairs of the section;[66]
- appointing and dismissing such *ad hoc* committees as it may deem necessary and delegating from time to time any of its powers to such committees;[67]
- determining and amending the rules and regulations of the section.[68]

The chairpersons of the councils are all members of ASATA's board of directors[69] together with its president,[70] its immediate past president,[71] its treasurer[72] and its executive director.[73] The board has the power to "do all such things as it may consider conducive to the interests and good of the Association for the promotion of its objectives"[74] in consultation with the relevant councils.[75] This includes the following:

- appointing, removing or determining the duties, salaries and remuneration of the executive director and other officials, employees, agents or representatives of ASATA, as well as engaging and paying for professional and other services;[76]
- receiving, controlling, administering, investing and disposing of the funds and other assets and property of ASATA;[77]
- representing ASATA in its dealings with governments, governmental or other authorities or agencies and the general public;[78]
- introducing, amending or rescinding such rules and regulations as it may consider necessary for the proper conduct of ASATA's affairs.[79]

The president, the immediate past president, the treasurer and the executive director constitute the board's executive management committee, the function of which is "to consider and make recommendations to the board on day-to-day administrative matters" relating to the functioning of ASATA.[80]

---

63 C 6 1 1 3 and 7 3 1.
64 C 7 5.
65 C 7 4 1.
66 C 6 1 1 1.
67 C 6 1 1 4.
68 C 3, 6 1 1 2 and 6 1 1 5.
69 C 5 1 1.
70 C 5 1 2. The president is elected by the Annual General Meeting for a term of one year (c 5 2 1) and is entitled to be present at any meeting of the councils although he has no vote at such meetings (c 5 2 5).
71 C 5 1 3.
72 C 5 1 4. The Treasurer is elected by the Annual General Meeting for a term of one year (c 5 2 1).
73 C 5 1 5. The Executive Director is the "senior full time salaried officer" of ASATA (c 3).
74 C 5 3.
75 C 5 3 12.
76 C 5 3 1.
77 C 5 3 3.
78 C 5 3 4.
79 C 5 3 11.
80 C 5 1 6.

All the members must comply with the rules and regulations of their respective section as well as ASATA's Constitution[81] including ASATA's Code of Conduct. The latter includes most of the principles stated in the Consumer Code for Travel Agencies.[82] It also contains minimum requirements for retail travel agencies and wholesale tour operators, wholesaling and the production of inclusive tour products and other travel-related products. Whenever a member of ASATA violates its Constitution, the Code of Conduct, the relevant section's rules and regulations or acceptable business practices, any concerned party may bring the matter to the attention of the relevant council chairperson.[83] If the chairperson, or a representative nominated by him or her, is unable to resolve the matter through negotiation within fifteen (15) working days of having been made aware of it, the matter must be referred to the council concerned.[84] A disciplinary committee is then constituted. It must comprise at least the chairperson of the council, two other members of the council and a third member of the council nominated by the party appearing before the committee.[85] The last-mentioned party must make every effort to resolve the matter amicably through negotiation.[86] If this is not possible, the committee must deal with the matter further according to the detailed provisions of the constitution.[87] When all the evidence concerning the matter has been considered and all applicable parties have been heard, the disciplinary committee must decide whether the member concerned is innocent or guilty by secret ballot on each individual issue.[88] A finding of guilt must enjoy the support of two thirds of the votes.[89] If such a finding is made, the committee must allow the member to make a final representation before a decision is reached with regard to a suitable disciplinary penalty.[90] The committee may then, after considering all the circumstances of the case, expel, suspend, fine or reprimand the member found guilty.[91] The latter has a right of appeal to ASATA's board of arbitration. The matter is then decided by one member of the board (if the disciplined member and the disciplinary committee agree on one individual) or by two members of the board, in terms of arbitration law.[92]

3 CONTRACTUAL PERSPECTIVES

From a contractual point of view, the phrase "travel agent" is somewhat problematic. The difficulty arises from the fact that the phrase is used colloquially in instances where the so-called "agent" is not actually an agent as far as the law is concerned. To complicate matters further, the term "agent" is used in South African law "to cover quite discrete legal concepts".[93] It falls beyond the scope of this paper to attempt to remove any confusion in this regard or to discuss

81 C 7 2.
82 See above.
83 C 8 1 and 8 3 1.
84 C 8 3 2.
85 C 8 4 1.
86 C 8 3 3.
87 C 8 3 2 to 8 4 9.
88 C 8 4 10.
89 C 8 4 11.
90 C 8 4 12.
91 C 8 4 13 and 8 5.
92 C 8 6.
93 Wille and Millin *Mercantile law of South Africa* (1984) 455.

exhaustively the various types of contractual relationships within which the travel agent may find himself. However, in order to attempt to bring some clarity to the matter, especially from the point of view of the consumer of travel services, this section of the paper distinguishes six types of contractual relationship. It also suggests that the person colloquially referred to as "travel agent" be referred to as "dispenser", "securer", "supplier", "tour operator", "assistant" or "consultant" according to the kind of contractual relationship(s), or the lack of it, in which he finds himself. In order to illustrate the analysis that follows, let us assume that Ms A, who lives in Port Elizabeth, purchases a holiday in a Mozambican coastal resort using the services of travel agent B.

3 1 The dispenser

It is suggested that a travel agent be referred to as a "dispenser" when he is in a principal-agent relationship with the supplier of the travel service purchased by the customer, where the principal is the supplier and the agent is the travel agent. In order for such a relationship to exist, there must be, *inter alia*, an agreement between the supplier and the travel agent in terms of which the travel agent is given authority to act for and on behalf of the supplier in contracting legal obligations with the consumer.[94] When such a relationship exists and the travel agent uses his or her authority, a legal relationship is established between the supplier and the consumer who acquired the service. A legal relationship is also created between the travel agent and the consumer.

Whether a principal-agent relationship exists between the travel agent and the supplier is determined by the courts after a careful examination of the facts of each case.[95] It is therefore not possible to go further than to submit that, in our example, B *could* be a dispenser if he entered into an agreement with C, the owner of the resort, in terms of which B could make accommodation available to A, on behalf of C, in such a way that A actually contracted with C.

3 1 1 The relationship between the travel agent as dispenser and the supplier of the travel service acquired

As indicated above, the relationship between the dispenser and the supplier of the travel service acquired is a principal-agent relationship where the principal is the supplier and the agent is the dispenser. This means that the supplier has conferred on the dispenser the authority to enter into binding contracts on his behalf.[96] The reason for the supplier conferring such an authority is usually that he finds it impracticable, inconvenient, or difficult to enter into binding contracts of purchase and sale.

Within that relationship the dispenser does not normally have a duty to use his authority.[97] When he exercises that authority, however, he has the duty to do so in accordance with the supplier's instructions, if any,[98] as well as with the necessary

---

94 De Villiers and Macintosh *The law of agency in South Africa* (1981) 38 42–43.

95 Zlotnick "Law of agency" 1995 *ASSAL* 172.

96 Not all agents are given the authority to perform acts binding their principal. Agents who are conferred such authority are referred to in law as "empowered agents". Agents who are not conferred such authority are referred to as "unempowered agents". See Kerr (fn 9) 3–4.

97 The ticket dispenser constitutes an instance of "independent empowered agent". See Kerr (fn 9) 11.

98 *Idem* 166–167.

care and diligence.[99] He must also do so in the interest of the supplier and not for his own benefit.[100] The dispenser has finally a duty to keep, and render to the supplier accounts for everything in good faith.[101]

The supplier, for his part, has the duty to pay the agreed remuneration, usually a commission,[102] whenever the dispenser makes use of his authority.[103] The supplier must also indemnify the dispenser in certain circumstances.[104]

The relationship's modalities as described above may be complemented and/or amended by the parties.

3 1 2 The relationship between the consumer and the supplier of the travel service acquired

Whenever the dispenser acts within the terms of his authority and the consumer is aware that the dispenser is acting on behalf of the supplier of the travel service acquired, a legal relationship is established between the consumer and the supplier. "The resulting legal position, as far as the [supplier] and the [consumer] are concerned, is the same as if the [supplier] had entered into the contract himself."[105]

Within that relationship, the main duty of the supplier is to perform the travel service acquired, and the main duty of the customer is to pay the price of that service. Such a payment may be made to the dispenser if he has the authority to receive it.[106]

Once again, the relationship's modalities as described above may be complemented and/or amended by the parties.

3 1 3 The relationship between the consumer and the travel agent as dispenser

The dispenser is not a party to a relationship established between a consumer and a supplier as a result of his having exercised his authority.[107] A contractual relationship between the dispenser and the consumer may, however, be established on the basis of another agreement that both parties have concluded between themselves.[108] The dispenser and the consumer have in such a case the duty or duties created by that agreement.

Furthermore, regardless of the existence or absence of an agreement between the dispenser and the customer other than that concluded by the dispenser (on behalf of the supplier) with the customer, the dispenser owes the customer the duties based on trade usage.[109] The dispenser is also bound by a warranty of

---

99 *Bloom's Woollens (Pty) Ltd v Taylor* 1961 3 SA 248 (N) 253–254.
100 *R v Milne and Erleigh* 1951 1 SA 791 (A) 828.
101 *Pretorius v Van Beeck* 1926 OPD 197 198.
102 Kerr (fn 9) 191 fn 220.
103 *Idem* 190–219.
104 *Idem* 219–228.
105 *Idem* 259.
106 *Idem* 295.
107 *Logan v Read and Ash* (1892) 9 SC 514; *Freemantle v McKenzie* 1915 CPD 568 572; *Howard's Debt Collecting Agency v Haarhoff* 1925 TPD 272 277; *Marais v Perks* 1963 4 SA 802 (E) 806F–G; *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac* 1972 2 SA 535 (D) 544 545H.
108 See eg *Steenkamp v Webster* 1955 1 SA 524 (A); *Froman v Robertson* 1971 1 SA 115 (A) 117H.
109 Kerr (fn 9) 299.

authority. The latter is an undertaking (deemed to have been given by the dispenser) that he was correct when he indicated to the consumer that he was acting on behalf of the supplier. If that representation was incorrect, "the warranty is said to have been breached".[110] The customer may rely on such a breach when no relationship has been established between the consumer and the supplier despite the actions of the dispenser.[111] In such a case, "[w]hat the law lays down at present is that the agent undertakes that the third person 'will be placed in as good a position as if he [the principal] were [bound]'".[112] The customer

> "who seeks to hold [a dispenser] liable under the residual warranty of authority has to show (1) that the [dispenser] represented that he had authority; (2) that the representation induced him to contract; (3) that the [dispenser] did not in fact have the authority which he represented that he had; and (4) that he (the [customer]) has suffered loss as a result of the fact that the [supplier] is not bound . . . [113] If the requirements of the action are met, the [customer] is entitled to (1) reimbursement of any fruitless expenditure reasonably incurred in claiming against the [supplier], and (2) the amount which he would have received on executing against the purported [supplier] a judgment for damages for breach of the purported contract, had it existed and been breached."[114]

3 2 The securer

It is suggested that a travel agent be referred to as a "securer" when his main legal relationship is with the customer, and that relationship is a principal-agent relationship where the principal is the customer and the agent is the securer. As in the case of the dispenser, for such a relationship to exist, there must be an agreement between the customer and the travel agent in terms of which the travel agent is given authority to act for and on behalf of the customer in contracting legal obligations with the supplier.[115] When such a relationship exists and the securer uses his authority, a legal relationship is established between the supplier and the consumer who acquired the service. A legal relationship is also created between the securer and the supplier. What has been said above about the modalities of the relationships of the travel agent as dispenser apply *mutatis mutandis* to the travel agent as securer.

Once again, it must be stressed that whether a principal-agent relationship exists between the travel agent and the supplier, is determined by the courts after a careful examination of the facts of each case.[116] It is therefore not possible to go further than to submit that, in our example, B *could* be a securer if he had entered into an agreement with A, in terms of which B could secure accommodation from C, the owner of the resort, on behalf of A, in such a way that A actually contracts with C.

3 3 The supplier

In the two examples discussed above, the customer purchases a travel service that is not supplied by the travel agent. It may, however, happen that the travel

---

110 *Idem* 302.
111 *Idem* 303.
112 *Idem*, quoting *Blower v Van Noorden* 1909 TS 890 906.
113 *Idem* 304.
114 *Idem* 307.
115 De Villiers and Macintosh (fn 94) 38 42–43.
116 Zlotnick (fn 95) 172.

agent actually supplies his own travel service. In such a case, it is suggested that a distinction be made between a primary service and a composite service (or "package"), where a composite service consists of two or more primary services. By way of illustration: a primary service would be accommodation in a hotel, and a composite service would be a tour involving transport, accommodation and visits (ie three primary services). Whenever the travel agent sells his own primary service, he acts as a supplier and, it is suggested, should be referred to as such. In our example, for B to be a supplier, he would have to be the owner of the resort.

It is submitted that the contractual rights and duties of the supplier are, in principle, the same as those of any other supplier of the same category of travel services.

3 4 The tour operator

In contra-distinction to the supplier, the tour operator does not supply his own primary service(s). He acquires those primary services from suppliers and adds a price. He then sells those services, usually as a package, to the customer. From a legal point of view, the difficulty is that, when the customer purchases the composite service from the tour operator, the legal relationship established as a result is only between the customer and the tour operator. This means that the suppliers of the primary services included in the package have no duty towards the customer as a result of the purchase.

The respective rights and duties of the customer and the tour operator depend in each case on the terms of the individual contract. The only two reported South African cases involving travel agents constitute pertinent illustrations.

In *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours*,[117] the two appellants were rugby enthusiasts. They entered into an agreement with the respondent in terms of which the respondent undertook to transport the appellants from Johannesburg to Twickenham. The respondent also undertook to provide the appellants with tickets to enable them to be at the newly refurbished stadium when the Springboks, at the time world champions, played England in November 1995. The appellants were transported to London, but did not receive any tickets. As a result, they had to watch the match on television. After their return to South Africa, the appellants

> "sued the respondent for repayment of the tour price (R 5 066 each) and expenses they had incurred to go on the tour, comprising the cost of insurance (R 86 each), airport tax (R143 each) and in the case of the first appellant, the cost of a visa (R196,50)".[118]

The respondent pleaded supervening impossibility of performance and the plea was upheld by the magistrate.[119] However, Cloete J, with whom Blieden J concurred, set aside the orders given by the magistrate. The judge ruled that "the respondent was in *mora* and the consequence was *perpetuatio obligationis* with the result that any subsequent supervening impossibility would not release the respondent from its duty to perform".[120] The court also ruled that the appellants were entitled to recover from the respondent the expenses they were claiming.[121]

---

117 1998 3 All SA 57 (W), 1998 4 SA 802 (W).
118 59e.
119 59e–f.
120 60e.
121 64b.

In *Masters v Thalia Thain t/a Inhaca Safaris*,[122] the appellant entered into an agreement with the respondent in terms of which the respondent undertook to transport the appellant and his family to Inhaca Island, off Maputo, and provide them with hotel accommodation there for ten days. The only reason why the appellant took his family to Inhaca was to enable him and his daughter to do scuba diving around the island. However, when the appellant arrived at Inhaca, no boat was available to take him "and his daughter out to sea for them to do scuba diving and none were going to be available for the duration of the holiday".[123] The appellant immediately demanded that the respondent fly him and his family back to South Africa and fully repay him the price he had paid, namely R15 245,00. The respondent complied with the first demand but refused to reimburse the appellant. The latter then sued the respondent for repayment of the amount of money paid and, in the alternative, payment of damages amounting to the said price. The magistrate dismissed the claim. However, Horwitz AJ, with whom Shakenovsky AJ concurred, upheld the appeal and ordered the respondent to repay the amount paid on the ground that the respondent was in breach of contract and that entitled the appellant to cancel the agreement.

3 5 The assistant

It is suggested that a travel agent be referred to as an "assistant" when he is in a mandate relationship with the customer, where the mandator is the customer and the mandatary the travel agent. For such a relationship to exist, there must be an agreement between the customer and the travel agent in terms of which the travel agent undertakes to perform a mandate or commission for the customer.[124] In our example, B could be an assistant if A instructed him to obtain a Mozambican visa for her.

In terms of such an agreement, the assistant must carry out his mandate; do so in accordance with the terms of, and the limitations imposed by, the contract of mandate; perform the mandate personally, unless provided otherwise; act with reasonable care and in good faith; render accounts; and account "to the mandator for whatever falls within the ambit of his liability in terms of the mandate".[125] In turn, the customer must refund or compensate the assistant for expenses or losses (if they have been incurred) and pay the agreed remuneration.[126]

3 6 The consultant

Today, travel agents are not only relied upon by customers in the process of purchasing travel services, but also to provide travel advice. In South Africa, it has already been argued in Parliament that

> "the travel agent must become a highly skilled professional because there is no future in the travel agent's business unless the travel agent of the future becomes a travel and leisure-time consultant in every sense of the word".[127]

---

122 1999 4 All SA 618 (W), 2000 1 SA 467 (W).
123 620h.
124 Van Zyl "Mandate and *negotiorum gestio*" 1999 17 *LAWSA* 2.
125 *Idem* 13.
126 *Idem* 14–15.
127 1983 *Hansard* 5860.

ASATA fully identifies with this view[128] which is supported by the fact that, in the USA, travel agents are considered by the courts primarily as information specialists upon whom consumers rely for the provision of accurate and concise information, and only secondarily as dispensers.[129]

It is suggested that the travel agent be referred to as a "consultant" when, and to extent that, he is relied upon by the customer for advice. In our example, B would have been a consultant if A had informed B of her desire to have a holiday at a tropical coastal resort, and B had advised A to go to the Mozambican resort.

Whether a contract is concluded between the customer and the consultant will depend mainly on the intention of the parties. If such a contract exists, it is unlikely to have resulted in the creation of a principal-agent relationship because the customer has probably not undertaken to assume the duties of a principal, especially the duty to indemnify the consultant in certain circumstances. It is also unlikely that the contract would be of letting and hiring of work. One of the reasons is that the consumer does not usually have a duty to remunerate the consultant. It is further unlikely that the contract would be one of mandate because the customer has probably not undertaken to refund or compensate the consultant for expenses or losses that he may have incurred.

4 DELICTUAL PERSPECTIVES

As in the case of the contractual aspects of the legal regime of travel agents, it falls beyond the scope of this paper to attempt to discuss exhaustively the cases in which a travel agent may be held delictually liable. As a result, this section of the paper merely provides a few introductory perspectives on the principle that, for a travel agent to be held delictually liable towards the customer, the latter must show that he suffered damage, that there exists a factual and legal causation between the conduct of the travel agent and the damage suffered, and that the conduct of the travel agent was voluntary, wrongful and either negligent or intentional.

4 1 The conduct of the travel agent

In order for the travel agent to be held delictually liable, he must have performed or failed to perform an act,[130] and have done so voluntarily.[131] But he need not actually have willed or desired his conduct.[132] In our example, B may be held delictually liable, provided that the other requirements are met, if he forgot to warn A that a malaria vaccine was necessary to travel to Mozambique.[133]

4 2 The damage suffered by the customer

It must be further shown that the customer has suffered harm. However, not all harms give rise to delictual liability.[134] For instance, if, as a result of B having

---

128 See ASATA's Membership Criteria and Application pack.

129 Dickerson (fn 3) 5–101.

130 Neethling *et al Law of delict* (1999) 28; Midgley "Delict" 1995 8 1 *LAWSA* 49; Boberg *The law of delict Vol I: aquilian liability* (1984) 210.

131 This would be the case when the travel agent is mentally capable to direct his muscular and bodily conduct. See Neethling (fn 130) 28; Midgley (fn 130) 49.

132 Neethling (fn 130) 28.

133 The travel agent would escape delictual liability, assuming that all the other requirements were met, only if he successfully raises the defence of automatism. See Neethling (fn 130) 29–32.

134 Neethling (fn 130) 210; Midgley (fn 130) 32 fn 2.

forgotten to warn A that a malaria vaccine was necessary to travel to Mozambique, A contracts malaria and then dies, her spouse will suffer harm consisting in the loss of the comfort and society of A. The spouse would, however, have no claim against the travel agent on that ground.[135] For the harm to give rise to delictual liability, it must qualify as damage, that is, it must affect either a legally recognised patrimonial interest of the customer (in which case the damage is referred to as "patrimonial loss") or a non-patrimonial interest of the customer (in which case it is referred to as "non-patrimonial loss").[136] For instance, the reasonable costs incurred for the purpose of hospitalisation of A would qualify as patrimonial loss[137] and the suffering that A had to endure during her illness as non-patrimonial loss.[138]

4 3 The causal *nexus* between the conduct of the travel agent and the damage suffered by the customer

A further requirement of delictual liability is the existence of a causal *nexus* between the conduct of the travel agent and the harm suffered by the customer.[139] For such a *nexus* to exist, the customer must prove that the conduct of the travel agent caused the damage suffered.[140] This customer can do by showing that the travel agent's conduct has in some way contributed to his damage. In other words, "it is unnecessary that [the travel agent's] conduct should be the only cause, or the main cause, or a direct cause" of the damage.[141] The damage must, however, not be too remote from the conduct. This is usually not the case, but may happen "where a whole chain of consecutive or remote consequences results from the wrongdoer's conduct".[142] In such a case,

> "[t]he basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice".[143]

In our example, it could be argued that B's failure to inform A that a malaria vaccine was necessary to travel to Mozambique contributed to A's contracting malaria, to reasonable costs having to be incurred for the purpose of hospitalisation of A and to A having to endure suffering during her illness. It could also be argued that there is a sufficiently close relationship between B's conduct and its consequences for the latter to be imputable to B.

4 4 The wrongfulness of the conduct of the travel agent

For the travel agent to be held delictually liable, the court must also find that the conduct that caused the damage suffered by the customer was wrongful.[144] This

---

135 *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 665.
136 Neethling (fn 130) 210–211; Erasmus and Gauntlett (rev by Visser) "Damages" 1995 7 *LAWSA* 10–11 and 15; Boberg (fn 130) 475.
137 Erasmus and Gauntlett (fn 136) 80.
138 Neethling (fn 130) 256.
139 Neethling (fn 130) 171; Midgley (fn 130) 101.
140 Neethling (fn 130) 172; Midgley (fn 130) 103; Boberg (fn 130) 380.
141 Neethling (fn 130) 181.
142 *Idem* 183.
143 *Idem* 185 (italics omitted). See also Midgley (fn 130) 49 and *S v Mokgethi* 1990 1 SA 32 (A) 39 *et seq*.
144 Neethling (fn 130) 35; Midgley (fn 130) 50.

would be the case whenever the conduct of the travel agent that caused the damage violated a legal norm.[145] "The basic question is whether, according to the legal convictions of the community and in light of all the circumstances of the case, the [travel agent] infringed the interests of the [customer] in a reasonable or an unreasonable manner."[146] In general,

> "[i]t may be assumed at the outset that, according to the legal convictions of the community, the actual infringement of interests is *prima facie* wrongful.[147] However, the fact that interests have been infringed is not in itself sufficient to substantiate *a final* decision as to the wrongfulness of conduct. A further investigation is necessary".[148]

Such an investigation aims in most cases[149] at determining whether the conduct of the travel agent infringed a subjective right of the customer or infringed a legal duty of the travel agent.[150] A court will decide whether the travel agent was in breach of a legal duty towards the customer after weighing

> "the conflicting interests of the [travel agent] and [customer] in light of all the relevant circumstances and in view of all pertinent factors in order to decide whether the infringement of the [customer]'s interests was reasonable or unreasonable".[151]

This is especially the case where, as in the case of travel agents, there is no precedent. In such instances, what is required:

> "is that, not merely the interests of the parties *inter se*, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the Court conceives to be society's notions of what justice demands".[152]

The concept of legal duty is "a device which assists courts in determining whether it is reasonable to impose liability".[153] "[T]he question whether a legal duty has been [infringed] is also determined with reference to the *boni mores* or general legal convictions of the community."[154] As a matter of principle, a person is not liable where his omission causes damage.[155] "In other words, where the defendant's conduct takes the form of an omission, such conduct is prima facie lawful."[156] However liability will follow

> "if the omission was in fact wrongful; and this will be the case only if in the particular circumstances a *legal duty* rested on the defendant to act positively to prevent harm from occurring, and he failed to comply (fully) with that duty. The question whether such a duty existed, is answered with reference to the legal convictions of the community.

---

145 Neethling (fn 130) 35.
146 *Idem* 38 (italics omitted). See also Midgley (fn 130) 51.
147 *Cape Town Municipality v Paine* 1923 AD 207. This is, however, not the case with pure economic loss. See Midgley (fn 130) 51.
148 Neethling (fn 130) 45.
149 As to the other cases, see Neethling (fn 130) 47–49.
150 Neethling (fn 130) 47; Midgley (fn 130) 51.
151 Neethling (fn 130) 39; Midgley (fn 130) 51.
152 *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 318G.
153 Midgley (fn 130) 54.
154 Neethling (fn 130) 56.
155 *Idem* 57.
156 Midgley (fn 130) 56. See also Boberg (fn 130) 211.

> The test to determine whether the omission was in conflict with the convictions of the community is purely objective, in the sense that all the relevant circumstances of a particular case . . . must be taken into consideration. Consequently, *all factors* which, according to the convictions of the community, may point to a legal duty to act positively, must be considered."[157]

One of the factors which may establish a legal duty is the defendant's office or occupation.[158] Thus, in *Cape of Good Hope v Fischer*,[159] the court stated:

> "[I]f . . . a properly executed mortgage bond has been passed before [the Registrar of Deeds], and is presented to him for registration, it is his duty to register it in the manner required by law, and if he fails in this duty he is liable to the mortgagee for any damages occasioned by his loss of preference."[160]

In *Sandilands v Tompkins*,[161] it was held that

> "[a]s a public officer, [a prison warden] owed a plain legal duty to the public to safely keep every prisoner lawfully confined, and, if he illegally allowed a debtor imprisoned for debt to escape, he is liable to an action at the suit of any person who has sustained special damages by reason of such escape".[162]

In *Joffe & Co Ltd v Hoskins*,[163] the court held that a reinforcing engineer had a duty to guard against reinforcing steel being displaced in the course of concreting.[164] It must be stressed, however, that "it is only in exceptional cases that the courts will deviate from the fundamental premise of our law that, in principle, a defendant does not act wrongfully where he fails to act positively in order to prevent harm to another".[165]

There exist special circumstances, referred to as "grounds of justification", that have the effect of excluding "wrongfulness by eliminating the apparent wrongfulness of the defendant's conduct".[166] Among those grounds are: private defence, necessity, provocation, consent, statutory authority, official capacity, and the execution of an official command.[167]

---

157 Neethling (fn 130) 57.
158 *Ibid* 68; Midgley (fn 130) 56. See also Boberg (fn 130) 212.
159 (1886) 4 SC 368.
160 375.
161 1912 AD 171.
162 176.
163 1941 AD 431.
164 454. Furthermore, in *Mtati v Minister of Justice* 1958 1 SA 221 (A), it was held that a prison warden who "has the power to allow persons to enter a cell where arrested persons are being detained" has a duty "to use reasonable care to see that no-one enters without good reason" 223H–224A. In *SAR&H v Kostopoulos* 1972 3 SA 240 (A), the court ruled on the dispute on the basis that the shipowner has a duty to warn persons in the vicinity of the bottom of a gangway to his or her ship that they could be injured as a result of the movement of the gangway. In *Minister van Polisie v Ewels* 1975 3 SA 590 (A), the court held that a police officer is under a duty to come to the assistance of an ordinary citizen who is in a police station when such a citizen is assaulted by another police officer 597H. In *Minister of Police v Skosana* 1977 1 SA 31 (A), the court held that police officers have a duty to take appropriate steps when an individual under their control requires medical attention 33H–34B. In *Magware v Minister of Health NO* 1981 4 SA 472 (Z), the court ruled that the casualty medical staff at a hospital have a duty to act reasonably towards their patients 477B–C. Finally, in *Macademia Finance Ltd v De Wet* 1991 4 SA 273 (T), the court ruled that liquidators have a duty to insure the assets of the company under liquidation 279J–280A.
165 Neethling (fn 130) 71.
166 *Idem* 73.
167 *Idem* 75–108.

In our example, the point of departure would be that B's failure to inform A that a malaria vaccine was necessary to travel to Mozambique would only be wrongful if, in the particular circumstances of the case and with reference to the legal convictions of the community, a legal duty rested upon B to warn A. It could be argued that such a legal duty flowed from B's occupation as a travel agent on the ground that the community places a duty on travel agents as professional travel specialists to issue vaccine warnings. It is furthermore unlikely that B could successfully rely on any ground of justification.

4 5 The travel agent acted intentionally or negligently

Finally, in order for the travel agent to be held delictually liable, he must have acted intentionally or negligently when performing the wrongful conduct that caused the damage suffered by the customer.[168] Negligence is present if:

> "(a) a [reasonable person] in the position of the defendant –
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant failed to take such steps."[169]

Although the criterion of the reasonable person has "the central place in the determination of negligence",[170] a person who engages in a profession, trade, calling or any other activity which demands special knowledge and skill, must measure up to a higher standard. Thus in certain cases the fact that the wrongdoer possesses, or is expected to possess, "proficiency or expertise in regard to the allegedly negligent conduct, affects the application of the reasonable man test".[171] Thus in cases such as the medical profession, the legal profession, auditors and accountants, architects, farmers, electricians, civil engineers and pilots of aircraft, our courts have used the test of the so-called reasonable expert.[172] "The reasonable expert is identical to the reasonable man in all experts, except that a reasonable measure of the relevant expertise is added."[173] The standard of expertise is described as "reasonable" because the highest degree of expertise is not used as a reference. Rather the standard is "the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs".[174]

"The test for negligence . . . rests on two pillars, namely the reasonable foreseeability and reasonable preventability of damage."[175] With regard to foreseeability, it seems that both logic and authority favour the view that "a wrongdoer is only negligent with reference to a specific consequence if that consequence,

---

168 Neethling (fn 130) 119–120; Boberg (fn 130) 268; Midgley (fn 130) 85.

169 *Kruger v Coetzee* 1966 2 SA 428 (A) 430.

170 Neethling (fn 130) 130.

171 Neethling (fn 130) 135; Midgley (fn 130) 98.

172 See the cases referred to in Boberg (fn 130) 347–348.

173 Neethling (fn 130) 135.

174 *Van Wyk v Lewis* 1924 AD 438 444. See also *Mitchell v Dixon* 1914 AD 519; *Buls v Tsatavolakis* 1976 2 SA 891 (T).

175 Neethling (fn 130) 137. Boberg (fn 130) 274 explains that, "[i]nfluenced by English law, our courts sometimes formulate the enquiry as to negligence in terms of a duty of care. However, the expression is best avoided, for it is used also to denote wrongfulness, and may therefore produce confusion between wrongfulness and fault".

and not merely damage in general, was reasonably forseeable".[176] There are no hard-and-fast rules as far as the application of the foreseeability test is concerned. It appears, however, that

> "the foreseeability of harm will depend on the *degree of probability of the manifestation of the harm* (or how great the *chance* or possibility is that it will occur). Therefore, the greater the possibility that damage will occur, the easier it will be to establish that such damage was (reasonably) foreseeable (of course, the contrary is also true)".[177]

With regard to preventability, four factors are taken into account when assessing whether the reasonable man would take steps to guard against the occurrence of damage: the nature and extent of the risk inherent in the wrongdoer's conduct; the seriousness of the damage if the risk materialises and damage follows; the relative importance and object of the wrongdoer's conduct; as well as the cost and difficulty of taking precautionary measures.[178]

It must be stressed that the issue of whether there is negligence must be assessed "in the light of all the relevant circumstances of a particular case".[179] In the process of doing so, it is important to keep in mind that

> "[w]here wrongfulness is in issue, the question is whether it was objectively unreasonable for the actor to bring about the consequence that he did, judged *ex post facto* and in the light of all relevant circumstances, including those not foreseeable by the actor or beyond his control . . .
>
> With negligence, on the other hand, the enquiry is whether the actor himself behaved unreasonably, judged in the light of his actual situation and what he ought to have foreseen and done in the circumstances that confronted him".[180]

Finally, it must also be mentioned that, "[i]n order to succeed in his claim, the onus is on the plaintiff to prove on a preponderance of probabilities that the defendant was negligent".[181]

In our example, it could be argued that a travel agent is expected to possess expertise with regard to vaccine requirements for travel purposes, and that the negligence test to be used is that of the reasonable travel agent. It could be argued further that B could foresee that travelling to Mozambique without having been administered a malaria vaccine would result in contracting the disease, the probability of this occurring being actually rather high. It could be argued finally that B could easily have prevented the damage. Such an argument would be based on the fact that: the risk was high; the damage caused was serious; whatever purpose, if any, was served by B's conduct did not outweigh the risk of damage that it created; and the said risk could have been eliminated without any cost and difficulty.

4 CONCLUSION

As indicated at the outset, this article can only have very limited ambitions in view of the dearth of case law and literature on travel agency in South Africa. A few (hopefully helpful) conclusions can, however, be drawn.

---

176 Neethling (fn 130) 138. See also Boberg (fn 130) 276-278; Midgley (fn 130) 92.
177 Neethling (fn 130) 139.
178 *Idem* 140–143; Midgley (fn 130) 95.
179 Neethling (fn 130) 143.
180 Boberg (fn 130) 269–270.
181 Neethling (fn 130) 148.

From the regulatory point of view, one does appreciate the difficulties of regulating an industry as complex and diverse as the tourism industry, as well as a profession so central in, and typical of, that industry as that of travel agent. But it is difficult to understand why it was felt necessary to enact specific legislation to regulate the profession in 1983 only to repeal it in 1993. From a consumer point of view, alternative safeguards are provided by ASATA. However, such remedies suffer from weaknesses associated with any system of self-regulation, as well as from the fact that they are not available if the travel agent is not a member of ASATA. In such a case, the customer must turn to general consumer law. It is submitted that, in view of the very important role played by travel agents in the tourism industry and the importance of the latter in the government's strategy of reconstruction and development, new legislation should be drafted and enacted. This would conform to a worldwide trend since the beginning of the 1990s. For instance, such legislation is now in force in eleven American states,[182] all the Australian states except the Northern Territory,[183] as well as in Europe: Belgium,[184] France,[185] Greece,[186] Ireland,[187] Italy,[188] Luxembourg,[189] Portugal[190] and Spain.[191]

From the contractual point of view, it is submitted that our courts, practitioners and writers should take great care to ascertain in each dispute the nature of the activity in which the travel agent was involved. Adopting specific terminology along the lines suggested above would also assist in developing the analytical framework necessary to avoid the confusion which is otherwise unavoidable and which still reigns in jurisdictions that have grappled with such issues for several decades.

From the delictual point of view, it is submitted that the present legal convictions of the community are that travel agents are professional travel specialists on whose advice and assistance consumers rely. They do so to find their way through, on the one hand, increasingly complex travel regulations and, on the other hand, increasingly sophisticated and numerous tourism services. Our courts have demonstrated great caution when called upon to extend the scope of delictual liability to new situations, requiring that positive policy considerations be shown to favour such an extension.[192] It is hoped however, that our courts, as soon as they are confronted with appropriate cases, will recognise the legal duties owed by travel agents.

---

182 Jarvis *et al Travel law* (1998) 94–95.
183 Cordato *Australian travel and tourism law* (1999) 352.
184 Yaqub and Bedford (fn 7) 158.
185 Py *Droit du tourisme* (1996) 92.
186 Yaqub and Bedford (fn 7) 266.
187 *Idem* 327–328.
188 *Idem* 388.
189 *Idem* 421.
190 *Idem* 500.
191 *Idem* 512.
192 *Lillicap, Wassenaar and Partners v Pilkington Brothers* 1985 1 SA 475 (A) 504G.

Die onderskeid tussen voorwaardes, *modus, fideicommissum* en trust in die Suid-Afrikaanse erfreg

Juanita Jamneck
BLC LLB LLD
Medeprofessor, Departement Privaatreg, Universiteit van Suid-Afrika

SUMMARY

The distinction between conditions, *modus*, *fideicommissum* and trust in the South African law of succession

The need for the correct use of terminology as well as the importance of the distinction between certain legal concepts and their consequences, is clear from the recent decision in *Kommissaris van Binnelandse Inkomste v Van Blommestein*.[1] It appears that a clear distinction is still not drawn between the *modus*, *fideicommissum*, different types of conditions and the trust. All these legal concepts have different effects on the vesting of rights. One must therefore distinguish clearly between them. There is also an unnecessary tendency to identify certain concepts and to interpret wills according to these concepts instead of identifying and giving effect to the testator's true intention.

1 INLEIDING

Die belang van die noukeurige opstel van 'n testament ten einde uiting te gee aan die werklike bedoeling van die testateur, is reeds herhaalde kere benadruk.[2] Sowel die noodsaak van die gebruik van korrekte terminologie as die belang van die onderskeid tussen verskillende regsfigure en hulle gevolge, het egter onlangs weer duidelik geword in die uitspraak in *Kommissaris van Binnelandse Inkomste v Van Blommestein*.[3] Uit dié saak blyk dit dat daar steeds nie duidelik onderskei word tussen die regsfigure *modus*, *fideicommissum*, voorwaardes en trust nie. In hierdie bydrae word die onderskeid weer eens in oënskou geneem en word ook gewys op die onnodige geneigdheid van die howe om bepalings as bepaalde regsfigure te identifiseer in stede daarvan om die testateur se werklike bedoeling vas te stel en daaraan uiting te gee.

---

1 1999 2 SA 367 (HHA).

2 Sien *Robertson v Robertson's Executors* 1914 AD 503; *Cuming v Cuming* 1945 AD 201; *Bell v Swan* 1954 3 SA 543 (W); *Ex parte Eksekuteure Boedel Malherbe* 1957 4 SA 704 (K); *Coetzee v Die Meester* 1982 1 SA 295 (O); *Campbell v Daly* 1988 4 SA 714 (T); Wiechers *Testamente: 'n kortbegrip* (1988) 58; Jamneck "Die belang van die noukeurige opstel van 'n testament" 1992 *De Jure* 467; Jamneck "*Fideicommissum*, vruggebruik en *modus*: *Kerkraad van die Nederduitse Gereformeerde Kerk, Douglas v Loots* 1990 3 SA 451 (NK)" 1991 *THRHR* 316.

3 1999 2 SA 367 (HHA).

2 VOORWAARDES

2 1 Opskortende en ontbindende voorwaardes

Van der Merwe en Rowland[4] beskryf die voorwaarde soos volg:

> "'n Testamentêre voorwaarde is 'n besondere bepaling of klousule in 'n testament waarvolgens die ontstaan of voortbestaan van 'n begunstigde se reg ten opsigte van die bevoordeling aan hom toegewys, onderhewig gestel word aan die plaasvind al dan nie van 'n onsekere toekomstige gebeurtenis. Met 'onsekere toekomstige gebeurtenis' word bedoel dat dit onseker is of sodanige gebeurtenis sal plaasvind al dan nie."

Voorts word onderskei tussen opskortende en ontbindende voorwaardes. By die opskortende voorwaarde word die vestiging van regte (*delatio/dies cedit*) en die tydstip waarop die vorderingsregte afdwingbaar word (*dies venit*)[5] uitgestel totdat die onsekere, toekomstige gebeurtenis plaasvind.[6] 'n Voorbeeld van 'n opskortende voorwaarde is die volgende:

> "Ek bemaak my plaas aan my seun, X, op voorwaarde dat hy hom binne drie jaar ná my dood op die plaas vestig. As X nie die plaas erf nie moet dit na my broer, Y, gaan."[7]

Hierdie bepaling word as 'n opskortende voorwaarde gekoppel aan 'n tydsbepaling uitgelê.[8]

By die ontbindende voorwaarde, daarteenoor, vind beide *dies cedit* en *dies venit* vir die erfgenaam plaas by die dood van die testateur. Indien die voorwaarde egter vervul word, verloor hy sy regte.[9] 'n Voorbeeld van 'n ontbindende voorwaarde lui soos volg:

> "Ek bemaak my plaas aan my seun, S. Indien hy homself drie jaar ná my dood nog nie op die plaas gevestig het nie, moet die plaas na my broer, Y, gaan."[10]

Wanneer voorwaardes in 'n testament geplaas word, moet in gedagte gehou word dat die testateur moet bepaal wat met die voordeel moet gebeur indien die voorwaarde nie vervul word nie. In geval van 'n opskortende voorwaarde word met behulp van direkte substitusie daarvoor voorsiening gemaak. In die voorbeeld hierbo is Y die direkte substituut wat die voordeel sal ontvang indien die begunstigde nie die voorwaarde nakom nie.[11]

---

4 *Die Suid-Afrikaanse erfreg* (1990) 273.

5 Van der Merwe en Rowland 12; *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 176.

6 Van der Merwe en Rowland 275; Erasmus en De Waal *The South African law of succession* (1989) par 106; *Jewish Colonial Trust v Estate Nathan* 1940 AD 163 176; *Botha v Botha* 1997 3 SA 792 (T).

7 Cronjé ea *Werkboek vir die erfreg* (1996) 110. 'n Beter formulering om die oogmerke van die testateur duideliker uiteen te sit, is moontlik die volgende: "Ek bemaak my plaas aan my seun, X, met dien verstande dat dit alleen sy eiendom sal word wanneer hy homself, binne 'n tydperk van drie jaar ná my dood, daar gaan vestig. As hy dit nie erf nie, erf my broer, Y, dit." Sien Jamneck 1992 *De Jure* 470 vir die redes waarom hierdie bewoording te verkies is. Sien ook *Levy v Schwartz* 1948 4 SA 930 (W) vir 'n voorbeeld van 'n opskortende voorwaarde. In dié geval is bevind dat die voorwaarde *contra bonos mores* was omdat die testateur beoog het om 'n bestaande huwelik te vernietig.

8 *Botha v Botha* 1979 3 SA 792 (T); Cronjé ea 110. Sien ook Jamneck 1992 *De Jure* 469 oor die praktiese implikasies van so 'n bepaling.

9 Van der Merwe en Rowland 275.

10 Jamneck 1992 *De Jure* 470.

11 Sien *Steffensen v Estate Atkinson* 1914 CPD 471; *Ex parte Harvey* 1942 OPD 249; *Kinloch v Kinloch* 1982 1 SA 679 (A); Joubert "Direkte substitusie of fideikommissêre substitusie?"

vervolg op volgende bladsy

In geval van 'n ontbindende voorwaarde moet die testateur ook bepaal wat met die voordeel moet gebeur indien die begunstigde sy regte verloor. In so 'n geval word die substituut by wyse van fideikommissêre substitusie aangewys aangesien daar 'n opeenvolging van begunstigdes plaasvind.[12] 'n Bepaling wat nie bepaal wat met die voordeel moet gebeur indien die voorwaarde nie vervul word nie, is 'n *nudum praeceptum* en nietig.[13]

2 2 Onderskeidende maatstaf

Die onderskeid tussen 'n opskortende en 'n ontbindende voorwaarde is dus geleë in die tydstip van vestiging van die begunstigde se regte. By die ontbindende voorwaarde vestig die regte by die testateur se dood in die bevoordeelde en verloor hy sy regte indien 'n onsekere, toekomstige gebeurtenis plaasvind. By die opskortende voorwaarde, daarenteen, word die vestiging van die bevoordeelde se regte uitgestel tot die plaasvind van 'n onsekere toekomstige gebeurtenis. Soos ons weldra sal sien, is dit ook hierdie maatstaf wat voorwaardes van die *modus* onderskei.

3 *MODUS*

3 1 Omskrywing

'n Mens het met 'n *modus* te doen waar 'n testateur 'n begunstigde verplig om 'n bemaakte voordeel of die opbrengs daarvan vir 'n bepaalde doel aan te wend.[14] Indien 'n begunstigde 'n bemaking onderworpe aan 'n *modus* aanvaar, ontstaan daar (in sommige gevalle) 'n verbintenis ingevolge waarvan hy verplig is om die las (*modus*) na te kom.[15]

Die oogmerk van die *modus* kan wees:

(a) In belang van die begunstigde self. Die erflater kan byvoorbeeld bepaal dat die begunstigde die bemaking moet gebruik om vir sy studies te betaal of om 'n

---

1953 *THRHR* 243; Corbett ea *The law of succession in South Africa* (1980) 213; Van der Merwe en Rowland 287; Erasmus en De Waal par 124 oor die werking van direkte substitusie. Sien ook a 2C(1) en (2) van die Wet op Testamente 7 van 1953 vir direkte substitusie *ex lege*.

12 Sien *Greenberg v Estate Greenberg* 1955 3 SA 361 (A); *Barnhoorn v Duvenhage* 1964 2 SA 486 (A); *Eksteen v Pienaar* 1969 1 SA 17 (O); *Wasserman v Sackstein* 1980 2 SA 536 (O); *Du Plessis v Strauss* 1988 2 SA 105 (A); Joubert "Die ontwikkeling van die *fideicommissum* in Suid-Afrika" 1960 *Acta Juridica* 56; Laurens "Fideikommis oor onroerende goed: aard van die *fideicommissarius* se reg" 1983 *THRHR* 14; Cronjé en Roos *Erfreg vonnisbundel* (1997) 285 291; Van der Merwe en Rowland 320 ev oor die *fideicommissum* in die algemeen. Sien ook die bespreking hieronder.

13 *Jewish Colonial Trust v Estate Nathan* 1940 AD 163 176; *Ruskin v Sapire* 1966 2 SA 306 (W). Sien ook *Ex parte Estate Wienand* 1965 1 SA 576 (K); *Ex parte Roads* 1978 4 SA 649 (O); *Vorster v Steyn* 1981 2 SA 831 (O); *Ex parte McClung* 1983 3 SA 446 (O); *Kerkraad van die Nederduitse Gereformeerde Kerk, Douglas v Loots* 1990 3 SA 451 (NK); Jamneck 1991 *THRHR* 322; Van der Merwe en Rowland 314 oor die *nudum praeceptum* in die algemeen.

14 *Jewish Colonial Trust v Estate Nathan* 1940 AD 163 176; *Ex parte Mouton* 1955 4 SA 460 (A); *Wessels v DA Wessels en Seuns (Edms) Bpk* 1987 3 SA 530 (T); *Kerkraad van die Nederduitse Gereformeerde Kerk, Douglas v Loots* 1990 3 SA 451 (NK); Van der Merwe en Rowland 281; Corbett ea 347.

15 *Wessels v DA Wessels en Seuns (Edms) Bpk* 1987 3 SA 530 (T); Jamneck 1991 *THRHR* 320.

bepaalde eiendom aan te koop.[16] In hierdie geval ontstaan geen verbintenis om die *modus* uit te voer nie en dus is die beswaarde erfgenaam nie verplig om uitvoering daaraan te gee nie.[17] Die rede hiervoor is dat daar niemand is wat kan toesien dat die morele verpligting wat op die beswaarde erfgenaam rus nagekom word nie. Beinart[18] betoog dat so 'n *modus* wel deur die hof of die eksekuteur afgedwing kan word. Hy baseer hierdie standpunt op Voet 35 1 15 wat gevolg is in *Ex parte Mouton*.[19] Nóg Beinart nóg die hof in *Ex parte Mouton* verduidelik egter hoe die hof of die eksekuteur te werk moet gaan om sodanige afdwinging te bewerkstellig en dit is dus nie duidelik op welke praktiese gronde hierdie stelling gefundeer is nie. Beinart[20] sê bloot dat so 'n bepaling alleen onafdwingbaar is waar die *modus uitsluitlik* tot die begunstigde se voordeel strek en die testateur in elk geval die bemaking aan hom sou gemaak het *ongeag* of hy die *modus* uitvoer al dan nie.

(b) In belang van 'n onpersoonlike doel. Die testateur kan byvoorbeeld bepaal dat die bemaking aangewend moet word om 'n kerk te bou of 'n monument op te rig. Ook hier bestaan die probleem dat daar niemand is om toe te sien dat die *modus* uitgevoer word nie. In die Romeinse reg was daar wel 'n moontlikheid dat dit deur middel van kerklike gesag of deur die hof afgedwing kon word,[21] maar dit het nog nooit in die Suid-Afrikaanse reg plaasgevind nie. Die Romeins-regtelike *actio popularis* wat gebruik kon word om aksies in die openbare belang in te stel en wat moontlik in hierdie gevalle van nut kon wees, het ook in onbruik verval.[22]

(c) In belang van 'n derde. Vir ons doeleindes is die *modus* in belang van 'n derde, die belangrikste verskyningsvorm van die *modus*. In hierdie geval bepaal die testateur byvoorbeeld dat die begunstigde 'n bepaalde voordeel ontvang en dat hy verplig is om 'n bedrag kontant aan 'n derde te betaal of om 'n bepaalde eiendom aan 'n derde te verhuur.[23] In so 'n geval kan die verpligting afgedwing word deur die eksekuteur, die meester of die derde in wie se guns die *modus* gemaak is.[24] Die derde is ook bevoeg om sekerheidstelling vir die uitvoering van die *modus* van die beswaarde erfgenaam te eis.[25] Die derde in wie se guns die *modus* gemaak is, beskik dus slegs oor 'n persoonlike reg teenoor die beswaarde erfgenaam en is by uitstek die persoon wat bevoeg is om die *modus* af te

16 Beinart "*Fideicommissum* and *modus*" 1968 *Acta Juridica* 186.
17 *Ex parte Gardner* 1940 EDL 175 178.
18 1968 *Acta Juridica* 187 vn 198.
19 1955 4 SA 461 (A).
20 1968 *Acta Juridica* 187 vn 198.
21 *D* 5 3 50 1; *D* 40 4 17 1; Beinart 1968 *Acta Juridica* 187 vn 200.
22 In *Ex parte Strümpfer* 1945 OPD 268 274 word die *actio popularis* beskryf as "judicially certified as dead". Daar kan moontlik geargumenteer word dat 'n soort *actio popularis* dmv a 38 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 herleef, maar aangesien dit 'n volledige bespreking op sy eie sou verg, word dit vir die oomblik daar gelaat.
23 Soos in *Kerkraad van die Nederduitse Gereformeerde Kerk, Douglas v Loots* 1990 3 SA 451 (NK). Sien ook Jamneck 1991 *THRHR* 321.
24 *Ex parte The Dutch Reformed Church of Dewetsdorp* 1938 OPD 136 139; *Ex parte Wessels* 1946 OPD 123 132. Honoré en Cameron *The South African law of trusts* par 26 vn 97 vra tereg of die bevoegdheid om die *modus* af te dwing al ooit in moderne tye deur die meester gebruik is.
25 *Ex parte Gitelson* 1949 2 SA 881 (O); *Benoni Town Council v Minister of Agricultural Credit and Land Tenure* 1978 1 SA 978 (T).

dwing.[26] Indien die derde 'n aksie instel om die *modus* af te dwing, is dit 'n persoonlike aksie teen die beswaarde erfgenaam en word die erfgenaam se saaklike regte geensins beïnvloed nie.[27]

3 2 Onderskeid tussen *modus* en voorwaardes

Die toevoeging van 'n *modus* tot 'n bemaking stel nie die vestiging van die beswaarde erfgenaam se regte uit nie.[28] Die *modus* verskil dus van die opskortende voorwaarde deurdat die vestiging van die begunstigde se regte nie uitgestel word nie, maar onmiddellik plaasvind.[29] Die instelling van 'n *modus* affekteer ook nie die begunstigde se regte indien hy nie die *modus* nakom nie. In teenstelling met die posisie in geval van 'n ontbindende voorwaarde, sal die begunstigde nie sy regte verloor indien hy nie die *modus* nakom nie. Die begunstigde stel homself bloot aan 'n persoonlike aksie in geval van 'n *modus* ten behoewe van 'n derde, maar sy regte ten opsigte van die bemaakte voordeel word nie beïnvloed deur sy versuim om die *modus* na te kom nie.[30] Volgens Voet[31] kan die legataris wat nie die *modus* uitvoer nie, verplig word om die bemaakte voordeel terug te gee, veral indien die testateur dit beveel het. Honoré en Cameron[32] vra egter tereg of hierdie bevoegdheid al ooit in moderne tye uitgeoefen is. Die begunstigde se saaklike regte op die bemaakte voordeel sal waarskynlik alleenlik beïnvloed word indien dit nodig sou wees om beslag op die goedere te lê ten einde die persoonlike reg van die derde af te dwing.[33]

4 *FIDEICOMMISSUM*

4 1 Omskrywing

'n Mens het met fideikommissêre substitusie te doen wanneer die erflater beveel dat 'n reeks erfopvolgers dieselfde eiendom agtereenvolgens moet ontvang.[34]

---

26 Die *modus* ten gunste van 'n derde behels dus slegs 'n persoonlike verpligting wat op die beswaarde erfgenaam rus en nie 'n saaklike reg nie (*Wessels v DA Wessels & Seuns (Edms) Bpk* 1987 3 SA 530 (T) 538). Streng gesproke behoort registrasie van die *modus* dus nie teen die titelakte van grond plaas te vind nie, maar in die praktyk vind registrasie blykbaar wel in sommige akteskantore plaas (*Nel v CIR* 1960 1 SA 227 (A); *Ex parte Esterhuyse* 1971 4 SA 261 (O); Van der Merwe en Rowland 283 vn 6). Honoré en Cameron (par 26) wys ook daarop dat registrasie wel plaasvind ten einde te verseker dat die eiendom nie in stryd met die *modus* vervreem word nie.

27 *Ex parte Strümpfer* 1945 OPD 268; *Ex parte Esterhuyse* 1971 4 SA 261 (O).

28 *British South Africa Company v Bulawayo Municipality* 1919 AD 84; Ex *parte Mouton* 1955 4 SA 464 (A); Wessels *v DA Wessels & Seuns (Edms) Bpk* 1987 3 SA 530 (T) 538; Beinart 1968 *Acta Juridica* 186; Van der Merwe en Rowland 282; Corbett ea 348.

29 Hierdie verskil het die hof nie in *Holley v CIR* 1947 3 SA 119 (A) nie raakgesien nie. Sien die bespreking hieronder.

30 *Ex parte The Dutch Reformed Church of Dewetsdorp* 1938 OPD 136; *Ex parte Strümpfer* 1945 OPD 268; *Ex parte Esterhuyse* 1971 4 SA 261 (O); *Wessels v DA Wessels & Seuns (Edms) Bpk* 1987 3 SA 530 (T) 538); Jamneck 1991 *THRHR* 321.

31 35 1 12.

32 Par 26 vn 97.

33 Sien ook *Benoni Town Council v Minister of Agricultural Credit and Land Tenure* 1978 1 SA 978 (T) waaruit dit duidelik blyk dat as 'n *modus inter vivos* deur middel van 'n kontrak tot stand kom en die betrokke party nie die *modus* uitvoer nie, kontrakbreuk plaasvind wat aan die ander party die gewone remedies vir kontrakbreuk verleen.

34 Van der Merwe en Rowland 293; Erasmus en De Waal par 142; Joubert 1953 *THRHR* 244; Jamneck 1991 *THRHR* 317.

Die erflater bepaal dus dat die bevoordeling eers na een persoon (die *fiduciarius*) moet gaan en by die vervulling van 'n voorwaarde of by die aanbreek van 'n bepaalde tydstip, na 'n ander persoon (die *fideicommissarius*). Die *fiduciarius* word dus reghebbende van die fideikommissêre vermoë ten behoewe van homself, maar sy eiendomsreg word, wat inhoud en duur betref, deur die reg van die *fideicommissarius* beperk.[35]

Ten einde 'n geldige *fideicommissum* in te stel, moet die testateur se bedoeling so bewoord word dat die bepaling "an effective 'gift over'"[36] daarstel. Daar moet dus 'n effektiewe oorgang van die testamentêre voordeel vanaf die *fiduciarius* na die *fideicommissarius* bewerkstellig word.[37]

Die eiendomsreg in die bemaakte voordeel wat met die *fideicommissum* beswaar is, vestig onmiddellik by die testateur se dood in die *fiduciarius*.[38] Die *fiduciarius* word dus by lewering of oordrag van die eiendom aan hom, eienaar daarvan,[39] hoewel sy eiendomsreg beperk is.[40] Hoewel die *fiduciarius* se regte dus met betrekking tot sowel die gewone inhoudsbevoegdhede van eiendomsreg as in duur[41] beperk is, bly hy steeds reghebbende ten behoewe van homself en nie ten behoewe van iemand anders nie. Hierdie aspek onderskei die *fideicommissum* van die trust en sal hieronder van naderby beskou word.

4 2 *Fideicommissum*, voorwaardes en *modus*

'n Testateur kan 'n *fideicommissum* aan 'n voorwaarde of 'n *modus*[42] koppel. Die algemeenste verskyningsvorm van 'n *fideicommissum* is inderdaad die voorwaardelike *fideicommissum*.[43] Vir die *fideicommissum* om geldig te wees, is dit noodsaaklik dat die fideikommissêre voorwaarde geldig moet wees. Die voorwaarde moet dus nie so vaag en onseker wees dat dit nie moontlik is om 'n

35 Vir die argumente rondom die vraag of 'n *fideicommissarius* 'n *spes* of 'n reg het, sien Van der Merwe en Rowland 332 ev; Beinart 1968 *Acta Juridica* 157; Laurens 1983 *THRHR* 14; *Barnhoorn v Duvenhage* 1964 2 SA 486 (A); *Van der Merwe v Registrateur van Aktes* 1975 4 SA 636 (A); *Wasserman v Sackstein* 1980 2 SA 536 (O).

36 Corbett ea 270.

37 Indien 'n effektiewe oorgang nie bewerkstellig word nie, staan die bepaling bekend as 'n *nudum praeceptum* en word dit as *pro non scripto* beskou. Sien *Drew v Executor of Drew* 1876 Buch 203; *Jewish Colonial Trust v Estate Nathan* 1940 AD 163; *Van Soelen v Van Soelen* 1964 4 SA 24 (O); *Morley v Standard Bank Trustees Department* 1970 4 SA 299 (W); *Ex parte Roads* 1978 4 SA 649 (O); Cronjé en Roos 305; Corbett ea 271.

38 *Estate Kemp v McDonald's Trustee* 1915 AD 491; *Breytenbach v De Villiers* 1961 2 SA 542 (T); *Van den Berg v Registrateur van Aktes, Transvaal* 1974 4 SA 619 (T).

39 *Greenberg v Estate Greenberg* 1955 3 SA 361 (A); Van der Merwe en Rowland 319; Corbett ea 301.

40 As algemene reël kan die *fiduciarius* nie die eiendom vry van die fideikommissêre beperking vervreem nie. Hy kan egter wel sy beperkte reg vervreem. Sien *Ex parte Wessels* 1949 2 SA 99 (O); *Crookes v Watson* 1956 1 SA 277 (A); Van der Merwe en Rowland 320.

41 *Greenberg v Estate Greenberg* 1955 3 SA 361 (A); *Eksteen v Pienaar* 1969 1 SA 17 (O).

42 Sien bv *Hobson v Hobson's Estate* 1918 CPD 52 waar die testateur sy boedel aan sy kleinseun bemaak het onderworpe aan 'n *fideicommissum* ten gunste van sy neefs en ook die kleinseun verplig het om 'n annuïteit aan sy weduwee te betaal. Laasgenoemde was 'n *modus* ten gunste van 'n derde (die weduwee). Sien ook *Barclays Bank DC & O v Anderson* 1959 2 SA 478 (T).

43 Sien Corbett ea 259.

redelike interpretasie daaraan te heg nie,[44] of onmoontlik wees om uit te voer nie,[45] of in stryd wees met die reg, goeie sedes of die openbare belang nie.[46]

'n *Modus* en 'n voorwaarde kan dus ook van 'n *fideicommissum* onderskei word aangesien dié regsfigure aan 'n *fideicommissum* gekoppel kan word. Op sy beurt moet die *fideicommissum* weer van die trust onderskei word.

5 TRUSTS

5 1 Omskrywing

Artikel 1 van die Wet op die Beheer oor Trustgoed 57 van 1988 omskryf 'n "trust" as

> "die reëling waardeur een persoon se goed uit hoofde van 'n trustdokument –
>
> (a) aan iemand anders, die trustee, in die geheel of gedeeltelik in eiendom oorgemaak of nagelaat word om ooreenkomstig die voorskrifte van die trustdokument geadministreer te word of oor beskik te word tot voordeel van die persoon of klas van persone in die trustdokument aangewys of ter bereiking van die doel in die trustdokument omskryf; of
>
> (b) aan die bevoordeeldes in die trustdokument oorgemaak of nagelaat word, welke goed ingevolge die trustdokument onder die beheer gestel word van iemand anders, die trustee, om ooreenkomstig die voorskrifte van die trustdokument geadministreer te word of oor beskik te word tot voordeel van die persoon of klas van persone in die trustdokument aangewys of ter bereiking van die doel in die trustdokument omskryf, maar nie ook die geval waar iemand die goed van 'n ander moet administreer as eksekuteur, voog of kurator ingevolge die bepalings van die Boedelwet, 1965 (Wet 66 van 1965), nie".

Uit die woordomskrywing blyk duidelik dat ons met 'n trust te doen het ongeag of die trustee of die begunstigde (die sogenaamde "bewindtrust") eienaar van die trustbates is. Voorts is dit ook duidelik dat die trustee reghebbende van die trustbates is ten behoewe van iemand anders (die begunstigdes) en nie ten behoewe van homself nie.[47] In *Kemp v McDonald's Trustees*[48] word dit soos volg verduidelik:

> "The underlying conception in these and other cases is that while the legal *dominium* of property is vested in the trustees, they have no beneficial interest in it but are bound to hold and apply it for the benefit of some person or persons or for the accomplishment of some purpose."

Die feit dat die trustee nie reghebbende ten behoewe van homself is nie, maar ten behoewe van iemand anders, is dan ook die faktor wat die trust van die *fideicommissum* onderskei.

---

44 *Ex parte Mouton* 1955 4 SA 460 (A); *Loock v Steyn* 1968 1 SA 602 (A); *Barnett v Estate Schereschewske* 1957 3 SA 679 (K).

45 *Ex parte Mouton* 1955 4 SA 460 (A); Corbett ea 282.

46 *Ex parte Swanevelder* 1949 1 SA 733 (O); *Barclays Bank DC & O v Anderson* 1959 2 SA 478 (T); *De Wayer v SPCA, Johannesburg* 1963 1 SA 71 (T); *Ex parte Higgs: In re Estate Rangasami* 1969 1 SA 56 (D); Cronjé en Roos 227.

47 *Estate Kemp v McDonald's Trustee* 1915 AD 491; Van der Merwe en Rowland 344.

48 1915 AD 491 508.

5 2 Trusts onderskei van *fideicommissa*

Ons het reeds hierbo gesien dat die *fiduciarius* ten behoewe van homself reghebbende is ten opsigte van die bates wat onderworpe is aan die *fideicommissum*, al beskik hy slegs oor beperkte regte. Die trustee daarenteen is reghebbende ten behoewe van iemand anders. Hierdie onderskeidende faktor is egter in die vroeëre Suid-Afrikaanse reg misgekyk en die howe het gepoog om die trust aan die *fideicommissum* gelyk te stel. In die *Kemp*-saak[49] het die hof selfs so ver gegaan om te beslis dat die trust vreemd is aan ons regstelsel omdat dit uit die Engelse reg afkomstig is en ons howe dit nie aanvaar het nie. Die hof het egter aan die bepalings in die betrokke testament gevolg gegee deur dit aan die *fideicommissum* gelyk te stel. Die neiging van die howe om 'n bepaalde regsfiguur te vergelyk met iets anders wat aan die hof bekend is in plaas daarvan om aan die testateur se bedoeling gevolg te gee, het dus reeds op hierdie vroeë stadium kop uitgesteek. Gelukkig het die hof in *Braun v Blann and Botha*[50] ten opsigte van die trust *mortis causa* beslis dat die trust 'n eiesoortige regsfiguur is en dus die trust *mortis causa* op die pad na selfstandige ontwikkeling geplaas.[51] Ongelukkig het dieselfde nog nie met die trust *inter vivos* gebeur nie. Hoewel die hof in *Crookes v Watson*[52] weggebreek het van die gelykstelling van die trust aan die *fideicommissum*, het die hof dit aan 'n ander regsfiguur, naamlik die *stipulatio alteri* gelykgestel.[53] Ongelukkig het die hof in *Hofer v Kevitt*[54] 'n gulde geleentheid laat verbygaan om ook die trust *inter vivos* as 'n *sui generis* regsfiguur te beskou en beslis dat daar geen rede bestaan om af te wyk van die beslissing in *Crookes v Watson*[55] nie.

Die trust kan dus van die *fideicommissum* onderskei word ten spyte van die feit dat daar ook van 'n "gift over" sprake is. By die trust word die eiendomsreg van die bates ook aan iemand oorgegee om dit in trust te hou en om dit later, wanneer die trust ontbind, op sy beurt aan die uiteindelike begunstigdes oor te gee. In geval van die trust word die trustee egter reghebbende ten behoewe van iemand anders, terwyl die *fiduciarius* ten behoewe van homself reghebbende word.

6 VERWARRENDE UITSPRAKE

6 1 Inleiding

Die bespreking van die onderskeid tussen die onderskeie regsfigure hierbo, bring ons nou by die hoofdoel van hierdie bydrae, naamlik 'n bespreking van *Holley v*

---

49 1915 AD 491; Van der Merwe en Rowland 344; Corbett ea 405.

50 1984 2 SA 850 (A).

51 Sien ook *Mariola v Kay-Eddie* 1995 2 SA 728 (W); Sher "Recent cases on trusts" 1998 *JBL* 81; Cronjé en Roos 324.

52 1956 1 SA 277 (A).

53 Die hof se konstruksie is deur sommige skrywers onderskryf (sien Swanepoel "Oor stigting, trust, fideicommissum, modus en beding ten behoewe van 'n derde" 1957 *THRHR* 113) terwyl ander dit gekritiseer het (sien Pollak "Donations and trusts" 1956 *Annual Survey* 180; Murray "The nature of a trust in South African law" 1958 *Acta Juridica* 64). Vir kritiek teen Murray se standpunt, sien Van der Merwe en Rowland 375 en Cronjé en Roos 338.

54 1998 1 SA 382 (HHA); Sher 1998 *JBL* 81.

55 1956 1 SA 277 (A). Daar is ongelukkig nie verwys na die bespreking en beslissing in *Braun v Blann and Botha* 1984 2 SA 850 (A) nie. Indien so 'n vergelyking plaasgevind het, kon die hof moontlik ook wat betref die trust *inter vivos* tot die gevolgtrekking gekom het dat die regsfiguur *sui generis* is en op sy eie behoort te ontwikkel.

Commissioner for Inland Revenue[56] en veral van *Kommissaris van Binnelandse Inkomste v Van Blommestein*.[57] Daar sal aangetoon word dat die howe se geneigdheid om 'n testateur se wense as 'n bepaalde regsfiguur te identifiseer en dit dan daarvolgens te interpreteer, in beide gevalle gelei het tot verkeerde stellings in verband met sekere regsfigure asook tot 'n verkeerde beslissing. Daar sal ook aangetoon word dat die benadering van die minderheidsuitspraak in die *Van Blommestein*-beslissing te verkies is aangesien dit konsentreer op die bedoeling van die testateur sonder om 'n bepaalde regsfiguur te identifiseer.

6 2 *Van Blommestein* en *Holley*

6 2 1 Die feite in Van Blommestein

Die tersaaklike feite in *Kommissaris van Binnelandse Inkomste v Van Blommestein*[58] was kortliks die volgende: Die testateur het 'n aantal bates besit wat hy aan verskillende erfgename bemaak het. Die belangrikste bepalings waarop die geskil betrekking gehad het, was dat die testateur twee plase en sekere aandele in 'n maatskappy wat die huurder van die plase was, aan sy seun bemaak het. Verder het die testateur bepaal dat sy seun 'n verband van R100 000 oor die eiendomme moet registreer ten gunste van die administrateur van die boedel. Die rente op dié bedrag moes die seun aan die administrateur betaal wat dit op sy beurt onmiddellik aan die testateur se weduwee moes oorbetaal. Die tersaaklike beding lui soos volg:

> "[S]odra my administrateur die rente ontvang moet hy dit, . . . [o]nmiddellik aan my gesegde eggenote oorbetaal totdat sy te sterwe kom. Hierdie verband mag nie opgeroep word solank die rente gereeld op die vervaldatum betaal word nie. Indien die verband opgeroep word moet my administrateur voormelde bedrag belê en administreer op dieselfde wyse hierintevore . . . bepaal. Hierdie trust sal op datum van afsterwe van my gesegde eggenote ten einde loop . . ."

Die seun het gepoog om die rente wat hy ingevolge die testament moes betaal as "aftrekbare onkoste" (ingevolge a 11 van die Inkomstebelastingwet 58 van 1962) van belasting af te trek maar die Kommissaris van Binnelandse Inkomste wou nie die aftrekking toelaat nie. Die Inkomstebelasting Spesiale Hof het die Kommissaris gelyk gegee waarop die seun geappelleer het. Die volbank van die Kaapse Provinsiale Afdeling het die seun (in 'n mate) gelyk gegee en gevolglik volg hierdie appèl deur die Kommissaris na die Hoogste Hof van Appèl.

6 2 2 Meerderheidsuitspraak

Appèlregter Hoexter wat die meerderheidsuitspraak[59] lewer, gaan redelik vreemd te werk om 'n beslissing te bereik. Hy begin deur die vraag te bespreek of ons hier met 'n *modus* of 'n *fideicommissum* te make het[60] met verwysing na *Holley v Commissioner for Inland Revenue*.[61]

---

56 1947 3 SA 119 (A).
57 1999 2 SA 367 (HHA).
58 *Supra*.
59 Plewman AR, Melunsky Wn AR en Ngoepe Wn AR het saamgestem.
60 Die respondent se advokaat het sowel in die Spesiale Hof as in die hof *a quo* betoog dat die bedrae ter sprake deur die belastingpligtige bloot as *fiduciarius* ontvang is en dat dit hom nie persoonlik toegeval het nie. Die probleme het dus reeds by die aanvanklike regsadvies wat die respondent ontvang het en die betoë wat in die hof gelewer is, ontstaan. Die hof moes dus dié regsfigure bespreek omdat dit deur die respondent betoog is.
61 1947 3 SA 119 (A).

In die *Holley*-saak het die testateur sy onverdeelde aandeel in eiendomme asook sy aandeel in 'n vennootskapsboerdery aan die appellant bemaak. Die appellant was die seun van die testateur se broer en medevennoot. Die bemaking het bepaal dat die appellant sekere bedrae jaarliks aan die testateur se weduwee moes betaal. Die twispunt was of dié bedrae vir belastingdoeleindes deur die appellant in sy persoonlike hoedanigheid "ontvang" is. Die appèlhof beslis dat die bemaking aan 'n *fideicommissum* ten gunste van die weduwee onderworpe was en dat die geld dus nie in die erfgenaam se hande belasbaar was nie. Die tersaaklike bewoording in die testament lui soos volg:

> "[a]s well as the whole of my interest in the partnership business of Holley Brothers, *both bequests being made subject to the following conditions*:[62] (b) He, my said nephew James Hunt Holley, shall pay to his aunt, my wife, Francis Annie Holley, during the term of her natural life, a sum of seven hundred pounds (£700) per annum."

Daar is namens die Kommissaris betoog dat dié bepaling nie 'n *fideicommissum* daarstel nie, welke betoog deur Davis Wn AR met die volgende woorde verwerp is:[63]

> "How it can be suggested that this is not apt language to impose a *fideicommissum* is somewhat difficult to appreciate. I can see no difference between a bequest to A of £1, 000 with a direction that he shall hand over £500 to B and a bequest of £1, 000 to A on condition that he shall hand over £500 to B."

Soos reeds hierbo aangetoon, is dié stelling ver verwyder van die waarheid aangesien 'n voorwaarde die vestiging van regte affekteer terwyl dit nie die geval is by die *modus* nie. In hulle kritiek op die stelling, verduidelik Van der Merwe en Rowland[64] soos volg:

> "Van die opskortende voorwaarde verskil die *modus* daarin dat die *modus* nie 'n vertraging van die *dies cedit* tot gevolg het nie. By die *modus* word die begunstigde na die dood van die erflater onverwyld reghebbende tov die nagelate voordeel en is dan onderhewig aan die verpligting om aan die *modus* uitvoering te gee. By die opskortende voorwaarde word die bevoordeelde nie voor vervulling van die voorwaarde reghebbende nie en rus daar ook geen verpligting op hom om, waar moontlik tot vervulling van die voorwaarde mee te werk nie."

By hierdie uiteensetting kan ook gevoeg word dat die hof in die *Holley*-saak nie raakgesien het dat die bepaling 'n *nudum praeceptum*[65] sou wees indien dit inderdaad 'n voorwaarde is, soos wat die testateur dit beskryf het nie.[66]

Die redes waarom die hof waarskynlik besluit het dat hier van 'n *fideicommissum* sprake is, is die volgende: Die testateur verklaar in die testament dat sy testamentêre bepalings "[a]rise from our earnest desire that the existence and continuity of the 'Broadmoor' Estate should be preserved".[67] Hy bepaal daarna

---

62 So gekursiveer deur Davis Wn AR op 128 van die verslag.

63 1947 3 SA 119 (A) 128.

64 282.

65 Sien die bespreking hierbo.

66 Dit is alombekend dat testateurs dikwels terme gebruik wat iets anders beteken as dit wat hulle in gedagte het. Die goue reël by die uitleg van testamente is gevolglik "[t]o ascertain the wishes of the testator from the language used and, when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule of law from doing so" (*Robertson v Robertson's Executors* 1914 AD 503 507). Sien ook *Cuming v Cuming* 1945 AD 201; *Coetzee v Die Meester* 1982 1 SA 295 (O); *Cohen v Roets* 1992 1 SA 629 (A).

67 1947 3 SA 119 (A) 125.

dat, indien James die eiendomme binne drie jaar na sy dood sou vervreem, die totale opbrengs daarvan in trust gehou moet word en die inkomste daaruit aan die testateur se weduwee moet gaan en by haar dood onder sy broer se drie kinders verdeel moet word. Laasgenoemde bepaling skep dus 'n geldige ontbindende voorwaarde omdat bepaal word wat met die bevoordeling (of, soos in hierdie geval, die opbrengs daarvan) moet gebeur indien die begunstigde strydig met die voorwaarde optree. Die bepaling herinner aan 'n vervreemdingsverbod wat normaalweg by 'n *fideicommissum* aangetref word, maar dit stel nie 'n geldige *fideicommissum* daar nie. Slegs waar 'n begunstigde aangedui is ten gunste van wie die vervreemdingsverbod ingestel is, ontstaan 'n geldige *fideicommissum*.[68] Die vervreemdingsverbod kan ook ten gunste van 'n klas persone gemaak word, byvoorbeeld waar die erflater bepaal dat die bevoordeling nie "uit die familie" mag gaan nie. In so 'n geval is 'n *fideicommissum* ten gunste van die erfgenaam se afstammelinge ingestel.[69] In die onderhawige geval maak die testateur dit egter nie duidelik dat die vervreemdingsverbod ten gunste van iemand ingestel word nie – hy bepaal nêrens dat die eiendomme in "die familie" moet bly of aan iemand anders moet gaan indien dit vervreem word nie. Inteendeel, hy bepaal dat die erfgenaam welkom is om dit te vervreem, maar dan moet die opbrengs in *trust* gehou word. Selfs al sou 'n mens uit die testament kon aflei dat die testateur bedoel het dat die eiendomme in die familie moet bly (en dus dat 'n *fideicommissum* wel geskep is), sou dit steeds nie betrekking hê op die bedrae waaroor die geskil gehandel het nie. Dit is duidelik dat die bepaling ten opsigte van die bedrae wat aan die weduwee betaal moes word, 'n *modus* was waaraan die erfgenaam uitvoering moes gee.

Om nou terug te keer na die uitspraak in die *Van Blommestein*-saak: Appèlregter Hoexter[70] haal die gewraakte stelling in die *Holley*-saak (soos hierbo aangehaal) aan en verwys na die kritiek van verskeie skrywers op dié stelling.[71] Hy gaan ook voort met 'n bespreking van die *modus* deur na verskeie ou skrywers[72] asook na een moderne skrywer, hoewel in baie ou artikels,[73] te verwys. Dan laat die hof egter 'n gulde geleentheid om die stelling in *Holley* finaal die nekslag te bied, asook om die onderskeie regsfigure duidelik te onderskei, deur die vingers glip deur te bevind dat "dit vir doeleindes van die onderhawige saak egter onnodig [is] om enige regstreekse bevinding oor die korrektheid van die *Holley*-saak te maak".[74]

---

68 Sien Voet 36 1 27; De Groot 2 20 20; *Pritchard's Trustee v Estate Pritchard* 1912 CPD 87; *Kock v Administator Estate Kock* 1946 CPD 27; *Ex parte Van Schalkwyk* 1968 4 SA 441 (O).

69 Voet 36 1 27; *Lind v Calitz* 9 SC 268; *Ryklief's Heirs v Ryklief's Estate* 13 SC 64; *Anderson v Estate Anderson* 1946 CPD 611.

70 1999 2 SA 367 (HHA) 381.

71 Hoexter AR verwys ook na Van der Merwe en Rowland 282 soos hierbo aangehaal en na Corbett ea 349 vn 167.

72 Op 382 verwys hy na Goudsmit *Pandecten-Systeem* (De Tracy Gould vert) 172–173; Voet 25 1 12 (Gane vert) en Sohm *Institutes of Roman law* (Ledlie vert) 215.

73 Beinart 1958 *Acta Juridica* 94 vn 19 en 97 vn 43; Beinart 1968 *Acta Juridica* 185 vn 194.

74 1999 2 SA 367 (HHA) 383. Die hof maak ook die stelling (383) dat die *Holley*-saak nie by beregting van die onderhawige saak "nuttig aangewend" kan word nie. Dit is inderdaad waar maar die hof kon die geleentheid gebruik het om die verkeerde stellings in die saak omver te werp en om die beginsels vir moderne gebruik duidelik te stel. Daar kan ook nie met die minderheidsuitspraak (387) saamgestem word dat die *Holley*-saak nie uit beleidsoorwegings omver gewerp behoort te word nie aangesien die uiteindelike beslissing wel

vervolg op volgende bladsy

Die hof onderskei die twee gevalle op die feite deur gebruik te maak van die testateur se bedoeling. In beide gevalle is eiendomme aan 'n begunstigde bemaak met 'n bepaling daarby dat 'n bedrag jaarliks aan die weduwee betaal moet word. Volgens die hof is daar egter 'n onderskeid in die testateurs se bedoeling omdat die testateur in die *Holley*-saak geweet het dat die begunstigde geen bates het waaruit hy vir die jaarlikse bedrae aan die weduwee voorsiening sou kon maak nie. In die *Van Blommestein*-saak het die testateur egter geweet dat die begunstigde wel oor fondse beskik waaruit hy die bedrae kon betaal. Wat egter vreemd is, is dat die hof na die likwidasie- en distribusierekening van die boedel gaan kyk om te sê dat die testateur geweet het dat sy seun wel oor fondse beskik en ook byvoeg dat die seun een van die plase verkoop het en dus wel oor fondse beskik. 'n Mens kan hier met twee vrae volstaan, naamlik:

(1) Hoe sou die testateur geweet het dat sy seun een van die plase sou verkoop en sodoende fondse sou bekom?[75] En meer tersaaklik,

(2) hoe het die hof hierdie afleiding uit die testament gemaak sonder die gebruik van ekstrinsieke getuienis?[76]

Daar moet gevolglik met die minderheidsuitspraak van appèlregter Smalberger saamgestem word dat die feite van die twee sake nie onderskei kan word nie omdat dit in beide gevalle gaan oor die beoordeling van die vraag "of dit die testateur se bedoeling was dat die bron van die jaargelde die inkomste (of bates) van sy boedel moes wees".[77] In beide gevalle is dit duidelik dat dit juis die testateur se bedoeling was om seker te maak dat die jaargelde uit sy boedel betaal kon word.

Ten spyte van appèlregter Hoexter se verklaring dat die *Holley*-saak nie hier van nut kan wees nie, beslis hy dat hier nie van 'n *fideicommissum* sprake is nie omdat die "[e]rflater se testament nie na die instelling van 'n *fideicommissum* [verwys] nie; en geen fonds aangewys [word] as bron van die bedrae aan die weduwee betaal nie". Hoewel saamgestem moet word dat hier nie 'n *fideicommissum* bestaan nie, is dit nie om die redes wat die hof hier noem nie. Soos reeds

---

korrek was (die begunstigde het nie die bedrae in persoonlike hoedanigheid "ontvang" nie). Die gronde waarop dit bevind is, nl dat hier met 'n *fideicommissum* gewerk word, is egter verkeerd.

75 Die testateur se bedoeling dat die erfgenaam beide eiendomme moet behou, blyk duidelik uit die testament. Hy maak verskeie bepalings ten opsigte van die beswaring van die eiendomme met verbande asook ten opsigte van betalings wat sy seun uit sy eie boedel moet doen ten einde enige tekort aan te vul. Die testateur het dus nie die moontlikheid voorsien dat sy seun een van die eiendomme sou verkoop nie. Selfs al sou die gebruik van ekstrinsieke getuienis hier toelaatbaar gewees het (sien vn 76), kan die verkoop van die een eiendom nie as argument aangevoer word om te sê dat die testateur geweet het dat sy seun oor fondse sal beskik nie.

76 Dit is 'n algemene beginsel van die bewysreg dat ekstrinsieke getuienis nie gebruik mag word om die inhoud van 'n testament te weerspreek of aan te vul nie. Waar die testateur se bedoeling duidelik uit die testament blyk, is geen getuienis buite die testament toelaatbaar om aan te toon wat die testateur se bedoeling was nie (*Campbell v Daly* 1988 4 SA 714 (T); *Will v The Master* 1991 1 SA 206 (K)). In beide die *Holley*- en *Van Blommestein*-saak was die testateur se bedoeling duidelik, naamlik om vir sy weduwee voorsiening te maak, sonder inagneming van die begunstigde se finansiële posisie. *In casu* oortree die hof dus die reël teen die gebruik van ekstrinsieke getuienis om 'n bepaalde bedoeling wat nie uit die testament blyk nie aan die testateur toe te sê.

77 1999 2 SA 367 (HHA) 387.

gesê,[78] gebruik testateurs dikwels nie die korrekte terminologie nie – dus sal 'n testateur nie noodwendig 'n bepaling as 'n *fideicommissum* beskryf nie. Dit is ook nie duidelik wat die hof bedoel met die verwysing na 'n "fonds" nie, maar dié beskrywing voldoen duidelik ook nie aan die vereistes van 'n *fideicommissum* nie.[79] Dit is moontlik dat die hof hier probeer aandui het dat daar ook nie met 'n trust gewerk word nie, ten spyte daarvan dat die testateur dit self 'n "trust" noem.[80] Hoe dit ook al sy, die hof vervolg dan deur te sê dat die betrokke bepaling 'n *modus* is; daarom het die weduwee nie die geld van die erflater se boedel nie, maar regstreeks van die respondent ontvang en daarom kan die respondent dit nie van belasting aftrek nie. Hoewel daar weer eens saamgestem moet word dat hier 'n *modus* is, kan daar nie saamgestem word dat die jaarlikse bedrae van die respondent kom nie. Die bedoeling is baie duidelik dat die erfgenaam en die administrateur slegs geleibuise is vir die geld om by die weduwee uit te kom. Die erflater se bedoeling dat die geld uit sy eie (die erflater se) boedel moet kom kan nie betwyfel word nie aangesien hy juis bepaal het dat 'n verband oor een van die bemaakte eiendomme geregistreer moet word ten einde dié bedrae te betaal sodat sy seun nooit nodig sou hê om dit uit sy eie sak te betaal nie.[81]

Die hof beslis in die laaste instansie dat die hof *a quo* gefouteer het met sy bevinding dat die bedrae aan die weduwee betaal deur die respondent ontvang is in sy hoedanigheid as *fiduciarius* en dat die bedrae by die respondent se bruto inkomste ingesluit moet word. Soos reeds aangetoon, is dit moeilik om in te sien hoe die bedrae as deel van die respondent se inkomste beskou kan word aangesien hy bloot as geleibuis moes dien ten einde die bedrae aan die weduwee oor te dra. Die eenvoudiger benadering van die minderheid van die hof sou tot 'n korrekte en baie billiker oplossing gelei het.

6 2 3 Die minderheidsuitspraak

Appèlregter Smalberger wat die minderheidsuitspraak lewer, sien die werklike bedoeling van die erflater raak en verklaar:[82]

> "[N]a my mening, het die erflater wel bedoel dat die bedrae aan sy weduwee betaal noodwendig uit die inkomste wat die respondent sou verdien deur middel van die geërfde bates, soos in die *Holley* geval. Dat die erflater die bemaakte jaargeld wou koppel aan sy plaaseiendomme, blyk ook uit die bepalings van klousule 10.5 *(a)* van die testament – die registrasie van 'n verband; die oproep van die verband sou betalings nie gereeld gemaak word nie; indien opgeroep, die belegging van die kapitale bedrag van die verband in trust; en na afsterwe van sy weduwee 'moet die trustgoed aan sy seun oorgemaak word as sy uitsluitlike eiendom'."

Volgens die minderheidsuitspraak is daar nie 'n verskil in die feite van die onderhawige saak en die *Holley*-saak nie, maar ook appèlregter Smalberger is huiwerig om 'n bevinding oor die korrektheid van dié beslissing te maak.

---

78 Sien vn 66.

79 Sien die beskrywing hierbo.

80 Dit wil tog voorkom asof die testateur wel die skepping van 'n trust in gedagte gehad het maar eers in 'n later stadium, naamlik wanneer die verband wat sy seun ten gunste van die administrateur moes registreer (sien die aangehaalde bepaling bo), opgeroep word. Die administrateur moet dan die aanvanklike bedrag van R100 000 in trust hou en steeds die rente aan die weduwee betaal.

81 Sien die mening van Smalberger AR in 6 2 3.

82 1999 2 SA 367 (HHA) 387.

'n Verklaring vir die meerderheid se omseiling van die *Holley*-saak kan moontlik ook gevind word in appèlregter Smalberger se huiwering:

> "Uit 'n beleidsoorweging sou ek ook huiwer om na verloop van meer as 50 jaar dit omver te werp gesien die feit dat die moontlikheid bestaan dat menige testateurs bemakings kon gedoen het in navolging van die beslissing in *Holley* se saak."

Ook appèlregter Smalberger vind dit onnodig om oor die korrektheid van die *Holley*-saak 'n bevinding te maak, maar volg 'n baie eenvoudiger benadering wat tot 'n billike resultaat sou gelei het indien dit die meerderheidsbeslissing was. Volgens hom is die

> "[k]ernvraag of die jaargelde wat die respondent aan die erflater se weduwee moes betaal in die belastingjare onder bespreking, deel gevorm het van sy bruto inkomste soos omskryf in artikel 1 van die Wet – met ander woorde, verteenwoordig dit bedrae 'ontvang deur of toegeval aan of ten gunste van die respondent'."[83]

Dit maak dus geen verskil of die bedrae kragtens 'n *fideicommissum* of kragtens 'n *modus* oorbetaal moes word nie – daar moet slegs gekyk word of die bedrae die respondent "toegeval" het en dit is patent duidelik dat die bedrae nie die respondent nie maar wel sy moeder "toegeval" het.

7 GEVOLGTREKKING

Uit die *Van Blommestein*-saak blyk dit dat daar steeds nie duidelik onderskei word tussen die regsfigure *modus*, *fideicommissum*, voorwaardes en trust nie. Indien die howe dit nodig vind om van hierdie regsfigure gebruik te maak wanneer testamente uitgelê word, moet die verskillende beginsels onderskei word aangesien elkeen die vestiging van regte op verskillende maniere beïnvloed. Die identifisering van hierdie regsfigure is egter dikwels onnodig omdat die vasstelling van die testateur se werklike bedoeling meesal die probleem kan oplos.

> *A greater immediate problem is the bureaucratic revolution that has engulfed us all. We have now reached a point at which bureaucracies are not simply instruments of service to other elements in the society but have become self-generating. They generate their own tasks. They create their own crises, which they are then called upon to solve.*
>
> *Daniel Elazar* Exploring federalism 264.

83 1999 2 SA 367 (HHA) 388.

Polisie-optrede tydens arrestasie

J le Roux
BIur LLB LLD
Medeprofessor in Strafreg aan die Universiteit van Pretoria

LADT Moolman
BProc LLB
Kandidaat-prokureur, Pretoria

SUMMARY

Police conduct during arrest

This article addresses police conduct during arrest, and the possible difficulties resulting from such arrest, from a juridical perspective. It endeavours to demonstrate the precise nature of the rights and duties which must be adhered to by a police official when making an arrest.

The statutory rights which empower the police official to make a successful arrest are also evaluated. The origin and extent of these rights are focused upon. There is recognition of the fact that armed resistance by criminals against lawful arrest is an unfortunate but common phenomenon and that many police officials have already lost their lives while attempting to execute an arrest. This situation necessitates a re-evaluation of the rights of the police official *vis-à-vis* those of the arrested person. The fact that the person to be arrested also enjoys particular rights, and that various requirements have to be met by the police official in order to make a lawful arrest, is evidence of the formidable challenge which faces South Africa's police officials today.

1 INLEIDING

Suid-Afrika beleef 'n misdaadontploffing. Daagliks dra die media berigte oor skokkende misdaadsyfers op sowel nasionale as provinsiale vlak. Nie net is seksuele misdade (veral teen vroue en kinders) aan die toeneem nie, maar die voorkoms van geweldsmisdade soos moord en roof is onrusbarend hoog. Dikwels is hierdie misdade polities gemotiveerd. Behoorlike wetstoepassing ter vergelding van gepleegde misdade én voorkoming en afskrikking van beplande misdade, het dringend noodsaaklik geword. In hierdie verband speel die polisiebeampte 'n sleutelrol, aangesien wetstoepassing en die bestrawwing van regskending daarvan afhanklik is dat die oortreder behoorlik gearresteer en voor 'n geregshof gebring word.

Die uitvoering van arrestasies is dikwels vir die polisiebeampte problematies. Gedurende 1996 het 517 polisiebeamptes in die (gepoogde) uitvoering van hul pligte gesterf. Van hierdie 517 polisiebeamptes is 223 blatant vermoor terwyl hulle aan diens was. Teen Mei 1999 het 323 polisiebeamptes reeds gesterf, waarvan 74 sterftes aan moord te wyte was. In Gauteng alleen is 21 konstabels gedurende die eerste vyf maande van 1999 vermoor.[1]

1 *The Pretoria News* 1999-05-03.

In die lig hiervan word die regte en verpligtinge van sowel die polisiebeampte as die persoon wat gearresteer staan te word, onder die soeklig geplaas.

2 GEARRESTEERDES, AANGEHOUDENES EN BESKULDIGDES IN DIE SUID-AFRIKAANSE REG

Die regte van gearresteerde, aangehoude en beskuldigde persone word in artikel 35(1)–(3) van die Grondwet uiteengesit.[2] By nadere ondersoek verskil hierdie regte van mekaar. Dit is dus belangrik om tussen "arrestasie" en "aanhouding" te onderskei, asook om te bepaal wanneer 'n persoon die status van "beskuldigde" verwerf. Artikel 35(1) van die Grondwet bepaal dat slegs 'n persoon wat 'n beweerde misdryf gepleeg het, gearresteer kan word. 'n Persoon wat weens 'n ander rede aangehou word, geniet daarom nie dieselfde regte as 'n gearresteerde persoon nie. Weens die feit dat die term "arresteer" nie in die Grondwet omskryf word nie, kan dit wees dat dié term nie dieselfde betekenis dra as wat ingevolge artikel 39 van die Strafproseswet[3] daaraan geheg word nie.

Weens konstitusionele redes kan geargumenteer word dat indien 'n verdagte ondervra, gevange geneem of andersins aangehou word, hy die status van 'n "gearresteerde persoon" verkry. Regter Satchwell het hierdie probleem in *S v Sebejan* aangespreek.[4] Hy beslis dat die kern van die onderskeid tussen 'n gearresteerde en 'n verdagte daarin geleë is dat laasgenoemde nie bewus is dat hy onderhewig is aan die risiko om van 'n misdaad aangekla te word nie. Omdat die verdagte van hierdie risiko onbewus is, kan hy die gevaar loop om ondeurdag op te tree deur byvoorbeeld selfinkriminerende uitlatings te maak wat later as getuienis teen hom gebruik mag word. Regter Satchwell laat haar soos volg hieroor uit:

> "If the suspect is deprived of the rights which have been afforded to an arrested person then a fair trial is denied a person who was operating within a quicksand of deception while making a statement. The pre-trial procedure is a determinant of trial fairness and is implicit in the Constitution and in our common law. How can a suspect have a fair trial where pre-trial unfairness has been visited upon her by way of deception . .? The temptation should not exist that accused persons, who must *a fortiori* have once been suspects are not advised of rights to silence and to legal representation and never receive meaningful warnings prior to making statements which are subsequently tendered against them in their trials, because it is easier to obtain such statements from them while they are still suspects who do not enjoy constitutional protection."[5]

Regter Satchwell kom tot die gevolgtrekking dat verdagtes op dieselfde verhoorprosedures as gearresteerdes geregtig is. Daar kan geargumenteer word dat die beskerming van artikel 35(1) so ontwerp en dus van toepassing is op "gearresteerde" persone soos omskryf in die Strafproseswet. Sekere van die gearresteerde se regte, soos om binne 48 uur na arrestasie in 'n hof te verskyn,[6] maak duidelik geen sin wanneer dit toegepas word op nie-gearresteerde persone soos verdagtes nie. Selfs die swygreg,[7] asook die reg om ingelig te word oor die rede vir

2 Wet 108 van 1996.
3 Wet 51 van 1977.
4 1997 1 SACR 626 (W).
5 *S v Sebejan* 1997 1 SACR 626 (W) 634F–G.
6 A 35(1)(d) van die Grondwet.
7 A 35(1)(a).

arrestasie,[8] behoort streng gesproke slegs tot die situasie waar die verdagte opgesluit en onder beheer van die staat is.[9]

Aanhouding verwys na gedwonge fisiese inperking van 'n persoon se vryheid. Kanadese howe het beslis dat aanhouding voorkom waar 'n agent van die staat "assumes control over the movement of a person by demand or direction which may have significant legal consequences and which prevents or impedes access to counsel".[10] Die Kanadese hooggeregshof het beslis dat wanneer 'n persoon se asem vir alkohol getoets word, dit geag word dat hy in aanhouding is.[11] Dit is onwaarskynlik dat Suid-Afrikaanse howe hierdie benadering sal volg. Om aanhouding te bewerkstellig, is 'n baie ernstiger inperking van bewegingsvryheid nodig. 'n Persoon moet vir 'n wesenlike tydperk fisies ingeperk word.[12]

Die beskuldigde is 'n persoon wat formeel aangekla is. In *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) par 18 wys regter Kriegler egter daarop dat die woord a*angekla*

> "can be interpreted very narrowly, so as to refer to the formal arraignment or something tantamount thereto, or broadly and imprecisely to signify no more than some or other intimation to the accused of the crime(s) alleged to have been committed".

In die meeste gevalle volg aanhouding na arrestasie, wat dan uitloop op 'n formele aanklag. 'n Persoon word met ander woorde eers 'n "arrestant", dan 'n "aangehoudene" en laastens 'n "beskuldigde". Snyckers in Chaskalson *et al Constitutional law of South Africa* (1996) hoofstuk 27 gaan hiermee akkoord. Arrestasie lê die regsbasis vir die aanhouding van 'n persoon met die doel om sy teenwoordigheid in die hof te verseker. Waar aanhouding op arrestasie volg, is dit logies dat die regte deur artikel 35(2) van die Grondwet verleen gelyktydig met dié van artikel 35(1) geld. Dit is nie seker of 'n gearresteerde altyd op die regte van 'n aangehoudene kan steun nie. Arrestasie kan net op fisieke beheer oor die arrestant slaan terwyl aanhouding verwys na voortgesette inperking van vryheid deur middel van gevangenisskap. Die regte soos deur artikel 35(2) verleen, sal dus net tot 'n aangehoudene se beskikking wees terwyl hy in aanhouding is. Waar 'n persoon gearresteer, aangehou en dan weer vrygelaat word, verval die regte soos in artikel 35(2) uiteengesit. Die regte deur artikel 35(1) verleen, bly egter van krag. Daar kan geredeneer word dat arrestasie aanhouding is vir doeleindes van strafregtelike vervolging en dat arrestasie ook aanhouding veronderstel. Omgekeerd, beteken arrestasie egter nie altyd regmatige aanhouding nie. 'n Gevangene wat tronkstraf uitdien, is byvoorbeeld 'n aangehoudene maar nie 'n gearresteerde nie. 'n Aangehoudene sal derhalwe nie altyd op die regte van 'n gearresteerde kan aanspraak maak nie. Net beskuldigdes het die reg op 'n billike verhoor.[13] Hierdie reg van die beskuldigde word geskend waar dit blyk dat daar inbreuk gemaak is op sy regte tydens sy vroeëre arrestasie of aanhouding. Dit sou byvoorbeeld die geval wees waar die staat sou poog om getuienis teen die beskuldigde te gebruik wat bekom is deur handelinge waardeur die beskuldigde se regte tydens sy arrestasie of aanhouding geskend is.

---

8 A 35(1)(b).

9 Hierdie situasie sal hom voordoen wanneer die verdagte gearresteer is.

10 *R v Therens* 1985 13 CRR 193 214. In *R v Hawkins* 1993 14 CRR 243 (SCC) is egter beslis dat ondervraging wat vóór arrestasie geskied nie aanhouding daarstel nie.

11 *R v Therens* 217.

12 Dit is telkens 'n feitevraag wat 'n fisiese inperking en 'n wesenlike tydperk sal wees. Sien De Waal, Currie en Erasmus *The Bill of Rights handbook* (1998) 424.

13 A 35(3) van die Grondwet.

3 VEREISTES VIR 'N REGMATIGE ARRESTASIE

'n Belangrike beginsel is deur die appèlhof neergelê in *Tsose v Minister of Justice* 1951 3 SA 10 (A). Die hof het naamlik beslis dat indien die oogmerk van 'n arrestasie is om die verdagte se lewe te vergal en hom die skrik op die lyf te jaag, sodanige arrestasie wederregtelik sal wees. Die rede hiervoor is dat die uitsluitlike doel van 'n arrestasie is om die beskuldigde voor die hof te kry. Die feite van bovermelde beslissing toon dat die polisie onwettige plakkers op 'n plaas herhaaldelik gearresteer het ten einde hulle op dié wyse te verplig om pad te gee. Hierdie optrede het die uitsluitlike oogmerk van bestrawwing gehad en is om hierdie rede deur die hof as 'n wederregtelike arrestasie bestempel. Arrestasie verteenwoordig 'n drastiese inbreukmaking op die individu se reg op vryheid van beweging. Die Grondwet verhef die reg van vryheid van beweging tot 'n fundamentele reg.[14] In die lig hiervan is dit van uiterste belang dat arrestasies regmatig uitgevoer word.

Regmatige arrestasie en regmatige voortgesette aanhouding wat daarop volg, vereis die volgende:

- Eerstens word vereis dat die arrestasie, hetsy met of sonder 'n lasbrief, behoorlik gemagtig moet wees. Daar moet dus 'n statutêre bepaling wees wat arrestasie magtig.
- Die polisiebeampte moet tweedens fisieke beheer uitoefen oor die persoon wat hy arresteer. Hierdeur moet die verdagte of arrestant se bewegingsvryheid aan bande gelê word. Indien die verdagte hom aan bewaring onderwerp, word arrestasie bewerkstellig deurdat die polisieman sy liggaam werklik aanraak of, indien omstandighede dit van hom vereis, deur sy liggaam met geweld in bedwang te bring.[15]
- Die derde vereiste is dat die gearresteerde ingelig moet word oor die rede vir sy arrestasie. Artikel 39(2) van die Strafproseswet is gebiedend in die opsig dat die polisieman ten tyde van die arrestasie of onmiddellik daarna die gearresteerde moet meedeel wat die rede vir sy inhegtenisneming is. In die geval van arrestasie met 'n lasbrief moet die arresteerder op versoek van die arrestant 'n afskrif van die lasbrief aan hom oorhandig. Aanhouding of bewaring sal onregmatig wees indien hierdie vereiste nie nagekom word nie.[16] Die omstandighede van elke geval sal bepaal of die arrestant genoegsaam ingelig is aangaande die rede vir sy inhegtenisneming. Die presiese bewoording van die klag wat later aan hom gestel sal word, hoef nie ten tyde van die arrestasie *verbatim* aan die gearresteerde bekend gemaak te word nie.[17] Indien die rede vir 'n persoon se arrestasie later aan hom gegee word, word die onregmatigheid van die arrestasie gekondoneer. Die arrestasie van 'n papdronke wat normaalweg onregmatig sou wees waar die rede vir sy arrestasie eers later, wanneer hy nugter is, aan hom meegedeel word, word op hierdie wyse bewerkstellig. Inligting wat 'n persoon self behoort te besit, hoef nie in besonderhede aan hom verstrek te word nie, veral waar hy *in flagrante delicto* betrap word.[18]

---

14 A 12(1).
15 A 39(1) van die Strafproseswet.
16 *S v Ngidi* 1972 1 SA 733 (N).
17 Sien in hierdie verband *Minister of Law & Order v Kader* 1991 1 SA 42 (A) en *Brand v Minister of Justice* 1959 1 SA 712 (A).
18 Die beslissing van die hof in *Macu v Du Toit* 1982 1 SA 272 (K) en *Minister of Law & Order v Parker* 1989 2 SA 633 (A) dien as gesag.

- 'n Laaste vereiste vir 'n regmatige arrestasie is dat die arrestant so gou redelik moontlik na die voorgeskrewe gesag geneem word. Artikel 50(1) van die Strafproseswet bepaal dat die arrestant so gou moontlik na 'n polisiekantoor, of in geval van arrestasie met 'n lasbrief, na die plek in die lasbrief genoem, geneem moet word. In *Ezekiel v Kynoch* (1923-04-13 (N)) is iemand 20 uur lank op 'n plek vyf kilometer vanaf 'n polisiestasie aangehou hangende 'n ondersoek na diefstal. Die hof beslis dat die aanhouding onregmatig was en staan skadevergoeding toe.

4 DIE PLIG OM TE ARRESTEER

In *Minister van Polisie v Ewels* het die respondent skadevergoeding van die appellant geëis. Die respondent het aangevoer dat lede van die Suid-Afrikaanse Polisie (soos dit toe bekend gestaan het) nalatig opgetree het deurdat hulle versuim het om hulle (statutêre) plig om die aanrander te arresteer na te kom. Die respondent is in die teenwoordigheid van polisiebeamptes aangerand en het as gevolg hiervan beserings opgedoen. Die respondent het aangevoer dat hierdie versuim van die polisiebeamptes om (positief) op te tree en die aanranding te voorkom, neerkom op die nie-nakoming van 'n statutêre plig. Die hof *a quo* het die respondent gelykgegee. Die appèl teen die beslissing van die hof *a quo* word verwerp. Hoofregter Rumpff het ter bekragtiging van die bevinding van die hof *a quo* dit nodig geag om kommentaar te lewer oor die effek van artikel 5 van die Polisiewet.[19] Artikel 5 lui soos volg:

> "Die werksaamhede van die Suid-Afrikaanse Polisie is, onder meer –
> (a) die bewaring van die binnelandse veiligheid aan die Republiek; (*sic*)
> (b) die handhawing van wet en orde;
> (c) die ondersoek van enige misdryf of beweerde misdryf;
> (d) die voorkoming van misdaad."

Hoofregter Rumpff het na die ontleding van artikel 5 tot die bevinding gekom dat, indien die wetgewersbedoeling soos dit uit die wet blyk in aanmerking geneem word, dit syns insiens nie gesê kan word dat nie-nakoming van die bepalings van artikel 5 deur 'n polisiebeampte noodwendig statutêre aanspreeklikheid daarstel nie. Die doel van artikel 5 is om in breë trekke die aard en werksaamhede van die polisie aan te dui en dit blyk nêrens uit die wet dat dit ooit die bedoeling van die wetgewer kon wees dat blote nie-nakoming deur 'n polisiebeampte van die plig om 'n bepaalde misdaad te voorkom of te ondersoek, statutêre (deliktuele) aanspreeklikheid skep nie. Die teendeel blyk egter uit artikel 32 van dieselfde wet, wat lui dat "enige siviele geding teen die staat of 'n persoon ten opsigte van enigiets uit hoofde van hierdie Wet gedoen ingestel word binne 6 maande nadat die eisoorsaak ontstaan het".

As uitgangspunt word aanvaar dat daar in die algemeen geen regsplig op 'n persoon rus om te verhinder dat iemand anders skade ly nie, al sou eersgenoemde maklik kon verhinder dat die skade gely word en al sou op *suiwer morele gronde* van so 'n persoon verwag kon word dat hy daadwerklik moet optree om die skade te verhinder. Tog kan die *boni mores* onder sekere omstandighede vereis dat 'n persoon moet verhinder dat 'n ander skade ly. Sou hy versuim om onder hierdie besondere omstandighede op te tree en gevolglik

19 Wet 7 van 1958.

nalaat om sy regsplig uit te voer, ontstaan daar 'n onregmatige late wat aanleiding kan gee tot 'n eis om skadevergoeding. Hoofregter Rumpff verklaar soos volg met verwysing na besondere gevalle van versuim (late) om positief op te tree ten einde nadeel te voorkom:

> "Dit skyn of dié stadium van (regs)ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so 'n aard is dat die late nie alleen morele verontwaardiging ontlok nie, maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree."[20]

In die onderhawige saak het 'n aantal polisiebeamptes hul in 'n polisiekantoor bevind. Dit is 'n gebou wat deur die polisie beheer word en wat vir lede van die publiek toeganklik is ten einde 'n klag te kan lê, synde een van die funksies wat 'n polisiekantoor vervul. Volgens artikel 5 van die Polisiewet[21] is een van die polisie se werksaamhede die voorkoming van misdaad. Dit is dus logies dat daar tussen 'n lid van die publiek en 'n polisiebeampte aan diens, 'n ander verhouding sal bestaan as tussen 'n lid van die publiek en 'n belangelose vreemdeling. Die polisiebeampte moet nie net misdaad afskrik of opspoor nie, maar moet ook mense beskerm. Die respondent is in die teenwoordigheid van 'n aantal polisiebeamptes, in die polisiekantoor, aangerand. Dit sou vir die polisiebeamptes redelik moontlik en selfs maklik gewees het om die aanval op die respondent te verhoed of beëindig.

Hoofregter Rumpff kom tot die slotsom dat die polisiebeamptes 'n regsplig gehad het om die respondent te hulp te kom. Hulle is derhalwe teenoor die respondent aanspreeklik. Die belang van die beslissing lê in die klem wat die hof plaas op die regsoortuiging van die gemeenskap as toets om te bepaal of daar in 'n gegewe geval 'n regsplig op 'n polisiebeampte rus om positief op te tree.

5 VERSET TEEN ARRESTASIE

Artikel 49 van die Strafproseswet 51 van 1977 lui soos volg:

> "(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 of 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 in 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 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."

---

20 *Minister van Polisie v Ewels supra* 597A–B.
21 *Ibid.*

Die filosofie onderliggend aan artikel 49 is die handhawing van wet en orde en die bevordering van behoorlike regspleging. Verdagtes word verhinder om deur middel van weerstand (wat die vorm van geweld kan aanneem) of ontvlugting arrestasie, en die daaropvolgende regsproses in die wiele te ry. Behoorlike bevoegdhede en magtiging om teen voortvlugtenes en ander verdagtes op te tree wat weerstand bied, is dus 'n *conditio sine qua non* vir suksesvolle arrestasie en behoorlike regspleging.

Artikel 49 dui nie as sodanig aan wat die moontlike gevolge sou wees indien 'n polisiebeampte buite die bevoegdhede wat deur die artikel verleen word, optree nie. Trouens, daar is nêrens in die Strafproseswet[22] 'n bepaling wat lig op hierdie vraag werp nie. Die bedoeling van die wetgewer met hierdie artikel is om sekere noodsaaklike bevoegdhede by arrestasie te verleen en nie om wederregtelike optrede te omskryf nie. Die algemene beginsels van strafregtelike aanspreeklikheid bly dus onveranderd. Wanneer die polisiebeampte wat na bewering sy/haar bevoegdhede ingevolge artikel 49 oorskry het, van 'n misdaad aangekla word, moet die staat as algemene reël al die gewone elemente van die betrokke misdaad bo redelike twyfel bewys. Hierdie aspek is deur die appèlhof beklemtoon in *S v Barnard*[23] en *S v Swanepoel*.[24] Die pleeg van 'n misdaad (bv moord) behels dus meer as bloot nie-nakoming van artikel 49. Die artikel moet gevolglik teen die agtergrond van die gemeenregtelike vereistes vir strafregtelike aanspreeklikheid gesien word.

Artikel 39(1) van die Strafproseswet verwys eweneens na die toepassing van geweld. Hierdie artikel bepaal die volgende:

> "Inhegtenisneming word met of sonder 'n lasbrief uitgevoer en, tensy die persoon wat in hegtenis geneem staan te word hom aan bewaring onderwerp deur sy liggaam werklik aan te raak of indien die omstandighede dit vereis deur sy liggaam met geweld in bedwang te bring."

In sy minderheidsuitspraak in *Macu v Du Toit*[25] het appèlregter Botha interessante opmerkings gemaak oor die verhouding tussen artikel 39(1) en 49 van die Strafproseswet. Volgens die regter het artikel 39(1) betrekking op die voorgeskrewe metode van arrestasie waarby die aanwending van geweld, indien dit nodig sou wees, inbegrepe is, terwyl artikel 49(2) die toelaatbare *quantum* van geweld omskryf wat geoorloof is wanneer 'n poging tot inhegtenisneming lei tot verset of ontvlugting deur die persoon wat gearresteer staan te word. Die twee artikels vind dus aansluiting: artikel 39(1) magtig geweld, terwyl artikel 49 vereistes en grense vir geweld daarstel. Hierdie twee artikels moet duidelikheidsonthalwe altyd saamgelees word ter bepaling van die korrekte wetgewersbedoeling.

Volgens die appèlhof moet artikel 49 streng uitgelê word aangesien hierdie artikel moontlik verreikende beskerming aan 'n beskuldigde kan bied. Regter Coetzee verwys in *S v Barnard* na artikel 49 as "'n verskoningsgrond wat baie streng vertolk moet word". Die vraag kan gestel word of hy nie te ver gaan met sy streng uitleg van artikel 49 nie, sodat hy uiteindelik die beskuldigde wat buite artikel 49 opgetree het aan moord skuldig bevind en wederregtelikheidsbewussyn vind waar die beskuldigde die situasie objektief verkeerd beoordeel het. Die

---

22 *Ibid.*
23 1986 3 SA 1 (A).
24 1985 1 SA 576 (A).
25 *Ibid.*

gebruiklike waarskuwing om artikel 49 streng uit te lê, kan ook misbruik word, nie net deur die betrokke artikel verkeerd toe te pas nie, maar ook deur die strafreg dekades terug te plaas deur die invoering van 'n tipe "opsetlose moord". Sonder ingrypende bevoegdhede aan die kant van die arresteerder sal behoorlike regspleging nie moontlik wees nie. Daar kan aanvaar word dat selfs die blote bestaan van artikel 49 verdagtes kan afskrik van weerstandbieding teen arrestasie. In sake soos *Macu v Du Toit*[26] wil dit tog lyk asof die howe in hulle streng uitleg van artikel 49 poog om die privaat persoon, eerder as die polisiebeampte, beduidend te beperk. Die korrektheid van sodanige benadering word betwyfel. Logieserwys kan daar omstandighede bestaan waar die privaat persoon juis meer ervaring van arrestasie het as die polisiebeampte. Gestel 'n werknemer van 'n buurtwagmaatskappy het tien jaar ondervinding van arrestasie en hy arresteer 'n inbreker. Gestel verder dat hy tydens 'n aanrandingsaak teen hom artikel 49 as verweer opwerp. Sal dit dan in hierdie omstandighede reg en billik wees om hierdie artikel strenger teen die privaat persoon uit te lê as teen 'n polisiebeampte wat minder ervaring het? Onses insiens is die antwoord ontkennend. Verder is daar in die bewoording van artikel 49 geen aanduiding dat dit die bedoeling van die wetgewer kon wees om tussen polisiebeamptes en privaat persone te onderskei nie.

6 EFFEK VAN ARRESTASIE

Die effek van arrestasie is dat die arrestant daarna in wettige bewaring is en dat hy in bewaring aangehou mag word totdat hy wettig uit bewaring ontslaan of vrygelaat word. Selfs waar arrestasie of aanhouding onregmatig is, sal dit geen invloed hê op die beskuldigde se aanspreeklikheid ten opsigte van die ten laste gelegde misdaad nie. Teoreties kan 'n aangehoudene wat onregmatig aangehou word by die hof aansoek doen om vrylating. In die praktyk sal dit egter toelaatbaar wees vir belanghebbendes soos familie, vriende, vennote of medelede van 'n vereniging of politieke party om dit ten behoewe van die aangehoudene te doen.

Die *interdictum de libero exhibendo* is 'n belangrike remedie wat aangewend kan word om regterlike hersiening van polisie-optrede te verkry en gevolglik die onderdaan teen arbitrêre vryheidsberowing te beskerm. Die hof word genader om 'n bevel dat die respondent (wat die Minister van Vryheid en Sekuriteit, die bevelvoerende offisier, die sipier, ens, kan wees), die (liggaam van die) aangehoudene op 'n sekere datum en tyd voor die hof moet bring. Hierdie bevel word gekoppel aan 'n bevel *nisi* en die respondent moet redes aanvoer waarom die aangehoudene nie vrygelaat moet word nie.

Tot onlangs was daar onsekerheid of Engelsregtelike of gemeenregtelike beginsels tydens hierdie aansoek toegepas moet word. Die Engelsregtelike remedie is die sogenaamde *habeas corpus*, en die gemeenregtelike remedie die *interdictum de libero homine exhibendo*. In die Engelse reg het daar tot onlangs geen reg op appèl bestaan vir 'n party teen wie 'n *habeas corpus*-bevel gegee is nie. In *Kabinet van die Tussentydse Regering vir Suidwes-Afrika v Katofa*[27] het die appèlhof beslis dat die *habeas corpus*-beginsel nie in ons reg opgeneem is nie en dat die beginsels van die *interdictum de libero homine exhibendo* in Suid-Afrika geld. Die hof beslis verder ook dat 'n reg van appèl teen die toestaan of weiering van 'n bevel tot vrylating vir alle partye bestaan.

---

26 *Ibid.*
27 1987 1 SA 695 (A) 727E.

Die pligte en bevoegdhede van persone wat deur 'n lasbrief gemagtig is om iemand in hegtenis te neem, stem grotendeels ooreen met dié van persone wat sonder 'n lasbrief arrestasie uitvoer. Hierdie pligte en bevoegdhede behels die plasing van voorwerpe wat aan die gearresteerde gevind word in veilige bewaring, die algemene bevoegdheid wat nodig is vir die uitvoering van 'n arrestasie en die bevoegdheid om te eis dat derde partye tydens die arrestasie daarmee behulpsaam moet wees.

7 DIE REGTE VAN GEARRESTEERDES IN DIE LIG VAN DIE GRONDWET

7 1 Die reg om te swyg

Die beskuldigde se swygreg spruit voort uit die vermoede van onskuld en ontstaan sodra arrestasie plaasvind. 'n Beskuldigde is nie verplig om die vervolging by te staan in sy taak nie en daar mag nie later teen die beskuldigde in die hof gediskrimineer word omdat hy sy swygreg uitgeoefen het nie. Verdagtes en persone wat nie gearresteer is nie, beskik egter nie oor 'n swygreg nie.

Voorts sal die swygreg nie die polisie verhoed om individue voor te keer en te ondervra nie. 'n Verdagte mag nie swyg wanneer die polisie sy naam of adres van hom vra nie. Sodanige optrede deur 'n verdagte sou moontlik die misdaad poging tot regsverydeling of regsbelemmering daarstel.

7 2 Die reg om onverwyld van die reg om te swyg verwittig te word

Die arrestant moet so gou doenlik oor sy swygreg ingelig word[28] asook van die gevolge indien hy nie hierdie reg uitoefen nie.[29] Die belang van hierdie reg is daarin geleë dat dit vir die arrestant moontlik moet wees om 'n ingeligte besluit te kan neem. Hy kan dus uit vrye wil oorweeg (soos bv in die geval van 'n formele erkenning) of hy inligting aan die staat gaan verstrek of nie. Indien die arrestant steeds verkies om inligting te verstrek, kan dit as getuienis teen hom in 'n hof gebruik word.[30] Indien die inligting verskaf word sonder dat hy van hierdie reg bewus was, kan die inligting van die hofverrigtinge uitgesluit word.

In beginsel moet die arrestant skriftelik of mondeling oor sy regte ingelig word. Dit kan ook stilswyend geskied waar die arrestant nie kan lees nie en boonop doof is. Die taal waarin die arrestant ingelig word, moet 'n taal wees wat hy kan verstaan (onder sekere omstandighede behoort gebaretaal voldoende te wees). Die taal wat gebesig word, hoef nie noodwendig die arrestant se moedertaal te wees nie. Die hof het in *S v Agnew*[31] beslis dat waar die arrestant reeds gewaarsku is om te swyg, die swygreg steeds ondermyn kan word deur opvolgende handelinge deur die staat. In hierdie saak[32] het die polisie versuim om te wag vir die arrestant se prokureur wat teenwoordig moes wees. Die arrestant het voortgegaan en 'n verklaring aan 'n landdros gemaak. Die prokureur sou sy kliënt geadviseer het om nie die verklaring onder die omstandighede te maak nie. Die verklaring was derhalwe ontoelaatbaar in die hof. Die hof het bevestig dat die teenwoordigheid van 'n prokureur wat sy kliënt bystaan, inlig en adviseer die swygreg versterk.

---

28 A 35(1)(b)(i).
29 A 35(1)(b)(ii).
30 'n Bekentenis deur die arrestant sou op hierdie wyse as getuienis aangewend kon word.
31 1996 2 SACR 535 (C) 541D.
32 *Ibid*.

7 3 Die reg om nie verplig te kan word om 'n bekentenis of erkenning te maak wat as getuienis teen daardie persoon gebruik sou kon word nie

'n Formele erkenning word binne die hof gemaak. Indien die hof dit aanvaar, is dit dieselfde as 'n pleit van skuldig. 'n Bekentenis kan binne of buite die hof gemaak word. Die effek daarvan is egter om 'n ongunstige feit buite geskil te plaas. Tradisioneel is daar onderskei tussen 'n bekentenis en 'n erkenning. Waar die erkenning nie ekwivalent was aan 'n pleit van skuldig nie, is daar nie in dieselfde mate daarteen gewaak as in die geval van bekentenisse nie. Die Grondwet[33] erken nie meer hierdie onderskeid nie. In *S v Mbolombo*[34] is geargumenteer dat die betaling van 'n baie hoë bedrag borggeld gelykstaande was aan erkenning van skuld deur die beskuldigde. Die hof beslis dat die landdros ten tyde van die vasstelling van die borgbedrag daarop geregtig was om aan te neem dat die beskuldigde skuldig was aan die roof van 'n groot bedrag geld en dat hy steeds in besit daarvan was.

Die belangrikste toepassing van hierdie reg word gevind in *S v Zuma*,[35] waar die Konstitusionele Hof artikel 217(1)(b)(ii) van die Strafproseswet ongeldig verklaar het. Hierdie subartikel het 'n bewyslas op die beskuldigde geplaas om onder andere te bewys dat 'n bekentenis voor 'n landdros nie vrywillig gemaak is nie. Die hof het beslis dat die gemeneregsreël dat die staat bo redelike twyfel moet bewys dat 'n bekentenis vrywillig gemaak is, 'n integrerende deel van die regte soos verskans in artikel 25(1)(c) van die interim Grondwet 200 van 1993 was.

7 4 Die reg om so gou as wat redelikerwys moontlik is voor 'n hof gebring te word

Artikel 50(1) van die Strafproseswet plaas 'n plig op die staat om die arrestant binne 48 uur voor 'n laer hof te bring. Hierdie artikel word deur die Grondwet gesteun.[36] Daar moet op gelet word dat die konstitusionele reg vereis dat 'n arrestant so gou as wat redelikerwys moontlik is en nie langer as 48 uur na inhegtenisneming nie voor 'n hof moet verskyn. Die 48-uur tydperk stel dus die limiet. Die reg van die individu kan beperk word deur oorskryding van die tydperk mits die regskending regverdigbaar is binne die konteks van artikel 36 van die Grondwet.[37]

8 KONKLUSIE

Suid-Afrika word tans deur 'n vlaag van misdaad geteister. Die vergelding van misdaad deur strafoplegging is afhanklik van die teenwoordigheid van die misdadiger in 'n geregshof. Deur die suksesvolle uitvoering van arrestasies, synde een metode om die teenwoordigheid van die beskuldigde in die hof te verseker, speel die polisiebeampte derhalwe 'n kardinale rol in strafregspleging.

Statistieke toon dat verset teen arrestasie 'n toenemende verskynsel van die moderne samelewing is. Daar word gevolglik daagliks hoër eise aan die polisiebeampte gestel wat die taak om geharde (en dikwels gewapende) misdadigers te arresteer, opgelê word. Die polisiebeampte word statutêr vir hierdie taak bemagtig. Tog beskik die arrestant eweneens oor bepaalde regte wat deurgaans deur die polisiebeampte eerbiedig moet word. Slegs dán kan die doeltreffendheid en integriteit van Suid-Afrika se strafregstelsel verseker word.

---

33 *Ibid.*
34 1995 5 BCLR 541 (C).
35 1995 4 BCLR 401 (CC).
36 *Ibid.*
37 *Ibid.*

The open society

Donrich W Jordaan
BLC LLB
Unit for Policy Studies, Centre for International Policy Studies, University of Pretoria

OPSOMMING

Die oop gemeenskap

Die relatiewe nuutheid van en onvertroudheid in regskringe met die konsep *oop gemeenskap* het aanleiding gegee tot die gerieflike hantering van die konsep as bloot 'n deel van die frase oop *en demokratiese gemeenskap*, met die klem op die meer bekende konsep *demokrasie*, wat die relevansie van die konsep oop gemeenskap in die praktyk drasties verminder. Die doel van hierdie artikel is om by te dra tot regspraktisyns se begrip van hierdie belangrike konsep en hul gewilligheid om dit in die praktyk te gebruik. Eerstens word die oorsprong van die oop gemeenskap in die werk van Bergson bespreek. Hierna skuif die fokus na Popper, onge-twyfeld die invloedrykste skrywer oor die onderwerp. Popper se invloedryke status word bevestig deur die feit dat hy deur die Konstitusionele Hof as gesag aangehaal word. Drie beginsels van 'n oop gemeenskap word uit Popper se definisie afgelei en ondersoek, naamlik vryheid, menslikheid en rasionaliteit. Wat verder duidelik blyk uit Popper se definisie, is dat 'n gemeenskap se oopheid nie net gemeet kan word aan die gemeenskap se formele navolging van die drie beginsels nie, maar baie spesifiek aan die gemeenskap se substantiewe – voetsoolvlak – navolging daarvan. Vervolgens word 'n *oop gemeenskap* onderskei van 'n vry gemeenskap en Popper se siening van individualisme word krities geëvalueer. Hierna val die kalklig op die merkwaardige bydrae wat deur regter Sachs gemaak is deurdat hy die oop gemeenskap onlosmaaklik aan diversiteit verbind het. Ten slotte word 'n geïntegreerde definisie voorgestel om die kern van die verskillende bydraes saam te vat.

1 INTRODUCTION

Since the dawning of our country's constitutional era the phrase *open and democratic society*[1] has become well known. While the concept *democracy* is used by other notable constitutions,[2] our young Constitution is the only one to refer to the concept *open society*, thereby introducing a political scientific concept into South African jurisprudence. But how well are legal practitioners acquainted with the *meaning* of this concept? The relative novelty and unfamiliarity in legal circles of the concept *open society* present the risk that the concept will conveniently be treated as just a part of the larger phrase with the emphasis on the far better known concept *democracy* – thus rendering the concept *open society* meaningless and of no particular relevance in itself. This untenable situation is clearly demonstrated by comparing the frequency with which these different concepts have been used in constitutional judgments. In the Butterworths Constitutional Law Reports the phrase

1 Ss 36(1) and 39(1) of The Constitution of the Republic of South Africa, Act 108 of 1996 (1996 Constitution).

2 See the Basic Law for the Federal Republic of Germany, art 18; and the Canadian Charter of Rights and Freedoms s 1.

"open and democratic society" is used 431 times, and the phrase "democratic society" 748 times. The phrase "open society", however, is used on a mere twenty occasions!

In this article I intend to shed some light on this central and unique part of our Constitution. I shall first discuss the origin of the concept and then its analysis by Popper, whose name has since become synonymous with the concept. After this the focus will shift to recent judgments that have contributed to our understanding of the content of the concept.

2 BIRTH OF THE CONCEPT: HENRY BERGSON

During the early thirties Bergson introduced the concept of the open society[3] in his book *Two sources of morality and religion*.[4] For Bergson the open society is a stage in the development of humanity, in essence entailing a global state, inclusive of the whole of humanity. This global state is based on religious notions such as love and the intrinsic dignity of all people.[5] A closed community, on the other hand – although it can be immensely large – includes only a segment of humanity and *excludes* another at any given point.[6] The difference between the open and the closed society is thus one of kind and not simply one of degree.[7] In spite of the universality of the open society Bergson views it as focused on the individual,[8] in contrast with the closed society which tends to be of a more organic[9] and therefore more impersonal[10] in nature.

The holistic character of Bergson's concept of the open society needs to be accentuated. By definition there can be only one all-inclusive open society, since there is only one humanity – hence the use of the definite article with the concept.[11] The question whether a nation state can be an open society immediately comes to mind. It is my contention that the Bergsonian open society can never be realised within the confines of the nation-state system, a political structure that by definition divides humanity. The question arises whether the framers of our Constitution were aware of this incompatibility. Since the 1996 Constitution expressly declares South Africa a sovereign (nation) state,[12] the only answer can be that the concept open society in our Constitution was not intended to have (and therefore cannot have) a Bergsonian content.

3 THE OPEN SOCIETY'S COMING OF AGE: KARL POPPER

During World War II, when it seemed that Nazism and Fascism might triumph, Popper wrote his famous book, *The open society and its enemies*, first published in 1946. Since then *The open society and its enemies* has come to be considered a landmark in the development of political theory and was also often utilised as a weapon on the academic battlefields of the Cold War.

---

3 See Germino and Von Beyme *The open society in theory and practice* (1974) 1.
4 Originally published in French as *Les deux sources de la morale et de la religion* (1932) trans Andra and Brereton (1935).
5 *Idem* 25.
6 *Idem* 22.
7 *Idem* 24.
8 *Idem* 42.
9 *Idem* 29.
10 *Idem* 26.
11 *Idem* 256. "The open society is the society which is deemed in principle to embrace all humanity."
12 S 1.

Popper defines an open society as a society which

> "rejects the absolute authority of the merely established and the merely traditional while trying to preserve, to develop, and to establish traditions, old or new, that measure up to [the] standards of freedom, of humaneness, and of rational criticism".[13]

3 1 Distinguishing between Popper and Bergson

Popper was well aware that Bergson also used the concepts open and closed society, and specifically distinguishes his analysis of the concept from that of Bergson:

> "My term indicates a *rationalist* distinction; the closed society is characterised by the belief in magical taboos, while the open society is one in which men have learned to be to some extent critical of taboos, and to base decisions on the authority of their own intelligence (after discussion). Bergson, on the other hand, has a *religious distinction* in mind."[14]

A further interesting difference between Popper and Bergson pertains to the advancement of the open society: Popper supports *liberal* imperialism,[15] while Bergson rejects all kinds of imperialism and holds that the open society must advance through cultural permeation rather than through power.[16] A more important difference, however, is that the object of the society's openness according to Bergson is humanity – other people – something concrete, while Popper sees it as abstract, namely value systems and ideas. This difference results in Bergson's insistence on a holistic open society, including all of humanity, contrary to the possibility – and indeed prevalence – of multiple (non-inclusive) open societies in Popper's paradigm.

3 2 The principles of an open society

In his definition Popper emphasises the concepts freedom, humaneness, and rationality. It is suggested that, since these three concepts are used as the basis for measuring openness, they can most suitably be described as *principles* of an open society.

3 2 1 Freedom

Although Popper does not provide us with an exact definition of freedom, he does make certain very instructive comments on the subject. The fundamental purpose of the state, according to Popper, is to protect that freedom which does not *harm* other citizens.[17] Furthermore:

> "[T]he state must limit the freedom of the citizens as equally as possible, and not beyond what is necessary for achieving an equal limitation of freedom."[18]

A recent contribution to our understanding of freedom in the context of an open society comes from Judge Ackermann's minority judgment in *Ferreira v Levin NO*

---

13 Popper *The open society and its enemies* Vol I (1950) Pref ix.
14 *Idem* Notes 202.
15 *Idem* 176.
16 Germino and Von Beyme (fn 3) 15.
17 Popper Vol I (fn 13) 110. Note Popper's use of the classical harm principle, introduced by John Stuart Mill in *On liberty*: Mill defined freedom as follows: "The only freedom that deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it." (*On liberty and the subjection of women* (1996) 16.)
18 Popper Vol I (fn 13) 110.

and *Vryehoek v Powell NO*.[19] He contends that the right to freedom and security of the person[20] is a residual freedom right, in the sense that it encompasses all the aspects of freedom which have not specifically been named in the rest of Chapter 3 of the interim Constitution. He consequently gives a broad and generous construction to this right, differing from the majority of his colleagues on the bench. The fact that the interim Constitution's limitation clause demanded that any limitation on the right to freedom and security of the person be not only reasonable, but also necessary, influenced the majority's judgment to a considerable degree. Since the necessity requirement is not included in the 1996 Constitution, Judge Ackermann's interpretation of the right to freedom and security of the person can very likely be followed in future constitutional cases. In the process of examining personal freedom, the judge focuses specifically on the concept of an open society, thereby illuminating the concept for the first time in our country's history of case law and providing the legal profession with valuable insight well worth quoting:

> "[An open society] is a society in which persons are free to develop their personalities and skills, to seek out their own ultimate fulfilment, to fulfil their own humanness and to question all received wisdom without limitations placed on them by the State. The 'open society' suggests that individuals are free, individually and in association with others, to pursue broadly their own personal development and fulfilment and their own conception of the 'good life'."[21]

Directly at the end of the above quoted paragraph a footnote is inserted in which Popper is quoted, showing clearly the basis of Judge Ackermann's analysis.

3 2 2 Humaneness

Humaneness, or humanitarianism as Popper also often refers to it, plays a fundamental part in his view on justice in an open society. Humanitarian ethics, he states, demands an *equalitarian* and *individualistic* interpretation of justice.[22] This is contrasted with the unequal and collectivist interpretation of justice in a closed society, which can, for instance, accommodate rigid caste systems and has as its sole criterion of morality the interest of the state. Morality in a closed society is therefore nothing more than political hygiene.[23] The primary function of the state from the humanitarian perspective is to *protect* its citizens – protection against harm and protection of each citizen's equal freedom.[24]

Humaneness is also used interchangeably with the concept of the *brotherhood of all men*,[25] emphasising the community of feeling between all human beings[26] and immediately calling the universality principle of human rights to mind. It is suggested that there is a clear analogy between humaneness and the constitutional value of human dignity, since both concepts revolve around consideration towards other individuals and avoidance of harm to them, based on the sole virtue of their being human.

---

19 1996 1 BCLR 1 (CC).
20 S 11(1) of the Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution).
21 *Ferreira* (fn 19) par 50.
22 Popper Vol I (fn 13) 106.
23 *Idem* 107.
24 *Idem* 110.
25 *Idem* 184 "faith in reason, freedom, and the brotherhood of all men . . . the only possible faith of the open society".
26 *Reader's Digest illustrated Oxford dictionary* (1998) 109.

3 2 3 Rationality

Rationality is based on reason (Popper uses the terms *reason* and *rationality* interchangeably), which is the intellectual faculty by which conclusions are drawn from premisses.[27] The crucial question therefore is: What can serve as premisses for reasoning – as the basis of norms – in an open society? Popper makes it clear that norms cannot be derived from facts:

> "Neither nature nor history can tell us what we ought to do. Facts, whether those of nature or those of history, cannot make the decision for us, they cannot determine the ends we are going to choose. It is we who introduce purpose and meaning into nature and into history. Men are not equal; but we can decide to fight for equal rights. Human institutions such as the state are not rational, but we can decide to fight to make them more rational."[28]

Note that the fact that a certain norm is widely accepted by a society – perhaps even by all societies! – does not make that norm a fact:

> "That most people agree with the norm 'Thou shalt not steal' is a sociological fact. But the norm 'Thou shalt not steal' is not a fact, and can never be inferred from sentences describing facts."[29]

It has thusfar been established that norms are derived from certain premisses which are decided on by man. From this follows an important part of Popper's philosophy, namely that because norms are in essence man-made, man also carries the responsibility for them:

> "[N]orms and normative laws can be made and changed by man, more especially by a decision or convention to observe them or to alter them, and that it is therefore man who is morally responsible for them; not perhaps for the norms which he finds to exist in society when he first begins to reflect upon them, but for the norms which he is prepared to tolerate once he has found out that he can do something to alter them. Norms are man-made in the sense that we must blame nobody but ourselves for them; neither nature nor God. It is our business to improve them as much as we can, if we find that they are objectionable . . . We can compare the existing normative laws (or social institutions) with some standard norms which we have decided are worthy of being realized. But even these standards are of our making in the sense that our decision in favour of them is our own decision, and that we alone carry the responsibility for adopting them."[30]

It has already been established what *cannot* serve as premisses in the rational processes which are essential in an open society. What is it that *can* serve as premisses, as standard norms which we have decided are worthy of being realised, in Popper's words? It is suggested that, in an open society, the answer to this question points clearly to the (other two) principles of an open society, namely freedom and humaneness.

3 3 The spheres of application of the principles: formal and substantive openness

In his definition Popper sketches the open society as a society which rejects the absolute authority of the merely *traditional*, while preserving and developing *traditions*, old or new, that measure up to the three principles. The dictionary

---

27 *Idem* 681 684.
28 Popper *The open society and its enemies* Vol II (1963) 278.
29 Popper Vol I (fn 13) 64.
30 *Idem* 61.

definition of tradition, namely a custom, opinion, or belief that is handed down to posterity especially orally or by practice,[31] is undoubtedly too narrow for the context in which Popper employed the term. It will be more contextually sensible to give traditions a broader interpretation that encompasses all of society's social arrangements. Tradition therefore does not only incorporate a society's law, but also a society's social morals or mores. The immense impact of mores on the individual has very eloquently been stated by Mill:

> "Society . . . practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties it leaves fewer means of escape, penetrating much deeper into the details of life, and enslaving the soul itself."[32]

Without underestimating the power of law to influence mores, jurists must be acutely conscious of the fact that mere conformity of the legal system to the three principles (ie formal openness) does not suffice. The mores must also comply with the three principles (ie substantive openness), and in order to achieve this goal it is my contention that the law needs *proactively* to advance the three principles in the community.[33] Mere conformity of the legal system may be a first step towards the attainment of an open society, and set an example to the community, but legally sanctioned affirmative action aimed at the renewing of mores is essential to ensure the full attainment of an open society. In the absence of proactive legal intervention in a society's mores, the interaction between law and mores can take generations to produce the desired mores, if at all, or the mores can even stay stagnant and eventually cause retrogression in the law!

3 4 Distinguishing between an open society and a free society

What is then the difference between openness and liberty, between an open and a free society?[34] Are the two concepts not synonymous? Since the two concepts have so much in common, it can be a seductive simplification to reduce them to synonyms. A reference to the three principles of an open society will easily explain the difference between the two concepts: An open society encompasses a free society, but it also encompasses more than that, namely the principles of reason and humaneness.

But is reason not implied by freedom, as the very basis of the latter? And is freedom not inherently humane? What is the importance of mentioning reason and humaneness separately? On the basis of the discussions above, it must be clear that both reason and humaneness have specific meanings and purposes independent of freedom. If they are seen only as values implied by freedom, their possible applications in society would also be limited to the context of freedom. In an open society, however, reason, humaneness and freedom are separate principles, mutually complementing and interacting with one another. When legal practitioners encounter the concept of an open society, they can therefore fruitfully employ all three the principles.

---

31 *Reader's Digest illustrated Oxford dictionary* (fn 26) 881.

32 Mill (fn 17) 8.

33 On the premiss, of course, that the mores of the particular society in question do not adhere to the three principles.

34 The Canadian Constitution refers to a "free and democratic society" and the German Constitution to "the free democratic basic order" (fn 2).

3 5 Atomistic versus communitarian individualism

A few prominent characteristics of Popper's open society deserve attention. In contrast to the collectivistic, organic character of the closed society, an open society is atomistic and its members are confronted by personal decisions. In an open society there is competition between its members to rise socially, while institutions and castes are sacrosanct in the closed society. Popper concedes that many people can experience the open society as impersonal and can be left in a condition of anonymity and isolation, and consequently of unhappiness. This is seen as the necessary price of incalculable gains: "Personal relationships of a new kind can arise when they can be freely entered into, instead of being determined by the accidents of birth; and with this, a new individualism arises."[35]

On this point I must observe the following: Popper is of the opinion that when the three principles are applied, this necessarily implies an atomistic (as the absolute opposite of organic) society, causing the isolation of some of its members. It is exactly this untested supposition which gave rise to the communitarian movement in recent decades. Communitarianism has gained in prominence during the past decade or two, largely as a line of thought within the broad liberal movement.[36] Many see it as a reality check on modern liberalism, which tends to view the individual artificially, if not incoherently, divorced from his or her social surroundings. Communitarians insist upon the interaction of the social context and individuals' self-conceptions.

In the light of communitarianism, it is my contention that the implementation of freedom, humaneness and rationality in a society need not necessarily cause the isolation of some of the society's members. Quite the contrary can be true: Freedom, humaneness and rationality are completely reconcilable with social responsibility and the maintenance – and indeed strengthening – of social support structures, on the condition, however, that these social support structures are supportive of and not contrary to the three principles of freedom, humaneness and rationality. In the words of Judge Ackermann:

> "The fact that the right to freedom must, in my view, be given a broad and generous interpretation at the first stage of the enquiry, must therefore not be thought to be premised on a concept of the individual as being in heroic and atomistic isolation from the rest of humanity, or the environment, for that matter."[37]

4 CELEBRATING DIVERSITY IN AN OPEN SOCIETY: JUDGE SACHS

Judge Sachs's interpretation and application of the concept of an open society in two Constitutional Court judgments, inseparably links the open society to diversity. In *S v Lawrence*; *S v Negal*; *S v Solberg*[38] he clearly isolates the concept of an open society from the larger phrase of an open and democratic society and reflects on its importance: "The concept of an open society must indeed be regarded as one of the central features of the bill of rights . . ."[39]

---

35 The information in this paragraph is based on Popper Vol I (fn 13) 174–75.

36 The information in this paragraph is taken from McLean *Concise dictionary of politics* (1996) 91; Bell *Communitarianism and its critics* (1993).

37 Ferreira (fn 19) par 52.

38 1997 4 SA 1176 (CC).

39 Par 146.

Judge Sachs typifies the open society as pluralistic – one in which there is no official orthodoxy or faith.[40] In an open society people have "the right to be different in belief and behaviour, without sacrificing any of the entitlements of the right to be the same in terms of common citizenship".[41] In *National Coalition of Gay and Lesbian Equality v Minister of Justice*[42] he builds further on the relationship between the open society and diversity:

> "What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour."[43]

Judge Sachs finally observes that the acceptance of the principle of difference does not imply an absence of a point of view or an absence of morality. Quite the contrary is true: The principle of difference, as an integral part of the open society, is part of the Bill of Rights – a document founded on deep political morality. The state does enforce morality, the dictates and limits of which are to be found in the text and spirit of the Constitution itself.[44]

5 CONCLUSION

In an effort to integrate the essence of the different contributions discussed above, the following definition of an open society is proposed: A society which rejects the absolute authority of merely established social arrangements, while trying to preserve and develop social arrangements based on the principles of freedom, humaneness, rationality and diversity.

The hope is that this integrated definition will contribute to legal practitioners' comprehension of – and therefore willingness to use – this most important concept of an open society which is unique to our Constitution.

> *Democracy, like respect for human rights, is not an end in itself, but a means to individual and social development.*
>
> *Dinah Shelton "Challenges to the future of civil and political rights"* 1998 Wash and Lee L Rev 672.

40 *Ibid.*
41 Par 147.
42 1999 1 SA 6 (CC).
43 Par 134.
44 Par 136.

Res publicae: A South African perspective*

Ntusi Mbodla
BA LLB
Lecturer, School of Law, University of Natal, Pietermaritzburg

OPSOMMING

***Res publicae*: 'n Suid-Afrikaanse perspektief**

In hierdie bydrae word eerstens die rol wat apartheid-wetgewing in die skending van die gemeensregtelike *res publica*-begrip gespeel het, onder oë geneem. Tweedens word die vermeende konflik wat tussen openbare eiendom en die herstel van grondbesit ingevolge Wet 22 van 1994 bestaan, ondersoek. Derdens word daar na besondere vraagstukke gekyk, soos byvoorbeeld die vraag of die bestaansbehoeftes van inheemse/landelike gemeenskappe erken moet word, en meer spesifiek of hulle binne die Nasionale Parke ('n soort *res publica*) 'n plek behoort te hê. Ten slotte word moontlike oplossings aan die hand gedoen vir die probleme wat in die bydrae onder die loep geneem word.

1 INTRODUCTION

This article is in four parts. In the first, I examine the role of apartheid law in disfiguring the common-law notion of *res publica*. In the second, I look at the perceived conflict between public property and land restitution in terms of the Restitution of Land Rights Act 1994,[1] as amended. In the third, I look at specific issues, such as whether the subsistence needs of indigenous/rural communities should be recognised, and more particularly whether they should have a place within the national parks. Finally, I consider possible solutions to the problems raised earlier in the article.

It should be noted that this article begins with the broad theme of *res publicae*, but in the course of the discussion attention will be given to National Parks, a kind of *res publica*.

2 THE DISFIGUREMENT OF THE COMMON-LAW NOTION OF *RES PUBLICA* UNDER APARTHEID LAW

A distinction was made in Roman law between two kinds of public property: *res universitatis* (property belonging to a corporate body) and *res publica* (a thing held by the state for the benefit of inhabitants). In this paper, attention will be given to the latter kind of public property only.

---

* Revised and edited version of a paper prepared for and accepted at the Eighth IASCP Conference in Bloomington, Indiana, USA, 2000-05-31–06-04.

1 Act 22 of 1994.

Public property has been the subject matter of litigation in South Africa.[2] The debate regarding the juridical disposition of *res publicae* has focused largely on the competence of the state in respect of the sea-shore, and the entitlements of members of the public in relation to perennial rivers.[3] Under this heading I consider the application by South African courts of the rules of the common law in respect of *res publicae* in these two areas.

In South African law a sea-shore is classified as *res publica*. In *Anderson & Murison v Colonial Government*[4] the applicants had bought the entire cargo of a ship that had sunk off the coast of Dassen Island. Their attempt to recover cargo that had washed ashore on the island was stifled by government officials, who denied them access to crown land above the high-water mark. The court held that the government could most certainly regulate access to state-owned land, but could not prevent free access to and use of the sea-shore by any member of the public, since the sea-shore was *res publica*. De Villiers CJ observed in this regard that "the government are, in one sense, the custodians of the sea-shore, but they are such only on behalf of the public".[5]

The insusceptibility of the sea-shore to ownership can be deduced from several judgments of the Supreme Court relating to the borderline of properties along the coast.[6] These cases provide clear authority for the proposition that whenever the seaward boundary of property is designated by words such as "sea-shore", "ocean" or "sea-coast", the sea-shore itself will be excluded from such property.

The reasoning in these cases, however, leaves unanswered the questions about the ownership, within the confines of the common law, of the sea-shore, whether or not private ownership of portions of the sea-shore can in fact be acquired, and the entitlements of members of the public in respect of the sea-shore. Some of these issues were touched upon in *Surveyor-General (Cape) v Estate De Villiers*.[7] The court (per Innes CJ) held that ownership of the sea-shore is vested in the Crown (now the state), but this did not mean that the state could deprive the public of its common-law entitlements to use and enjoyment of the sea-shore. Our courts have accordingly declined to follow certain English decisions in which it was held that members of the public did not have a common-law right to bathe in the sea.[8]

The question whether the state in South Africa can grant rights in respect of the sea-shore to private persons, has received attention in several judgments of the Supreme Court. In the case of *Estate De Villiers* Solomon JA found it "difficult . . . to conceive"[9] that the state would deliberately grant a private person part of the sea-shore, which at common law was inalienable. The issue of the state's competence to grant rights in respect of the sea-shore to private individuals came squarely before the Appellate Division in *Consolidated Diamond Mines of South West Africa Ltd*

2 See *De Villiers v Pretoria Municipality* 1912 TPD 626; *Hornby v Municipality of Roodepoort-Maraisburg & Arthur* 1918 AD 278.
3 See Van der Vyver "The etatisation of public property" in Visser *Essays on the history of law* (1989) 261.
4 (1891) 8 SC 293.
5 296.
6 See eg *Pharo v Stephan* 1917 AD 1; *Union Government (Minister of Lands) v Lovemore* 1930 AD 13.
7 1923 AD 588.
8 See *Blundell v Catterall* (1821) 5 B & Ald 268, 106 ER 1190.
9 1923 AD 608.

v Administrator, SWA.[10] This case turned largely on the description of the "Sperrgebiet", an area referred to in Proclamation 11 of 1920 (SWA), which description was by reference included in the Halbscheid Agreement of 1922/1923 concluded between the Administration of South-West Africa and the appellant. In the Proclamation, the western boundary of the Sperrgebiet was described as running "along the Atlantic coastline". The main question at issue was whether the description of the western boundary of the Sperrgebiet within which the appellant held exclusive prospecting and mining rights included the area between the high-water mark and the low-water mark.

On appeal the question of the extent of the rights of the public to the foreshore was touched upon by Fagan CJ, who said that the public have certain simple rights to the foreshore, such as to go onto it, to bathe, to fish, to dry nets and to draw up boats, and that any substantial interference with those rights would be a wrongful act. The Appellate Division held that the exact extent of those rights did not need to be determined in the *Consolidated Diamond Mines* case because, by legislation, any rights, including ownership, may be granted in the foreshore. Steyn JA, in a dissenting judgment (with which Hall AJA concurred), regarded the government as merely the custodian of the sea-shore on behalf of the public,[11] and held further that there was a strong presumption against the granting of full ownership in respect of a *res publica*, as well as against the concession of a lesser right in it.

It is beyond dispute from the cases, however, that the entitlements the public have to *res publicae* have been severely curtailed. It is aslo of importance that the cases demonstrate that in South African law there is gradual phasing-out of the vital distinction between *res universitatis* and *res publica*.

It seems to me, however, that South Africa is not alone in regarding *res publicae* as state-owned resources.[12] The minority judgment in the *Consolidated Diamond Mines* case, stating that the government is merely the custodian of the sea-shore on behalf of the public, seems to be in accordance with our rich common law. There is, however, a growing feeling in South Africa that such a custodial relationship or trust on behalf of the community is unsatisfactory, as it fails to create a direct link between the producer community and natural-resource management.[13] It should be noted that the moment the control of *res publica* is taken away from the state and conferred directly on the community, the property will cease to be *res publica*.

3 LAND RESTITUTION AND PUBLIC PROPERTY

The present distribution of property rights in South Africa is the product of a history of discriminatory practices that is well known. For large parts of the twentieth century, the Group Areas Acts[14] and Black Land Acts (the Black Land Act 1913[15] and the Development Trust and Land Act[16]) effectively prevented the majority of the

10 1958 4 SA 572 (A).

11 643B–C.

12 See Sibanda and Omwega "Some reflections on conservation, sustainable development and equitable sharing of benefits from wildlife in Africa: The case of Kenya and Zimbabwe" 1996 26(4) *S Afri J Wild L Res* 178.

13 See Summers "Legal and institutional aspects of community-based wildlife conservation in South Africa, Zimbabwe and Namibia" 1999 *Acta Juridica* 188 208.

14 Acts 41 of 1950, 77 of 1957 and 36 of 1966.

15 Act 27 of 1913.

16 Act 18 of 1936.

population from acquiring, holding and disposing of immovable property. At the same time, the political exclusion of the black population meant that the power and resources of the South African state tended to be used for the benefit of the select few.

This situation has given rise to a great deal of controversy about community involvement in protected areas.[17] Many people were displaced in order to establish protected areas, and this is becoming a major bone of contention in a period of land claims by previously dispossessed communities.

To be more specific, the question is what happens where a particular community was displaced, the area was declared a protected area and the community now claims it back in terms of the Restitution of Land Rights Act. The solution will have to be carefully worked out, bearing in mind the relevant competing interests: on the one hand, the interest of the dispossessed and on the other, the protection of the resources in question.

Section 2(1) of the Restitution of Land Rights Act provides that a person or community is entitled to restitution of a right in land if (a) the person or community was dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, or the claimant is a direct descendant of such a person; and (b) the claim for restitution is lodged not later than 31 December 1998. No person is entitled to restitution of a right in land if just and equitable compensation as contemplated in section 25(3) of the Constitution of the Republic of South Africa, 1996,[18] or if any other consideration which is just and equitable, calculated at the time of any dispossession of the right, was received in respect of the dispossession.

All relevant factors must be taken into account, in particular planning and environmental considerations, and whether the land has been transformed to make restitution impractical. Furthermore, the purchase or expropriation of private land can take place only if it is just and equitable, taking into account all relevant factors including the history of the dispossession, the hardship caused, the use to which the property was being put, the history of the acquisition of the land by the owners, the interests of the owner and others affected by the expropriation, and the interests of the dispossessed.

The St Lucia dispute is a case in point. Lake St Lucia and its surrounds on the coast of northern Natal have long been a topic of controversy. The region around the Lake is characterised by two major features. It includes some of the least developed districts in South Africa, and is home to people who are often extremely poor. The need for development and upliftment is keenly felt. On the other hand, it is blessed with attractive wild scenery, and there is a spectacular diversity of plant and animal life. In a period of less than half a century, major decisions affecting the land use of the areas surrounding the lake have been made:

- In the 1950s, commercial forestry was commenced on the eastern shores of the lake, and state forest land was proclaimed and demarcated. Currently, 5 244ha within the 12 874ha of the Eastern Shores State Forest has been afforested with slash pine by the Department of Water Affairs and Forestry.

---

17 See Kidd *Environmental law: A South African guide* (1997) 107.
18 Act 108 of 1996.

- As a result of the commercial forestry operations, many local people were evicted from the eastern shores area and resettled elsewhere.
- The plans for afforestation and the construction of a dam on the Hluhluwe River provoked a public outcry in the 1960s. In 1966 the Kriel Commission of Inquiry recommended to Parliament an increase in the size of the conservation area at the time, that the eastern shores be included, that the area be managed by a single body, that existing commercial afforestation be phased out, and that no new plantations be established in the eastern shores area. These recommendations were, however, not implemented.
- Prospecting leases in the area have been granted to various bodies and companies since 1972. Appeals by, and meetings with, conservation bodies resulted in the exclusion of some sensitive areas.
- The Kingsa prospecting lease on the eastern shores of Lake St Lucia was granted in 1972, and the Kingsa Extension and Tojan leases in 1976. (The mineral rights for these areas currently reside with the South African government.)
- On 2 October 1986, the St Lucia system, which includes the eastern shores area with its extensive afforestation and existing prospecting leases, was designated a wetland of international importance in terms of the Ramsar Convention.
- Conservation areas have been proclaimed in the area since the previous century. The St Lucia Game Reserve (comprising Lake St Lucia and a half-mile strip around it) was established in 1897. Since then, numerous conservation areas have been proclaimed around the lake. The latest announcement came in early 1990, when the then Minister of Environment Affairs announced proposals for a Greater St Lucia Wetland Park. The management of the Eastern Shores State Forest was transferred to the Natal Provincial Administration (NPA) in August 1992.

On 15 June 1989, Richards Bay Minerals applied for mining rights in respect of prospecting leases on the eastern shores. This triggered the latest struggle. Environmentalists went on to produce what became the largest single environmental petition in the country against the Richards Bay Minerals Company, which sought to mine titanium at the expense of the area's beauty and ecosystem. For thousands of black people living on the periphery of St Lucia, however, the battle has just begun for inclusion in the development of an area from which they have often been ejected in the past. Of interest, however, is a Memorandum of Understanding entered into by and between St Lucia residents and the KwaZulu-Natal Nature Conservation Board (dated 1999-10-08). Some of the salient provisions of this Memorandum of Understanding are clauses 4 and 12. Clause 4 provides as follows:

> "Management of heritage site. The parties recognise that the Heritage Site shall be managed for the benefit of both the Board and the Claimant.
>
> It is agreed by the parties that the management of the Heritage Site shall be in accordance with the norms and standards set by the Board at any time and that due recognition is given by the parties to the status of the Heritage Site's presence within a World Heritage Site. Inappropriate and/or ad hoc developments cannot be sanctioned but suggestions concerning recognition of the heritage value and presence of the Claimant will be thoroughly respected and given due consideration through mutual discussion and negotiation."

Clause 4 is important, not just in itself, but for what it signifies – namely that, for the first time since the inception of our democracy, the thousands of black people living on the periphery of St Lucia now stand to benefit from the Heritage Site. For

instance, it has been recognised that if local communities can be given a stake in wildlife, they will have incentives to develop and conserve the resource, resulting in improved resource conservation and reduced enforcement costs.[19] But the question remains: is that what the people want? Or is it merely what we think the people want? Perhaps the answer lies in an article published in *The Citizen* newspaper on 12 March 1998, headed "New row looms over St Lucia plans", by Gumisai Matume. This reads in part as follows: "St Lucia is white, noted a petition circulated by one of the groups fighting for multiracial management of the resort."

This is a telling demonstration that people want to participate in management and decision-making. Unfortunately, clause 4 of the Memorandum of Understanding is silent on that question. It is submitted that the St Lucia issue is far from resolved, as people are not part of the decision-making. There is a precedent for the South Africans in St Lucia to follow. The WINDFALL (Wild Industries Developed For All) programme in Zimbabwe, the purpose of which was to give communities incentives to preserve wildlife, is instructive in demonstrating the importance of community participation in decision-making. One of the main reasons for the failure of this programme was the lack of significant local participation in decision-making. Without local participation, communities failed to develop the necessary custodial responsibility towards wildlife. It is exactly this type of problem which leads common property theory to focus on the importance of local institutions that can allow communities to participate in decision-making and the benefits of common property.[20]

4 SHOULD INDIGENOUS/RURAL COMMUNITIES HAVE A PLACE WITHIN THE PARKS FOR THEIR SUBSISTENCE NEEDS?

The colonial approach to conservation in Africa over the past century centred around the notion that the exclusion of rural people from protected areas would lead to the ultimate protection of wildlife and its habitats. This was essentially a protectionist approach, which entailed the creation of wildlife sanctuaries, predominantly in the form of national parks and game reserves, to the exclusion of local communities.[21] Thus it is not always correct to say that there were conflicts between man and nature in the past.[22]

The colonial approach is the same as the United States wilderness model of a national park.[23] Its central premiss is the exclusion of human occupation (resident peoples) from within its boundaries. There is a plethora of legal literature to the effect that this model undermines indigenous rights and their role in environmental management.[24]

19 See Le Quesue "Common property theory and wildlife resource use – Community based wildlife resource management programmes in Africa" (http://www.saep/org/subject/natcon/natleq/html) 2.

20 See also Le Quesue *op cit* 7.

21 See Summers *op cit* 188.

22 See "*People and parks, parks and people*": Proceedings of a Conference held at Koinonia Conference Centre, Botha's Hill 1995-05-22–23.

23 See also the South African approach, set out in s 21 of the National Parks Act 57 of 1976.

24 See Stevens "*Inhabited national parks: Indigenous peoples in protected landscapes*" (1986) (IUCN) East Kimberley Working Paper No 10.

Another important point to be noted in dealing with this issue of "wilderness" is that the survival of rural communities is intimately connected with that of wildlife. Strict adherence to the definitional requirements of a national park has planted the seeds of conflict for millions of "resident peoples", particularly in those developing countries which have large rural and often migratory populations. In recent times there has been increasing recognition by governments in many countries that there is a place for indigenous peoples within national parks, particularly where zones have been established to protect a cultural heritage.[25]

There is growing acceptance that new conservation policy needs to be formulated which will take into account the greater socioeconomic context. This is demonstrated by the following statement of law:

> "For any legal dispensation to be effective and enduring, it should be socially and economically relevant. South Africa is a developing country and its wildlife law must respond appropriately to its development needs and the apparent dilemma of conserving natural resources while at the same time recognizing the subsistence needs of indigenous people. It is essential that the last remnants of our wildlife and its habitat be legally protected, but the laws must be so formulated and applied as to permit of controlled taking on a sustained-yield basis, particularly in those areas where the traditional way of life is dependent upon access to flora and fauna for food, fuel, medicine and building materials. Local people should be permitted controlled access to natural resources within such areas, or defined buffer zones, consistent with their traditional harvesting practices. Irrespective of theoretical or philosophical commitments, the reality is that South African wildlife law must be human-oriented, otherwise it will not be effective.
>
> . . . There should be provision, as a matter of law and not of administrative policy, for local participation in the protection of wildlife and natural areas, the determination of reserve boundaries and preparation of management plans, and in the economic benefits derived from these resources."[26]

The authors of this passage, Bothma and Glavovic, are not alone in their approach. There has recently been a departure from the orthodox view of national parks even in the United States and Canada, where a variety of subsistence uses by indigenous peoples has been recognised and allowed to continue within the boundaries of national parks.[27] It should be noted, however, that these instances turned on the limited measure of sovereignty accorded to aboriginal communities in terms of American and Canadian constitutional law. They are therefore distinguishable from the South African situation, where communities subject to indigenous law do not enjoy similar autonomy.[28]

5 POSSIBLE SOLUTIONS

There is a growing acceptance that rural communities or indigenous peoples should share in the benefits arising from the use of parks.[29] The question that seems

---

25 See Stevens *op cit* 23.

26 Bothma and Glavovic "Wild animals" in Fuggle and Rabie (eds) *Environmental management in South Africa* (1992) 250 258.

27 See *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC); *R v Sundown* (1999) 170 DLR (4th) 385 (SCC).

28 See Currie "Indigenous law" in Chaskalson *et al Constitutional law of South Africa* (1996) 36–27 fn 4.

29 See Summers *op cit* 205; Proceedings of a Community Workshop held at Sodwana Bay, 1995-05-15–17 3.

unsettled is how to share the benefits. Basically, there are two possible approaches: on the one hand, there is the view contained in the Convention on Biological Diversity (which came into force in December 1993) that there should be a fair and equitable sharing of benefits arising from the use of resources. South Africa is a party to this Convention.[30] On the other hand, there is the view that benefits should be shared proportionately.[31] As a party to the Convention, South Africa is therefore obliged to develop national strategies which will give effect to the former objective.

Surprisingly, the debate on the question of sharing of benefits from the resources is silent on the question of the share of future generations in the resources. The inclusion of future generations would be in line with the provisions of section 24 of the Constitution of the Republic of South Africa, 1996,[32] in particular section 24(b), which states that everyone has the right "to have the environment protected, for the benefit of present and future generations". The St Lucia Memorandum of Understanding seems to have touched on this aspect, for clause 12 provides for payment of levies to a trust, whose duty is to administer the levies for the existing and future generations.

There is also a growing move towards the view that parks as *res publicae* should no longer be held in trust, since (it is said) this is unsatisfactory as it does not create a direct link between the producer community and natural-resource management.[33] Another view which lends credence to this approach is that one cannot develop land without ownership.[34]

I would like to disagree with the view that ownership of parks should be transferred to rural communities. I concede that people feel alienated. This, however, is not because they do not own the land, but because they are not part of the decision-making on how to manage the natural resources. There seems to be a misunderstanding of the saying that a "park is ours" or that a park is "our park". This refers simply to community involvement in management of the parks, not to physical transfer of ownership. Such an interpretation is not only in tune with the whole notion of *res publica* (property held for the benefit of the public) but also ensures community participation.

As to the view that one cannot develop property without ownership, I submit that it is without merit, for a person can develop property if he/she stands to gain from this, even without ownership.

On the question of land claims, I suggest that the issue should not be approached legalistically. It should be resolved sensibly, with the co-operation of the affected communities.[35] Another point that should be emphasised is trust and good communication between the communities and the park management/state.[36]

Lastly, there is the question whether indigenous/resident peoples should be accorded a place within the parks. The answer to that question depends upon whether one adheres to the orthodox definition of a national park. As indicated above, there has been a departure from a definitional requirement to that effect in

30 See Summers *op cit* 205.
31 See Proceedings of a Community Workshop held at Sodwana Bay *supra* fn 29 3.
32 Act 108 of 1996.
33 See Summers *op cit* 208.
34 See Proceedings of a Community Workshop held at Sodwana Bay *supra* fn 29 9.
35 *Idem*.
36 See West and Brechin (eds) *Resident peoples and national parks* (1991) 61.

the United States and Canada, where a variety of subsistence uses by indigenous peoples has been recognised and allowed to continue within the boundaries of national parks. In the United States this has been formalised by statute, for example under the Alaska Native Interests Land Conservation Act, although in both countries the governments retain almost total discretion over land use within park boundaries.[37] It should be noted, however, that the situations in the United States and Canada turn on the limited measure of sovereignty accorded to aboriginal communities in terms of American and Canadian constitutional law.[38]

There is doubt as to whether in South Africa we still have "pure indigenous peoples" whose survival is intimately connected with wildlife. If they are still in existence, then we should recognise their systems and, where appropriate, build on them. We should also recognise their subsistence needs. Local people should be permitted controlled access to natural resources within the park consistent with their traditional harvesting practices.[39]

> *Both liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for the wolves is death to the lambs.*
>
> *Isaiah Berlin* The crooked timber of humanity 12.

37 See Jeffrey "National parks and protected areas – approaching the next millennium" 1999 *Acta Juridica* 163 178 fn 70.

38 See fn 28 *supra*.

39 See Bothma and Glavovic *loc cit*; cl 3 of the St Lucia Memorandum of Understanding.

AANTEKENINGE

CONTRACTUAL CLAIMS AND CONTRIBUTORY NEGLIGENCE

1 Introduction

In this case both the facts and the law were described by the judge as extremely complex (974H–I). This is no understatement, as one can see from the fact that it took more than two years to try the case, and from the seventy-odd pages of the reported judgment.

The simplified facts are as follows: The plaintiff employed the defendant firm as auditors. The plaintiff alleged that the auditors had breached the auditing agreement between them by failing to detect that several sums of cash had not been deposited, and that a promissory note belonging to the plaintiff had been cashed and the proceeds stolen. The plaintiff's financial manager, Mitchell, who had a criminal record and had spent some time in prison for stealing cheques, had stolen the undeposited cash and the proceeds of the promissory note. A number of legal issues were raised, for example the nature of the auditing contract and the duties of auditors in terms of it (985H–995H), the question whether the auditors were in breach of the auditing contract (995H–1006E – the court found that the auditors were indeed in breach – 998A–B 1006D–E)), causation (1006–1024D – the court found that by employing a convicted thief, the plaintiffs had caused their own loss – 1024B–D)), and the apportionment of damages or the issue of contributory negligence (1024E–1029H).

I intend to concentrate on the last issue only: can contributory negligence be pleaded in respect of a claim in contract? In the context of the present case, the question is whether the plaintiff's claim had to fail because of its own negligence in employing Mitchell, or whether it was partly saved by the provisions of Chapter I of the Apportionment of Damages Act 34 of 1956. The court boldly held that the plaintiff's claim was partly saved and applied the Act to reduce the amount of damages awarded (1032C–E).

2 The Apportionment of Damages Act 34 of 1956

At common law, if a defendant who was negligent could prove contributory negligence on the part of the plaintiff even in a minor degree, the plaintiff's claim for damages was completely defeated (*Pierce v Hau Mon* 1944 AD 175 204; *King NO v Pearl Insurance Co Ltd* 1970 1 SA 462 (W) 464F–H; *OK Bazaars (1929) Ltd v Stern and Ekermans* 1976 2 SA 521 (C) 528C–E). To alleviate this harsh consequence, the Apportionment of Damages Act 34 of 1956 was adopted. Section 1 of the Act, which also comprises the whole of Chapter I of the Act, under the title "Contributory Negligence", provides as follows:

"(1) (a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

(2) Where in any case to which the provisions of subsection (1) apply, one of the persons at fault avoids liability to any claimant by pleading and proving that the time within which proceedings should have been instituted or notice should have been given in connection with such proceedings in terms of any law, has been exceeded, such person shall not by virtue of the provisions of the said subsection, be entitled to recover damages from that claimant.

(3) For the purposes of this section 'fault' includes any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence."

This section has been applied and interpreted by the courts in numerous judgments (see eg *Frodsham v Aetna Insurance Co* 1959 2 SA 271 (A); *South British Insurance Co Ltd v Smit* 1962 3 SA 826 (A); *Van Oudtshoorn v Northern Assurance Co Ltd* 1963 2 SA 642 (A); *Barclays Bank DCO v Straw* 1965 2 SA 93 (O); *Jones v SANTAM Bpk* 1965 2 SA 542 (A); *Motor Insurers' Association of Southern Africa v Boshoff* 1970 1 SA 489 (A); *James v Fletcher* 1973 1 SA 687 (RA); *Strougar v Charlier* 1974 1 SA 225 (W); *Roxa v Mtshayi* 1975 3 SA 761 (A); *Grove v Ellis* 1977 3 SA 388 (C); *Bowkers Park Komga Co-operative Ltd v South African Railways and Harbours* 1980 1 SA 91 (E); *Mabaso v Felix* 1981 3 SA 865 (A); *Union National South British Insurance Co Ltd v Vitoria* 1982 1 SA 444 (A); *South African Railways and Harbours v South African Stevedores Services Co Ltd* 1983 1 SA 1066 (A); *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A); *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 591 (W)). Where a plaintiff sues a defendant in delict, the Act is potentially applicable, and successful reliance on the Act will mean that the amount which a defendant must pay in damages will be reduced. This much is clear, at least where the plaintiff's claim is founded in delict. The position where the defendant raises the defence of contributory negligence when the plaintiff's claim is for damages resulting from a breach of contract, is less certain.

It is clearly desirable that the differences between contractual and delictual actions based on the same set of facts should be eliminated as far as possible. There are, however, a number of problems with this approach. First, at common law contributory negligence was not a defence against a claim founded in contract where the claimant was also at fault in causing the loss. Secondly, the Act does not seem to apply to contractual claims.

3 The Apportionment of Damages Act and contractual claims

The question whether the Act applies to claims for breach of contract was first raised in *Barclays Bank DCO v Straw* 1965 2 SA 93 (O) but the court did not find it necessary to decide the question, since it was not a case in which the plaintiff had claimed damages. The court did, however, state that the Act was not historically intended to apply to claims based on contract (99E). (For a discussion and criticism of the case, see Boberg 1965 *Annual Survey of South African Law* 179–180; Davids "Altered cheques: Apportionment of loss" 1965 *SALJ* 289; Davids "Apportionment of contractual damages" 1966 *SALJ* 226.)

In *OK Bazaars (1929) Ltd v Stern and Ekermans* 1976 2 SA 521 (C) the issue was pertinently raised. In this case the plaintiff claimed damages from a firm of land surveyors for, *inter alia*, failing to exercise due care and skill in the performance of its obligations (522D). The defendants claimed that the plaintiff was partly responsible for causing the damage and that since the plaintiff's cause of action was based on delict, the Apportionment of Damages Act would apply. They also argued that even if the claim was not based on delict, the Act was applicable to a breach of a contract which imported a duty not to be negligent (525D–E). The court held that the action was founded in contract (525H), and proceeded to enquire whether the Act applied to the plaintiff's claim. Watermeyer J, with whom Steyn J concurred, concluded that prior to the passing of the Act, contributory negligence was not one of the recognised common-law defences to a claim based upon a breach of contract and that the Act could not be construed to apply to such breaches (529F–G). The court was further of the opinion that the interpretation of the word "fault" in section 1(3) had a restricted meaning and did not include "fault" arising from a breach of contract (528A–C). The plaintiff further argued that if the Act did not apply to all claims for breach of contract, then it should at least be construed as covering claims for breaches of contracts which imported a duty not to be negligent (529G–H). For this proposition the plaintiff relied on certain English cases. The court recognised that the English Law Reform (Contributory Negligence) Act 1945 corresponded in several respects to Chapter I of the South African Act. It nevertheless held that there were material differences between the wording of the English and the South African Acts, and that because the English common law was not the same as the South African common law, it would not be safe to follow it (530D–E). The court therefore declined to accept the defendant's reasoning.

The decision in *OK Bazaars* was not favourably received by academic lawyers, and a number of them commented on its deficiencies (see Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 165–166; Christie *The law of contract in South Africa* (1996) 613–616; Lötz "Vermindering van kontraktuele skadevergoeding" 1996 *TSAR* 170). Christie, whose discussion of the case is the most incisive, argues that the Act should apply to claims in contract since it is undesirable that fundamentally different results should be reached depending on whether a claim is brought in contract or in delict. Van der Merwe and Olivier also point out that there is no reason in principle why the Act should not apply to both claims in contract and claims in delict (165–166).

One other aspect must be commented on. The finding in *OK Bazaars* that the English Act differs from the South African one is unassailable. It is none the less debatable whether the differences are so vast that developments in English and other jurisdictions regarding contributory negligence in a contractual context can simply be ignored. The indications point rather the other way. In, for example, *South British Insurance Co Ltd v Smit* 1962 3 SA 826 (A) Ogilvie Thompson JA also commented on the virtually identical formulation of section 1 of the South African and English Acts (834E). It is indeed true to say that South African judges have not hesitated in drawing upon English law when interpreting section 1 (see, eg, *Bowkers Park Komga Co-operative Ltd v South African Railways and Harbours* 1980 1 SA 91 (E) 96H–97E; *Vorster v AA Mutual Insurance Association Ltd* 1982 1 SA 145 (T) 164E–165B; *Union National South British Insurance Co Ltd v Vitoria* 1982 1 SA 444 (A) 458H–462H).

The issue again arose in *27/36 Siphosethu Road (MTE) (Pty) Ltd v Vanderverre Apsey Robinson & Associates Inc* (D & CLD Case No 2779/98, unreported). There the plaintiff engaged the services of the defendant, an architect, to erect a building

comprising a warehouse and offices. The services were not only to design the buildings but also to supervise their construction by the builder appointed by the plaintiff. It was not expressly agreed, but it was accepted by the parties that in performing these services, the defendant would exercise the level of professional skill and care that one would normally expect of a reasonable practising architect. It was also accepted that the architect would likewise exercise this level of care and skill when issuing certificates indicating that the work was properly done at the stages of final and partial completion of the building. The builder delivered a defective performance, but the defendant nevertheless issued a final certificate of completion of the contract. The plaintiff sued the defendant for breaching the agreement between them, and alleged that the defendant had failed to act as a reasonably skilful and competent architect would have done when it issued the certificate of final completion. The defendant did not dispute that it was the architect engaged by the plaintiff, or that it would have been bound to exercise the level of professional competence claimed by the plaintiff in the discharge of that work. But it said that the plaintiff had engaged the services of a firm of engineers which was responsible for not alerting the defendant to the defective performance of the builder. The defendant therefore issued third-party notices against the engineers and the builder. According to the defendant, the engineers and the builder were also negligent and were joint wrongdoers within the ambit of section 2 of the Apportionment of Damages Act and would be liable for such damages as the plaintiff proved, in whatever proportions the court determined their respective degrees of fault to be. Both third parties excepted to the notice and claimed that the defendant could not join them since the plaintiff's claim for damages was based on breach of contract, and the Apportionment of Damages Act did therefore not apply.

The court was of the opinion that the defendant's case raised two issues: first, the issue of the possible concurrence of actions (see *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A); *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A)), and secondly, the issue whether a defendant who is sued for damages for breach of contract can invoke the provisions of section 2 of the Apportionment of Damages Act. The two issues are closely related, but I shall refrain from discussing the first. The second issue received scant attention, and was dismissed by Squires J as follows:

> "[T]he point of departure, one would think, must be the nature of the plaintiff's claim . . . Here the plaintiff has elected to rely on its contract and sue the defendant for breach of that . . . [A]ny liability of the third parties to the plaintiff, subject to the question of the final certificate in respect of the second party, would also be the breach of their agreement with the plaintiff.
>
> That being so, I do not think recourse can be had by the defendant to the Apportionment of Damages Act. Apart from the reasons set out in *OK Bazaars (1929) Limited v Stern and Ekerman*s, the long title of Act 34 of 1956, which is a legitimate aid in statutory interpretation, provides that its purpose, *inter alia*, was 'To amend . . . the law relating to the liability of persons jointly or severally liable in delict for the same damage . . .'. And in chapter II, which sets out the position relating to 'joint or several wrongdoers' – not just 'defendants' – it refers in section 2(1) to a situation '[w]here it is alleged that two or more persons are jointly or severally liable in delict to a third person'.
>
> It is not alleged in this action that anyone is liable to the plaintiff in delict . . . I would have thought that before consideration could be given to entertaining the defendant's third party notices here, the legislation would have to be amended."

The third-party notices were accordingly found to be bad in law and were struck out.

Apart from endorsing the *OK Bazaars* case, this decision does not take the debate much further. Furthermore, the argument that the long title of the Act limits the Act to claims in delict rests on fairly shaky ground. The long title of an Act may tend to show the object of the legislation. It should, however, be borne in mind "that in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended" (*Bhyat v Commissioner for Immigration* 1932 AD 125 129). In other words, the long title cannot change the plain meaning of an Act unless the interpretation placed on a particular provision will lead to some "absurdity, inconsistency, hardship or anomaly". The rule in *Bhyat* has since been confirmed by the Appellate Division (as it then was) (see *Norden v Bhanki* 1974 4 SA 647 (A) 655*pr*–B; *George Municipality v Vena* 1989 2 SA 263 (A) 269H–I). The real issue, therefore, is whether an interpretation which renders the Apportionment of Damages Act applicable to contractual claims leads to some absurdity, inconsistency, hardship or anomaly.

4 *Thoroughbred Breeders Association of South Africa v Price Waterhouse*: a bold judgment

The judgment of Goldstein J goes to the heart of the issue. According to the court, section 1 of the Act can be applied to contractual claims without straining its language (1024I). The section "provides for the apportionment of damages between a plaintiff and a defendant where both have through the fault of each contributed to the causing of such damages" (1029B–C). The point is also made that the long title of the Act cannot change the clear and unambiguous meaning of section 1(1)(a) of the Act (1025C–J). There are also other reasons why the Act applies to contractual claims: the content of fault, as used in subsections 1(1)(b) and 1(3) of the Act, is not limited to delictual claims; in the present case, the application of the Act leads to fair and equitable results (1027B); an individual statute can operate upon different branches of the law (1028F–G); the ambit of application of a statute is a question of construction, and the fact that the application fails to observe divisions of current academic legal theory creates no difficulty at all (1028G); and the fact that the Act may have been prompted by problems which tend in practice to surface more in the field of delict than in that of contract is no reason to restrict the clear wording of the Act (1029E).

Goldstein J's interpretation of the Act is to be commended. It is not absurd, inconsistent or anomalous. Quite the contrary: it is absurd to non-suit a plaintiff merely because he or she has suffered damage caused partly by his or her own fault. In this case, it would also be inconsistent and anomalous to have different rules for claims based on breach of contract and for claims founded in delict.

5 The position in other legal systems

I have already referred to the fact that South African judges have in the past not hesitated to draw upon English law when interpreting section 1. In this regard, the current position in English law is revealing. The English courts were initially divided on the issue, some holding that the English Law Reform (Contributory Negligence) Act 1945 had no application where an action was framed in contract (see *Basildon District Council v JE Lesser (Properties) Ltd* 1985 1 QB 839; *Victoria University of Manchester v Wilson & Wormesley* 1985 2 Con LR 42; *AB Marintrans v Comet Shipping Co Ltd, The Shinjitsu Maru No 5* 1985 3 All ER 442),

others the contrary (eg *Quinn v Burch Bros (Builders) Ltd* 1966 2 QB 370; *De Meza & Stuart v Apple, Van Straten, Shena & Stone* 1974 1 Lloyd's Rep 508; cf *De Meza & Stuart v Apple, Van Straten, Shena & Stone* 1975 1 Lloyd's Rep 498 (CA), where the Court of Appeal found it unnecessary to decide the point). The matter has now, for the time being, been settled by the decision of Hobhouse J in *Forsikringsaktieselskapet Vesta v Butcher* 1986 2 All ER 488, the conclusion and the reasoning on which it was based having been upheld by the Court of Appeal (*Forsikringsaktieselskapet Vesta v Butcher, Bain Dawes Ltd & Aquacultural Insurance Services Ltd* 1989 AC 852 (CA)). This issue did not arise in the subsequent appeal to the House of Lords. Hobhouse J divided the cases in which the question arose whether the Act applied to claims brought in contract into three categories:

> "(1) Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant.
>
> (2) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract.
>
> (3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract" (508*f–g*).

According to Hobhouse J, the Act applies only to category (3), and apportionment of damages will take place regardless of whether the plaintiff's claim is framed in contract or in tort (510*f*–511*b*). This approach was followed in subsequent English cases (*Barclays Bank plc v Fairclough Building Ltd* 1995 1 All ER 289 (CA); *Youell v Bland Welch & Co Ltd (The "Superhulls Cover" Case) (No 2)* 1990 2 Lloyd's Rep 431).

In New Zealand the position is the same. The matter was first raised in *Rowe v Turner Hopkins & Partners* 1982 1 NZLR 178 (CA), where the Court of Appeal, without finding it necessary to decide the point, drew attention to the view that the Contributory Negligence Act 1947 "can apply wherever negligence is an essential ingredient of the plaintiff's cause of action, whatever the source of the duty" (181 lines 20–21). In *Mouat v Clarke Boyce* 1992 2 NZLR 559 (CA) the Court of Appeal had the chance to consider the issue fully, and unequivocally found that the Act applies whether the source of the duty which is breached arises from contract or from tort (563 line 48–565 line 19). The court went even further and held that "whenever liability depends on breach of a duty of care (however arising) apportionment for contributory negligence is available even if the Contributory Negligence Act be considered inapplicable" (565 lines 16–18). This approach is in sharp contrast to that in South African law, where the argument seems to be whether our Apportionment of Damages Act can, or even should, apply to a claim based on breach of contract.

The High Court of Australia, however, rejected the English and New Zealand approaches and in *Astley v Austrust Ltd* 161 ALR 155 (HC of A) legislation similar to the English Law Reform (Contributory Negligence) Act 1945 was held to have no application to claims for breach of contract. The court was of the opinion that historically such legislation was unconcerned with contractual claims, and that "fault" in the legislation did not include breach of contract. According to the court, the case law (including English and New Zealand cases) "displays substantial flaws of reasoning and is overall in a state of confusion" (176 line 33).

6 Conclusion

It seems that in South Africa the verdict on the availability of a defence of contributory negligence against a claim founded in contract is not yet in. In a number of cases a plaintiff will have a concurrent claim against the defendant. It seems illogical and unjust that a plaintiff should be able to escape the consequences of his or her own negligence by suing in contract alone. There seems to be good reason why, in an appropriate case, the defence of contributory negligence should be available whether the claimant chooses to sue in contract or delict or both. It remains to be seen whether our Supreme Court of Appeal, when the opportunity presents itself, as eventually it is sure to do, will be prepared to support the imaginative judgment of Goldstein J or will shrink from it.

PH HAVENGA
University of South Africa

Certitude is not the test of certainty. We have been cock-sure of many things that were not so.

Oliver Wendell Holmes in Marke (ed) (1964) The Holmes reader 81.

VONNISSE

DEELNEMENDE ELEKTRONIESE WAARNEMING AS DREIGEND-ONREGMATIGE PRIVAATHEIDSKENDING

Tap Wine Trading CC v Cape Classic Wines (Western Cape) CC
1999 4 SA 194 (K)

In hierdie saak het sogenaamde deelnemende elektroniese waarneming, dit wil sê waar een van die deelnemers aan 'n gesprek toestem tot die heimlike elektroniese opname van die gesprek, ter sprake gekom. Vir huidige doeleindes is van belang of sodanige opname 'n oortreding van die Wet op die Verbod op Onderskepping en Meeluistering 127 van 1992 daarstel, die (konstitusionele) reg op privaatheid van die nietoestemmende party skend en of die gewraakte gesprek as getuienis in die hof toelaatbaar is. Die feite was kortliks die volgende. A het 'n interdik aangevra teen B ten einde B te verbied om enige valse of lasterlike bewerings aangaande A te publiseer of te versprei. In 'n aansoek *in limine* vra B egter dat alle verwysings na telefoongesprekke tussen A en B wat sonder B se toestemming in opdrag van A op band geneem is, uit A se openingsverklaring geskrap word, en wel op grond van die volgende oorwegings:

> "The ground for the striking out application is that the said recording and consequent transcript are the product of a criminal contravention of the Interception and Monitoring Prohibition Act 127 of 1992. Moreover the recordings constitute an infringement of [B's] fundamental right to privacy, which includes the right not to have the privacy of [B's] communications infringed, enshrined in s 14 of the Constitution of the Republic of South Africa Act 108 of 1996. The evidence obtained by way of the said illegal recordings of [B's] conversations is a deliberate breach of the constitutional right."

Volgens waarnemende regter Prisman (196J–197A) het 'n mens hier met 'n geval van "participant electronic surveillance" in 'n siviele saak te make. In hierdie verband verkies hy (197B–E) die benadering van die Amerikaanse regspraak – bo dié van die Kanadese howe – dat deelnemende elektroniese waarneming geoorloof is en dat inligting wat op hierdie wyse bekom is dus wel as getuienis in die hof toelaatbaar is. Hy stem saam met die opvatting van die Kanadese skrywer (Hogg *Constitutional law of Canada* 3e uitg 1058) dat die teenoorgestelde "extravagant notion of privacy" 'n ironiese resultaat lewer:

> "The police informers . . . are free to testify in court about their conversations with the accuseds, where their memory and credibility will no doubt be challenged by the accused; but the electronic records of the conversations, which would set all doubts at rest, are inadmissible."

Die regter (197G–H) is voorts van oordeel dat deelnemende elektroniese waarneming deur private persone nóg die Wet op die Verbod op Onderskepping en Meeluistering oortree, nóg die (konstitusionele) reg op privaatheid aantas:

> "I am of the view that, in the conduct of civil litigation only (not involving the State), the use of a 'trap' in regard to participant electronic surveillance does not infringe any constitutional right (cf the approach of Page J in *MCT Labels SA and Another v Gemelli CC* 1991 (1) SA 53 (D) which, although heard before any constitutional protections, did not include any judicial rebuke in regard to the employment of a trap)."

Ten slotte laat hy hom soos volg uit oor die vraag na die toelaatbaarheid in die hof van getuienis wat deur middel van deelnemende elektroniese waarneming bekom is (198G–H):

> "In any event, even if the evidence was obtained improperly, illegally or unconstitutionally, this Court would have the discretionary right to admit the evidence: s 35(5) of the Constitution and the limitation clause – s 36 thereof – would permit such admission in civil cases (in which the State is not a party) where to do so would further the administration of justice."

Regter Prisman se uitspraak verg die volgende kommentaar:

(a) Eerstens geniet die vraag aandag of deelnemende elektroniese waarneming 'n misdaad ingevolge die Wet op die Verbod op Onderskepping en Meeluistering daarstel. Ter toeligting word artikel 2(1) volledig aangehaal:

> "Niemand mag –
>
> (a) 'n mededeling wat per telefoon of op enige ander wyse oor 'n telekommunikasielyn versend is of word of bedoel is om versend te word, opsetlik en sonder die medewete of toestemming van die versender onderskep nie; of
>
> (b) opsetlik meeluister na 'n gesprek [wat ook die opname daarvan insluit] deur middel van 'n meeluisterapparaat ten einde vertroulike inligting aangaande enige persoon, liggaam of organisasie in te win nie."

Die regter se beskouing dat die heimlike opname van 'n gesprek deur 'n gespreksgenoot in die geval van privaat persone – anders as deur die staat (sien *Tap Wine Trading* 197I–198F) – nie artikel 2(1) van die Wet oortree nie, word deur ander beslissings gesteun. In *S v Kidson* 1999 1 SACR 338 (W) 348 (sien ook *S v Dube* 2000 1 SACR 53 (D) 75–76) vat regter Cameron sy gevolgtrekking soos volg saam:

> "(a) The principle of interpretation *in favorem libertatis* obliges the conclusion that the prohibition in section 2(1)(b) of the 1992 statute applies in the first instance only to third party monitoring of conversations. Its primary signification is not to cover participant monitoring, ie when one of the parties to the conversation monitors it.
>
> (b) Police, defence and intelligence agency personnel who wish to monitor conversations for the purpose the statute specifies must however in terms of sections 2(2) and 3 obtain authorisation even for participant monitoring.
>
> (c) A private individual who with the assistance of the police engages in participant monitoring is in the absence of proof that the operation is a sham designed to evade the statutory prohibition not covered by the criminal prohibition."

Hierdie opvatting verdien instemming, eenvoudig omdat 'n heimlike bandopname deur 'n gespreksgenoot nóg 'n mededeling *onderskep* (a 2(1)(a)), nóg op meeluistering van 'n *gesprek* neerkom (a 2(1)(b)). Regter Cameron se slotsom word ook deur die Suid-Afrikaanse Regskommissie (*Report on the Interception and Monitoring Prohibition Act 127 of 1992* (1999) 197) onderskryf en sal na alle waarskynlikheid gevestigde Suid-Afrikaanse reg word. (Terloops, 'n interessante vraag mbt a 2(1)(b) Wet 127 van 1992 is dié na die betekenis van die woorde "vertroulike inligting" in die verbod op die opsetlike meeluistering na 'n gesprek deur middel van 'n meeluisterapparaat. In *Protea Technology Ltd v Wainer* 1997 9 BCLR 1225 (W) 1234 lyk dit of die hof hierdie vraag grootliks beantwoord met verwysing na die bedoeling van die kommunikeerder. Cameron R is in *Kidson supra* 347 egter 'n

ander mening toegedaan. Volgens hom moet "the information the communication intended to restrict as confidential . . . be information upon which the law confers the attribute of confidentiality". Dit sal myns insiens die geval wees nie alleen waar die inligting persoonlik van aard – dus die privaatheid van die kommunikeerder in gedrang bring – en beperk is tot bepaalde persone (onder andere die gespreksgenoot) of verband hou met 'n vertroulike verhouding nie (sien hieroor Neethling *Persoonlikheidsreg* (1998) 269 ev 275 ev), maar ook waar dit gaan oor vertroulike besigheidsinligting en dus die sfeer van handelsgeheime betrek (sien Van Heerden en Neethling *Unlawful competition* (1995) 223 ev)).

(b) Met die regter se siening dat deelnemende elektroniese waarneming nie die (konstitusionele) reg op privaatheid skend nie, kan nie fout gevind word nie. Volgens sowel *Kidson supra* 350 as *Dube supra* 76 sou 'n teenoorgestelde mening op "an inappropriately extravagant notion of privacy" neerkom. Privaatheid kan net geskend word deur 'n indringing in of openbaarmaking van private feite (sien bv *Motor Industry Fund Administrators (Pty) Ltd v Janit* 1994 3 SA 56 (W) 60; Neethling *Persoonlikheidsreg* 40–41; Neethling, Potgieter en Visser *Law of delict* (1999) 354–355), en die heimlike elektroniese opname van 'n gesprek deur een party tas op sigself nie die ander party se privaatheid op enige van die twee wyses aan nie. Nietemin skep die vaslegging van private feite in 'n bandopname 'n *bedreiging* vir die reg op privaatheid aangesien dié regsgoed aan die *gevaar of risiko* van onregmatige indringing in of openbaarmaking van die private feite blootgestel word. Dit kan soos volg verduidelik word. Waar 'n mens te make het met 'n heimlike bandopname deur 'n gespreksgenoot, word die slagoffer se reg op privaatheid uiteraard nie deur 'n indringingshandeling van die dader bedreig nie. Wat egter wel waar is, is dat die gevaar bestaan, juis omdat die gesprek op band is, dat derdes op ongemagtigde wyse die opname kan bekom, daarna luister en so onregmatig in die privaatheid van die slagoffer indring. Insgelyks is 'n direkte openbaarmaking aan derdes deur die dader in die afwesigheid van 'n besondere vertroulike verhouding (sien Neethling *Persoonlikheidsreg* 275 ev; vgl ook *Kidson supra* 349–350) tussen hom en die slagoffer, ook nie onregmatig nie. Desnietemin is die aantasting van privaatheid deur direkte openbaarmaking van die beliggaamde private feite (soos 'n bandopname van 'n baie emosionele gesprek) dikwels van 'n veel ernstiger aard as die blote mededeling van kennis aangaande hierdie feite. Daarom behoort bedoelde openbaarmaking in beginsel of *prima facie* (dit wil sê, in die afwesigheid van 'n regverdigingsgrond) as *contra bonos mores* gebrandmerk te word (vgl Neethling *Persoonlikheidsreg* 277 vn 81). In die lig van die bedreiging wat deelnemende elektroniese waarneming vir die reg op privaatheid van die slagoffer inhou, en omdat sodanige optrede in elk geval nie in ooreenstemming met aanvaarde menslike gedragspatrone in die moderne samelewing is nie – dus nie deur redelike mense (algemene regsgevoel of *boni mores*) as normaal ervaar word nie – en gevolglik nie deur die slagoffer geduld hoef te word nie, word as uitgangspunt aan die hand gedoen dat alle vasleggingshandelinge in beginsel as onregmatig beskou behoort te word (sien Neethling *Persoonlikheidsreg* 286–287). Sodanige onregmatigheid behoort net deur die aanwesigheid van 'n regverdigingsgrond opgehef te word. In *S v Bailey* 1981 4 SA 187 (N) 189 stel die hof dit in die algemeen met betrekking tot privaatheidskending so:

> "In all these cases it is the unlawful interference against which the individual's privacy is protected. Clearly . . . there is no unqualified right to privacy. This right, like so many others, survives only until such time as it is overshadowed by some superior legal right. Many examples of lawful interference spring to mind such as arrest, search, taking of finger prints or blood samples under the Criminal Procedure Act, the furnishing of the mass of detail required in the income tax return forms, and so on."

Die heimlike opname van 'n private gesprek kan byvoorbeeld geregverdig wees in omstandighede waar die dader sy belang in die verkryging van bewysmateriaal wil beveilig. Omdat dié vaslegging egter slegs regmatig is indien dit noodsaaklik is om sy belang op dié wyse te beskerm, kan die vaslegging net deur die *bewysnood* van die dader geregverdig wees (maw, die dader kan op geen ander wyse bewysmateriaal bekom as deur die vaslegging nie). Sodanige situasies is byvoorbeeld voorhande waar iemand 'n ander onder vier oë beledig of wanneer 'n man die lewe vir sy vrou ondraaglik maak wanneer hulle alleen is. Hier sal 'n heimlike bandopname van die beledigende woorde of van die man se verkleinerende opmerkings teenoor sy vrou vir bewysdoeleindes dus regmatig wees (sien Neethling *Persoonlikheidsreg* 292). Insgelyks word deelnemende elektroniese waarneming deur statutêre bevoegdheid (die openbare belang) geregverdig waar byvoorbeeld die polisie ingevolge artikel 2(2) van die Wet op die Verbod op Onderskepping en Meeluistering 127 van 1992 deur 'n regter daartoe gemagtig is.

Bostaande *de lege ferenda* beskerming teen 'n dreigende privaatheidskending deur heimlike bandopnames word gerugsteun deur die verskansing van die reg op privaatheid as fundamentele reg in die Handves van Regte (a 14 van die Grondwet 108 van 1996), wat die beskerming van dié reg versterk en dit 'n hoër status gee in die sin dat dit op alle reg van toepassing is (a 8(1) en (2) van die Grondwet). Enige regsreël of optrede van die staat of 'n persoon mag dus met verwysing na die reg op privaatheid getoets word en enige beperking van hierdie reg mag net in ooreenstemming met die beperkingsklousule van die Handves van Regte geskied (a 36 van die Grondwet). Hoe ook al, as uitgangspunt behoort die algemene beginsels wat reeds met betrekking tot die *boni mores* uitgekristalliseer het om die onregmatigheid al dan nie van 'n privaatheidskending te bepaal, as *prima facie* aanduiding van die redelikheid al dan nie van so 'n krenking ingevolge die Handves van Regte beskou te word (sien Neethling *Persoonlikheidsreg* 68–69 94–95).

Die beskouing dat deelnemende elektroniese waarneming *prima facie* onregmatig behoort te wees, word nie deur regter Kotzé in *Human v East London Daily Dispatch (Pty) Ltd* 1975 2 PH J24 (OK) onderskryf nie. In hierdie saak het die verweerders sonder medewete van die eisers 'n telefoongesprek tussen hulle op band geneem. Die eisers beweer dat hierdie optrede 'n *iniuria* daarstel. Regter Kotzé verklaar egter dat

> "in principle there is no difference between the taking of a tape recording by a participant in a telephone conversation and the taking down of a verbatim note thereof by him. To suggest that the lastmentioned course constitutes an invasion of privacy or an aggression upon the person, dignity and self esteem of the other party to the conversation seems to me to be preposterous".

Alhoewel die regter gelyk gegee moet word – soos reeds aangedui – dat hierdie optrede as sodanig nog nie 'n privaatheidskending inhou en bygevolg nie as 'n *iniuria* met betrekking tot privaatheid aangemerk kan word nie, is sy klaarblyklike instemming met die geoorloofdheid van heimlike bandopnames in omstandighede soos die onderhawige om bogenoemde oorwegings nie goed te praat nie. Soos gesê, skep dié vaslegging 'n bedreiging vir die reg op privaatheid en behoort die betrokkenes, in die afwesigheid van 'n regverdigingsgrond, minstens 'n interdik te kan verkry. In hierdie verband behoort beide vorme van die interdik, naamlik 'n gebod en 'n verbod, toepaslik te wees. Enersyds moet die dader *verbied* word om die bandopname aan buitestanders beskikbaar te stel, en andersyds moet die dader ook *gebied* word om die bandopname te vernietig of onbruikbaar te maak deur uitwissing van die gesprek. Sonder hierdie gebod kan die dreigende of voortgesette skending van die reg op privaatheid nie effektief verhinder word nie (sien Neethling *Persoonlikheidsreg* 287 vn 139).

(c) Ten slotte moet gewys word op die kwessie van die toelaatbaarheid in siviele litigasie van getuienis wat deur middel van 'n dreigend-onregmatige privaatheidskending bekom is. Dit kom voor of daar eenstemmigheid bestaan dat 'n hof 'n diskresie in hierdie verband behoort te hê om sodanige inligting, afhangende van die omstandighede, in siviele verrigtinge toe te laat of uit te sluit (sien *Tap Wine Trading* 198G–H, aangehaal hierbo; *Protea Technology supra* 1238 ev; *Lenco Holdings Ltd v Eckstein* 1996 2 SA 693 (N) 702–704; vgl *Shell SA (Edms) Bpk v Voorsitter, Dorperaad van die Oranje-Vrystaat* 1992 1 SA 906 (O) 916). In *Motor Industry Fund Administrators (Pty) Ltd v Janit* 1994 3 SA 56 (W) 63–64 laat regter Myburgh hom soos volg uit oor die moontlikheid om selfs relevante inligting as ontoelaatbare getuienis te weier:

> "Modern technology enables a litigant to obtain access to the most private and confidential discussions of his opponent: his telephones can be tapped, a listening device can be planted in the board room (or bedroom) of the opponent, documents can be photostatted, tape recordings of meetings stolen . . . It is poor solace to the litigant whose privacy has unlawfully been invaded by those means that the perpetrator of the wrong may face criminal prosecution if the evidence so obtained can be used in the civil proceedings in which they are engaged. In my view, as a matter of public policy, a Court should have a discretion to exclude evidence which was unlawfully obtained."

Soos voorheen reeds aangedui (sien Neethling en Potgieter "Aspekte van die reg op privaatheid" 1994 *THRHR* 709–710), kan hierdie standpunt ondersteun word. 'n Soepele diskresionêre benadering is verkieslik bo 'n rigiede reël dat alle relevante inligting sonder meer as getuienis in 'n hof toelaatbaar is. Insgelyks is 'n summiere afwysing van alle inligting wat op onregmatige of onwettige wyse bekom is, onaanvaarbaar. Dit behoort tog van die omstandighede van elke geval af te hang hoe 'n hof hierdie diskresie sal uitoefen (sien ook Neethling *Persoonlikheidsreg* 275 vn 68).

J NEETHLING
Universiteit van Suid-Afrika

TO DOGMATISE OR TO HERMENEUTICISE? A TALE OF TWO READINGS

Standard Bank Investment Corporation Ltd v Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission 2000 2 SA 797 (SCA)

1 Background observations

According to Hans-Georg Gadamer, the leading exponent of philosophical hermeneutics, a constitutional state (*Rechtsstaat*), where legal precepts bind all members of the (legal) community in the same way, is a prerequisite to legal hermeneutics properly so-called (*Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik* (1975) 312):

> "[I]n an absolutist state, where the will of the absolute ruler is above the law, hermeneutics cannot exist, 'since an absolute ruler can explain his words in a sense that goes against the rules of general interpretation'. . . There is a need to understand

> and interpret only when something is enacted in such a way that it is, as enacted. irremovable and binding" (Gadamer *Truth and method* (1975) 294).

The will of a despot can blatantly overtrump the interpretation of authorised legal interpreters such as judges. More subtly, however, legal interpreters themselves can evade their *hermeneutic responsibility* – in law a distinctively *judicial* responsibility – by hiding behind the "clearly expressed will" of the sovereign. In the latter instance the "objective adjudicator" assumes that (s)he dares not limit or broaden the legislative will, lest (s)he lands up in the murky waters of politics. Hermeneutic responsibility, Gadamer (*Wahrheit und Methode* 312–313) argues, requires of the legal interpreter, especially the judge, a *concretisation* of the legal norm (*Konkretisierung des Gesetzes*) which includes its application, and which often requires its completion through augmentation (*Rechtsergänzung*). Judicial decisions may be justified on the strength of either legal dogma or legal hermeneutics, that is to say, either by subsuming legal problems under generally applicable legal norms and principles or by concretising normative texts interpretively. Gadamer assigns priority to the latter mode of judicial problem-solving and, eventually, decision-making. Interpretive responsibility enjoins the judicial decision-maker to *hermeneuticise* rather than simply to *dogmatise*.

Pre-constitutionalist South African case law offers many examples of the evasion of hermeneutic responsibility, varying from blatant deference to the will of the despot to more subtle (albeit misplaced) declarations of judicial independence from politics. In *Rossouw v Sachs* 1964 2 SA 551 (A), for instance, the Appellate Division denied a detainee access to reading material even though the repressive provisions authorising his detention without trial and prescribing the conditions for the detention were silent on this particular issue. The court argued that allowing a detainee to read whatever (s)he wants, would defeat the purpose of the detention, namely to "induce the detainee to speak" (564). This is "purposive interpretation" at its cynical worst, augmenting the (verbally) unexpressed will of the despot (McCreath "The 'purposive approach' to constitutional interpretation" in *Constitution and law* (1998) 65–68). *Minister of the Interior v Lockhat* 1961 2 SA 587 (A) was an instance of ill-conceived judicial UDI with the highest court of the land averring its helplessness to mitigate the ill effects of the Group Areas Act (77 of 1957; later 36 of 1966). Holmes JA thought that he could do no more than acquiesce in (and thereby authorise) the apartheid government's "colossal social experiment and ... long-term policy" resulting, for numerous South African citizens, in "disruption and, within the foreseeable future, substantial inequalities" (602). A Pilate of old would have envied the specious grace with which the court revelled in its deferential disposition:

> "The question before this court is the purely legal one whether this ... legislation ... authorises ... the ... discriminatory results complained of in this case. In my view ... it manifestly does."

The "dogmatic moves" in both the aforementioned cases are conspicuous. In *Sachs* the court accepted (*a priori*) that it is co-responsible for the maintenance of "state security", and thereby dogmatically assumed a duty to support the state's securocrats in inducing "dangerous detainees" to speak. In *Lockhat* Holmes JA, invoking the dogma that a court should not interfere in policy matters, refused to pierce the wall of separation between (i) the ill effects of the policies that non-judicial branches of government seek to implement and (ii) the court's duty to do justice. These dogmatic moves were made prior to and ultimately regardless of any serious interpretive engagement with the statutory provisions that the judicial decision-makers in both instances were called upon to construe. Preceding these moves is a judicial confidence that a court (can) know what the legislature wants to say.

Is this confidence dogmatic too?

More than three and a half decades after the judgments in *Sachs* and *Lockhat* the Supreme Court of Appeal's judgment in *Standard Bank Investment Corporation Ltd v Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission* 2000 2 SA 797 (SCA) ("the *Standard Bank* case") raises this question once more. The legal scene has, in the meantime, changed dramatically. The very statutory provisions which the two judgments had to deal with in the early 1960s would today have been constitutionally unsustainable without more ado. But it does not follow that all statutory interpretation is now purged of (all) dogmatism. The dissimilarity in the approaches of the majority and a rather distinct minority (of one judge) in the *Standard Bank* case gives the legal exegete à la Gadamer pause.

2 The issue(s)

Standard Bank centres on a proposed merger of two major South African banking companies, Nedcor Ltd ("Nedcor", the respondent) and Standard Bank Investment Corporation Ltd ("Standard Bank", the appellant). The former company initiated the proposed merger while the board of the latter opposed it. This merger, "the largest ever attempted in our country" (to use the words of Schutz JA, speaking for the majority of the court), profoundly affected the Liberty Life Association of Africa Ltd ("Liberty", the second appellant): it would give Old Mutual plc, Nedcor's controller, control over Liberty. The Competition Act (89 of 1998) subjects "large mergers" (s 11(3)(b)), such as the one proposed by Nedcor, to certain control measures (s 14(3)): the Competition Commission has to refer proposals for such mergers, together with a recommendation, to the Competition Tribunal and the Minister of Trade and Industry. The tribunal then has to make a decision (in terms of ss 15 and 16 of the Act) and there is a right of appeal against this decision to the Competition Appeal Court (ss 17 and 37 of the Act).

However, where the acquisition of more than 49% of the shares of a "controlling company" of a bank is involved, section 37(2)(a)(iii) of the Banks Act (94 of 1990) (also) requires the Minister of Finance, through the Registrar of Banks, to grant permission for such acquisition (albeit *after consultation* with the Competition Commission, called into existence in Chapter 4 Part A (ss 19–25) of the Competition Act) (cf s 37(2)(b) of the Banks Act). Similarly, the Registrar of Long-Term Insurance must grant permission for the acquisition of control of one life insurer by another (s 26 of the Long-Term Insurance Act, 52 of 1998).

At this point section 3(1)(d) of the Competition Act enters the picture:

> "(1) This Act applies to all economic activity within, or having an effect within, the Republic, except – . . .
>
> (d) acts subject to or authorised by *public regulation*; . . ."

The interpretive issue in the *Standard Bank* case was how the exemption in section 3(1)(d) should be construed in relation to section 37(2)(a)(iii) of the Banks Act and section 26 of the Long-Term Insurance Act. Would the permission of the Minister of Finance and the Registrar of Long-Term Insurance respectively, constitute sufficient "public regulation" to exempt a proposed "large merger" of two banks and the (effective) acquisition of control of one life insurer by another from the provisions of the Competition Act? In answering this question two definitions in section 1 of the Competition Act are relevant. "Public regulation" is said to be

> "[a]ny national, provincial or local government legislation or subordinate legislation, or any license, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority",

whereas a "regulatory authority" is described as

> "[a]n entity established in terms of national, provincial legislation or local government legislation or subordinate legislation responsible for regulating an industry, or sector of an industry".

3 The majority's approach

The majority of the court, per Schutz JA (Hefer JA, Nienaber JA and Harms JA concurring), assumed that section 3(1)(d) of the Competition Act, read with the definitions in section 1 of the Act as well as the other statutory provisions pertinent to the interpretive issue, "clearly"/"plainly"/"literally" means that the proposed "large merger" between Nedcor and Standard Bank is neither subject to the merger control procedures in Chapter 3 nor to approval by any of the controlling bodies in Chapter 4 of the Act. Approval by the Minister of Finance in terms of section 37(2)(a)(iii) of the Banks Act (for the merger of the controlling companies of the two banks) and by the Registrar of Long-Term Insurance in terms of section 26 of the Long-Term Insurance Act (for the acquisition of control of Liberty by Old Mutual) therefore suffices (pars [9]–[12] of the judgment). Schutz JA intimated that he was prepared to depart from what he sees as the clear or literal meaning of section 3(1)(d) of the Competition Act, but only if convincing arguments inducing and justifying such departure can be advanced. That he seems to be rather reluctant to find such reasons (if not predisposed not to find them) clearly (?) appears from the jeering remark prefacing his "search":

> "I now turn to the various arguments that have been raised as to why s 3(1)(d) should not be read as it reads" (par [14]).

What then follows is a lecture on the (de-)merits of (non-literal) purposive interpretation, presented as acceding to "extraneous considerations" and reading words into provisions too readily. This approach is contrasted with the tested and tried literal(-ist) reading of a statutory text that does not tamper with the words of the legislature (cf also Harms JA in *Abrahamse v East London Municipality. East London Municipality v Abrahamse* 1997 4 SA 613 (SCA) 632G–H). Schutz JA cites an impressive array of *dicta* in support of his misgivings about purposive *vis-à-vis* literal(-ist) interpretation (pars [16]–[22]). He even reminds us, quite platitudinously one might add, that section 43 of the Constitution vests legislative authority in Parliament and that "Parliament exercises its authority mainly by enacting Acts . . . expressed in words"!

Taking Gadamer's exhortation that legal interpretation involves a thorough hermeneutic engagement with a law-text seriously, there is much to criticise in the majority judgment in the *Standard Bank* case. The equally serious proponent of purposive statutory interpretation will also find more than enough reason to take issue with Schutz JA's one-sided representation of this mode of interpretation (though it should immediately be added that purposive interpretation is not the panacea for all literalist and formalist ills). However, one need not even criticise the majority judgment from the perspective of either Gadamer's hermeneutics or purposive interpretation. *In terms of his own mode of reasoning,* Schutz JA shoots himself in the foot so badly that, as a believer in "clear statutory language", he illustrates its fallacies as effectively as any of its antagonists can do. The ease with which he comes (jumps?) to the conclusion that words or phrases occurring in provisions relevant to the interpretive issue *clearly mean this or that,* is so remarkable that it warns the vigilant exegete of a snake in the grass. To cite, at some length, from paragraph 10 of the judgment (with my italics where the obvious clarity of the meaning of words and concepts is uncritically and unreflectively proclaimed):

> "The act of merging two banks by the acquisition by one of the majority of the shares in the other *is clearly an 'act'*. Because the Minister of Finance must grant his 'permission', the act of acquisition has to be 'authorised by' him. As this is so it is unnecessary to consider the exact import of the phrase 'subject to'.
>
> The next enquiry is whether authorisation by the Minister is authorisation 'by public regulation'. This enquiry takes one to the definition of 'public regulation'. This definition falls into at least two parts, but the one presently relevant is 'any licence, . . . or similar authorisation issued by a *regulatory authority* . . .' If the Minister is a 'regulatory authority', then this part of the definition is satisfied. That part of the definition of 'regulatory authority' which reads 'an entity established in terms of national . . . legislation . . . responsible for regulating an industry, or sector of an industry' is satisfied, provided that the Minister is an 'entity'. As to whether the Minister is an 'entity', *he clearly is.* According to *The Shorter Oxford English Dictionary* an entity is a 'being'. The nature of the being is indefinite. It may be a person, the holder of an office, a board, an institution. It may also be a Minister of Finance. The relevant part of the definition is satisfied because the Minister's post is established under s 91, read with section 85(2) of the Constitution of the Republic of South Africa, 1996; and because under the Banks Act he has wide powers of regulation over the banking industry (s 90) and particularly over bank mergers (see ss 37 and 54)" (par [10]).

It is, to begin with, not altogether clear that "the act of merging two banks" is clearly *an act.* It can more precisely be described as *a series of acts* and taken at face value this may indeed be what the wording of section 3(1)(d) suggests, for it uses "acts" in the plural. But this only as an aside. More problematic is Schutz JA's uncritical assumption that the minister *clearly is "an entity"* because the minister is "a being". The judge allegedly consulted lexicographic authority for this contention but, with all due respect, he did not read his dictionary properly. Dictionaries (including *The shorter Oxford English dictionary* (1973) which he used) do not say that "an entity" is "a being" (cf eg *The new Oxford dictionary of English* (1998), *The concise Oxford dictionary* (CD-ROM version), *The Oxford modern English dictionary* (1995), *The Oxford thesaurus* (CD-ROM version) and *The new Collins concise dictionary of the English language* (1984)). First, "an entity" is mostly said to denote "a thing with independent existence". Note the use of "thing" as opposed to "person" or "human being". Secondly, the "thing-ness" of an entity is frequently related to the existence of a body or persona or collectivity, but far less frequently to a human being or agent (albeit in an official capacity) such as a minister. Thirdly, it is true that dictionaries relate "entity" to "being" but then not "a being", but "being" (not preceded by an indefinite article) in the sense of "existence" or, as *The Oxford modern English dictionary* so neatly captures it, "a thing's existence regarded distinctly". In Schutz JA's own lexicographic source (*The shorter Oxford English dictionary*) the entry on which he relies to define "entity" is the following: "being, existence as opposed to non-existence". Surely a minister cannot be (a) "being" in this sense! The court's confidence that the minister is indeed *a being* is reminiscent of John F Kennedy's misuse of the indefinite article when, during a visit to Berlin in the early 1960s, he (ex-)claimed: "Ich bin ein Berliner!"

Even if the meaning which the court attributes to "an entity" is the "best possible" meaning on the strength of lexicographical evidence (which it is not), then it would still not be the only possible and therefore indisputably "clear" meaning. This, after all, is what language is all about: ambiguity, open-endedness, malleability. The meaning that Schutz JA attaches to "an entity" is not a meaning he found in the text of the Competition Act, but – as the proponents of the linguistic turn in legal interpretation would have it – a meaning that he made in dealing with the text (Coombe "'Same as it ever was': Rethinking the politics of legal interpretation" 1989 *McGill LJ* 603–652).

One can advance a perfectly sustainable policy reason why "an entity" in the Act's definition of a "regulatory authority" should be understood to be "a body" consisting of a number of persons rather than simply "an individual" such as "a minister". Deliberation, which is best possible within a *body* of decision-makers, is likely to enhance the quality of decisions on issues pertinent to a matter of public interest as weighty as merger control. And, as I have shown, it is linguistically quite possible (if not preferable) to understand "an entity" to be such a body. However, the majority's pussyfooting around policy issues precludes consideration of this possibility. Schutz JA, for instance, commences his judgment on the merits of the case in the following vein:

> "Much has been said in the papers about the merits and demerits of Nedcor's proposal. This is not a subject on which this court should express any view. The decision is one that rests, in the first place, with the appropriate regulatory authorities and ultimately, if permission be given, with the shareholders of Standard Bank" (par [3]).

If this *dictum* means that it is inappropriate for a court of law to pre-empt (or, *ex post facto,* second-guess) administrative decisions that have been arrived at in a rational manner, Schutz JA finds himself in the good company of, amongst others, the Constitutional Court (in *Soobramoney v Minister of Health KwaZulu-Natal* 1997 12 BCLR 1996 (CC)). However, if this *dictum* is designed to preclude any judicial consideration of how the Competition Act can best be construed to achieve the policy objectives set out in, for instance, its preamble and its purpose clause (s 2), the majority's sincerity seriously to engage with the Act is suspect. Their high-handed dismissal of any purposive interpretation fuels this suspicion of insincerity, reminiscent of Holmes JA's judicial UDI in the *Lockhat* case.

In short then, the majority's contention that the Minister of Finance clearly is an entity for purposes of the definition of a "regulatory authority" in section 1 of the Act is casting it exceedingly high. This meaning is lexicographically hardly sustainable.

There is, in the majority judgment, another spectacular illustration of the failure of the clear language thesis. Schutz JA gives the following apparently innocent explanation to label the term "act" (or, to be more precise, "acts") in section 3(1)(d) of the Competition Act with a certain tag:

> "Because of the frequency with which I will have to refer to the confined construction that I have placed on the word 'act', and its importance, I shall refer to the word so construed as a 'monopolistic act'. I do not use this expression pejoratively, nor in order to define, but in order to coin a brief label. This construction does not involve reading words into the subsection. It is a necessary construction, given the context and given the purpose of the Act. Failure to construe the word correctly is the reason, it seems to me, for much of the confusion and the concern about the operation of the Act, manifested both in this appeal and more widely" (par [9]).

The *dictum* itself already sows seeds of suspicion that "monopolistic act" in the majority judgment does not really operate as the neutral working hypothesis Schutz JA makes it out to be. A "failure to construe the word [*act*] correctly" is discernible only when "incorrect constructions" are contrasted with the (court's) correct (?) understanding of a "monopolistic act" as *defined* in the *dictum.* "Monopolistic act" thus loses its innocence as "a brief label" and overpowers other possible meanings of "acts" in section 3(1)(d). This becomes abundantly clear later in the judgment when the majority deals with counsel for the appellant's contention that serious anomalies would arise if section 3(1)(d) were not appropriately contained or restrained (in relation to provisions such as section 37(2)(a)(iii) of the Banks Act and section 26 of the Long-Term Insurance Act). A plethora of regulative measures

in numerous statutes, counsel argued, could then be held to exempt vast areas of economic activity from the regulative effect of the Competition Act. Schutz JA dismisses this concern (par [26]):

> "A literal interpretation of s 3(1)(d) would lead to what was called a startlingly wide field of exclusion from the application of the Competition Act. *When one bears in mind that one is concerned only with the exclusion of a 'monopolistic act' I do not find such exclusions as there may be to be startling"* (my italics).

In paragraph 9 of the majority judgment Schutz JA warns that there is no reason to give the exceptions in section 3(1) less weight than the general (introductory) words but 17 paragraphs later, in the *dictum* just cited, he does precisely that: section 3(1)(d) is enervated in relation to the introductory words and its scope is narrowed down significantly to include only some acts. This certainly did not happen on "purely linguistic" grounds! It is indeed a matter of reading the qualifier "monopolistic" into the subsection, the court's earlier avowal to the contrary notwithstanding, "given the context and given the purpose of the Act" (par [9]). And so a protagonist of clear language is converted to the idea of non-literalist, contextual and purposive interpretation – at least to the limited extent that it suits an argument justifying his (preconceived?) conclusion!

4 The minority's approach

The interpretive approach of Marais JA, the only judge to hand down a minority judgment, is substantially different from that of the majority. According to him the construction of section 3(1)(d) must follow from a holistic reading of the Competition Act. A conventional assumption of statutory interpretation, namely that the court must give effect to the intention of the legislature *as can be gleaned from indicia in the Act,* induces this *modus operandi.* Marais JA engages with the text without verbalising any assumptions about the clarity or effect of language. On the contrary, he intimates that the language of the Act as it stands is not the final and sacrosanct determinant of the interpretive result. Here is how he puts it (par [3]) of the minority judgment):

> "I approach the problem with no innate prejudice against either 'reading in' or 'reading down' or 'extensively' or 'restrictively' interpreting the provision. Whether or not the case calls for the deployment of any of those familiar techniques will only be known once one has taken into account in their totality all those factors to which it is legitimate to have regard in aid of interpretation. If it does, the use of the technique will be no more nor less intellectually justifiable than giving the language its plain meaning would have been if there had been no or insufficient reason to qualify or depart from it."

He also seeks, at the outset, to allay fears that his *modus operandi* might result in ignoring the legislature's language in favour of a (pre-)preferred policy stance:

> "I come to the task of interpreting the provision without making any assumptions *a priori* as to the legislature's sense of priorities or as to its view on the relative importance of banking considerations as against competition concerns. That would not be a permissible approach. If they are relevant and appear with sufficient clarity from the legislation after one has undertaken the task, that is another matter" (par [2]).

The judge then examines the Competition Act as a whole, heeding Alice in Wonderland's exhortation "that you should begin at the beginning and go on till you come to the end: then stop" (par [4]). He takes into consideration the Act's long title, its preamble and the statement of purpose in section 2 (pars [5]–[7]).

He furthermore attaches interpretive weight to the very wide opening words of section 3, the prohibition of certain restrictive practices in Chapter 2 and the

provision for merger control in Chapter 3 (pars [8]–[12]). Of equal significance are, according to Marais JA, the nature and powers of the Chapter 4 entities exercising merger control, the fact that their personnel are required to be appropriately qualified and experienced persons and the comprehensive powers vested in the Competition Tribunal to deal with transgressions coupled with its power to grant exemption from provisions of the Act (pars [13]–[17]). Finally, the spirit, tenor and objects of the transitional provisions in Schedule 3 to the Act are taken into account too (par [18]).

Marais JA then concludes (par [20]):

> "Once one has read the Competition Act in its entirety it becomes quite plain that the evils it identifies are regarded as not having been adequately countered in the past and that a change for the better is intended. It is also plain that a 'competitive economic environment', the regulation of 'the transfer of economic ownership in keeping with the public interest' and the establishment of 'institutions to monitor economic competition' are key concepts in the legislative plan to achieve that change for the better. In short, the general thrust of the stated objects of the Act is more and better control and certainly not less control than had existed in the past."

In the light of this reading of the Act, Marais JA, at pains not to find interpretive answers in speculation, but in what the legislature itself had said (par [22]), in effect agrees with counsel for the appellant that the literal reading of section 3(1)(d) for which the majority opted would lead to a startlingly wide field of exclusion from the application of the Competition Act (par [26]). He thus concludes that section 3(1)(d) can only exempt acts subject to forms of public regulation (already) catering for concerns to which the Act also attends from the operation of control measures in the Act. There will have to be *substantial* (and not necessarily complete) correlation between such other forms of regulation and those provided for in the Act (par [34]), and each case will have to be decided on its own facts (par [35]). In the case at hand, however, the proposed merger, according to Marais JA, definitely had to be subject to control in terms of the Competition Act (par [40]).

The judge has no qualms about reading words such as "other" or "for competition purposes" into section 3(1)(d) (par [33]). The provision would then read: "acts subject to or authorised by *other* public regulation *for competition purposes*".

5 Assessment

The majority judgment in *Standard Bank* shows what can happen when a court grabs hold of the presumably clear language of a statute and starts running – regardless. The minority judgment is an example of a serious and holistic hermeneutic engagement with a statute. Both interpretive modes are induced by considerations that, in the context of statutory interpretation in South Africa, are conventional and even trite. In the first instance faith in the power of clear language dominates and in the second the belief that a statute embodies the intention of a legislature. A combination of the two constitutes the dominant *literalist-cum-intentionalist* approach to statutory interpretation which sees statutory interpretation as an exercise in gleaning the intention of the legislature primarily *from the words or language it used* (Cowen "Prolegomenon to a restatement of the principles of statutory interpretation" 1976 *TSAR* 131–176 and "The interpretation of statutes and the concept of 'the intention of the legislature'" 1980 *THRHR* 374–399). If a provision is thought to have but one plausible, "clear meaning", there is no doubt what the legislature intended and what the provision therefore means. Language, so tradition concedes, can sometimes leave one in the lurch: the meaning of a statute is not

always apparent from its words and more than one meaning may linguistically be possible. That is when the common law rules and presumptions of statutory interpretation kick in (Steyn *Die uitleg van wette* (1981) 1–12).

Neither of the judges handing down the Supreme Court of Appeal's judgments in the *Standard Bank* case has made the linguistic about-turn. Both think that they have brought to light a meaning residing in section 3(1)(d) of the Competition Act and would probably object to suggestions that they have "made" this meaning, even though they both read words/phrases into the provision! Schutz JA's justification for such "reading in" is overtly literalist (rather than intentionalist) and he is probably mesmerised by a *dictum* from one of the most frequently cited *minority* (and therefore non-binding) judgments in South African legal history, namely that of Schreiner JA in *Jaga v Dönges NO* 1950 4 SA 653 (A) 664E–H:

> "Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over the context, and *vice versa,* the less clear it is the greater the part that is likely to be played by the context.
>
> Ultimately, when the meaning of the language in the context is ascertained, it must be applied regardless of the consequences and even despite the interpreter's firm belief, not supportable by factors within the limits of interpretation, that the legislator had some other intention . . . But the legitimate field of interpretation should not be restricted as the result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene."

The question is what to include in the notion of "context". Can (clear) language itself, in one given capacity, be a context for (clear) language in another capacity? This seems to be the assumption on which Schutz JA's reading of the word "monopolistic" into section 3(1)(d) is premised: in his judgment he makes no reference to a context other than that to be found within the four walls of *clear* language itself – as he understands it. For Marais JA there seems to be the *context* of what the legislature intended, discernible by reading section 3(1)(d) in the *context* of the Competition Act as a whole, *but nothing more,* for the judge continuously warns against "speculations" about policy (cf also par [36] of the minority judgment).

Can one say that either of the two judgments is to be preferred – if not *qua* result then at least *qua modus operandi*? I think so, but before showing any preference I have to put my own hermeneutic cards on the table. I cannot agree with either of the two judges that there is any meaning inherent in section 3(1)(d) or, for that matter, in the Competition Act as a whole. Meaning does not reside in a (law-)text but is constituted through a dynamic and complex to-and-fro play of signifiers in and around the text, as well as among a plethora of texts that are signifiers themselves, constituting a highly complex context and impacting on meanings assignable to the text to be construed. This latter text is a point of departure in deciding on (or "making") a meaning – it is not a source from which a pre-existent meaning can be exhumed (Du Plessis "Die sakelys vir wetsteksvertolking en die epog van konstitusionalisme in Suid-Afrika" 1999 *Koers* 223–259 242–243). As a rule, it is not paucity of meaning that causes the predicament: on the contrary, a confusing proliferation of possible meanings clamouring for pre-eminence and confronting the reader of a law-text – who *must* choose. *Standard Bank* poignantly illustrates this dilemma.

The credibility and legitimacy of the eventual choice does not necessarily depend on the interpretive result, but often on the manner of interpretation and the justificatory arguments advanced. In the *Standard Bank* case this was particularly

true, for it was a matter of two heavyweights tackling each other and there was little reason for sympathy with an underdog. Policy issues of competition control were, of course, involved and the case was therefore not (politically) uncontroversial. But still, in the perception of the proverbial man (or is it entity?) in the street, it did not really matter much which way the decision went. It was not a "tough case" putting the legitimacy of the legal order in the eyes of the broad public at stake.

Standard Bank is bound to convey a message to powerful role-players in the South African economy. The message conveyed by the majority judgment is a rather shallow one: if you can afford a lawyer clever enough to convince a court of "the clear meaning" of a statutory provision favouring you, you will win your case. A shrewd litigant may even understand what Stanley Fish (*Doing what comes naturally. Change, rhetoric, and the practice of theory in legal studies* (1989) 358) has discerned: clear meaning does not reside in a law-text but in the interpretive assumptions of the judge reading it; the clearer the language of a text, the more deeply hidden the prejudices making it clear. It is therefore better to get yourself a lawyer who understands, knows and shares the prejudices of the legal fraternity rather than one who carefully reads and seriously engages with law-texts.

The minority judgment conveys a more acceptable (though not perfect) message. It effectively subordinates the "clear language" of the statutory provision in question to what the legislature (presumably) intended. An attempt is made to glean this intention from the Act as a whole. It is never suggested, however, that "clear language" is the decisive vehicle conveying legislative intent nor that the exegete must try and mind-read the legislature. All things considered, "intention of the legislature" in the minority judgment is more akin to "the purpose of the Act" than to "what the legislature had in mind" – and I conclude this as someone sceptical about the redeeming features glibly attributed to the nowadays fashionable *Open sesame!* of *purposive interpretation.* It is crucially significant, though, that the minority's disposition calls for a holistic engagement with a *text* in order to construe one of its crucial provisions. This satisfies Gadamer's requirement for legal interpretation in a constitutional state.

It is impossible to lay down hard and fast rules for reading law-texts in but one "correct" way. However, even in the absence of the possibility of a single correct reading, there are cogent reasons for preferring a hermeneutic reading to a dogmatic one. Essentially it boils down to honouring and enhancing democracy in the constitutional state. To engage with a statutory text is to take it seriously. This is a wholesome approach, with the so-called counter-majoritarian difficulty constantly looming in the background (Tushnet "Anti-formalism in recent constitutional theory" 1985 *Michigan LR* 1502–1544 1503): an unelected judiciary should continually remind itself not to take the legislative work of an elected legislature lightly.

Marais JA is in earnest about the legislature's work. His *modus operandi* is not startling. It is a matter of reading a particular provision *ex visceribus actus* in a substantive (and not just formal) way (Du Plessis *The interpretation of statutes* (1986) 128). That he erroneously thinks he is exhuming (a) meaning from somewhere within the text is forgivable because his working method does enough good. In short, Marais JA hermeneuticises.

The proponent of the "clear language" approach might claim that (s)he also takes the legislature's work seriously by unquestioningly deferring to the clear language the legislature uses. However, there will be substance to this claim only if the principal assumptions of literalism-cum-intentionalism are sustainable – which they

are not. Once one has grasped that the clarity of language has more to do with the interpreter's presuppositions and pre-understanding than with some or other quality of language itself, language *per se* can no longer be clear. Consider the following *dictum* of Davis J in *Langklip See Produkte (Pty) Ltd v Minister of Environmental Affairs and Tourism* 1999 4 SA 734 (C) 746C–D:

> "A purposive approach to interpretation is desirable when a statute contains open-textured concepts or ambiguity as assessed by a reasonable reader, but when a provision is clear there is no room for ignoring the manifest meaning."

The crucial words here are "reasonable reader" because they echo a belief, a presupposition, that "good" or "rational" jurists will understand a certain kind of language in the same way. This follows because this privileged group of hermeneuts reason like (only) jurists (do), they see the "world" like only jurists can and they are therefore the ultimate arbiters of clear language in law-texts. This is an instance of judicial ideology (Nicolson "Ideology and the South African judicial process – Lessons from the past" 1992 *SAJHR* 50–73 61–64), of a juridically and judicially elitist dogma that restrains a democratic reading of law-texts.

Standard Bank itself strikingly illustrates the untenability of the clear language thesis: judges of appeal attach diametrically opposed meanings to one and the same statutory provision believed to be couched in clear language. Schutz JA suggests (eg in par [11]) that the clear meaning of section 3(1)(d) is not in dispute, but only the extent to which it would be appropriate to depart from it. However, if that were so, why did he himself have to read a word into the provision? And why did his learned brother handing down the minority judgment opt for other words to be read in? In the respective views of the minority and the majority at any rate, the "clear language" of section 3(1)(d) means two wholly different things. For the majority it is the dominant determinant of the meaning of the provision. For the minority it plays second fiddle to a meaning arrived at through a holistic reading of the Act.

From a democratic perspective the interpretive *outcome* of the minority judgment also surpasses that of the majority judgment. The latter gives precedence to the non-deliberative decision-making of a minister while the former assigns decision-making to deliberative bodies of experts called into existence by the Competition Act for the very purpose of making decisions of the kind called for in the *Standard Bank* case. The latter process of decision-making is more likely to advantage and advance democracy. We know now that the minister's decision went against the "winners" in the appeal case. It may perhaps be that these "winners" have been prejudiced by the exclusion of the very eventuality they sought to avoid, namely a deliberative body of experts investigating and pronouncing on the sustainability of the proposed merger!

Marais JA, at the end of his judgement, makes the following laconic remark: "For the rest, I am in respectful agreement with the majority."

This cannot be correct. There are actually very few points of agreement between the two judgments – except perhaps that Marais JA also pays lip service to some conventions of statutory interpretation. His judgment is qualitatively so superior to that of the majority that it may, it is hoped, in years to come, rival Schreiner JA's minority judgment in *Jaga v Dönges* (*supra*) for a position of eminence among quotable, non-binding judgments on statutory interpretation.

LOURENS DU PLESSIS
University of Stellenbosch

THE RIGHT TO ACCESS TO INFORMATION

Korf v Health Professions Council of South Africa 2000 1 SA 1171 (T)

1 Introduction

The right of access to information in South Africa is currently entrenched in section 32 of the Constitution of the Republic of South Africa 108 of 1996 (hereafter "the 1996 Constitution"). However, a limited version of this fundamental right applied until recently while waiting for the legislature to enact national legislation to define and describe the minimum standard set by the Constitution. The coming into effect of the less restrictive version of section 32 was therefore suspended for three years from the date of coming into operation of the 1996 Constitution and only became effective in February 2000 (see discussion *infra*).

The following case was heard during the abovementioned three-year period and is a good example of the way in which the applied limited version of the right of access to information prejudiced the applicant in that she was prohibited from access to all the information she required. If, however, the case had been heard after the said three-year period, the applicant's rights would probably have been much more extensive and the court's decision very different.

In the following few paragraphs I shall first discuss the case of *Korf v Health Professions Council of South Africa* with regard to the facts and the judgment and secondly give a brief description of the constitutional position. Thirdly, I shall also deal with some of the more relevant issues emanating from the Promotion of Access to Information Act 2 of 2000 (hereafter referred to as "the Act") which could have had an effect on the rights of the applicant had the case been heard after the Act became operational.

2 The case

This was an application for access to the contents of a file, allegedly in the possession of the respondent, relating to the alleged negligence of a certain Dr H. The applicant relied on section 32 (the right of access to information) of the 1996 Constitution.

2 1 The facts

The applicant was five months pregnant when she was admitted to the Witbank Hospital (a state hospital) on the instructions of Dr H. Dr H studied a sonar report of the applicant and, after at first telling her there was no need to worry and that everything was fine, informed her that the foetus had to be removed as it would not live. He then proceeded to remove the foetus, after which he placed it on a trolley and left. According to the applicant Dr H did not examine the foetus for signs of life at that stage. Shortly afterwards the applicant's friend noticed the foetus moving and informed Dr H about this. He replied that these movements were merely final spasms, but when he then examined the foetus, Dr H found that the foetus was alive and ordered that the foetus be put in an incubator. The foetus was, however, already blue at this stage. The baby lived, but was a quadriplegic. According to the applicant, the above conduct of Dr H constituted medical negligence and that consequently Dr H had been responsible for her baby's becoming a quadriplegic.

As a result, the applicant lodged a complaint of medical negligence with the South African Medical and Dental Council (the predecessor of the respondent) against Dr H. The council later informed her that they had investigated the matter, that Dr H had explained his conduct and that the council had accepted his explanation. They would not take any further steps against Dr H and the matter was considered closed.

The applicant was not satisfied with the finding of the council and decided to institute action for medical negligence on behalf of her child against Dr H and the Witbank Hospital. For this purpose she needed the medical records and other relevant documentation from the file held by the respondent. However, the applicant had not been able to obtain the contents of the file, as the council had refused her any access to it. As a last resort, the applicant lodged an application for an order granting her access to the contents of the file.

2 2 Ratio decidendi

Judgment was delivered by Van Dijkhorst J. The main question with which the court occupied itself related to the respondent's argument on section 32 of the Constitution. The respondent countered that section 32 cannot be read in isolation, but must be read together with item 23(2)(a) of Schedule 6 of the Constitution and that the applicant had to comply with its provisions.

The court distinguished three requirements with regard to item 23, namely that

1 ". . . the information must be held by the State or an organ of State in a sphere of government;

2 the information must be required by the applicant;

3 for [the purpose of] the exercise or protection of any of [the] rights" (1178E).

With regard to the first requirement, the court entered into a long discussion on whether or not the respondent is an organ of state. The court referred to case authorities and legislation on the point and concluded that the test to be applied to determine whether or not a body or functionary is an organ of state, is the so-called control test (ie whether or not the body or functionary is directly or indirectly controlled by the state). The judge also referred to *Mistry v Interim National Medical and Dental Council of South Africa* 1997 7 BCLR 933 (D), an application by a medical doctor relying on *inter alia* the right to privacy as entrenched in the interim Constitution in opposing a search and seizure operation of the applicant's premises conducted by the predecessor of the respondent *in casu*. The Durban Local Division had applied the control test to the respondent's predecessor and had held that the latter is not an organ of state. Therefore it was held that because the interim Constitution applied vertically only, the Constitution and more particularly the right to privacy, did not regulate the relationship between the parties. (Griessel "The right to information: The applicability of section 23 of the Constitution to statutory bodies and institutions" 1995 *De Rebus* 779 780 also shares the point of view that the South African Medical and Dental Council is not an organ of state.)

However, the court *in casu* did not stop here, but went further and held that although the respondent is not an organ of state, the first requirement had nevertheless been met, because the Witbank Hospital is a provincial hospital and therefore an organ of state and that the respondent was at most entitled to keep the documents in question on behalf of the Witbank Hospital. (It appears from the facts that the parties could not agree on which party had been in possession of the documents in question. When the applicant requested the hospital records, the Witbank Hospital told her that the documents were missing and that she should enquire about them from the respondent. The respondent, however, claimed that it had no control or

jurisdiction over the Witbank Hospital and that the applicant should request the documents from the hospital itself. The court eventually found on a balance of probabilities that the respondent was in possession of the documents.)

With regard to the second requirement the court held that the applicant required the information to enable her to investigate a probable claim on behalf of her child.

The court found that the applicant had a *prima facie* case on behalf of her child and that the documents were needed for legal purposes. (The court listed the fundamental rights possibly violated to a greater or lesser extent by the alleged negligent conduct of the medical personnel at the birth of the child. The list includes a shortened life expectation, the right not to be treated in an inhuman way, the right to bodily integrity, the right to health care services and emergency medical treatment, the child's right to basic health care services as well as the child's right to be protected from maltreatment. The court also pointed out that the child's best interests are of "paramount importance in every matter concerning [a] child" (1179B–D). The third requirement had therefore also been complied with.)

The applicant was eventually granted an order giving her access not to the entire contents of the respondent's file, but only to the documents which the respondent held on behalf of the Witbank Hospital.

2 3 Comments

The *Korf* decision was heard and delivered (on 1999-10-05 and 1999-10-15 respectively) before the implementation of the national legislation as required by section 32(2) of the 1996 Constitution. The transitional provision that was in force at that stage, was the limited right as set out in item 23(2)(a) of Schedule 6 (see discussion *infra*) of the 1996 Constitution. The effect of this was that the right of access applied only vertically, that is, to information held by the state or organs of state in a sphere of government. The determining question was therefore whether the respondent and the Witbank Hospital were organs of state. The scope of the applicant's success therefore depended not on her need for the required documentation, but on an abstract test for the categorising of the institution(s) in possession of such documents.

3 The position in terms of the Constitution

3 1 The 1993 Constitution

The right of access to information was expressly included in section 23 of the bill of rights of the interim Constitution (Constitution of the Republic of South Africa 200 of 1993 – hereafter referred to as "the 1993 Constitution") which reads as follows:

> "Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights."

This right was inherently limited by two qualifications, that is, it applied vertically only and the information had to be required for the exercise or protection of rights (for criticism of this latter inherent qualification, see Mureinik "A bridge to where? Introducing the interim Bill of Rights" 1994 *SAJHR* 31 43–44; Govender "Access to information: Enforcement mechanisms and fees" 1995 *SA Public Law* 346 349–350).

Even without its inherent limitations, section 23 was, of course, also further qualified by the conditions of the limitation clause (s 33 of the 1993 Constitution) which stipulated that a fundamental right could be limited as long as the limitation

was reasonable (s 33(1)(a)(i)) and justifiable in an open and democratic society based on freedom and equality (s 33(1)(a)(ii), did not negate the essential content of the specific right (s 33(1)(b)) and, in so far as the right related to free and fair political activity, was necessary (s 33(1)(bb)) (see Cachalia *et al Fundamental rights in the new Constitution* 1994 105–116). With regard to the last-mentioned factor, it follows that in so far as the right did not relate to free and fair political activity, the limitation did not need to be necessary (see Du Plessis and Corder *Understanding South Africa's transitional Bill of Rights* 1994 126–128 for a discussion on the stricter test for limitation as set out in s 33(1)(bb)). (For more on s 23 of the 1993 Constitution, see Johannessen "Freedom of expression and information in the new South African Constitution and its compatibility with international standards" 1994 *SAJHR* 216; Du Plessis and Corder *supra* 164–165).

3 2 The 1996 Constitution

The Constitution of the Republic of South Africa 108 of 1996 repealed the 1993 Constitution when it came into operation on 7 February 1997. The right of access to information is currently entrenched in chapter two (the bill of rights) of the 1996 Constitution (for a commentary in general on chapter two of the 1996 Constitution, see Du Plessis "Evaluative reflections on the final text of South Africa's bill of rights" 1996 *Stell L Rev* 283) and reads as follows:

> "32. Access to information.–
> (1) Everyone has the right of access to –
> (a) any information held by the state; and
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

It is clear that the Constitutional Assembly, which was responsible for the drafting of the 1996 Constitution, intended the right of access to information to have a much wider scope than its predecessor in the 1993 Constitution.

The first important difference in this regard between the 1996 and 1993 Constitutions is that a person's right of access to information held by the *state* is now unqualified. Everyone has the right to *any* information held by the state. The internal qualification that the information has to be required for the exercise or protection of any rights, falls away. (However, the right remains subject to the general limitation clause – see later.)

The second important difference relates to the application of this right. Whereas the 1993 Constitution made provision for the vertical application of the right of access to information only, the 1996 Constitution now recognises a direct horizontal application of this right. This means that this right now applies not only to information held by the state, but also to information held by "another person". "Another person" is interpreted to include any body other than one falling within the ambit of section 32(1)(a), and thus excludes, for example, state departments and organs of state. In other words, information held by bodies other than state departments and organs of state, may also be requested.

A further point worth mentioning has regard to the use of the words "any rights" in section 32(1)(b). According to Cachalia *et al Fundamental rights in the new Constitution* (1994) "any rights" include not only rights as entrenched in the bill of rights, but all legal rights (70). (See *Van Niekerk v Pretoria City Council* 1997 3 SA

839 846F–G where it was held that s 23 of the 1993 Constitution also applied to contractual rights and rights arising from delictual claims.)

The minimum standard set by the 1996 Constitution with regard to the right to access to information clearly ensures a very wide interpretation of the right in that it covers information held by *any* person needed for the protection of *any* right.

3 3 Transitional arrangements

Section 32 should, however, be read together with item 23 of Schedule 6 of the 1996 Constitution. (Sch 6 contains the transitional arrangements regarding the Constitution. Item 23 stipulates that national legislation as referred to in section 32(2) must be enacted within three years of the date on which the 1996 Constitution came into effect (item 23(1)). Du Plessis *supra* 304 criticises this "watering down" of the "enhanced constitutional protection" by the need for national legislation.)

According to the Constitutional Court, freedom of information generally necessitates detailed legislative regulation which cannot be included in a constitution and should preferably be seen to by the legislature and not the courts. The purpose of this transitional arrangement was therefore to grant the legislature time to draft the said legislation (*In re: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) paras 85–86). (Pimstone "Going quietly about their business: Access to corporate information and the Open Democracy Bill" 1999 *SAJHR* 2 6 describes the purpose of the national legislation as a "first port of call, both procedurally and substantively, for claiming the protective cover of the right, without detracting from the utility of the right in s 32(1)".)

The required legislation (the Promotion of Access to Information Act 2 of 2000) was indeed assented to on 2 February 2000 and published one day later on 3 February 2000, although it will become operational at a later stage (see discussion *infra*). This means that the Act was enacted a mere four days before the constitutional deadline. Had such legislation not been enacted within this period, section 32(2), together with the transitional provisions in terms of item 23, would have lapsed. With the national legislation meeting the deadline, however, it follows that the suspensive condition was fulfilled and that section 32(1) of the 1996 Constitution became operational on 3 February 2000, albeit without the aid of the national legislation. It is therefore of the utmost importance that the Act should come into operation as soon as possible in order to regulate and to lend detail to the general right of access to information as entailed in section 32(1).

Although the interim right has therefore fallen away in the meantime, it is still relevant to this case discussion as the *Korf* decision was decided in terms of that right and merits a brief discussion.

Before the enactment of the national legislation, section 32(1) was deemed to read as follows:

> "(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights" (item 23(2)(a)).

This interim right differed little from the right of access to information in terms of section 23 of the 1993 Constitution and consequently the same limitations that applied to the latter, also applied to the interim right. This means that until the enactment of national legislation as required in section 32(2) of the 1996 Constitution, the right of access to information applied (i) vertically only and (ii) only to information required for the exercise or protection of rights.

A cause for great concern is the fact that the interim right did not comply with the requirements of Constitutional Principle IX (*Certification* case *supra* para 83). Constitutional Principle IX stipulated that "[p]rovision shall be made for freedom of information so that there can be open and accountable administration at all levels of government". According to the Constitutional Court, the qualification that the right applied only when the information was needed for the exercise or protection of a right, fell short of the much wider purpose envisaged by Constitutional Principle IX, namely to "ensure that there is open and accountable administration at all levels of government" (para 83). One could therefore argue that the *Korf* decision was decided in terms of an unconstitutional interim right, and that either an amended interim right or, in the absence of another interim right, the broader right envisaged in section 32(1) should have applied. As this issue was not raised by the court, I shall leave it there.

4 The Promotion of Access to Information Act 2 of 2000

4 1 Introduction

The national legislation required by section 32(2) of the 1996 Constitution is contained in the Promotion of Access to Information Act 2 of 2000 (the Act) as enacted on 3 February 2000. In terms of General Notice 2555 of 2000 (*GG* 21362 2000-07-07) it is the intention of the legislature to put the Act into operation as soon as possible. The intended date is 15 September 2000, although this date has not yet been proclaimed. It is, however, foreseen that some of the sections will come into operation at a later stage. All these sections involve the compiling and promulgation of additional regulations or publications and include section 10 (the guide on how to use the Act), section 14 (the manual on the functions of, and index of records held by, a public body), sections 15 and 52 (the duty of public and private bodies respectively to submit to the Minister a description of the categories of records held by such body that is automatically available), section 16 (the duty of a national department to publish an official telephone directory of all its employees' names and contact numbers), section 19 (the duty of an information officer to assist requesters) and section 51 (the duty of a private body to compile a manual containing certain information on such private body).

The abovementioned General Notice also contains draft regulations concerning, *inter alia*, the fee structure as well as draft request forms involved in obtaining access to records from public and private bodies together with draft forms to be used as notices of internal appeal.

I shall now deal with some of the other sections (ie those that will probably come into effect on 2000-09-15 and which may have an effect on future cases similar to the facts of the *Korf* decision). The purpose of this note is not to give a detailed discussion of the contents of the Act, but merely a very cursory overview of some of the more important and relevant provisions. (See Johannessen, Klaaren and White "A motivation for legislation on access to information" 1995 *SALJ* 45 for reasons for the need for such an Act as well as certain recommendations on the Act. Also cf White "Open democracy: Has the window of opportunity closed?" 1998 *SAJHR* 65 for criticism of the approved bill which preceded the Act.)

4 2 Purpose and objects of the Act

The purpose of the Act is set out in the preamble as twofold, namely to foster a culture of transparency and accountability and to enable the people of South Africa to exercise and protect all of their rights more fully.

Section 9 contains the objects of the Act. These objects include (i) subjecting the right of access to information to justifiable limitations such as the right to privacy, commercial confidentiality and any other human right (these limitations do not, however, form a *numerus clausus*); (ii) promoting a human rights culture; and (iii) educating and empowering everyone to understand their rights in this regard by implementing a swift, inexpensive and effortless procedure.

4 3 Accessibility of the Act

It is clear from (iii) above that the legislature intended this Act to be accessible to everybody (including the man on the street) and the following provisions in the Act echo this intention.

The first of these provisions is contained in section 10. In terms of this section the Human Rights Commission is obliged, within 18 months after the commencement of section 10, to compile a guide on how to use the Act in an easily comprehensible form and manner and in all the official languages. Judging from the information which should appear in it, the guide is meant to be very consumer-friendly and should play a major role in the education of the general public in understanding their rights (s 9(e)). Apart from the normal information (ie the objects of the Act, the manner and form of the request, the remedies in law should such a request fail and regulations made in terms of the Act) the guide should also include the postal and street address, phone and fax number and, if available, electronic mail address of the information officer and deputy information of every public body, the particulars of every private body as are practicable, the fees payable by the requester and the assistance available from the Human Rights Commission. These stipulations ensure not only that any person will be able to consult the guide on the correct procedures to be followed in requesting information from a public or private body, but also that the correct names of all public bodies and some private bodies, together with the name and number of a contact person for each such a body, will be provided in a handy directory. This will eliminate time-consuming administrative problems for anyone wanting to make a request and will, it is hoped, speed up the process.

Another provision which shows the legislature's commitment to making this right as accessible as possible to all South African citizens, is section 18(3), which stipulates that an illiterate or disabled person who is not able to submit a request in the prescribed form, may make the request orally. The information officer must then put such request in writing and in the prescribed form before receiving the request. (Take note, however, that this special provision is applicable only to requests for the records of public bodies.) The information officer must, within 30 days of receiving a request, decide whether or not the request will be granted and notify the requester, in the manner stipulated by the requester, of the decision (s 25(1) with regard to public bodies and s 56(1) with regard to private bodies), the access fees to be paid (s 25(2)(a) and s 56(2)(a)) and the form in which access will be given (s 25(2)(b) and s 56(2(b)).

4 4 The limitation of records required for civil proceedings after commencement of proceedings

Section 7(1) provides that the Act does not apply to records requested from a public or private body when (a) "that record is requested for the purpose of criminal or civil proceedings", (b) "after the commencement of such proceedings" and (c) "the production of or access to that record is provided for in any other law". Any record obtained in contravention of this section is regarded as inadmissible evidence, unless the exclusion of such evidence would, in the court's opinion, be detrimental to the interests of justice (s 7(2)).

The effect of this section is that information required in criminal or civil proceedings in terms of the 1996 Constitution may be requested only (i) before such proceedings have begun and (ii) if the information cannot be acquired in any other legal way. With regard to (i), the question arises what the interpretation of "commencement" should be. Does it only include the proceedings in court or the pre-trial proceedings as well? The answer to this question is to be found in the options as referred to in (ii) above. Rule 35 of the High Court Rules entitles a party in a civil lawsuit to access to (and copies of) documentary and other information that relates to the dispute and is in the possession of the other party. This process is, however, limited by certain categories of evidence, such as attorney-client information (ie privileged information). Similarly, an accused is entitled to have access to the police docket and to consult with state witnesses (*Shabalala v Attorney-General* 1996 1 SA 725 (CC)), subject to certain limitations. The purpose of section 7 of the Act is therefore purely to protect these already existing limitations and to prevent parties engaged in civil or criminal proceedings from following the wrong channels in obtaining information from one another.

Consequently, information required in an investigation that *might* lead to a claim being instituted, is not intended to fall within the ambit of section 7 and requests for such information should be possible and applicable in terms of the Act.

4 5 Access to records of public bodies

Part 2 of the Act enables any person (natural or juristic) other than a department of state or administration in the national, provincial or local sphere or a functionary or institution performing a duty in terms of the Constitution or any provincial constitution (s 1), to request access to a record of any public body (s 11). A public body includes "any other functionary or institution when exercising a public power or performing a public function in terms of *any* legislation" (my italics).

The question which now arises, is whether a body such as the respondent *in casu* is included in this description. In *Korf*, the court answered this question in the negative when measuring the respondent against the definition contained in section 239 of the 1996 Constitution (1177F–G). The court held that this description does not extend the meaning of an organ of state and that the respondent is not an organ of state.

Provision is also made for certain mandatory and discretionary grounds for the refusal of access (ss 33–46) as well as third party notification and intervention (ss 47–49).

However, since the respondent is not a public body, the applicant would not have made her request in terms of this part of the Act and a discussion of this aspect is not necessary. If, however, the Witbank Hospital had been a party to these proceedings, the situation would have been different, since the Witbank Hospital is a provincial hospital and therefore a public body.

4 6 Access to records of private bodies

The preamble echoes the direct horizontal application (entrenched in s 8 of the 1996 Constitution) of the right of access to information as set out in section 32. (For a discussion on the arguments against direct horizontal application and for indirect horizontal application of the bill of rights only, see Sprigman and Osborne "Du Plessis is *not* dead: South Africa's 1996 Constitution and the application of the bill of rights to private disputes" 1999 *SAJHR* 25.)

Part 3 of the Act deals with requests for access to records of private bodies. "A private body" is defined as either a natural person or a partnership which carries or has carried on any trade business or profession, and is restricted to that capacity as such, or to any former or existing juristic person (s 1). This means that access to the records of a natural person or a partnership, for purposes of obtaining information outside the professional sphere of such a person or partnership's activity, is prohibited. The prohibition is aimed at the protection of such a person or partnership's right of privacy. This prohibition does not apply to juristic persons for the obvious reason that a juristic person is usually created for the purposes of trade, business or profession.

Not only natural persons, but also juristic persons, public bodies and other private bodies are entitled to access to the records of a private body (s 1). What is important, is that the South African Revenue Service is also considered a public body for purposes of the Act (s 2(3)). The effect of this is that, in addition to individuals and other private bodies, any department or organ of state may request access to the records of any private body, as long as such department or organ of state can prove that it is acting in the public interest (s 50(2)).

There are three requirements that have to be met for a request to be granted, namely: (a) the record must be required for the exercise or protection of any rights (the inherent qualification included in the 1996 Constitution); (b) the procedural requirements must be complied with; and (c) none of the grounds for refusal must be applicable (s 50(1)). The procedural requirements include that the request be lodged in the prescribed form at its (registered?) address (s 53(1)). The Act requires certain minimum information which must appear on the prescribed form (s 53(2)). With regard to the grounds of refusal as mentioned in requirement (c), it suffices to say that the Act makes provision for mandatory and discretionary grounds (ss 62–70) which include the protection of commercial and research information of the private body itself as well as third parties, the protection of the privacy of third parties who are also natural persons, the protection of safety of individuals and of property and privileged information concerning legal proceedings.

A ground of refusal that may be relevant, is the protection of certain confidential information (held by a private body) of third parties (s 65). This section provides that requests must be refused if the disclosure of the information would constitute an action for breach of a duty of confidence [*sic!*] owed by the private body to a third party in terms of an agreement. The question which now becomes relevant, is whether the respondent *in casu* had such a duty of confidentiality with regard to Dr H. In this regard Van Dijkhorst J made the *obiter* remark that it "is [neither] the duty of the respondent to shield doctors from complainants, [nor] to persecute them [the doctors] on behalf of the complainants" and that the respondent "should not create the impression that it is shielding medical practitioners from . . . the truth" (1175G). In the light of this remark it would seem that if the court had found the respondent to be an organ of state, the applicant might have succeeded in her claim.

The Act further makes provision for third party notification and intervention (ss 71–73) and concerns a process of informing the third party of intended disclosure of information on request and obtaining the third party's consent to the disclosure. (Driver-Jowitt "Access to medical information balancing the views" June 1998 *De Rebus* 25 gives a doctor's point of view [ie that of resistance] on the disclosure of their practice notes and medical information on their patients.)

If it should happen that the requested information does not exist or is in the private body's possession but cannot be found, it is the duty of the information officer to notify the requester of such a fact, by way of affidavit. The affidavit must

contain a full account of all steps taken to find the record (s 55). Such an affidavit is regarded as a decision to refuse a request (s 55(3)) which immediately places it within the ambit of section 82 (see discussion *infra*).

Very importantly, the Act makes it possible for a requester to lodge an internal appeal where requests are refused or for a third party to lodge an internal appeal against the granting of a request (s 74). These remedies are, however, available only against public bodies. An aggrieved requester or third party does have the right to apply to court (Constitutional, High or magistrate's court) in terms of section 82 for an amendment, confirmation or setting aside of a decision made by the public or private body.

4 7 Other provisions

These include the duties and functions of the Human Rights Commission (ss 83–85), transitional arrangements (ss 86–88), a liability clause (s 89) as well as a section dealing with offences in terms of the Act and the possible sentences for such offenders (s 90).

5 Conclusion

Although the Act does not take away the qualifications to the right of access to information set by the Constitution, it (the Act) would have made the applicant's search for the required information much swifter and easier, and would probably have obviated the need for this application to court, had the Act been in force at the time of her enquiries. The Act would have been relevant in the following ways:

(a) the applicant would have been able to request the information from the respondent, whether the respondent was an organ of state, a public or a private body;

(b) the applicant would have been able to consult the guide issued by the Human Rights Commission on the request procedures, remedies and other important information;

(c) the applicant would have received an answer within 30 days of such request;

(d) the respondent would have been obliged to search for the missing documents and to inform the applicant of the results of the search;

(e) Dr H would have been notified of the applicant's request and been given the opportunity to consent to the granting of the request, or, alternatively, to challenge the granting of the request in court in terms of section 82;

(f) the applicant would have been able to challenge the respondent's refusal of the request in court in terms of section 82; and

(g) the applicant would have been granted access to *all* the information, and not only to the information held by the Witbank Hospital.

In general, the whole process would have been much shorter, cheaper and problem-free than the nine years which the applicant spent *in casu* (and for which trouble she did not even receive all the information that she needed!).

In conclusion, it is hoped that with the implementation of the Promotion of Access to Information Act 2 of 2000, which aims to explain and elaborate on the minimum standards set by section 32 of the 1996 Constitution, individuals in similar cases will in future be spared the same hopeless paper war which the applicant was forced to wage in her administrative struggle against the bureaucracy and other unhelpful institutions.

LIEZL GAUM
University of South Africa

THE *AEDILES CURULES* AND THE CONSTITUTION

Janse van Rensburg v Grieve Trust CC 2000 1 SA 315 (C)

There is a pleasing irony in the fact that as soon as the Gregorian calendar came to the end of the 1900s, and at a time when there has been much concern (a legal *fin de siècle*, if you like) about how our common law will best flourish in a brand new millennium, the January 2000 *South African Law Reports* revealed a case that breathes new life into one of the most hallowed institutions of our ancient Roman legal heritage – the aedilitian actions. The case which, in the spirit of the Roman god Janus, looks backwards in order to seek innovation in our common law, is *Janse van Rensburg v Grieve Trust CC*.

This case concerned an appeal to the Cape High Court from a judgment in the Worcester magistrate's court (316G–H). The appeal was argued on the basis of a stated case (316H; see Rule 33(6) of the Uniform Rules of Court), and the relevant facts were as follows: the appellant (Janse van Rensburg) had entered into a contract to purchase a 1990 Opel Kadett from the respondent (Grieve Trust) for R38 046. The purchase price consisted of two discreet entities. First, Janse van Rensburg tendered the trade-in of his interest in a used Isuzu motor vehicle, which was valued, for the purposes of the sale, at R15 418. This amount was calculated by subtracting the amount that Janse van Rensburg still owed on the Isuzu in terms of a credit agreement with a third party (R29 582)(316I) from the trade-in value of the vehicle (R44 000). The remainder of the purchase price (R22 628) was paid in cash.

As far as Janse van Rensburg was concerned, he truly believed, and indeed represented to Grieve Trust, that the Isuzu which he was trading-in was a 1993 model. However, after the sale was completed, it was discovered that the Isuzu was in fact a 1989 model (317A). It was common cause between the parties that the misrepresentation was innocently made by Janse van Rensburg (317A). It was also common cause that had Grieve Trust known the true facts, it would have fixed the trade-in value of the Isuzu at only R34 200 (317B). In the premises, Grieve Trust sought an order for R9 800 – the difference in the trade-in value of the respective models of Isuzu. Grieve Trust's argument in support of its claim was the following: where a seller accepts a trade-in as part payment of the purchase price of a vehicle and there is an innocent misrepresentation made about the thing which was traded in, the seller ought to be entitled in law to an aedilitian action. In particular, Grieve Trust sought an *actio quanti minoris* in order to claim compensation for an amount which would ensure that the purchase price (viewed as a whole) reflected the true value of the trade-in.

The aedilitian actions have their roots in Roman law (*D* 21 1 1 and 2), and apply both to contracts of sale and exchange (*D* 12 1 19 5). In the milieu of the law of sale, where the aedilitian actions find their most frequent application, the actions are designed to provide an aggrieved purchaser with an action against a seller in two circumstances. Traditionally these are first, where the *merx* suffers from a latent disease or defect which was not disclosed by the seller, and which existed at the time of the sale. A latent defect is defined as "an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita* for the purpose for which it was sold or for which it is commonly used" (per Corbett JA in

Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 3 SA 670 (A) 683H). Secondly, an aedilitian action is available to the buyer where the seller has made a false statement amounting to a *dictum et promissum* about the *merx* and which induces the buyer to contract at all or on particular terms (the availability of the actions in such circumstances was confirmed in South African law in the leading case of *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A)). Although there is some dispute about the meaning of the term "*dictum et promissum*" (see Kerr *The law of sale and lease* (1996) 106; Honoré "The history of the aedilitian actions from Roman law to Roman-Dutch law" in Daube (ed) *Studies in the Roman law of sale* (1959) 141; De Wet and Van Wyk *Kontraktereg en handelsreg* (1992) 346 fn 209), a controversy which was raised but ultimately not considered for the purposes of the decision in the *Janse van Rensburg* case (318D–H), the recognised definition of the term in our law may be found in *Phame*'s case 418A: "A *dictum et promissum* is a material statement made by the seller to the buyer during the negotiations bearing on the quality of the *res vendita* and going beyond mere praise and commendation."

The two aedilitian actions are the *actio redhibitoria* and the *actio quanti minoris*. The *actio redhibitoria* entitles an aggrieved buyer to rescind the agreement and claim restitution (*Van Zyl v Credit Corporation of South Africa Ltd* 1960 4 SA 582 (A) 589–590), provided the defect or false representation is material in that a reasonable buyer would not have entered into the contract at all had he or she known the true state of affairs (*Reid Brothers v Bosch* 1914 TPD 578). The *actio quanti minoris* allows an aggrieved purchaser to retain the *merx*, but to reclaim a portion of the purchase price equivalent to the difference between the actual purchase price paid and the true market value of the *merx* (*Davenport Corner Tearoom (Pty) Ltd v Joubert* 1962 2 SA 709 (D) 714B–D; *SA Oil and Fat Industries v Park Rynie Whaling Company Ltd* 1916 AD 400 413). This remedy may be sought in two circumstances: first, a purchaser has an election to claim an *actio quanti minoris* in the alternative to the *actio redhibitoria*, where the facts justify a claim for the *actio redhibitoria*; or secondly, where the buyer would still have entered into the contract, but only at a lower price.

The thorny question whether the aedilitian actions may also apply to sales where a trade-in forms part of the purchase price – the issue before the court in *Janse van Rensburg*'s case – is not new to our law. In such circumstances, there are two variations in the normal application of the actions. First, it is the seller who is seeking a remedy because of a problem with the purchase price, not (as is traditional) a buyer seeking a remedy because of a problem with the *merx*. Secondly, where the aggrieved party seeks an *actio quanti minoris*, the remedy is not a reduction in the purchase price; the purchase price remains the same, but the aggrieved party seeks a reduction in the *value of the trade-in* which the parties agreed upon at the outset (cf Van Zyl J in *Janse van Rensburg* 320B–C), and payment of an equivalent amount to bring up the shortfall with respect to the original purchase price. In other words, the aggrieved seller seeks compensation (a term used in *Wastie v Security Motors (Pty) Ltd* 1972 2 SA 129 (C) 130A) equivalent to the difference between the initial value of the trade-in and its true value, now that the innocent misrepresentation has been discovered.

The matter first came up for adjudication in *Wastie*'s case. The court in that case was asked to determine whether an *actio quanti minoris* was available to an aggrieved seller in a trade-in agreement, where the vehicle traded-in as part of the purchase price was suffering from a latent defect (in that case the traded-in Peugeot had a cracked cylinder head, which caused water to leak into the sump (129H)). It

was argued in *Wastie*'s case that no such remedy existed. The reason given was that an *actio quanti minoris* entitled a purchaser to claim compensation for a latent defect in the *merx*, but was not designed to allow a seller to claim compensation for a latent defect in the *pretium* (131G). It was alleged that this reciprocal application of the aedilitian actions had never been contemplated when the actions were introduced by the *aediles*, and that extending the law to cater for this eventuality would be inappropriate. Van Zijl J (with whom Baker AJ concurred) disagreed (131H):

> "I have been able to find no authority dealing directly with this point, but an analysis of the law on sale and exchange leads to the conclusion that where a portion of the purchase price consists of something other than money, the same principles that apply to the *merx* must apply with equal force to the non-money portion of the *pretium*."

Van Zijl J found that the aedilitian actions are available to both parties in a contract of exchange, and held that it would be "unfair and illogical" (132B) not to extend the availability of the aedilitian actions to a seller in respect of the *pretium*, where the *pretium* consisted in part of a defective item which had been traded-in. A failure to allow such remedies would, in Van Zijl J's opinion, have upset the balance the law seeks to uphold between buyer and seller (132H).

Wastie's case quite clearly concerned the availability of the aedilitian actions where that part of the purchase price that comprised a trade-in had a latent defect. The availability of such remedies where the traded-in portion of the purchase price was affected by a *dictum et promissum* was not at issue in that case. Not surprisingly, in the wake of *Phame*'s case the courts were eventually confronted with attempts to extend the law to cover just such an eventuality: can a seller seek an aedilitian action where a buyer makes a *dictum et promissum* about a trade-in which forms part of the purchase price, and it is subsequently discovered that the *dictum et promissum* is false?

This particular question was first raised in our courts in the case of *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 1 SA 172 (D). The facts of this case were very similar to those in *Janse van Rensburg*. The plaintiff sold a 1986 BMW to the defendant for R58 535 (173C). The purchase price was to be paid by way of a cash payment of R14 535, and the trade-in of a 1985 BMW 733i vehicle, valued at R44 000. After the agreement was concluded, it was discovered that the defendant had innocently misrepresented (173D) that the trade-in vehicle was a 1985 model, when in fact it was a 1983 model. The plaintiff alleged that because of this misrepresentation (which amounted to a *dictum et promissum*) it was entitled to rely on the *actio quanti minoris* and claim a reduction in the value of the trade-in by R16 970 (173F). Although *Wastie*'s case did not concern *dicta et promissa*, but the presence of a latent defect in the traded-in vehicle which formed part of the purchase price, Bristowe J nevertheless sought guidance in that case, but ultimately found the reasoning of Van Zijl J unhelpful. Bristowe J held that the aedilitian actions are peculiar to a defect or *dictum et promissum* affecting the *merx* – they do not apply to the non-monetary portion of the *pretium* (180E–G). Bristowe J criticised Van Zijl J's finding that the law ought logically to allow a seller a remedy in situations where a trade-in forms part of the purchase price, on the grounds of the need to treat sellers and buyers fairly and equally (180J–181C).

> "There is, as far as I can find, no authority for the proposition that there is an implied warranty in our law that the non-monetary portion of the *pretium* (or indeed the monetary portion) is free from latent defects. Nor am I aware of a 'careful balance which the law preserves between purchaser and seller'; on the contrary, the law obliges the seller to honour duties (unless he contracts out of them) which are not

> imposed on the buyer. And finally the proposition that an innocent seller may be overreached 'by an unscrupulous purchaser feigning ignorance of a latent defect' is, with great respect, not convincing. Quite apart from the fact that the seller can protect himself by requiring an express warranty against latent defects, it is, I believe, a most doubtful proposition that it is the law's function to regulate matters so as to come to the aid of a litigant who finds it difficult to prove his case."

Thus Bristowe J held that the plaintiff purchaser could not rely on the *actio quanti minoris* for an innocently made *dictum et promissum* which proved to be false, and which affected the value of a trade-in that formed part of the *pretium*. A plaintiff's remedy in such situations is to claim rescission and restitution for the innocent misrepresentation in terms of the general principles of the law of contract (181D).

A similar conclusion was reached in the case of *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 2 SA 208 (O), where Wright AJ (with Smuts JP concurring) agreed with Bristowe J's finding in the *Mountbatten* case that the aedilitian actions apply only to the thing forming the subject matter of the contract of sale, and not to the non-monetary portion of a purchase price (211E–F).

The cases discussed above have all come under academic scrutiny. In his comment on the *Mountbatten* case, Reinecke ("Ruil of koop?" 1989 *TSAR* 442) criticises the *ratio decidendi* in *Wastie*'s case, and states that the court in *Mountbatten*'s case was correct in deciding that the aedilitian actions are not available to a purchaser (447). He prefers the conclusion reached in *Mountbatten*'s case that, where the value of the trade-in portion of the purchase price (which Reinecke prefers to describe as a purchase price in cash, coupled to a "facultative performance" – a reduced cash price plus a thing) is affected by an innocent misrepresentation, the general principles of the law of contract should determine the seller's remedies, and the only remedy available to the aggrieved party is rescission and restitution (*ibid*).

Hawthorne, commenting both on the *Mountbatten* case ("The nature of trade-in agreements" 1990 *THRHR* 116) and the *Bloemfontein Market Garage* case ("Nature of a trade-in agreement" 1992 *THRHR* 143), is also critical of the decision in *Wastie*'s case, and its purported extension of the aedilitian actions to the non-monetary portion of a purchase price. Yet she has sympathy for Van Zijl J's argument that it might be unfair to deprive an aggrieved seller of an aedilitian action in the context of a trade-in agreement. She suggests that such remedies may indeed be available if one correctly identifies the true nature of a trade-in agreement. Hawthorne suggests that the true nature of a trade-in agreement is neither in the character of a classic sale nor an exchange, but rather has the character of a substituted performance, or a *datio in solutum debiti* (1990 *THRHR* 120;1992 *THRHR* 148; see further on the *datio in solutum* Joubert "*Datio in solutum*" 1977 *De Jure* 29. De Wet and Van Wyk *Kontraktereg en handelsreg* 314 fn 5 take a similar approach to the matter). In such a scenario, there is an initial agreement of purchase and sale at a fixed price. The creditor then agrees to accept something else (eg, a vehicle and a reduced cash payment) as a substituted performance of the obligation. With reference to the work of Joubert (*ibid*) as well as to comparative authority from Germany and the Netherlands, Hawthorne suggests that an analogy may be drawn between a *datio in solutum* and a sale. She submits that a *datio in solutum* acts as a novation of the initial obligation, and that similar actions to the law of sale (eg, actions for latent defects and the warranty against eviction) may be available if the substituted performance is found wanting (1990 *THRHR* 121; 1992 *THRHR* 150). And on the basis of *Phame*'s case, Hawthorne sees no reason why an aedilitian action should not also be available in cases of *datio in solutum* where the performance is affected by an innocently made, but false *dictum et promissum*.

Janse van Rensburg's case was the third time a court had been faced with the question whether the aedilitian actions apply to a vehicle traded in as part of the purchase price, and where it was subsequently discovered that the trade-in was affected by a false, but innocently made, *dictum et promissum*. In the court *a quo* the magistrate held in Grieve Trust's favour, and granted an order in the amount of R9 800 (317C–D). According to the judgment on appeal, the magistrate did so for two reasons. First, the magistrate held that he was bound by the decision in *Wastie*'s case to find for the plaintiff. This was held to be so despite the existence of direct authority to the contrary in other provinces (*Mountbatten*'s case and the *Bloemfontein Market Garage* case). Secondly, the magistrate held that the aedilitian actions applied to trade-in transactions by drawing an analogy between a sale and a *datio in solutum* (317D).

On appeal, Janse van Rensburg argued that *Wastie*'s case was distinguishable in that the case at hand concerned a *dictum et promissum*, and *Wastie*'s case concerned a latent defect. Alternatively, on the strength of the *Mountbatten* case and the *Bloemfontein Market Garage* case, it was argued that *Wastie*'s case was in fact wrongly decided, and that an *actio quanti minoris* can be sought only where a latent defect or innocent misrepresentation affects the *merx* – not the *pretium* (317E–F).

Van Zyl J (who wrote the opinion of the court, Griesel J concurring) began his exposition by conducting a brief historical exposition of the development of the aedilitian actions by the *aediles curules*, the remedies arising from the actions, and the way in which the actions have been applied and developed in South African law (317I–318H). The judge then proceeded to undertake a careful and considered analysis of the case law on the point (as discussed above) as well as academic opinions on the debate (which included the examination of sources to which I have not yet referred in this note). This analysis provided the springboard for Van Zyl J's decision.

The judge held that it was critical to assess the spirit and purport of the judgment in *Phame*'s case, and the impact of that judgment upon the issue faced by the court. Van Zyl J conceded that the *Phame* decision was not concerned with the extended application of the aedilitian actions to trade-in agreements, but suggested that had the Appellate Division (as it then was) in fact discussed the issue, it might well have held (albeit *obiter*) that such an extension was appropriate (323E). He held that this conclusion was warranted, since the Appellate Division in *Phame*'s case had taken an extensive approach to the application of the aedilitian actions in general terms, and had also said that the aedilitian actions could apply to sales of incorporeal things (*Phame*'s case 419F). The extension of the aedilitian actions to situations where a trade-in was defective in *Wastie*'s case could be seen as a pre-emption of the liberal attitude to the aedilitian actions endorsed in *Phame*'s case and there was therefore merit in Van Zijl J's opinion that the dictates of fairness and reasonableness warranted such an extension in the application of the aedilitian actions (323F–G; 324H–I).

Van Zyl J went on to point out that the equitable principles so fundamental to the Roman legal system (which were received into Roman-Dutch law and the broader European *ius commune*) have also been subsumed into South African law. And it is these fundamental principles of equity which have allowed our courts to treat the common law as a flexible entity, which may be adapted to suit modern needs. In support of this argument Van Zyl J was able to refer to the celebrated *dicta* of Innes CJ in *Blower v Van Noorden* 1909 TS 890 905 that

> "[t]here 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 legal ideas, and to keep pace with the requirements of changing conditions"

and Lord Tomlin in *Pearl Assurance Co v Union Government* 1934 AD 560 563 that the common law is

> "a virile, living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society".

In the spirit of these comments, Van Zyl J held that although trade-ins were unknown in Roman times, they are now a daily reality in our modern commercial milieu, and that in his opinion, the *aediles curules* would have had no difficulty at all in extending the application of the aedilitian actions to trade-in agreements, had they been faced with the problem. This was reinforced by the fact that the *aediles* were prepared to extend the application of their edict to contracts of exchange, and there is some basic similarity between a contract of exchange and a sale involving a trade-in agreement (324G and see *Wastie*'s case 131). The general tenor of the dicta in *Blower v Van Noorden* and the *Pearl Assurance* case, the perceived soundness of the reasoning in *Wastie*'s case, as well as the positive direction given in *Phame*'s case, led Van Zyl J to conclude that the aedilitian actions could easily and logically be extended to provide a remedy in cases where a vehicle traded-in as a portion of the purchase price is affected by a defect or innocent misrepresentation (324H–I).

In the alternative, the judge held that even if his argument above was not acceptable, he still believed that such an extension was appropriate (325B). Changing tack slightly, Van Zyl J held that allowing an aggrieved party relief in such circumstances was "required by the general principles of justice, equity, reasonableness and good faith inherent in our common law and strongly evident in our law of contract" (325C). He cited the recent concurring minority opinion of Olivier JA in the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (SCA) in support of this argument – an opinion which has become one of the leading commentaries on the importance of good faith and public policy in our law of contract. Van Zyl J went on to state (325H–326A):

> "It goes without saying that, in a trade-in agreement, it would be unjust, inequitable and unreasonable should the seller be liable for latent defects in, and misrepresentations relating to, the vehicle sold by him, while no such liability attaches to the purchaser in regard to the vehicle traded-in by him. The purchaser would in fact be at large, while proclaiming his innocence and good faith, to deliver a defective trade-in vehicle in the knowledge that the seller will have no recourse against him by means of the aedilitian actions. If the aedilitian actions are available to the one, so also should they be available to the other. If this were not so, the law would be paying lip service to the good faith required of parties to a synallagmatic contract, with its reciprocal rights and duties. It would also be in conflict with the behests of public policy, which represents the balanced interests of all members of a community, including those participating in commercial interaction with one another."

As a result, the court held that the findings in the *Mountbatten* case and the *Bloemfontein Market Garage* case ought to be rejected (326D–E). This was so because in those cases the judges had closed their eyes to the importance of balancing the rights, duties and interests of the buyer and the seller, and secondly had not embraced the principle that our courts should be alive to the innate flexibility of our common law, and the possibility of adapting ancient legal principles to modern commercial realities (326B–C).

In Van Zyl J's opinion, this conclusion is reinforced by the spirit of the Constitution and the powers that that document grants to the courts to develop the common law (326E). In particular, section 8(3)(a) of the Bill of Rights states that "a court, in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right". With respect to the case at hand, Van Zyl J identified the right to equality contained in section 9 of the Constitution as being of paramount importance (particularly in that buyer and seller should not be treated differently in like situations). The Constitution reinforces the duty of the courts to develop the common law in the spirit of the Bill of Rights in section 39(2), which states that "[w]hen developing the common law . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". Additionally, this accords with the inherent power of the courts to "develop the common law, taking into account the interests of justice" – a power which is recognised in such words in section 173 of the Constitution.

Having reached these conclusions, Van Zyl J rejected the suggestions made by certain academics that a trade-in agreement is in the nature of a *datio in solutum*. This was held to be so for two reasons. First, the learned judge held that a *datio in solutum* refers to the position where performance consists of something other than the performance originally agreed upon, and does not refer to a substitution of only part of the actual performance owed (327A–B). Secondly, he held that in any event in the case of trade-in agreements, the vehicle which is traded-in is not a substitute for an initial debt – "it is part and parcel of the original debt agreed upon by the parties, being a portion of the purchase price that the seller is obliged to pay for the vehicle purchased by him from the seller" (327C).

Returning to the facts of *Janse van Rensburg*'s case, the court held, for the reasons described above, that the aedilitian actions (in this case, the *actio quanti minoris*) are available to a seller where an innocent misrepresentation is made in respect of a thing which is traded-in as a portion of the purchase price (327F). Indeed, Van Zyl J held in addition that it made no difference that from a technical perspective what was traded-in was not the vehicle, but an incorporeal right in a vehicle which Janse van Rensburg held in terms of a credit agreement with a third party (327E–F). Grieve Trust were thus entitled to their remedy, and the appeal was dismissed with costs.

This decision is to be welcomed for adopting a refreshingly frank, common-sense approach to what has become a contentious issue in our law of sale. The decision also provides a blueprint for a principled yet liberal approach to the development of our common law of contract – an approach which is both constitutionally sound, and in addition seeks to emphasise that, where appropriate, well-known legal actions may be adapted to suit the needs of modern commercial reality, while at the same time remaining true to their innate historical character.

Of course, it may not always be appropriate to extend Roman legal principles beyond their natural roles in order to suit some modern scenario. A good example would be our courts' decisions that the *praetor*'s edict *de nautis, cauponibus et stabulariis* (which imposed strict liability for the safekeeping of goods entrusted to mariners, innkeepers and stablekeepers; see *D* 4 9 1) does not extend to all public carriers by land in South Africa (*Anderson Shipping (Pty) Ltd v Polysius (Pty) Ltd* 1995 3 SA 42 (A)) nor to a modern racehorse trainer (*Swart v Shaw t/a Shaw Racing Stables* 1996 1 SA 202 (C)); see too Thomas "Classless society? South African Roman law" 1996 *SALJ* 589). But it is submitted that the courts should always be alive to the possibility of developing the common law where such an extension would be sensible, principled and fair.

In this respect, it is submitted that Van Zyl J's rejection of the *Mountbatten* decision and the *Bloemfontein Market Garage* decision is warranted. In fact, the *Mountbatten* case, which took a conservative approach to the possibility of extending the application of the old actions to trade-in agreements, has in particular been the subject of some academic criticism. Stoop ("*Hereditas damnosa*? Some remarks on the relevance of Roman law" 1991 *THRHR* 175) considers the *Mountbatten* judgment to have adopted an antiquarian attitude to Roman law which retarded the natural development of the law, and prevented justice being done between the parties (184). Stoop rejects Bristowe J's suggestions that the aedilitian actions cannot apply to the *pretium* because (a) there is no precedent to that effect in our legal history (180J); (b) similar remedies do not apply in the law of lease and agency (180F); and (c) a seller could always protect himself by demanding an express warranty from the buyer trading in his old vehicle (181B) as an example of the law being applied "in a dogmatic and unyielding manner [which] did not search for what is just and equitable" (187). Since trade-in agreements are a facet of everyday life in South Africa, Stoop sees no reason why, in the true spirit of Roman law, we should not innovate and extend the application of the aedilitian actions to trade-in agreements, and provide an aggrieved seller with an action in appropriate circumstances. In this respect the *Wastie* decision *supra* is preferred as being "in perfect accordance with the true spirit of good faith that has formed the basis for the contract of sale ever since the days of classical Roman law" (186).

Kerr *The law of sale and lease* 92–95 agrees with Stoop's analysis. Kerr points out that the problem faced in cases like *Mountbatten* (and indeed *Janse van Rensburg*) is similar to the one faced by the *aediles* over two thousand years ago – is there a justification for expanding the law to provide a remedy? As in Roman times, where the *aediles*, faced with complaints about unscrupulous sellers in the *fora*, were prepared to provide a buyer with a remedy where a *merx* suffered from a latent defect or was sold contrary to what was stated and promised, so are there sound reasons for broadening the scope of the aedilitian actions to cover trade-in agreements in the modern era (Kerr *The law of sale and lease* 94). In this respect Kerr suggests that if the whole rationale behind the duty invented by the *aediles* was that a seller ought to be aware of the defects in the *merx*, or represent the true character of the *merx* (*D* 21 1 2), and if the *aediles* were later prepared to extend the application of the aedilitian actions to both parties to a contract of exchange, then why should an equivalent duty not be imposed upon a buyer who trades in a vehicle as part of his purchase price – a common modern phenomenon?

Van Zyl J indeed relied heavily upon the arguments of both Stoop and Kerr to provide support for his judgment in *Janse van Rensburg*'s case. It is submitted that Van Zyl J's reasoning ought to be supported in several respects:

First of all, the judgment takes its lead from the seminal decision in *Phame*'s case, which took a liberal approach to the application of the aedilitian actions in South African law. Not only did the Appellate Division (as it then was) reaffirm that an aedilitian action is available in our law in cases where a false *dictum et promissum* has been made about the *merx*, but it also went on to hold that the aedilitian actions could be adapted to apply to the sale of incorporeal shares in a company – a phenomenon unknown in Roman times, yet common today. Indeed, in that judgment Holmes JA held that "it seems to us that the current climate of opinion is propitious and receptive to such an extension by the Courts, in appropriate circumstances" (419E–F). Curiously, Van Zyl J described this extension of the aedilitian actions to sales involving incorporeals as an *obiter dictum* (318H; 323E–F). With respect, it is unclear why he should have done so, when the sale in *Phame*'s case indeed

concerned the purchase of the defendant's shareholding in a company (407F), and the question of the applicability of the aedilitian remedies to sales of incorporeals was therefore directly at issue. Be that as it may, the positive attitude to the development of the common law which was articulated in *Phame*'s case and which was philosophically grounded in the *dicta* of Innes CJ in *Blower v Van Noorden* and Lord Tomlin in *Pearl Assurance v Union Government* provides powerful support for the decisions in *Wastie*'s case and the *Janse van Rensburg* case that the aedilitian actions can easily be adapted to apply to trade-in agreements. But the *Janse van Rensburg* case takes the matter even further by holding (again in the light of *Phame*'s case) that the aedilitian actions not only apply to trade-in agreements where a latent defect or *dictum et promissum* affects the vehicle traded-in itself; Van Zyl J also held that the aedilitian actions apply where the non-monetary portion of the purchase price is an incorporeal thing (327G). In *Janse van Rensburg*'s case, what was traded-in by Janse van Rensburg was, of course, not the Isuzu itself, but only his incorporeal interest in an Isuzu. The interest was the equivalent of the amount which he had paid off the original purchase price of the Isuzu in terms of a credit agreement with a third party (316I–J).

Secondly, Van Zyl J's argument that the aedilitian actions should be extended to trade-in agreements on grounds of the principle of good faith is also to be supported. There has been a concerted effort in the past few years to prioritise the concept of good faith as a fundamental principle of the law of contract, and to reject a formalist, rule-bound approach to contractual relationships which takes no cognisance of the policy that commercial dealings should occur in a fair and reasonable way. This attitude has been championed both in the courts (see *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A); *Van der Merwe v Meades* 1991 2 SA 1 (A); *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*) and in academic writing (see Van der Merwe, Lubbe and Van Huyssteen "The *exceptio doli generalis: Requiscat in pace – vivat aequitas*" 1989 *SALJ* 235; Lewis "Towards an equitable theory of contract: The contribution of Mr Justice EL Jansen to the South African law of contract" 1991 *SALJ* 249; Lubbe "*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse verbintenisreg" 1990 *Stell LR* 7; Zimmermann "The law of obligations – character and influence of the civilian tradition" 1992 *Stell LR* 5; Glover "Good faith and procedural unfairness in contract" 1998 *THRHR* 328). Bearing this in mind, Van Zyl J's reasoning in the *Janse van Rensburg* case seems to make sense. Why should a seller be liable for a latent defect or *dictum et promissum* concerning the *merx*, yet the buyer, who trades in a thing as part payment of the purchase price, not be responsible for a latent defect or *dictum et promissum* relating to the trade-in? It seems only fair and reasonable that the same remedies should be available to both parties where the same problem (a latent defect or innocent misrepresentation) affects an item in the context of a sale. Bristowe J's argument in the *Mountbatten* case (181A) that the residual duties of a buyer and a seller are innately different may be true as far as it goes, but one needs to remember that the Supreme Court of Appeal has made it quite clear that the residual duties that attach to parties to a contract are not a *numerus clausus*, and additional duties may be identified should modern circumstances and developments demand this (*A Becker & Co v Becker* 1981 3 SA 406 (A) 419G). Seeing that the residual duties currently recognised in our law developed out of the dictates of fairness and reasonableness (*Becker* 419F), there appears to be no reason why, on similar grounds, the residual duties of buyer and seller should not be adapted to provide both parties with like remedies in like situations.

The third, and indeed the most striking, feature of the judgment in the *Janse van Rensburg* case is Van Zyl J's appeal to the Constitution to provide further support for his arguments. The power to develop the common law in the warm glow of the Bill of Rights has not yet had a huge impact upon our private law in general, and has rarely been exercised in the law of contract in particular. Who, after all, could ever imagine the aedilitian actions of all things having constitutional implications? Most commonly our courts have, in contract cases, made reference to the Constitution in order to confirm that the common law as it stands is constitutionally sound. For example, this has occurred in the realm of the law of mistake (*Goldberg v Carstens* 1997 2 SA 854 (C)) and in cases concerning covenants in restraint of trade (*Knox d'Arcy Ltd v Shaw* 1996 2 SA 651 (W); *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Permain* [1997] 4 All SA 650 (SE)). Since it is now mandatory for every court to develop the common law where it is necessary to ensure that the law is compatible with the Bill of Rights, Van Zyl J's invocation of the court's power to develop the common law in the light of the Bill of Rights in *Janse van Rensburg*'s case (326E–H) is an exciting development. There can be no stronger method of buttressing an argument that the law ought to be developed to ensure that both buyer and seller are entitled to the same remedies in similar circumstances than to refer to section 9(1) of the Constitution, which states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law". That the dictates of the Constitution can have a role to play in the development and extension of well-known institutions of the law of contract (and are not merely available to affirm that those traditional principles are acceptable as they have traditionally been applied) bodes well, in a curious yet pleasing way, for the likely powers of survival of many principles of the Roman and Roman-Dutch common law.

The fourth feature of Van Zyl J's judgment that warrants discussion, is his rejection of the argument raised by certain academics that the only way in which the aedilitian actions could apply to trade-in agreements is by identifying the true nature of a trade-in agreement as a substituted performance or *datio in solutum*. The details of this argument may be found elsewhere in this note. With respect, this approach to the problem faced by the court in *Janse van Rensburg*'s case appears to be overly technical. Van Zyl J correctly points out that, from a practical perspective, the trade-in portion of the purchase price is not a substitute for an original debt which is owed; it is in fact an integral part of the original debt which was agreed upon by the parties (327C–D). In the ordinary course of events (particularly in the light of the fact that motor vehicles are extremely expensive today), a trade-in will frequently form part of the initial purchase price which a prospective buyer offers to pay. There are few who are in the lucky position of being able to contemplate paying a cash price in full for a new motor vehicle, and trading in their old vehicle is a means of deferring some of the exorbitant interest payments that would attach to a plain credit sale. In addition it is common, where vehicle purchases are concerned, for the full cash price of a vehicle to be different to the ultimate financial value of the purchase price where a trade-in is involved. Frequently the ultimate price will be lower, as the seller is able to take the trade-in vehicle and sell it fairly swiftly, and at a handsome profit. This would be a fact that would further negate the argument that a trade-in agreement could be in the character of a substituted performance of an original debt.

In conclusion, it is submitted that the court's decision in *Janse van Rensburg*'s case to extend the application of the aedilitian actions to situations where a thing (*in casu* an incorporeal thing) has been traded in as a portion of the purchase price, and does not possess the characteristics it was represented to possess, is the correct one. In particular, from a practical perspective, it would appear that the remedies afforded by the aedilitian actions, particularly the *actio quanti minoris*, provide the

most appropriate mechanism for solving such disputes in an equitable manner, and a manner which ensures both that the agreement may remain in place, and the legitimate expectations of the parties may be satisfied. Granting the aggrieved seller an amount to compensate that party for the true value of the vehicle which was traded in, appears to be an eminently suitable remedy. To expect the parties to have to rescind the agreement and make restitution in accordance with the general principles of the law of contract would surely be a commercial hindrance, especially in view of all the administrative details which would have to be reversed (licensing and registration being mere examples). It is hoped that should a similar matter come before any other court, or even the Supreme Court of Appeal, the decision in *Janse van Rensburg*'s case will be endorsed.

GB GLOVER
Rhodes University

NEGLIGENCE, DEMOCRACY AND THE VIRTUE OF GOOD JUDG(E)MENT

S v Manamela 2000 1 SACR 414 (CC)

1 Introduction

There are a number of reasons why the recent judgment of the Constitutional Court in *S v Manamela* 2000 1 SACR 414 (CC) deserves to be read and re-read with close attention. It is, first of all, one of the most recent by the Constitutional Court on the meaning and scope of the right to a fair trial, in particular the right of an accused person "to be presumed innocent, to remain silent, and not to testify during the proceedings" as set out in section 35(3)(h) of the Constitution, Act 108 of 1996. The question before the court was whether to confirm, as is required by section 172(2) of the Constitution, an order made earlier in *S v Manamela* 1999 2 SACR 177 (W) to the effect that the statutory reverse onus provision contained in section 37(1) of the General Law Amendment Act 62 of 1955 is unconstitutional. The relevant portion of this well-known statutory offence reads as follows:

> "Any person who . . . acquires or receives into his possession from any other person stolen goods . . . without having *reasonable cause, proof of which shall be on such first-mentioned person*, for believing . . . that such goods are the property of the person from which he receives them or that such person has been duly authorized by the owner thereof to deal with or dispose of them, shall be guilty of an offence" (emphasis added.)

The majority of the court held (per Madala, Sachs and Yacoob JJ) that the reverse onus provision included in the section was indeed unconstitutional. However, the minority (per O'Regan J and Cameron AJ) found that the reverse onus in question passed constitutional scrutiny (pars [60]–[102]). The judgment of the minority understandably elicited an authoritative restatement by the court of the circumstances under which the onus of proof in a criminal trial can legitimately be reversed (pars [27]–[34], see also *S v Zuma* 1995 2 SA 642 (CC); *S v Bhulwana; S v Gwadiso* 1996 1 SA 388 (CC); *S v Julies* 1996 4 SA 313 (CC); and *S v Mello* 1998

3 SA 712 (CC)). Even so, the division within the ranks of the court regarding one of the cornerstones of the criminal justice system is worthy of, and likely to attract, extensive discussion and commentary.

Secondly, the court used its remedial powers to *read words into* legislation, on this occasion section 37(1) of the General Law Amendment Act, from which a reverse onus provision had been struck. The court had previously assumed this "legislative" power from an interpretation of section 172(1) of the Constitution (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) pars [65]–[76]). In particular the court read down the reverse onus provision contained in section 37(1) to the level of an evidential burden (pars [52]–[59]). Thus, instead of "reasonable cause, proof of which shall be on the first-mentioned person", section 37(1) of the General Law Amendment Act now reads: "In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause . . ." (par [59]). By exercising its legislative function in this manner, the court has raised the possibility of, and begun to set out some of the guidelines for, an ongoing constitutional conversation between itself and Parliament (see pars [34]; [55–57]; [95]). This latest development of the court's powers of constitutional review is even more worthy of, and even more likely to attract, careful consideration and comment (see eg Taylor and Wildenboer "Don't procrastinate: adjudicate, legislate or debate" to be published in the May 2001 issue of the *THRHR*).

On the assumption that the two abovementioned issues will be extensively debated by others, I have decided to restrict my discussion of the case to a third, but equally important aspect of the judgment, one which is likely, for reasons which will become clear shortly, to receive less attention. I am referring to the nature and place of negligence as standard of criminal responsibility in an open and democratic society. This issue is discussed in both the majority and the minority judgments of the court and should be welcomed as an important addition to the court's thusfar tentative attempts to delimit the constitutional dimension of criminal responsibility (see eg *S v Zuma* par [16]; *S v Ntuli* 1996 1 SACR 94 (CC) par [2], *S v Coetzee* 1997 1 SACR 379 (CC) pars [93]–[96]; [161]–[177] and Le Roux "Die strafhof as publieke ruimte: psigologiese skuld en politieke dialoog" 1999 *THRHR* 285 286). It is on this aspect of the judgment that I shall focus my attention.

2 The proceduralisation of the substantive criminal law: how the issue of negligence was (not) dealt with by the court

To suggest that the judgment of the court involved a critical reflection on the nature and place of negligence in the substantive criminal law is misleading. At the original appeal against their conviction, the accused followed the example set in *S v Coetzee* 1997 1 SA 379 (CC) and challenged the constitutionality of section 37(1) of the General Law Amendment Act on two separate grounds. In the first place the accused claimed that the fault requirement of the offence was unconstitutional. This was so, either because liability based on negligence (as opposed to *dolus*) was inappropriate for the nature of the offence, or because the application of an objective standard of negligence would inevitably lead to injustice given the diversity of the South African population (*S v Manamela* 1999 2 SACR 177 (W) 195E–196A). The second ground upon which the accused challenged the constitutionality of the section was that the reversal of the onus of proof rendered their trial unfair. The first claim goes to the heart of the substantive criminal law, the second claim to the heart of the law of criminal procedure.

In response to the accused's two-pronged attack, Tip AJ significantly held that the constitutionality of section 37(1) of the Act should be decided as an issue of procedural fairness and not as one of substantive justice (190F). The case was therefore disposed of by the decision whether the reversal of the onus of proof rendered the trial procedurally unfair. The unfortunate effect of this approach was that the accused's challenge to negligence, as part of the substantive criminal law, was, apart from one or two *obiter* remarks, left in abeyance. At the hearing before the Constitutional Court, the accused's challenge to the substantive criminal law was therefore no longer an issue to be decided.

The two *Manamela* judgments once again illustrate a reluctance to confront the implications which the Constitution may have for substantive criminal law, a reluctance which in South Africa has become characteristic of recent reforms to the criminal justice system. In spite of some tentative suggestions to the contrary (see *S v Zuma* par [16] and *S v Ntuli* par [2]) the Constitutional Court finally held in *S v Coetzee* that the substantive rules of the criminal law had no bearing on the "substantive fairness" of the trial, but should be dealt with, where the risk of imprisonment exists, under the right to freedom and security of the person (currently s 12(1)(a) of the Constitution). The unintended effect of this clear separation of substance and procedure has been that a proper constitutional investigation into the general principles of the substantive criminal law has up to now been sidelined.

Current limitations in the South African concept of fault, for example, have either been re-described as procedural problems, or have been left undecided in favour of a determination of the case at hand on purely procedural grounds (as happened again in the *Manamela* judgments). One could, in this regard, properly speak of a *proceduralisation of the substantive criminal law*. The best example of this process remains the constitutional regulation of police entrapment where a procedural defence has been created to fill a gap left by the narrow empirical foundations of the psychological approach to fault. (For a fuller discussion of this issue see Le Roux "Trapped between the truth and logic of legal formalism" 1999 *SALJ* 868 and "'n Les uit Eden: Onbillike lokvalle en strafregtelike skuld" 1997 *SACJ* 3.)

In spite of the fact that both the *Manamela* judgments both fell prey to the *proceduralisation of the substantive criminal law*, the substantive issues concerning the nature of negligence which the accused raised, nevertheless entered the court's reasoning through the back door, this time in the guise of an investigation into risks attached to the onus of proof borne by the accused in terms of section 37(1) of the Act. The attempt below to read the Constitutional Court's judgment as an investigation into the constitutional dimension of criminal responsibility must therefore constantly be qualified to reflect this fact.

3 Reasonableness in a pluralistic and democratic society

The court unanimously found that the state had established the importance and legitimacy of the policy objective to "eradicate the market in stolen property which has a devastating effect on the maintenance of law and order" (pars [41]; [82]). It also unanimously accepted, without debate, that the legislature, as means to this end, was justified in creating section 37(1) of the Act as a special statutory offence criminalising the receipt of stolen goods outside ordinary commercial channels. The court was also unanimous in its finding that the legislature was for the same reason justified in lowering the common-law standard of criminal responsibility for theft from intention (*dolus*) to negligence (*culpa*) (pars [42]; [61]).

These findings are in line with the earlier judgment of the court in *S v Coetzee* in which O'Regan J held that the level of culpability or blameworthiness required constitutionally to establish criminal liability, need not be restricted to intention (*dolus*) but could also include negligence or *culpa* (par [177]). She also stated that the appropriate form of culpability has to be determined with reference to factors such as the nature of the offence, and suggested that considerable leeway should be granted to the legislature to determine the appropriate standard of criminal responsibility (*ibid*). *Manamela* re-confirmed this approach and established negligence firmly as part of the constitutional landscape. So much for the first of the objections against the substantive criminal law raised by the accused.

Once the constitutional validity of statutory theft is accepted, it becomes important to establish how negligence should be conceptualised. The court reconfirmed (as did Kentridge AJ in *Coetzee* par [95]) that negligence cannot be conceptualised as a subjective state of mind – an option which the court explicitly mentioned but rejected (par [74]. This option was put forward by De Wet and Swanepoel *Strafreg* 156–163 but renounced in *S v Ngubane* 1985 3 SA 677 (A)). Negligence, by contrast, implies failure on the part of the accused to measure up to a standard of reasonable behaviour. Reconfirming the old position, however, on this occasion accentuated new problems (or, if you prefer, threw new light on old problems).

Both the majority and the minority alluded to the difficulties associated with the application of an objective standard of reasonable behaviour in a pluralistic democratic society (pars [44]–[45]; [74]–[76]. See also Heyns "'Reasonableness' in a divided society" 1990 *SALJ* 279 and Whiting "Negligence, fault, and criminal liability" 1991 *SALJ* 431). To claim that negligence is not a subjective state of mind does not imply that it can or should be established with reference to a fixed objective standard uncompromisingly applicable to all. As the court rightly suggested, the challenge facing courts in a democratic society is to develop a *variable standard* of reasonableness in which the conduct or beliefs of an accused are viewed both subjectively and objectively (par [75]).

As far as the subjective element of reasonableness is concerned, the court held firmly that reasonableness had to be established both "in the context of the character and background of the accused" and "the material circumstances" in which the accused found herself (pars [20]; [74]). In this regard both the majority and the minority of the court emphasised the "social context" in which the accused found herself (pars [44]; [76]). With specific reference to the receipt of stolen goods the majority suggested that it is the poor, unskilled and illiterate class in society who are "most vulnerable to erroneous conviction" because of so-called findings of "unreasonableness" (par [44]).

The remarks by both the majority and minority of the court can best be interpreted as support for a complete individualisation of the standard of reasonableness to reflect both the cultural and class background of the accused. If so, the Constitutional Court thereby strongly rejected the approach to objective reasonableness adopted by Tip AJ in the original *Manamela* judgment. Tip AJ dismissed the suggestion that a culturally relative approach to reasonableness should be adopted in the context of the handling of stolen goods (195I–196A). In the light of the response by the Constitutional Court, there remains no reason to follow Tip AJ on this matter and restrict the variation of the standard of reasonableness to cases where cultural factors, like belief in witchcraft, are involved. A cultural, gender and class-specific approach should be adopted in all cases where the culpability of an accused person needs to be determined.

4 Good judgement and the risks involved in the application of an individualised standard of reasonableness

Having established that the culpability of an accused, that is, the reasonableness of her beliefs and behaviour, should be measured against the conduct of her cultural, class and gender specific peers, the question shifts to the manner in which this measurement is to be made, and in particular, to whether a finding of negligence can ever be made objectively in a heterogeneous society. In the context of the procedural enquiry undertaken by the court, these questions are related to the risks involved in the establishment of reasonableness or negligence (risks which the reversal of onus shifts onto the accused).

In terms of the text of the General Law Amendment Act, the reverse onus contained in section 37(1) requires an accused to prove on a balance of probability that she had *reasonable cause* to believe that the (stolen) goods she received into her possession were not stolen or being handled against the will of the owner. In discharging the onus an accused person must establish two things. In the first place she will have to prove all the facts upon which she relied to form the *bona fide* belief that the goods were not stolen. This is purely a factual matter. In the second place the accused will have to establish that her belief was not only real and *bona fide*, but that it was also reasonable, given the proven facts. This is purely a matter of evaluation. (See in general *S v Kaplin* 1964 4 SA 355 (T) 358A; *S v Ghoor* 1969 2 SA 555 (A) 557G–H.)

The phrase "reasonable cause" can therefore be broken down into a factual element ("cause") and an evaluative component ("reasonable"). The dispute between the majority and the minority over the constitutionality of the reverse onus revolved essentially around the factual element of the reversed onus.

The majority held that it cannot fairly be expected of an accused person to prove on a balance of probability every fact which might back up her belief that the goods were not stolen (pars [44]–[46]). With reference to the wide range of goods involved, the wide meaning of possession and the level of poverty and illiteracy in our society, many accused would, according to the court, not be able to collect or keep the factual records necessary to meet this burden (pars [43]–[46]). The reversal of the onus therefore leaves many accused at the risk of unfair conviction, a result which cannot be justified in a democratic society. The minority, on the other hand, held that it can indeed be expected of the democratic citizens of a crime-ridden society, when they acquire goods outside ordinary commercial channels, "to ensure that they take steps that will enable them to establish that they had reasonable cause to believe that the goods are not stolen" (par [89]). If members of the public take all the steps necessary to obtain enough factual information about such goods, so that they will later be able to convince fellow citizens of their *bona fides* and reasonableness, the minority argued, traffic in stolen goods would diminish (par [88]). In short: in a crime-ridden society, responsible citizens must not only behave reasonably, they must manifestly be seen to behave reasonably.

The dispute between the minority and the majority about the factual element of the onus of proof aside, the court was in agreement that the evaluative element of the onus was not a problematical aspect of the case and, in itself, did not create an added risk of unfair conviction (pars [45]; [74]–[76]). This somewhat optimistic conclusion stemmed largely from the court's understanding of the way in which the assessment of reasonableness ought to be made in a pluralistic society. This understanding constitutes the heart of the court's judgment and received prominent attention especially in the judgment of the minority.

The minority made it clear that the assessment of reasonableness is truly an evaluative undertaking which cannot be approached in a *quasi*-scientific or deductive manner as if factual truths or the dictates of formal logic can *determine* the outcome. The distinction between determinant and reflective judgements has, since Immanuel Kant's *Critique of judgement* (1790), become well established in legal philosophy. Judgement, according to Kant, is the ability to think about a particular thing in universal terms. If the universal (rule, principle or concept) is given, then the judgement is *determinant*. Thus Kant claimed that transcendental judgements of science and morality are determinant. On the other hand, if the universal is not already given, judgement involves more than merely logically subsuming a new case under an existing universal category. Now the particular is given and the universal has to be found. In such cases the judgement is *reflective* in nature. Thus Kant claimed that transcendental judgements of taste (or beauty) are reflective. Furthermore, it is of the nature of determinant judgements that they are susceptible to objective proof (ie what is *true* and what is *right* can, according to Kant, be objectively demonstrated). It is in the nature of reflective judgements that they are not susceptible to objective proof but require persuasion (ie what is *beautiful* can, according to Kant, not be proved or demonstrated to be so). Determinant judgements can be made in isolation (universals that are already given determine the outcome). Reflective judgements, on the other hand, always proceed on the basis of a real or imagined reflective dialogue with other people and require the presence of others. For this reason Kant's model of reflective (or aesthetic judgement) has been explored by a number of thinkers as the most appropriate understanding of political and legal judg(e)ments under conditions of radical plurality (see eg Arendt *Lectures on Kant's political philosophy* (1982) 7–77; Howard *From Marx to Kant* (1985) and Beiner *Political judgement* (1983)).

As the minority of the court presented it, the judgement of reasonableness is akin to the judgement of beauty in Kant's scheme. Whether an accused person had reasonable cause to believe that the goods in question were not stolen would, according to O'Regan J and Cameron AJ, depend on the "sound and fair judgment" of the presiding officer taking into account the many subtle particularities of each and every case (par [76]). The court thus conceded that even the individualised standard of reasonableness it favoured (or any other standard of reasonableness for that matter) cannot be formulated in the abstract in such a determinant way that its application can take place in an analytical or mechanical fashion. As the minority put it, the finding of reasonableness "depends less on the elucidation of sophisticated legal formulae than on the practical employment of good sense" (par [77], but see Heyns 1990 *SALJ* 279 for a defence of a sophisticated rational formula, in his case after the example of John Rawls's difference principle, to deal with the thorny issue of reasonableness).

Strictly speaking then, we are not in the assessment of reasonableness dealing with anything that the accused can prove in any meaningful sense of the term. What I earlier called the "evaluative element" of the onus of proof turned out not to be that at all. The court's understanding of reasonableness reminds us that neither the accused, nor the state, can prove or demonstrate factually or logically that a particular mode of conduct or belief was unreasonable. The establishment of culpability involves acts of persuasion (as opposed to demonstration), good judgement and prudence (as opposed to knowledge of abstract formulas or rules) and is therefore always a contestable affair. As the late Etienne Mureinik remarked years ago, the democratic South Africa "must be a community built on persuasion, not coercion" ("A bridge to where? Introducing the Interim Bill of Rights" 1994 *SAJHR* 31 32).

It should be noted that in the view of the court the impossibility of achieving analytical formality in the assessment of criminal culpability does not mean that the enquiry into reasonableness disintegrates into a purely arbitrary matter, thus exposing the accused to an unjustifiable risks of unfair conviction. The necessary appeal to prudence, rather than to legalistic formalism, is something which the court does not regard as a problematic aspect of a pluralistic culture, but rather embraces as a safeguard. On those occasions where an insufficiency of "good sense" might lead to "imprudent convictions", correction by the appellate courts and the establishment of "sensible guidelines" would offer sufficient protection (par [77]).

The court's response to the challenges posed by diversity is therefore to resist further formalisation and to emphasise good sense and practical wisdom in concrete situations. By celebrating the need for and virtue of good reflective judgement, the court reminded us that the opposite of formal legal science need not be the unfair and arbitrary exercise of power (for similar suggestions see Singer "The player and the cards: nihilism and legal theory" 1984 *Yale LJ* 1 and Frug "Argument as character" 1988 *Stanford LRev* 869). Good judgement, on the contrary, implies reflection within an horizon established through dialogue between a variety of perspectives (in the context of the assessment of culpability at least between the accused and the presiding officer). The legitimacy and quality of the judgement can nevertheless never depend on anything more secure than the richness of the tentative dialogical horizon which informed it.

5 Conclusion

While restricting its enquiry to the procedural fairness of a reversed onus provision, the Constitutional Court in *Manamela* has made an important contribution towards a better understanding of the normative foundation of the South African criminal law. The court has shown the way towards a complete individualisation of the standard of reasonableness and, even more importantly, the court has situated good reflective judgement in the place of logic and positivistic science as the normative centre of the criminal law. These aspects of the court's judgment must be celebrated as important steps in the development of a democratic and inter-active or dialogical criminal law, freed from the shackles of positivistic science and logic which are, unfortunately, still operative in post-apartheid South Africa in the guise of the psychological approach to fault.

WESSEL LE ROUX
University of South Africa

The legal process is always the same, an open, though bounded, forum where forensic battles are contingently and temporarily won.

Stanley Fish.

REDAKSIONELE KOMMENTAAR

'n Raaiskoot wat waarskynlik nie ver van die kol af is nie, is dat nege en negentig persent van *Tydskrif* se lesers oor tjekrekenings beskik. Soos die skrywer hiervan, is diegene waarskynlik ook in die onlangse verlede deur hul banke gebombardeer met kennisgewings oor en kleurryke illustrasies van 'n nuwe bedeling insake die gebruik van sogenaamde nie-oordraagbare tjeks. Dit volg natuurlik op die promulgering van die Wisselwysigingswet 56 van 2000 wat verskeie bepalings in dié verband bevat. (Die wysigingswet reël ook verskeie ander aangeleenthede waarby nie stilgestaan word nie.) Omdat hierdie 'n aangeleentheid is wat elke tjekgebruiker – en natuurlik die banke – raak, word slegs kommentaar gelewer op die geslaagdheid van die nuwe bepalings insake nie-oordraagbare tjeks.

Dit is algemene kennis dat die Wisselwet 34 van 1964 vir drie tipes dokumente voorsiening maak: (a) die heel onveiligste van almal, die sogenaamde toonderdokument, wat deur blote lewering verhandel kan word en wat so goed is soos kontant wat rondlê, aangesien enigiemand, selfs 'n dief, wat in besit is daarvan as houer kwalifiseer, wat impliseer dat 'n bank in beginsel 'n reëlmatige betaling aan enige besitter daarvan kan maak en die trekker se rekening mag debiteer; (b) effens veiliger is die orderdokument wat deur endossement aangevul deur lewering verhandel kan word; en (c) die dokument wat ons dosente ons geleer het die veiligste is, naamlik die dokument wat slegs *inter partes* geldig is (nóg 'n toonder- nóg 'n orderdokument) aangesien dit woorde bevat wat oordrag verbied en nie verder verhandel kan word nie. Voorbeelde hiervan is waar 'n tjek betaalbaar gestel word aan "C *alleen*", of waar die woorde "nie oordraagbaar nie" op die voorkant daarvan verskyn; en waar 'n orderdokument 'n beperkende endossement bevat, soos "Betaal D alleen – geteken C".

Wat (c) betref, sou u dalk vra: Die veiligste vir wie? Vanuit die *trekker* se oogpunt: Indien die betrokkene bank die tjek uitbetaal, is die ideaal dat dit 'n sogenaamde reëlmatige betaling moet maak alvorens dit die trekker se rekening met die bedrag van die tjek mag debiteer. 'n Reëlmatige betaling is onder andere 'n betaling aan die *houer* van die tjek, te wete die nemer of geëndosseerde wat in besit is daarvan, of die toonder daarvan. Indien 'n *inter partes*-geldige tjek dus byvoorbeeld gesteel word en die bank die dief op sterkte van die tjek sou betaal, is dit nie 'n reëlmatige betaling nie aangesien die dief nie die houer kan wees nie. Die gevolg: Die trekker se rekening mag nie gedebiteer word nie en die bank sal moet probeer om die bedrag van die dief terug te eis (indien hy opgespoor kan word). Vanuit die *houer* se oogpunt: Gestel lewering van die tjek het reeds deur die trekker aan die houer geskied sodat hy as ware eienaar daarvan kwalifiseer. Indien die tjek by laasgenoemde gesteel word en deur die bank vir 'n dief (beskikkingsonbevoegde) ingevorder word, het die ware eienaar in beginsel 'n deliktuele aksie teen die invorderingsbank vir die bedrag van die tjek (of sy skade).

Geen wonder dus nie dat banke oor dekades heen probeer het om op een of ander wyse die strenge werking van die *inter partes*-geldige dokument te temper. In die laat sewentigerjare het die banke byvoorbeeld besluit om nie meer tjeks in te vorder vir 'n rekening waarvan die naam nie honderd persent ooreenstem met die naam van die begunstigde op die tjek nie. In die vroeë negentigs is besluit dat

'n nie-oordraagbare tjek ook gekruis moet word, anders sal dit aan die trekker teruggestuur word gemerk "nie invorderbaar nie". Die rede hiervoor was om die betrokkene bank te beskerm: Indien die tjek gekruis is, sal (behoort) die betrokkene nie die tjek oor die toonbank uitbetaal nie, maar aan 'n ander bank. Ingevolge artikel 79 sal sodanige bank beskerm wees indien dit te goeder trou en sonder nalatigheid aan 'n ander bank betaal het. Selfs al het 'n dief (nie die houer nie) dus uiteindelik met die betaling weggeloop nadat dit byvoorbeeld 'n rekening onder 'n vals naam by die invorderingsbank geopen het, was die betrokkene beskerm en kon hy die trekker debiteer. Wat oorgebly het, is dat die invorderingsbanke met eentonige reëlmaat deliktueel aanspreeklik gehou is deur die ware eienaar weens tjeks wat hulle vir beskikkingsonbevoegdes ingevorder het. Veral die nie-oordraagbare tjek was vir invorderingsbanke 'n kopseer aangesien hulle weens gebrek aan mensekrag nie altyd in staat was om woorde wat oordrag verbied te identifiseer nie en dus tjeks vir beskikkingsonbevoegdes ingevorder het, met die gepaardgaande deliktuele eis gegrond op nalatigheid. Die wetswysigende maatreëls was hoofsaaklik daarop gemik om onder die gesketste omstandighede verligting te verleen aan invorderingsbanke:

Die nuwe artikel 75A(1) bepaal:

> "Wanneer 'n tjek opsigtelik op die voorkant daarvan die woorde 'nie oordraagbaar nie' of 'nie-oordraagbaar' het, met of sonder die woord 'alleen' ná die naam van die nemer –
>
> (a) is die tjek nie oordraagbaar nie, maar is dit geldig tussen die partye daartoe;
>
> (b) word die tjek geag algemeen gekruis te wees, tensy dit 'n besondere kruising bevat; en
>
> (c) mag die woorde 'nie oordraagbaar nie' of 'nie-oordraagbaar' nie gekanselleer word nie en enige voorgegewe kansellasie is nietig."

Dit wil voorkom asof hierdie gedeelte van die nuwe artikel poog om die *identifisering* van nie-oordraagbare tjeks te vergemaklik. Die belangrike woord hier is natuurlik "opsigtelik". Wat sou dit beteken? Die wetgewer meld dit nie en vandaar waarskynlik die bombardement met pamflette en inligtingstukke deur die banke: voorbeelde van hoe banke *dink* of *meen* die gewraakte woorde op tjeks aangebring moet word (ook die banke se brosjures verskil hieroor).

Dit neem die aanspreeklikheid van 'n invorderingsbank wat hierdie woorde sou ignoreer steeds nie verder nie. In 'n ongelukkige poging om sodanige aanspreeklikheid aan te spreek, bepaal artikel 75A(2):

> "'n Bank is nie slegs omrede van sy versuim om hom in te laat met –
>
> (a) 'n endossement wat bedoel is om oordrag van die tjek te verhoed; of
>
> (b) woorde wat, op 'n ander wyse as waarvoor in hierdie artikel voorsiening gemaak word, oordrag verbied of aanduidend is van 'n bedoeling dat dit nie oordraagbaar sal wees nie, nalatig nie."

By die lees van die nuwe artikel is dit duidelik dat die wetgewer hier iets reggekry het wat hy waarskynlik nooit in gedagte gehad of voorsien het nie, naamlik dat ons voortaan twee soorte *inter partes*-geldige tjeks sal hê: Die een is die ou bekende waarvoor onder artikel 6(5) voorsiening gemaak word, soos 'n beperkende endossement en die woord "alleen" langs die begunstigde se naam. Die tweede is natuurlik dié waarvoor nou spesifiek in artikel 75A voorsiening gemaak word.

Ten opsigte van die eerste tipe geld die bestaande statutêre en positiewe reg onverminderd. Sou 'n bank dus steeds sodanige tjek vir 'n beskikkingsonbevoegde invorder, sal die bestaande deliktuele aanspreeklikheid volg, nieteenstaande

artikel 75A(2) wat bepaal dat 'n bank nie slegs omrede sy versuim om hom in te laat met die beperkende woorde nalatig is nie. Die positiewe reg hieroor is baie duidelik: *Invordering* namens 'n beskikkingsonbevoegde is reeds *prima facie* nalatig. Wat bedoel die wetgewer in elk geval met "versuim om hom in te laat met"? Hierdie woorde is nie net onduidelik nie, maar dra geensins daartoe by om die bank se posisie te verbeter nie.

Wat die tweede tipe betref: Wat is die bank se regsposisie indien dit ten spyte van die woorde "nie oordraagbaar nie" of "nie-oordraagbaar" wat *opsigtelik* op die voorkant van 'n tjek aangebring is, sou voortgaan en die tjek vir 'n beskikkingsonbevoegde invorder? Die antwoord moet noodwendig wees: Presies dieselfde as voor die wetswysiging. Die wysiging raak slegs die *identifisering* van die nie-oordraagbare tjek maar het myns insiens geen invloed op die bestaande deliktuele aanspreeklikheid van die invorderingsbank nie.

Dit wil dus voorkom, die wetswysigings ten spyt, asof nóg die tjekgebruiker slegter nóg die banke beter daaraan toe is en dat daar in hierdie opsig weinig indien enige noemenswaardige verskil aan die bestaande regsposisie gemaak is.

Lesers wat meer besonderhede, bewysplaatse en verwysings verlang, kan die volgende met vrug raadpleeg: Pretorius "The Bills of Exchange Amendment Act 56 of 2000" in The Centre for Business Law (Unisa) *Current Commercial Law* (2001) 2 ev.

CHRIS NAGEL

ERRATUM

The note by PH Havenga in the February 2001 issue entitled "Contractual claims and contributory negligence" should have contained a reference to the case of *Thoroughbred Breeders Association of South Africa v Price Waterhouse* 1999 4 SA 968 (W).

The legitimacy of legal orders (1): Introducing the problem

Henk Botha
BLC LLM LLD
Professor of Law, University of South Africa

OPSOMMING

Die legitimiteit van regsordes (1): Bekendstelling van die probleem

In hierdie artikel ondersoek ek die verband tussen die legitimiteitsbegrip en ander begrippe, soos "gesag", "mag" en "kritiek". Ek ondersoek ook die historiese oorsprong van die legitimiteitsprobleem. Laasgenoemde hang ten nouste saam met die moderne besef dat politieke gesag op konvensie berus. Die moderne word, polities gesproke, gekenmerk deur 'n radikale onbeslistheid oor die grondslae, plek en omvang van gesag. Ek bespreek vervolgens verskillende bronne van legitimiteit, asook die spanning in Westerse politieke denke tussen wil en rede, demokrasie en regte, en substansie en prosedure.

1 INTRODUCTION

The discourse on legitimacy has been central to South Africa's constitutional transition. The illegitimacy of the apartheid legal order, and the need to establish a new, legitimate legal order, has been a recurrent theme of our constitutional discourse.[1] Hence the insistence that a new constitution had to represent a complete break with the past; that the old order could not be reformed from within. Hence, also, the democratic nature of the constitution-making process: the insistence that a final constitution should be adopted by a democratically elected Constitutional Assembly; and the calls for popular participation (in the form of inputs to the Constitutional Assembly) in the constitution-making process.[2]

However, the argument of legitimacy has been invoked to justify a whole range of conflicting positions in the South African constitutional debate. This is not surprising, as legitimacy is an elusive and contested concept.[3] In this series of

1 On the illegitimacy of the apartheid legal order, see eg Hoexter (chairman) *Commission of Inquiry into the Structure and Functioning of the Courts*, final report RP78/1983 (1984); HSRC *South African society: realities and future prospects* (1985); Greenberg *Legitimating the illegitimate* (1987); Van der Vyver "Constitutional options for post-apartheid South Africa" 1991 *Emory LJ* 745 820–825; and Corder "Establishing legitimacy for the administration of justice in South Africa" 1995 *Stell LR* 202.

2 See eg Erasmus and De Waal "Die finale Grondwet: legitimiteit en ontstaan" 1995 *Stell LR* 31 on the legitimacy of the "final" Constitution.

3 Even though the term "legitimacy" is used frequently by South African legal academics, few of them seem to be aware of the debates surrounding the meaning of the concept. Exceptions are Bonthuys and Du Plessis "Observations on the conceptualisation and definition of legitimacy in a legal context" 1996 *Stell LR* 217; and Botha "The values and principles underlying the 1993 Constitution" 1994 *SAPR/PL* 233.

articles, I inquire into the different uses and meanings of the concept of legitimacy. I also explore some of the attributes that are believed to confer legitimacy on political regimes and legal orders. However, my aim is not to arrive at the "correct" definition of legitimacy,[4] nor to devise a set of criteria that will distinguish legitimate regimes from illegitimate ones. Rather, I hope that by exploring the tensions between different conceptions and sources of legitimacy, we may come to a richer – and more complex – understanding of the way our everyday judgments about the law are informed by often tacit assumptions about the nature and legitimacy of power.

In this, the first article, I explore the link between the concept of legitimacy and other concepts, such as "authority", "power" and "critique". I also examine the historical context in which the problem of legitimacy first came to the fore. The problem of legitimacy, it seems, is intimately bound up with the modern realisation of the conventional nature of authority. Political modernity is characterised by a radical indeterminacy as to the foundations, location and scope of authority, and the institutionalisation of the debate on legitimacy. I also discuss various sources of legitimacy. This discussion introduces the tension in Western thought between will and reason, democracy and rights, and substance and procedure.

In the second article, I consider the various meanings of legitimacy, and the various contexts in which the term is used. I argue that we should be wary of definitions that reduce legitimacy to either moral justifiability or social acceptance or to formal legal validity. Ethical, legal and empirical considerations are all relevant to an inquiry into legitimacy. By focusing on the contradictions and dissonances between these dimensions, we can come to a more critical concept of legitimacy: one that continues to question political and social power, instead of merely acquiescing in it.

The third article focuses on the role of law in the legitimation of power. The rule of law legitimation of power has run into serious problems in the modern state. This raises vital questions about the capability of law to restrain power, and the possibility of legitimacy in the modern state. Is it possible to reconstruct the rule of law? Or are we relegated to the rule of men and/or the rule of administration? Is it possible to institutionalise a critical discourse of legitimacy, or is a veneer of legitimacy all we can hope for, in a world ruled by the authority of fact?

2 LEGITIMACY: A CONTESTED CONCEPT

Legitimacy is often said to distinguish authority from naked power.[5] This suggests that brute force by itself is not sufficient to constitute a person or body as an authority. The robber may exercise power, but he lacks authority.[6] However, not all

---

4 Holmes "Two concepts of legitimacy: France after the Revolution" 1982 (10) *Political theory* 165 172 notes that "the idea of legitimacy has as many *real meanings* as it has actual uses".

5 Selznick *The organization weapon* (1960) 242; Lasswell and Kaplan *Power and society* (1950) 133 ("authority is the expected and legitimate possession of power"). Lewis defines legitimacy as "that political condition in which power-holders are able to justify their holding of power in terms other than those of the mere fact of power-holding" – Lewis "Legitimacy and the Polish communist state" in Held (ed) *States and societies* (1983) 431.

6 See Locke *Two treatises of government* (1967) II par 186 (410–411); Hart *The concept of law* (1961) 19. Wiechers (1984) 3 *Administratiefreg* emphasises that government authority is conferred by law, and is therefore not synonymous with political or physical power within the state. However, the terms "authority" and "power" are often used interchangeably – cf Rautenbach and Malherbe *Constitutional law* (1996) 61.

authority is legitimate. A further distinction is therefore introduced: that between legitimate and merely *de facto* authority:

> "Legitimate authorities are there by right. They have the right to act as authorities. Mere *de facto* authorities do not, but they claim such right. Here lies the difference between naked power and *de facto* authority. *De facto* authority comes under a mantle of legitimacy. It claims the right of an authority."[7]

Legitimacy is often defined as the title to rule, and the right to be obeyed.[8] Habermas defines legitimacy as "a political order's worthiness to be recognized";[9] legitimacy means that the claim of a political order to be recognised as right and just, is supported by good arguments. Thus legitimacy is a "contestable validity claim; . . . the concept is used above all in situations in which the legitimacy of an order is disputed, in which, as we say, legitimation problems arise. One side denies, the other asserts legitimacy".[10] We can therefore observe a process of legitimation and delegitimation. According to Habermas, processes of this kind are defused and normalised in the modern constitutional state, with the institutionalisation of an opposition. Legitimacy can, therefore, be regarded as a permanent problem.

Legitimacy is also concerned with the proper scope, and therefore the proper confines, of authority. The need for the legitimation of power springs from the often painful and humiliating consequences and corrupting influences of exercises of power. Because power is so problematical,

> "societies will seek to subject it to justifiable rules, and the powerful themselves will seek to secure consent to their power from at least the most important among their subordinates. Where power is acquired and exercised according to justifiable rules, and with evidence of consent, we call it rightful or legitimate".[11]

The need for legitimacy therefore arises from man's normative dimension: the wish to confer meaning on his existence and aspirations (and institutions), and to provide justification for it.[12] However, pragmatic considerations also come into play, as it is in the interest of the powerful to secure consent to their rule.

The difficulty of establishing what makes power legitimate, and where the proper constraints on the exercise of legitimate power lie, is exacerbated by the way in which the concept of legitimacy is itself immersed in power relations. Ever since it became part of the political vocabulary of modern societies, the term legitimacy has been a tool in political power struggles. Stephen Holmes makes the following telling comment:

> "The language of politics is perhaps less a repository of shared meanings and a medium for social consensus and harmony, than an armory where conflicting parties are only too happy to commandeer and brandish the weapons of their enemies."[13]

---

7 Raz "Introduction" in Raz (ed) *Authority* (1990) 3.

8 Cf d'Entrèves "Legality and legitimacy" 1963 *Rev of Metaphysics* 687 687 (legitimacy is conferred by a proper "title" to rule); Dworkin *Law's empire* (1986) 191; Wolff "The conflict between authority and autonomy" in Raz (ed) *Authority* 20 24 (legitimacy "is a matter of the *right* to command, and of the correlative obligation *to obey the person who issues the command* ").

9 Habermas *Communication and the evolution of society* (1979) 178 (emphasis omitted).

10 *Idem* 178–179.

11 Beetham *The legitimation of power* (1991) 3.

12 Couwenberg *Van monarchale machtsstaat naar liberale democratie* (1979) 61.

13 Holmes 1982 *Political Theory* 173. Cf also Schaar "Legitimacy in the modern state" in Connolly (ed) *Legitimacy and the state* (1984) 104 111 (theories of legitimacy "are weapons in the

continued on next page

Yet another difficulty is that the question of legitimacy is the concern of various groups of professionals. From a theoretical point of view it stands at the intersection of legal theory, political and moral philosophy and sociology. While each of these disciplines has cast a different perspective on the question of legitimacy – often to a point that conversation between the various discourses on legitimacy seems meaningless – recent years have seen an important degree of convergence. Legal theory has become increasingly interested in the question of political legitimacy; and an easy opposition between political legitimacy and legality has become untenable.[14] Max Weber's reduction of legitimacy to the belief in legitimacy has been questioned in sociological writings, which now often exhibit a greater interest in the moral-normative dimension. And moral and political philosophy, sensitive to charges that it grounds legitimacy in metaphysics, or that it is blind to the social and cultural contingency of normative practices, has looked at social consensus and communicative action to ground a normative theory of legitimacy. However, despite some degree of convergence, the divergent definitions of legitimacy offered by different groups of professionals add to the complexity of the problem, and legitimacy remains an essentially contested concept.

3 WHY DOES LEGITIMACY MATTER?

One can think of several responses to the question: Why does legitimacy matter? One possibility is to examine the consequences that a lack of legitimacy may entail. It is often said that legitimate regimes operate far more efficiently than regimes that rely exclusively on fear of sanction, or custom, or considerations of self-interest to secure conformity with their prescriptions.[15] Empirical studies may show that the absence of legitimacy may result in widespread disobedience to authority; a lack of social cooperation in the pursuit of important societal goals; a sense of alienation; and ultimately, the breakdown of civil order.

Another option is to enquire when and why the question of legitimacy arises. This approach treats the problem of the legitimacy of law as an historical one; as something that appears at a definite moment of social development. Such a study may show that legitimacy becomes an issue when the bonds among religion,

---

struggles of men to enjoy the benefits and escape the burdens of power"); and Schmitt *The concept of the political* (1975) 31 (all political concepts have a polemical meaning, and "are incomprehensible if one does not know exactly who is to be affected, combated, refuted, or negated by such a term"). The polemical meaning of legitimacy has also been evident during the transition to a new constitutional dispensation in South Africa. Arguments of legitimacy were invoked on a regular basis by the former liberation movements, while the former political establishment countered either by relying on arguments of legality or efficiency, or by contesting the concept of legitimacy relied upon by their opponents. See eg Kruger "Die beregting van fundamentele regte gedurende die oorgangsbedeling" 1994 *THRHR* 396 401 fn 27, who argues that the concept of legitimacy is used too readily to cast suspicion on certain proposals or role players, and must be used with the greatest circumspection and objectivity. However, Kruger does not specify what the content of a more objective concept of legitimacy might be, or how it may differ from current usages.

14 See Cotterrell "Legality and political legitimacy in the sociology of Max Weber" in Sugarman (ed) *Legality, ideology and the state* (1983) 69 69.

15 See eg Weber *Economy and society* (1978) 31; Easton *A systems analysis of political life* (1965) 278; Beetham *Legitimation* 28. But see also Held *Political theory and the modern state* (1989) 101–102.

morality and law break down (a characteristic of pluralist societies);[16] or suggest that modern society "is visibly developing in such a direction that the grounds for the validity, and in consequence for the acceptance, of law are increasingly questioned".[17]

A third approach might focus on the connection between law and legitimacy.[18] In this view, legitimacy is essentially a question about the possibility of the rule of law; about law's capability to "speak truth to power". Thus the relation between law and politics is at the centre of the problem of legitimacy. Among the gravest problems facing law in the bureaucratic state, is its instrumental subordination to the political system: law's autonomy (which finds expression in phrases such as the "rule of law" and "constitutionalism") is increasingly threatened as it comes to be seen as a means of realising political goals.[19]

The question of legitimacy also involves the problem of relations between law and society. The twentieth century has seen extensive attempts to remedy social wrongs through law – ranging from the restructuring or planning of the economy to attempts to shape attitudes and beliefs. Law can appear as an independent agency of social change only in so far as it has been severed from its social and cultural roots. It is reduced to an instrument of state power, and the links between law and morality "seem to loosen and eventually largely to disappear in popular consciousness".[20] This raises important questions about the capability of the law to effect social change. The widening gap between law and other aspects of social regulation may become an obstacle to social change, and reveal the law's limitations in affecting social behaviour.

The term "legitimation" is also central to critical theory. However, critical theorists often use the term in a pejorative sense to denote the legitimation of illegitimate structures and hierarchies. For instance, scholars associated with the critical legal studies movement have attempted to show how capitalism is legitimated by the ideology of liberal legalism. Antonio Gramsci's notion of hegemony has been particularly influential. By hegemony is meant that

> "the most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are".

These assumptions make it hard for anyone "even to imagine that life could be different and better".[21] Critical theorists have devoted a great deal of attention to the

---

16 See Rosenfeld "Law as discourse: bridging the gap between democracy and rights" 1995 *Harvard LR* 1163 1165.

17 Skapsa and Stelmach "Contemporary problems and models of the legitimacy of law" (1989) 20 *Rechtstheorie* 245 245.

18 The question of legitimacy is central to legal theory. Cf Dworkin's view that the question of legitimacy is the threshold problem facing any conception of law (*Law's empire* 190–191); and the view that the introduction of a supreme constitution in South Africa has institutionalised the question of legitimacy.

19 See Botha "The legitimacy of legal orders (3): The rule of law under threat" (forthcoming).

20 Cotterell *The sociology of law: An introduction* (1984) 49.

21 Gordon "New developments in legal theory" in Kairys (ed) *The politics of law* (1990) 413 418. See also Greer "*Antonio Gramsci and legal hegemony*" in Kairys (ed) *The politics of law* (1982) 304; Cain "Gramsci, the state and the place of law" in Sugarman *Legality* 95.

ways in which domination and social stratification have been legitimated by the ideologies of civil rights law or criminal law.[22]

Some writers reject the preoccupation of political, social and legal theory with legitimacy. Hyde argues that we should abandon the concepts of legitimacy and legitimation, as they "explain neither obedience, revolt, nor legal behavior".[23] In his view, the concept of legitimation is not helpful for the critique of social institutions, as the term "legitimate" has an "unfortunate history" of being used "to free someone from arguing on moral grounds for a contested moral claim".[24] Moreover, the focus on legitimation is premised upon a structural-functional approach which is not tested. The assumption that all law contributes to the maintenance of a social system blinds us to anomalies, and to the possibility that law is a terrain of combat, rather than a system-maintaining mechanism. Finally, it makes it possible to discuss the attitudinal and behavioural impact of law without addressing its substantive moral content. Hyde proposes that, instead of trying to explain conduct through legitimacy, we should rather investigate rational grounds for action.

Foucault also rejects the focus on legitimacy, as it hides the domination intrinsic to law:

> "The essential role of the theory of right, from medieval times onwards, was to fix the legitimacy of power; that is the major problem around which the whole theory of right and sovereignty is organised ... [T]he essential function of the discourse and techniques of right has been to efface the domination intrinsic to power in order to present the latter ... on the one hand, as the legitimate rights of sovereignty, and on the other, as the legal obligation to obey it ... Right should be viewed, I believe, not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates."[25]

We have to tread lightly, then. The fact that "legitimacy" and "legitimation" are so central to political, social and legal theory, is in itself adequate reason for a closer scrutiny of these concepts. By focusing on the legitimacy of social institutions, we may expose commonplace – and unwarranted – assumptions about social life, and the place of law in society. However, if our aim is to subject power to critique, we should be conscious of the ways in which the discourse of legitimacy may operate to preclude normative questions, and thus to lull us into complacency. Instead, I shall argue for a discourse of legitimacy which is disruptive; one which never ceases to question the discourse of facticity, instead of surrendering to it.

4 LEGITIMACY AND MODERNITY

There is no consensus whether legitimacy is a contemporary problem, which is unique to the modern state, or whether it is universal, cutting across historical and cultural differences. However, it seems fair to say that the problem of legitimacy

---

22 See eg Balbus *The dialectics of legal repression: black rebels before the American criminal courts* (1976) (the criminal justice system legitimates the political and economic system by adhering to formal legal rationality); Freeman "Legitimizing racial discrimination through antidiscrimination law: a critical review of Supreme Court doctrine" 1978 *Minnesota LR* 1049.

23 Hyde "The concept of legitimation in the sociology of law" 1983 *Wisconsin LR* 379 419.

24 *Idem* 420.

25 Foucault "Two lectures" in *Power/knowledge* (1980) 78 95–96.

may arise wherever political power is exercised, even though full awareness of the problem has only recently dawned on western culture.[26]

It was, however, only after the advent of modernity that the question of legitimacy was brought into sharp relief. The advent of modernity marks a decisive break with an era in which God or nature or immemorial tradition undergirded authority. Connolly shows that it was possible to pose the question of legitimacy within the framework of medieval society, "but compared to modernity, the space provided for such a question was cramped and confined".[27] Questions about the legitimacy of political authority did arise, for instance in disputes between the church and secular authorities, but such questions never reached into the foundations of political authority. It was possible for an authority to overstep its limits, but that did not alter the fact that its authority fitted into a hierarchy of power, which not only was divinely sanctioned, but the limits of which were finely drawn according to divine purpose. By contrast, "[t]he issue of legitimacy reaches into every corner of modernity and each claim to resolve it definitively eventually encounters a series of vocal counterclaims".[28] Legitimacy becomes such a problem because of the widespread appreciation that social norms and institutions rest upon social convention, and are not the expression of an underlying natural order. The law is increasingly seen as a human artefact; its legitimacy can no longer be established with reference to supra-conventional norms.

Claude Lefort offers a particularly radical analysis of the nature of political modernity. Lefort writes that, with the institution of democracy, power is no longer embodied in the person of the prince. "The locus of power is an empty place, it cannot be occupied ... and it cannot be represented."[29] Society is no longer conceived as a harmonious whole, whose unity is guaranteed and represented by the prince, but, rather, becomes the site of institutionalised conflict. Moreover, power can no longer be grounded in transcendent reason and justice; it is disentangled from the spheres of justice, law and knowledge. Law is, therefore, "always dependent upon a debate as to its foundations, and as to the legitimacy of what has been established and of what ought to be established".[30] Democracy is the antithesis of totalitarianism, which is characterised by a condensation between the spheres of power, law and knowledge, and eschews all difference in the name of the unity of the people, who comprise a homogeneous and self-transparent society. By contrast,

> "democracy is instituted and sustained by the *dissolution of the markers of certainty*. It inaugurates a history in which people experience a fundamental indeterminacy as to the basis of power, law and knowledge, and as to the basis of relations between *self* and *other*, at every level of social life".[31]

---

26 See Couwenberg *Monarchale* 60; d'Entrèves 1963 *Rev of Metaphysics* 687; Habermas *Communication* 179 181; Merquior *Rousseau and Weber: Two studies in the theory of legitimacy* (1980) 2; and Stillman "The concept of legitimacy" 1974 (7) *Polity* 32 33 on the contexts in which the problem of legitimacy could and did arise in premodern societies.

27 Connolly "Introduction: legitimacy and modernity" in Connolly (ed) *Legitimacy and the state* (1984) 2.

28 281.

29 Lefort *Democracy and political theory* (1988) 17.

30 He also writes that "modern democracy invites us to replace the notion of a regime governed by laws, of a legitimate power, by the notion of a regime founded upon *the legitimacy of a debate as to what is legitimate and what is illegitimate*": *Idem* 39.

31 *Idem* 19.

Charles Taylor identifies two reasons why legitimacy is of particular importance in modern society. The first is that modern societies arose out of a background in which the conditions of legitimate rule were a central philosophical problem. The second is that the participation demands of modern society are greater than those of previous societies. This is true in two respects. First of all, modern society demands "an unprecedented degree of disciplined, dedicated, innovative productive activity" of its members. Secondly, modern societies (at least in the "First World") tend to be liberal democracies, which are based on the ideal of self-government.[32]

For the modern mind, which sees hierarchy as a human convention, the notion of a right to rule is deeply problematical. Robert Paul Wolff argues that the notion of a legitimate authority, which one has a duty to obey whether one agrees with it or not, is irreconcilable with the Kantian notion of individual autonomy. The duty to obey authority amounts to an abdication of the right and duty to be responsible for one's own actions and to conduct oneself in the best light of reason.[33]

"Legitimacy" started its modern career as political concept in the aftermath of the French Revolution.[34] It was a concept developed by royalists, wishing to affirm the legitimacy of the monarchy and to deny the Republic the rightful title to rule. Traditionalist theorists such as Maistre, and liberal theorists such as Constant, joined forces in their denunciation of the legitimacy of a regime based upon popular sovereignty. However, the meaning of legitimacy was contested from the outset. Holmes distinguishes between the ultraroyalist and politique conceptions of legitimate monarchy: whereas the first viewed legitimacy as static, unquestionable and sacred, the second saw it as changing and profane. For the ultraroyalists, legitimate monarchy was a moral ideal; "the ideal political order or the best wordly regime possible".[35] The politiques, on the other hand, saw legitimate monarchy as a practical compromise, a *modus vivendi* among conflicting groups.

Although the concept of legitimacy was first used within the context of a particular political struggle, it gave expression to a problem that was (is) central to modernity and which predated the actual use of legitimacy as a political concept.[36] The concept has outgrown its conservative origins, and is currently used in a general sense to denote the lawfulness, moral justifiability and/or popular acceptance of the exercise of power.

5 POWER, LEGITIMACY, CRITIQUE

I have already referred to the view that constitutionalism connotes the institutionalisation of a discourse on legitimacy. According to Couwenberg, constitutional law is primarily concerned with the dialectical tension between two opposing – yet

---

32 Taylor "Alternative futures: legitimacy, identity, and alienation in late-twentieth-century Canada" *Reconciling the solitudes: Essays on Canadian federalism and nationalism* 59 65.

33 Wolff "The conflict between authority and autonomy" in Raz (ed) *Authority* (1990) 20.

34 See Holmes 1982 *Political Theory* 165; Richter "Toward a concept of political illegitimacy: Bonapartist dictatorship and democratic legitimacy" 1982 (10) *Political Theory* 185. According to Couwenberg *Monarchale* 61, legitimacy first came to the fore as a political ideal at the Congress of Vienna (1814/1815), where it was used in support of the claims to rightful authority of the pre-revolutionary monarchies.

35 Holmes 1982 *Political Theory* 179.

36 Kitromilides argues that, even though the use of legitimacy as a political concept is of a more recent historical vintage, the idea of legitimacy is central to the politics of the Enlightenment. Kitromilides "Enlightenment and legitimacy" in Moulakis (ed) *Legitimacy/Légitimité* (1986) 60.

interdependent – forces: integration and emancipation. *Integration* relates to public authority and law and order, and results from the quest for political power. This force is countered by the quest for *emancipation*, which finds expression in the ideas of freedom and equality. This tension is ever-present in constitutional law: constitutions both liberate and bind; they both emancipate and consolidate.[37] Constitutional law is concerned with the justification of official action, the burdens of which (in terms of individual freedom) must constantly be weighed up against the advancement of the public interest, or other trade-offs in the promotion of human freedom and equality. Seen thus, the question of legitimacy is at the centre of constitutional law: to pose this question is to subject power to reflection; to expose our institutions to critique; to open up avenues of reform and transformation.

Couwenberg distinguishes two broad types of legitimation: endogenous and exogenous legitimation. In the first, legitimacy is derived directly from existing power relations: somebody's rule is considered legitimate simply because he is the strongest or most able, or is a member of the social group that has established itself as such ("might is right"). The legitimacy of power is grounded either in natural factors, such as the biological, the psychological, the economic or the sociological (examples are social Darwinism and modern race and elite theories), or in God's will, and in His sovereign power, from which all other positions of power are derived. The exogenous legitimation of power, on the other hand, looks for the justification of power in factors outside existing power relations, such as the consent of the people or the achievement of emancipatory aspirations.[38] The second type of legitimation, unlike the first, offers criteria for the evaluation and critique of actual power arrangements.

It may be argued that endogenous "legitimation" is not legitimacy at all, but rather naked power, or at best, *de facto* authority. By contrast, exogenous legitimation relies on the Enlightenment ideal of emancipation; and the notion that power may be held up to the critical light of reason. However, even exogenous theories of legitimacy may serve to mask oppression and to preclude discussion about vital issues. Even though legitimacy is supposedly judged with reference to factors outside existing power relations, the discourse on legitimacy often collapses into an affirmation of existing power arrangements; celebrating authority, instead of providing a basis for the critique of institutions; legitimating, rather than questioning. Among the mechanisms by which this is achieved are the equation of legitimacy with the belief in legitimacy and the equation of legitimacy with legality or validity.[39]

6 SOURCES OF LEGITIMACY

6 1 General

Max Weber distinguished three pure types of legitimate domination: charismatic domination, traditional domination and legal domination. Charismatic authority "is the authority of the extraordinary and personal gift of grace (charisma), the absolutely personal devotion and personal confidence in revelation, heroism, or

37 Couwenberg *Monarchale* 2–7; Bogdanor "Introduction" in Bogdanor (ed) *Constitutions in democratic politics* (1988) 4.

38 Couwenberg *Monarchale* 61–62.

39 See Botha "The legitimacy of legal orders (2): Towards a disruptive concept of legitimacy" (forthcoming).

other qualities of individual leadership", as exercised by the prophet, the elected war lord, the plebiscitarian ruler, the great demagogue or the political party leader.[40] Traditional authority rests on the sanctity of immemorial tradition (the "eternal yesterday"); it is the authority of the patriarch and the patrimonial prince.

In contrast to these personal forms of authority stands the impersonal authority of legal domination or "domination by virtue of *legality*, by virtue of the belief in the validity of legal statute and functional *competence* based on rationally created *rules*".[41] According to Weber, legitimacy in the modern state is based primarily in rational order. This refers not to a rational belief in the absolute value of the order, but to the acceptance of the legality or formal legal rationality of exercises of power.

Couwenberg identifies four types of legitimacy: ideological legitimacy; procedural or structural legitimacy; personal legitimacy; and effectiveness. Ideological legitimacy arises from a particular ideology or legitimating idea or set of norms and values, which provides justification for power, as well as a measure for its evaluation. The second type of legitimacy depends on the observance of recognised procedures and structures. The third arises from respect for personal qualities, such as wisdom, courage, or vision. And finally, power may be legitimated with reference to the effectiveness by which political ends are realised.[42]

Couwenberg's classification has much in common with that of Easton, who identifies three types of legitimacy: ideological legitimacy; structural legitimacy; and personal legitimacy.[43] Examples of ideological legitimating sources are the principles of obligation as consent, divine right, social contract, the right of the wise, or the rights of a religious elite. Structural legitimacy refers to an independent belief in the structure and norms of a particular regime. Easton illustrates the independent effect of structure with reference to the "sanctity" of the Constitution of the United States. In the United States there is widespread resistance to any form of tampering with the Constitution. In other systems, such as in France, it has proved much easier to undertake basic readjustments in the structure of authority. This difference cannot be explained with reference to the legitimating principles underlying the two systems, as they are validated by very similar moral principles about popular participation, limited government, and the rights and duties of citizens and authorities. What is different, however, is the "kind of regime norms and structures to which the authorities must conform if they . . . are to be considered legitimate".[44] The third type of legitimacy, personal legitimacy, is a much wider category than Weber's charismatic authority; and refers to the situation where a system is considered legitimate because the occupants of authority roles are seen, personally, as worthy of moral approval.

6 2 The authority of God, nature, will and reason

Von Wright identifies three mainsprings of legitimacy, that at various times in history – sometimes to the exclusion of, and sometimes in combination with, each other – grounded the legitimacy or challenges to the legitimacy of power. These are religion, nature and reason.[45] The *religious* (or theocratic) legitimation of power is

---

40 Weber "Politics as a vocation" in *From Max Weber: Essays in sociology* (1948) 79.
41 *Ibid.*
42 Couwenberg *Monarchale* 62.
43 Easton *A systems analysis of political life* (1965) 286–288 289–310.
44 *Idem* 301.
45 Von Wright "Legitimität des Rechts" 1989 *Rechtstheorie* 137.

manifested in the political influence of the Church during the Middle Ages; the theocratic legitimation of secular authority in Reformation theology; and the legitimation of absolute monarchies in terms of the "divine right of kings". According to theocratic theories of legitimacy, political authority derives from the divine will. The religious justification of state power was criticised as far back as the fourteenth century,[46] but it took several centuries before it lost its hold.[47]

The idea that the law reflects some underlying *natural* order has also been influential. Von Wright states that, since the inception of natural law theory, the legitimation of the state has oscillated between the sources of objective nature and human reason.[48] However, God's retreat from the world resulted in the "disenchantment of nature": nature was no longer understood as a purposeful order given to us by God, but as "a deposit of objects to be understood through humanly constructed categories".[49] The recognition of the conventional nature of law and society removed law from "the order of things"; it exposed the artificial character of social norms and institutions and made political authority dependent upon human will. For Unger, the central modernist insight is that "society is made and imagined, . . . a human artifact rather than the expression of an underlying natural order".[50]

In modern times, the legitimacy of governments is said to rest upon the consent of the governed. Even today, when the notion of society as the product of a social contract between originally free and equal individuals is hardly credible,[51] we retain the notion that governments derive their legitimacy from an expression of the *will of the people*. The authority of the people does not derive from their superior knowledge or access to the truth, but simply from their status as free and equal beings: the only scheme of government which is compatible with their freedom and equality is one in which the people are subject only to laws which are of their own making.[52] However, few democrats would maintain that this entitles the people to do whatever they wish, no matter how unreasonable or arbitrary. This introduces the problem which has plagued political and constitutional theorists for centuries: how far, and on what basis, can constraints on the democratic decision-making process

---

46 Marsilius of Padua is widely regarded as the first theorist who challenged the religious legitimation of power during the late Middle Ages. See Marsilius *The defender of peace* (1956). A critique of the role of religion in politics can already be found in the Greek sophist Critias, who proclaimed that the gods were invented by rulers as a deterrent, to prevent subjects from doing evil secretly. Dreyer *Die wysbegeerte van die Grieke* (1981) 69.

47 James Otis wrote in 1764 that government "has an everlasting foundation in the unchangeable will of God, the author of nature, whose laws never vary . . . Government is therefore most evidently founded on the necessities of our nature. It is by no means an arbitrary thing, depending merely on compact or human will for its existence". Otis "Rights of the colonies" in Morison (ed) *Sources and documents illustrating the American Revolution and the formation of the Constitution* (1923) 4–5. In the nineteenth century, conservative thinkers such as De Bonald and De Maistre once again sought to ground the legitimacy of the monarchy in religion. Today, religious legitimation is still common in Islamic countries. Western countries are also witnessing the resurrection of religion as a source of legitimation, in the form of various fundamentalist movements.

48 Von Wright 1989 *Rechtstheorie* 139.

49 Connolly "Introduction" in Connolly (ed) *Legitimacy and the state* 3.

50 Unger *Social theory: its situation and its task* (1987) 1. Cf also Oakeshott's distinction between the ancient tradition of political thought based on Reason and Nature and the modern conception based on Will and Artifice. Oakeshott *Hobbes on civil association* (1975) 7.

51 See Habermas *Between facts and norms* (1996) 44–45.

52 See Walzer "Philosophy and democracy" 1981 *Political Theory* 379 383.

be legitimately imposed?[53] Certain constraints, it may be argued, are perfectly compatible with the idea of popular sovereignty, such as the stipulation that the people may not renounce their right to will, or that they must will generally, and not single out particular individuals or groups for special treatment. Others are more problematic, since they appeal to principles of right which are grounded in some universal or transcendent truth, and therefore negate the modernist insight that society rests upon will and artifice, rather than nature and reason.[54]

The tension between democracy and rights, or between the rule of the people and the rule of law, lies at the heart of liberal democracies. Liberal political and legal theory relies on principles of political right to circumscribe and limit the authority of the people, and to subject the excesses of political majorities to the dictates of reason. However, different conceptions of *reason* – and of the self – underlie different conceptions of the relation between democracy and rights. For instance, utilitarian theorists see the individual as a rational maximiser of his own interests, and define the legitimacy of the legal order in terms of its capacity to promote the greatest happiness for the greatest number of individuals. This reduction of the public good to the sum of private interests results, however, in a shallow conception of democracy as a mere means to protect private freedom; and also fails to provide adequate protection for minorities and other vulnerable groups.[55]

Kantian theorists, by contrast, insist that no individual may ever be treated as a means to an end, and assert the "priority of the right over the good". Morality, in this view, cannot rest upon the maximisation of self-interest, but must be based upon a universal maxim that is valid for all rational beings. Kant grounded reason in the knowing subject who, he believed, is able to have a unified grasp of the world about us.[56]

However, when Weber states that rationality is the most important source of legitimacy in the modern state, he does not share the confidence of Enlightenment thinkers about the possibility of moral knowledge. Instead, he refers to the *instrumental-purposive rationality* which is so central to scientific and technological modes of thought, and has come to play an important role in many other spheres of life. Even though, in Weber's analysis, a multi-party democracy can help to counterbalance the pervasive logic of bureaucratic and market operations, the parliamentary system which he advocates is in many respects an extension of the

---

53 The problem is compounded by the ambiguity of the concept of will or voluntary action. Riley points out that "will" has both a moral and a psychological meaning. When treated in the physiologico-psychological sense as simply the "last appetite in deliberating" (Hobbes *Leviathan* (1962) ch 6 (20)), it is difficult to see how it can provide the basis of political legitimacy. It is only when the will is seen as a moral faculty, which presupposes an autonomous moral agent, that it can ground political authority. However, a moral reading runs the risk of conflating will with reason. See Riley *Will and political legitimacy* (1982) 10.

54 According to Walzer 1981 *Political Theory* 384 Rousseau's concept of the general will rests upon philosophical truth rather than the popular will, in so far as he insists that "the people will will the common good if they are a true people, a community, and not a mere collection of egoistic individuals and corporate groups". The notion of natural rights is another example of a constraint which appeals to universal reason.

55 See Macpherson *The life and times of liberal democracy* (1977) for a critique of the protective model of democracy advocated by Jeremy Bentham and James Mill.

56 See Kant "Fundamental principles of the metaphysic of morals" in *Kant's critique of practical reason and other works on the theory of ethics* (1963) 1.

instrumental-purposive rationality which characterises bureaucracies and economic competition.[57]

Habermas, on the other hand, rejects both the Kantian "reduction of moral action to the monologic domain"[58] and the Weberian emphasis on instrumental-purposive rationality. By grounding his theory of legitimacy in a model of *communicative rationality*, he recognises that the individual's motives of action and value orientations are themselves shaped by the practical discourses of the society in which she lives.[59]

6 3 Substantive and procedural theories of legitimacy

Habermas identifies three stages in the legitimation of power. In early civilisations the ruling families justified their power with the help of myths of origin. With the imperial development of the ancient civilisations the need for legitimation grew. A political order (in addition to the person of the ruler) now had to be legitimated. Narrative grounds (mythological stories) were no longer sufficient; and made way for rationalised world views ("cosmologically grounded ethics, higher religions, and philosophies"),[60] in terms of which arguments were made possible. These world views were grounded in ultimate grounds or unifying principles which explained the world as a whole. Finally, in modern times, the status of ultimate grounds became problematic. Natural law theories that legitimated the emerging modern state no longer invoked cosmology, religion or ontology (or so they claimed), but relied instead on the formal principle of reason:

> "Since ultimate grounds can no longer be made plausible, *the formal conditions of justification themselves obtain legitimating force*. The procedures and presuppositions of rational agreement themselves become principles . . . [I]t is the formal conditions of possible consensus formation, rather than ultimate grounds, which possess legitimating force."[61]

The criteria for legitimacy must be procedural rather than substantive. Social contract theory is the prime example of the procedural type of legitimation: "The idea of an agreement that comes to pass among all parties, as free and equal, determines the procedural type of legitimacy of modern times."[62] The social contract stipulates the conditions under which regulations count as legitimate – for Rousseau, for instance, the sole test is whether law gives expression to the general will.

The reliance on substantive visions of the good life is rendered problematic by the plurality of values that characterises the modern state.[63] Consider, for instance, the liberal insistence that legislators or citizens should not use the political process to impose comprehensive conceptions of the good – religious or otherwise – on others.

---

57 See Weber "Politics as a vocation" in Gerth and Mills (eds) *From Max Weber: essays in sociology* (1948) 77; Beetham *Max Weber and the theory of modern politics* (1985).

58 McCarthy "Complexity and democracy, or the seducements of systems theory" (1985) 35 *New German Critique* 27 35. See also Habermas *The theory of communicative action* vol 2 (1987) 95–96.

59 Moral action, in this view, is "essentially communicative, a relation between subjects who are *involved in a complex of interactions as their formative process*". McCarthy 1985 *New German Critique* 35. See also Botha *The legitimacy of law and the politics of legitimacy* ch 9 sect 4.2 for a discussion of Habermas's communicative model of legitimacy.

60 Habermas *Communication* 183–184.

61 *Idem* 184.

62 *Idem* 185.

63 See Tuori "Legitimität des modernen Rechts" 1989 *Rechtstheorie* 221 225.

It is argued that, since no general agreement about the nature of the good life can be expected in a modern, pluralistic society, principles of political cooperation have to be devised that are neutral with respect to conflicting conceptions of the good.[64]

7 BEARERS OF LEGITIMACY

Habermas writes that only political orders can have legitimacy; multinational corporations or the world market are not capable of legitimation.[65] However, within a given legal or political order, one can think of a variety of possible bearers[66] of legitimacy: the actual rulers or the personnel of a bureaucracy; particular institutions, such as Parliament or the courts; a particular branch of legal doctrine; or the legal order as a whole.

Easton identifies three basic objects of political support within a given political system. These are the political community, the regime and the authorities.[67] Political community refers to a group of people who participate in a common structure and set of political processes.[68] Different levels of political community may be distinguished, for instance a municipality, a province, a nation-state, or an international political system. A regime refers to the set of basic rules and procedures relating to the settlement of political disputes, and may also be described as the constitutional order. A regime has three components: the values (goals and principles), norms (operating rules or the rules of the game), and structure of authority. Finally, "authorities" refers to the occupants of authority roles.

This classification may be useful to analyse legitimation problems in various political systems. According to Easton,[69] the German political community had undergone few changes after the First World War and in 1933, yet the shifts from monarchy to Weimar Republic to the Nazi order represented fundamental changes in the political system (regime).[70] France is another country which has seen a succession of changes in the political system, while the French political community has remained relatively intact since the Revolution. In the aftermath of Watergate, the legitimacy of the highest political authority in the United States, President Nixon, vanished, but loyalty to the community and to the regime remained widespread. Finally, for a large number of people from Quebec or Scotland, it is the legitimacy of Canada or the United Kingdom as their respective political communities that is in question.

---

64 See eg Ackerman *Social justice in the liberal state* (1980) 10–11; Greenawalt *Religious convictions and political choice* (1988); and Larmore *Patterns of moral complexity* (1987).

65 Habermas *Communication* 179.

66 It is perhaps more common to refer to "objects" of legitimacy. However, since "objects" has a subjectivist ring to it, I prefer the term "bearers" of legitimacy.

67 Easton *Systems analysis* 171–219.

68 *Idem* 177. Easton distinguishes between a political community and a sense of community. The existence of a political community does not depend on the existence of a sense of community or a set of common traditions.

69 *Idem* 190.

70 Merquior *Rousseau and Weber* 4 writes that the legitimacy of the community in the Weimar Republic was intensely felt, but that "the regime enjoyed only a very precarious support from most of the political elites".

This series of articles is concerned with the legitimacy of legal orders and, in particular, constitutional orders. I am especially interested in the legitimacy of constitutional norms, values and structures (the regime in Easton's classification).[71] However, if it is true that some degree of social integration is indispensable to the legitimacy of a legal order,[72] and/or that constitutionalism is a process through which the collective identity of the political community is continuously reinvented,[73] the legitimacy of legal norms cannot be judged in isolation from questions about the legitimacy of the political community.

During a life of strenuous exertion he never excited one transient enmity in his progress to the highest professional eminence. He never stooped to any unworthy condescension. Zealous but candid, modest yet bold, his simple and persuasive eloquence was the pure result of generous feeling and animated conviction. No sophism disgraced his reasoning, no studied ornament impeached his sincerity. Worth, learning, intellect all conspired to exalt him to distinction. Characteristic modesty grew with the growth of his reputation, whilst it seemed to impede it, it advanced his progress and, interesting all men in his success, shed an unoffending lustre upon his prosperity. This unprecedented offering of a grateful profession to a member distinguished by all the great and amiable qualities of the head and heart . . . may perpetuate the benefit of his example by encouraging unobtrusive worth and unpatronized genius to pursue his path and acquire his celebrity.

Inscription on the tombstone of Irish barrister and advocate of Irish independence, John Ball, St Patrick's Cathedral, Dublin.

---

71 It may be that my emphasis on the legitimacy of constitutional orders, through which state authority is structured and constrained, is anachronistic. It is often proclaimed that economic globalisation goes hand in hand with the demise of the nation-state. The sovereignty and competence of states are currently undermined by the power of international authorities, multinational corporations and non-governmental organisations (NGOs). At the same time, the assertion of cultural and ethnic particularities – which is the reverse side of globalisation – makes it difficult for states to sustain broad consensus around shared goals, or to retain the allegiance of their citizens. It may therefore be argued that traditional notions of state sovereignty and the democratic legitimacy of governments have become irrelevant in an age of globalisation. While I accept that the state finds itself in a precarious situation today, I think it is far from clear that state authority is about to wither away completely. Moreover, constitutional guarantees of individual (and collective) rights and freedoms allow social movements to protest against the actions of international authorities (such as the International Monetary Fund) and multinational corporations. According to Rosenau, such protests, along with the pressures exerted by some NGOs and social movements for greater transparency on the part of hierarchical organisations, could serve as "functional equivalents of the various electoral, legislative and journalistic checks that sustain a modicum of democracy in territorial polities". Rosenau "States and sovereignty in a globalizing world" in *Understanding globalisation: the nation-state, democracy and economic policies in the new epoch* (1998) 31 50.

72 See Habermas *Between facts and norms* 79.

73 See Botha *The legitimacy of law and the politics of legitimacy* ch 12.

Labours of love: Child custody and the division of matrimonial property at divorce

Elsje Bonthuys
BA LLM PhD
Senior Lecturer in Law, University of the Witwatersrand

OPSOMMING

Liefdeswerk: Toesig en beheer oor kinders en die verdeling van bates by egskeiding
Hierdie artikel analiseer die verband tussen die versorging van kinders wat meestal deur vroue gedurende huwelike en na egskeiding as toesighoudende ouers verrig word, en die verdeling van bates by egskeiding. Alhoewel howe en die breë gemeenskap vroue se versorgingstaak nie as werk klassifiseer nie, is die effek van vroue se beleggings in hulle mans se loopbane gewoonlik om die man se verdienververmoë ten koste van die vrou te verhoog.

1 INTRODUCTION

Current interpretations of the best interests standard, it is sometimes argued, favour women by granting them custody of children while men's limited access rights depend on their having to pay maintenance. This is accompanied by a popular perception of divorced women as "alimony drones" who live in leisure on the proceeds of their ex-husbands' labour. Yet, in her often-cited study of post-divorce couples in the United States, Weitzman showed a dramatic drop in the living standards of women and children while men experienced an increase in their income, leading to what is commonly referred to as the "feminization of poverty".[1] Seven years later these findings were replicated in studies of post-divorce economic adjustment in other countries.[2]

Although spousal maintenance and the division of matrimonial property in South African law have recently been discussed,[3] my purpose is to situate child custody in

1 *The divorce revolution: The unexpected social and economic consequences for women and children in America* (1985) 323–356: "When income is compared to needs, divorced men experience an average 42 percent rise in their standard of living in the first year after the divorce, while divorced women (and their children) experience a 73 percent decline" (323).

2 Maclean and Weitzman "The way ahead: A policy agenda" in Weitzman and Maclean (eds) *Economic consequences of divorce: The international perspective* (1992) 417 (hereafter Maclean and Weitzman); Bastard and Voneche "Attitudes to finance after divorce in France" in Weitzman and Maclean 407; Funder "Australia: A proposal for reform" in Weitzman and Maclean 143 146.

3 See eg Sinclair "Marriage: Is it still a commitment for life entailing a duty of support?" 1983 *Acta Juridica* 75; Sinclair *The law of marriage* vol I (1996); Van Zyl "Post-divorce support – theory and practice" 1989 *De Iure* 71; De Jong "New trends regarding the maintenance of spouses upon divorce" 1999 *THRHR* 75.

the context of rules about the division of property and maintenance obligations at divorce. My aim is to question perceptions of custody as an unmixed blessing and to show how the interaction between legal and societal expectations structures a situation where women pay heavily for the privilege of custody, while men gain financially.

My discussion focuses on marriages which have produced children. Different rules may be fair in childless marriages.[4] I also assume that, despite changing norms favouring equal parental rights, custody disputes, both under the maternal preference, the equal parent regime and agreements between parents, will generally result in women obtaining custody while men have access.[5]

The first part of the article consists of a theoretical discussion of the nature and value of women's and men's work during marriage. This is followed by an investigation of the rules relating to division of assets at divorce in order to determine whether they compensate women for their childcare labour during marriage. I then look at the influence of women's childcare labour and argue that, typically, it has the effect of enhancing husbands' career potential, while diminishing that of women. In the following section I examine the redistribution of career assets at the time of divorce. Thereafter I examine whether women are compensated for the detrimental effects of childcare on their careers, either through spousal maintenance, or in the calculation of maintenance for children. I also explore the ways in which women's greater need to have custody of children impacts on their bargaining ability in relation to matrimonial property. Finally, I focus on particular difficulties which face African women in customary marriages and poor and rural women.

2 MEN AND WOMEN'S WORK DURING MARRIAGE AND AT DIVORCE

2 1 Gendered division of labour

Discourses about good parenthood are based on a gendered division of labour between men and women. They are not limited to the time of divorce, but imply gender-specific standards for parental behaviour during marriage and after divorce.[6] Legal discourse in particular,

> "operates within the field of power to support the gendered division of labor and the institutions that create it. It either maintains the status quo with its built-in gender disparities or it is used to shape workplace and family policies based on a gendered division of labor."[7]

The gendered division of labour means that women are primarily responsible for routine household tasks. They produce food and clothing for consumption by the household, nurture husbands and children, keep up family ties, and care for elderly and ill family members. Women bear children and take primary responsibility for

---

4 Singer "Husbands, wives and human capital: Why the shoe won't fit" 1997 *Fam LQ* 119 127.

5 Limited samples by Budlender *In whose best interests: Two studies of divorce in the Cape Town Supreme Court* (1996) 58 and Burman and Fuchs "When families split: Custody on divorce in South Africa" in Burman and Reynolds (eds) *Growing up in a divided society: The contexts of childhood in South Africa* (1986) 115 124 support this assumption.

6 See generally Bonthuys "Familiar discourses of parenthood" 1999 *THRHR* 547.

7 Slaughter "The legal construction of 'mother'" in Fineman and Karpin (eds) *Mothers in law: Feminist theory and the legal regulation of motherhood* (1995) 73 86.

their physical, emotional and social welfare.[8] These tasks are encoded in custody rules based on the maternal preference, but rules about equal parenting implicitly retain this division as a subtext.[9]

The division of assets and maintenance orders are mechanisms to divide and allocate the products of the spouses' labour at the termination of marriage. If custody rules are implicated in determining a gendered division of labour during marriage, they should also be relevant to the division of assets at divorce. This is even more so when the gendered division of labour continues beyond divorce. However, the opposite also holds true. Allocation of assets and maintenance structure the economic conditions under which custodian parents and their children live. For these reasons, allocation of assets at divorce must form part of a discussion of custody of children.

Child bearing and raising is the archetypal form of female labour, differentiating women from men, and is fundamental to other forms of female labour. It precedes marriage and continues beyond marriage or co-habitation. Even when they do not perform housekeeping tasks for men, women continue to perform them for children or other dependants. This would explain data showing that, even in couples where there has previously been a more egalitarian division of household labour, traditional gendered labour roles are undertaken with the birth of children.[10]

Some people argue that nowadays "new fathers" do as much in the home as women, especially when women also engage in wage labour. However, Drakich argues convincingly that social science studies which purport to show such trends are methodologically flawed and influenced by the rhetoric of fathers' rights groups.[11] In fact, women continue to bear the major responsibility for household and child-care work in addition to their wage labour, while men are perceived as "helping out" their wives.[12] This imbalance does not change when women engage in wage labour or when men are unemployed.[13]

2 2 A woman's work is never paid

> "Motherhood is presented as *the* source of gratification for women, and it is impressed on women that this is their *natural* function . . . [S]ince bearing and rearing children are women's *natural* vocation, they do not require any special skills. They are not *work*, and thus deserve no compensation beyond the so-called joy of satisfying women's innermost instincts of bearing children and seeing their offspring prosper."[14]

---

8 Delphy and Leonard *Familiar exploitation: A new analysis of marriage in contemporary Western societies* (1992) 99–100.

9 See Bonthuys (fn 7) 567–570 for a more detailed discussion.

10 Sanchez and Thomson "Becoming mothers and fathers: Parenthood, gender and the division of labour" 1997 *Gender and Society* 747 748–750; Antill and Cotton "Factors affecting the division of labor in households" 1988 *Sex Roles* 531 549.

11 "In search of the better parent: The social construction of ideologies of fatherhood" 1989 *Canadian J of Women and the Law* 69 76–83.

12 Drakich (fn 11) 83–85. Her article focuses on Canada. Similar findings are reported by Sanchez and Thomson (1997) in the United States and Australia by Antill and Cotton (1988).

13 Antill and Cotton (1988) 550; Kynaston "The everyday exploitation of women: Housework and the patriarchal mode of production" 1996 *Women's Studies International Forum* 221 228; Delphy and Leonard (fn 8) 115–118.

14 Stolcke "Women's labours: The naturalisation of social inequality and women's subordination" in Young, Wolkowitz and McCullagh (eds) *Of marriage and the market: Women's subordination in international perspective* (1981) 30 44.

It is regarded as both impossible and inappropriate to place a monetary value upon women's childbearing, childcare and household labour, since that would commodify the values of altruism and love and undermine the inherent value of the family.[15] This view of women's household and childcare work is not confined to family law, but permeates diverse areas like labour law, tax law, welfare law and the law of delict and contract.[16] It can be called the "cross-over discourse of housework as expression of love".[17]

The denial of women's labour as work depends on a definition of work as that which is performed in exchange for money. This structures an impossible situation: because it is not paid, women's labour is not work – therefore women are not paid for it. Domestic work is not regarded as part of the national economy when economic theories of work are formulated and there is a general reluctance to apply economic analysis to housework and childcare.[18]

Women themselves often fail to perceive household work as labour worthy of financial compensation.[19] The rhetoric is made more plausible by the fact that bearing and nurturing children is an integral part of female gender identity. Women's need to nurture children tends to be stronger than that of men,[20] whose masculinity depends not on fatherhood, but on heterosexual virility.[21] It is legitimated by the construct of childbearing as a biological function, which furthermore constitutes the fundamental difference between men and women. Women's "biological" ability to bear children becomes a "natural" ability to raise them, to nurture husbands and to be housekeepers.

The gendered division of labour means that men benefit from the tasks which wives perform. Their earning power increases because they do not have to set aside time or energy for all the tasks which are needed to replenish their labour power. Women also often contribute directly to their husbands' work by helping in their businesses, providing emotional support, creating comfortable environments for men to rest or work in, maintaining kin and friendship networks and entertaining their friends and business associates.[22]

Most significantly, because women shoulder the burden of primary care of children, men have the ability to be both ideal wage workers and parents.[23] Women generally structure their careers to accommodate the needs of children and the careers of their husbands by doing part-time or relatively undemanding work, interrupting their careers to care for young children, limiting their occupational mobility, refusing to work over-time and even choosing careers which will be compatible with family life. Men and children are not expected to do the same in

15 Silbaugh "Turning labor into love: Housework and the law" 1996 *Northwestern Univ LR* 1 81.
16 Silbaugh (fn 15) 28–79.
17 Fineman *The neutered mother, the sexual family and other twentieth century tragedies* (1995) 102–103.
18 Phillips *Hidden hands: Women and economic policies* (1983) 4; Delphy and Leonard (fn 8) 88–89.
19 Delphy and Leonard (fn 8) 138–143; Bennholdt-Thomsen "Subsistence production and extended reproduction" in Young, Wolkowitz and McCullagh (eds) (1981) 16 21.
20 Carbone and Brinig "Rethinking marriage: Feminist ideology, economic change, and divorce reform" 1991 *Tulane LR* 953 1005.
21 See Bonthuys (fn 7) 558–559.
22 Delphy and Leonard (fn 8) 228–251; Phillips (fn 18) 13–18.
23 Singer (fn 4) 126.

return. Indeed, women do not automatically have the "right" to work outside the home, but often negotiate this with their husbands in the economic interests of other family members.[24] Because of their work in the home, women's career possibilities suffer, while those of their husbands are enhanced.[25]

The fact that, traditionally, a husband should maintain his wife, does not constitute payment for her work. The extent of this maintenance is unrelated to the quality and quantity of her work, but depends upon the discretion and goodwill of the husband. Rich and middle class husbands maintain wives who delegate most of their household tasks to other women.[26]

It could be argued that women are rewarded for their work during marriage by sharing equally in the standard of living made possible by their husband's wage labour. However, studies show that family resources are not usually distributed equally. Men generally have privileged access to resources like food, leisure time, leisure activities, money, credit, autonomy, and freedom of movement, health care and occupational satisfaction and opportunities.[27]

The low value placed on women's traditional labour is reflected in the wage market where women take part-time or lower positions in order to accommodate domestic responsibilities. Reflecting its unwaged nature, the kind of work which women traditionally perform is often perceived as "dirty," "mindless," and unimportant.[28] Commercial cleaners, caretakers, nurses and primary school educators receive low pay because of the link between their work and low-status housework. Black and poor women generally perform such forms of "commercial housework".[29]

3 DIVISION OF ASSETS AT DIVORCE

3 1 Wives' contributions and the division of assets

At divorce, the mechanism for obtaining more than a half-share of the accrual or the common estate is forfeiture of assets,[30] while a redistribution order entitles the successful applicant to a share of the other spouse's estate, which would normally be precluded by the ante-nuptial contract.[31] Spousal maintenance may also be used to achieve the same aim.[32] When making a redistribution order or a maintenance order, the court may consider the applicant's contribution to the increase in the other

---

24 Wax "Bargaining in the shadow of the market: Is there a future for egalitarian marriage?" 1998 *Virginia LR* 509 599–603.

25 Brinig "Property distribution physics: The talisman of time and middle class law" 1997 *Fam LQ* 93 109 estimates that women lose 1.5 percent of future earning capacity for every year spent outside wage labour.

26 Delphy and Leonard (fn 8) 117–122.

27 Kynaston (fn 12) 228–231.

28 Phillips (fn 18) 15–17; Delphy and Leonard (fn 8) 88.

29 Glenn "From servitude to service work: Historical continuities in the racial division of paid productive labour" 1992 *Signs* 1 7–23, 31.

30 Divorce Act 70 of 1979 s 9(1).

31 S 7(3), (4).

32 S 7(2). The link between maintenance and the division of property is also reflected in the jurisprudence which links redistribution orders to the existence and size of spousal maintenance awards. See *Beaumont v Beaumont* 1987 1 SA 967 (A) 991I–992F; *Katz v Katz* 1989 3 SA 1 (A) 11B; *Esterhuizen v Esterhuizen* 1999 1 SA 492 (C) 501C–504B.

spouse's estate. This contribution may be in the form of "the rendering of services or the saving of expenses".[33]

Courts seem to be quite sympathetic to the plight of the older wife and housekeeper who is married out of community of property and has not amassed any property of her own. Unless a redistribution order is made, she would be left penniless at divorce. The Appellate Division in *Beaumont* and *Katz* confirmed that housekeeping and childcare constitute contributions to the husband's estate in terms of section 7.[34] In *Beaumont* the court *a quo* described the wife (who apart from housekeeping also helped her husband in his business) as follows:

> "She contributed directly, indirectly, continuously and capably, to the maintenance and increase of his estate. That contribution was very substantial indeed. The plaintiff had a secretary and general assistant in his business, a mistress, a housemaid, a cook, a seamstress, a scullery maid, a laundress, a nanny, a governess, a general domestic manager and a messenger. She worked for well over ten hours per day, seven days per week, 52 weeks a year. He paid her nothing. Her emoluments were clothing, board and lodging."[35]

The wife claimed redistribution of the husband's estate, valued at R450 000 and maintenance for herself and the four children. Her assets were worth R3 000 and the court acknowledged that "[t]hat disparity is in no small measure due to the contribution made by the defendant to the maintenance and increase in the plaintiffs estate".[36] Kriegler J took as a starting point the so-called "one-third" guideline[37] formulated by Lord Denning in the English case of *Wachtel v Wachtel*[38] to order redistribution of R150 000, adding R700 per month (a quarter of the husband's monthly income) spousal maintenance and R250 for each child. The Appellate Division confirmed the orders, but declined to endorse the one-third rule. It doubted the wisdom of laying down guidelines which could fetter the court's discretion.[39]

Despite judicial disapproval of the one-third rule,[40] only one of the reported redistribution cases I surveyed allowed the wife more than one-third of the husband's assets.[41] In *Archer v Archer*, where the husband's misconduct was regarded as severe and the wife's contribution consisted of maintaining the family while he was unemployed, she obtained R500 000 (one-third) of his assets of R1.5 million. On the basis of the clean break principle she obtained no maintenance.[42] In *Katz*, where the husband's assets amounted to R7.5 million, a redistribution order of R1.5 million (twenty percent) was made, but no maintenance ordered.[43] It is noteworthy that these cases involved wealthy people where the amounts ordered were not constrained by the husbands' ability to pay. This would not, of course, count as a scientific study of the amounts awarded by courts, but may indicate that redistribution is usually not more than a third and is often accompanied by a refusal to order spousal maintenance.

---

33 Divorce Act s 7(4).
34 1987 997F–H and 1989 14A–15I respectively.
35 1985 4 SA 171 (W) 177D–G. Also *Hassan v Hassan* 1998 2 SA 589 (D) 597E.
36 *Beaumont* 1985 178I–J.
37 1985 180C–181H. Also used as a starting point in *Kroon v Kroon* 1986 4 SA 616 (E) 638I–H.
38 [1973] 1 All ER 829 (CA).
39 *Beaumont* 1987 991A–H.
40 In *Grasso v Grasso* 1987 1 SA 48 (C) 52F–G it was called a mere starting point which should not limit the judge in his discretion.
41 *Beaumont* 1987.
42 1989 2 SA 885 (E) 894I–895A.
43 17A–D.

Redistribution orders are available only where the parties have been married out of community of property and profit and loss, excluding the accrual system and where the marriage took place before 1984 or 1988.[44] To obtain more than half of the common estate in marriages in community of property, a wife needs to apply for a forfeiture order, which does not take the relative contributions of the spouses into account.[45]

Thus housework or childcare contributions are taken into account only where it is a matter of redistribution, when courts generally seem to award less than half the husband's estate. In other cases, the wife is not entitled to more than half the estate and no contribution of household or wage labour will enable her to claim more.[46] Apart from maintenance, the maximum percentage of the combined wealth which a wife can therefore claim on the basis of her household and childcare contribution, is fifty percent.

3 2 Problematic aspects of redistribution

At the time of marital breakdown, contributions by spouses are treated like those of strangers involved in a business transaction. Courts are, for instance, reluctant to acknowledge the existence of a universal partnership unless the spouses also fulfilled the requisite legal formalities for such a contract.[47] Therefore, if they want the benefits of partnership on divorce, women must act like strangers towards their husbands and children. This is directly opposed to the legal expectations of good mothers in custody discourse and presents women with the dilemma of being either good mothers or rational economic partners.[48] The law, in property division, fails to recognise the division of labour set up by legal rules of custody, rendering it a "voluntary decision by rational economic actors".[49]

The ostensibly equal division of assets is based on the idea that spouses were equal partners during marriage and should be equally rewarded at divorce. However, unlike partners, married people's decisions are not always based on individual economic benefit. Women's decisions about the division of labour during marriage presuppose continuation of the relationship and are influenced by emotional attachment to husbands and children. Thus a division based on a partnership model fails to capture many aspects of the relationship between spouses and penalises women for altruistic decisions.[50]

---

44 Divorce Act s 7(3). The dates refer to the application of the accrual system to non-African and African marriages respectively.

45 Contribution is relevant only in marriages in community of property where, once the court has decided to order forfeiture, the offending spouse is entitled to the restoration of his or her contribution. See *Singh v Singh* 1983 1 SA 781 (C).

46 See eg *Wijker v Wijker* 1993 4 SA 720 (A) where, having fulfilled her traditional child-rearing role for twenty years, the wife started her own estate agency. Her business thrived so that at the end of the marriage the value of her business far exceeded that of the assets amassed by the husband. Because she could not rely on the fact that her contribution, consisting both of housework and services and of money, was more substantial than his, she had to rely on fault to claim forfeiture of benefits.

47 *Katz* 7D–F; *Kritzinger* 1989 77B–D.

48 Boyd "From gender specificity to gender neutrality: Ideologies in Canadian child custody law" in Smart and Sevenhuijsen (eds) *Child custody and the politics of gender* (1989) 126 137–141.

49 Horsburgh "Redefining the family: Recognizing the altruistic caretaker and the importance of relational needs" 1992 *Univ of Michigan J of L Reform* 423 485–497.

50 Baker "Contracting for security: Paying married women what they've earned" 1988 *Univ of Chicago LR* 1193 1198–1199.

> "[W]omen make their greatest contribution in the early years of marriage (in child-bearing and childrearing) when the Breadwinner is only getting started in the labor market; the Breadwinner makes his greatest contribution in later years through increased earning power. Thus the Breadwinner cannot compensate the Mother at the time of her contribution and goes into her debt. The amount of that debt is measured by the loss of human capital she suffers through domesticity. The loss is measured by what capital she would have developed had she not dropped out of the labor market."[51]

Starnes suggests that, during marriage, spouses make different kinds of contribution to the union which allow income to be generated. This includes investments in careers and qualifications which continue to bear fruit after divorce. If courts adopt the partnership model the wife should, in addition to equal distribution at divorce, have a right to some of her husband's post-divorce income by receiving periodic payments.[52] Finally, equal division on divorce ignores the long-term effects of a woman's childcare labour, both in terms of diminution of her own earning potential and enhancement of her husband's.[53]

4 REDISTRIBUTING EARNING POWER

4 1 Assets for redistribution at divorce

Redistribution and forfeiture involve assets with monetary value only. The most important asset for many middle- or working-class couples is not property, but the earning capacity of the spouses. This includes professional qualifications, promotions, the goodwill of a business, partnerships, pensions and retirement and medical benefits. As explained above, women curtail their own careers and, by assuming their child-care responsibilities, make an investment in their husbands' careers.[54] During marriage, spouses share the costs of wives' staying at home and the benefits of husbands' wage labour. After divorce, investment in the husband's career continues to pay dividends in the form of higher earnings and a higher capacity to earn. The decrease in the wife's earning power is not compensated for merely by awarding her half of the communal assets, since the husband also obtains half. In effect, he gets all of his increased earning power plus half of the accumulated assets while she alone bears the costs of her decreased earning power.[55]

South African law includes pension benefits in the assets to be distributed at divorce,[56] but shared pension benefits are calculated as if the husband had resigned from the fund at the time of divorce,[57] preventing wives from sharing in husbands' increased earning power. Other career assets like professional qualifications, goodwill and earning power are not shared.

---

51 Slaughter (fn 7) 95.

52 Starnes "Divorce and the displaced homemaker: A discourse on playing with dolls, partnership buyouts and dissociation under no-fault" 1993 *Univ of Chicago LR* 67 130–138.

53 See paras 3 and 4 1.

54 Delphy and Leonard (fn 8) 228–232.

55 Funder (fn 2) 149–156; Weitzman "Marital property: Its transformation and division in the United States" in Weitzman and MacClean (fn 2) 85 86–139.

56 Divorce Act s 7(7).

57 Divorce Act s 1; *Ex parte Randles: In Re King v King* [1998] 2 All SA 412 (D). See, however, recommendations by the Law Commission in its final report on *Sharing of pension benefits* (1999).

In *Katz* the wife put forward three forms of contribution to her husband's estate: contributions made by her parents (including money which enabled the husband to buy into a legal partnership); her own advice on his career; and contributions as housewife and mother. The court accepted only the last of these, finding that contributions by her parents could not be ascribed to the wife, and that her husband's business success was based solely on his own business acumen, without any contribution by her.[58]

Interestingly, in the only case in which a contribution to the other spouse's career assets was considered as the basis for redistribution, *Kritzinger*,[59] the applicant was male. The parties had no children and the husband argued that, by remaining in South Africa, where his wife was managing director of a big company, he diminished the value of his own career, which would have flourished had he been prepared to move to the United States. The court *a quo* agreed to redistribution on the bases of the wife's adultery and the husband's contribution to her career.[60] The Appellate Division, however, held that the marriage had disintegrated before the adultery took place and that this could not justify redistribution.[61] The sacrifice of his career opportunities was dismissed in a way which bodes ill for women who curtail their careers in the interests of husbands and children:

> "The respondent is, so it seems to me, caught on the horns of a dilemma. If, in fact, his prospects were really as rosy as those painted by him and his counsel, then he simply made a bad error of judgement in deciding to stay where he was, and cannot expect to be compensated for his error by the appellant. If, however, his prospects were not nearly as rosy as those suggested on his behalf, then he has not, in fact, made the sacrifice which it is suggested he made ... It becomes apparent that what the respondent was really seeking to do was to claim damages for loss of his wife's contribution to their combined earning power, due to the breaking up of their marriage ... There is, of course, no warrant for such a claim ... [T]here is no basis in law upon which he can be compensated for the fact that his expectations turned out not to be justified."[62]

If a woman argued that she had relinquished career advantages to care for children she would have to prove the extent to which her potential career assets were diminished. If she proved a significant loss she would have made "a bad error of judgement", since she should have foreseen the possibility of a divorce. If she were unable to prove the extent of her career loss, a difficult feat in any event, she would be deemed to have made no sacrifice at all.

4 2 Redistribution through maintenance

Redistribution of career assets could be effected by spousal maintenance. Weitzman identifies five changes in the United States after the adoption of the "clean break principle" according to which it is best to sever the economic bonds between parties after divorce. They are a shift from permanent to transitional alimony awards, a reduction in the number of awards, a reduction of awards after short-term marriages, abolition of fault as a criterion and refusal of alimony to women who are considered

---

58 *Katz* 12F–13J.

59 The case *a quo* was reported as 1987 4 SA 85 (C) and the appellate decision as 1989 1 SA 67 (A).

60 1987 97D–E.

61 1989 80A–84A.

62 1989 86D–H.

able to support themselves.[63] Although a detailed survey of maintenance awards in South Africa is lacking,[64] some of these trends are evident from the reported cases.[65]

The Appellate Division endorsed the clean break principle in *Beaumont,* adding that:

> "The manner of achieving such a result is, of course, by making only a redistribution order in terms of ss (3) and no maintenance order in terms of ss (2) . . . [T]here will no doubt be many cases in which the constraints imposed by the facts (the financial position of the parties, their respective means, obligations and needs, and other relevant factors) will not allow justice to be done between the parties by effecting a final termination of the financial dependence of the one on the other."[66]

In the event, the principle was not applied in this case. Subsequently, however, the clean break principle was applied in both *Archer*[67] and *Katz*[68] to refuse claims for spousal maintenance where redistribution orders were made. However, the size of the redistribution orders in these cases was one-third and twenty per cent respectively, no more than would have been competent under the conservative one-third rule. It seems, therefore, that the net effect of the clean break principle was to remove spousal maintenance without increasing the size of the redistribution.

By contrast, the cases of *Grasso* and *Pommerel*, which dealt with maintenance only, do not mention the clean-break principle at all. In both cases the courts made strong statements to the effect that wives could expect, as far as possible, the same living standards as before divorce. This was linked to the interests of children in continued personal maternal care.

> "I know of no authority which requires a mother to go to work to maintain herself where it is reasonable that she should stay at home to care for her children and where her former husband is able to maintain her and the children of the marriage without working."[69]

The court in *Grasso* held that rehabilitative maintenance should only be considered in cases of childless couples or where the husband did not earn enough to maintain two households.[70] Courts do not automatically assume that women can earn enough to support themselves:

> "[T]he question of the reasonableness of her decision not to work must be considered. In deciding the question of reasonableness, many factors come to play – her age, state of health, qualifications, when she was last employed, the length of her marriage, the standard of living of the parties during marriage, her commitment to the care of young children and others."[71]

Applying these criteria, South African courts are particularly sympathetic to young wives of rich men with young children,[72] and older wives with few qualifications or

---

63 (1985) 143–183.
64 See Budlender (fn 5) for a limited sample.
65 See De Jong (fn 3) who adds that the trend to curtail post-divorce spousal maintenance seems predominant in practice.
66 1987 993C–E.
67 894–895A.
68 11C–E.
69 *Pommerel v Pommerel* 1990 1 SA 998 (E) 1004A–B; *Grasso* 58D–G.
70 58F–G.
71 *Pommerel* 1000D–E.
72 *Grasso*; *Pommerel*; *Beaumont* 1987 998H–999A.

suffering from ill health.[73] However, women who have worked during marriage are highly unlikely to obtain maintenance, even where their earnings are far below that of their ex-husbands.[74] This confirms Weitzman's observation that wives' chances of obtaining maintenance are linked to their socio-economic status and the resources of their husbands.[75] Courts frankly acknowledge that different rules apply to the rich and the poor:

> "[W]e in South Africa live in a unique society where the non-working wife is the norm in upper middle-class (and certainly in the case of wealthy) families, with the working wife on their social and economic level a relative rarity. There is little, if any, doubt in my mind that, where the divorced husband (and particularly one whose misconduct has caused the breakdown of the marriage) can easily afford to have his ex-wife not go out to work and where she did not work prior to divorce, but devoted herself instead to her home and to the upbringing of her children, he should be required to see to it that such a state of affairs continues . . ."[76]

This indicates that maintenance is not ordered as compensation for loss of earning capacity. Instead, it illustrates that standards of motherhood for rich and middle-class women require that they remain at home to care for children. If maintenance were a form of redistribution to which women were entitled, their ability to engage in wage labour and their husband's ability to afford high payments would be less relevant to such a claim.

The refusal to compensate women economically for loss of earning power represents a continuation of the unpaid status of women's childcare work during marriage. Women are left to bear the costs of the marital division of labour sanctioned by custody rules, while men retain the benefits of enhanced career prospects.

5 CUSTODY AND CONTINUING CHILD-CARE RESPONSIBILITIES

5 1 Continued loss of earning potential after divorce

When women retain custody of children after divorce, their loss of earning power because they are the primary care-givers of children, will continue as they continue to structure careers to accommodate their childcare responsibilities.[77] A legal reluctance to order maintenance for working women who are considered able to support themselves not only entails, therefore, a refusal to compensate them for past diminution in earning power, but fails to account for loss of earning power which inevitably attaches to post-divorce custody. To my knowledge there are no cases where courts have considered ordering maintenance to ex-wives on this basis.

The marketplace exacerbates this effect by structuring itself around the needs and abilities of workers who have no childcare or homemaking responsibilities. When women take time off work to have children, attend to ill children or perform childcare or homework, refuse to work overtime or demand childcare facilities, they deviate from the norm of the ideal worker who is not distracted by these concerns.

---

73 *Kroon* 632H–J; *Peycke v Peycke* 1955 3 SA 80 (C) 81C–D. See however *Watson v Watson* 1979 2 SA 854 (A) 855A–D where the court refused increased maintenance because the woman was a spendthrift and *Hossack v Hossack* 1956 3 SA 159 (W).

74 *Herfst v Herfst* 1964 4 SA 127 (W); *Qoza v Qoza* 1989 4 SA 838 (Ck); Budlender (fn 5) 31.

75 (1985) 189. See also par 7.

76 *Grasso* 58C–E. Also *Pommerel* 1004A–B.

77 Funder (1992) 153; Okin *Justice, gender and the family* (1989) 166.

This impacts on their ability to find work and their opportunities for promotion.[78] Women have been, and still are, denied equal access to certain jobs and training and it is well documented that their salaries are often lower than that of men in the same or comparable occupations.[79]

The reluctance to award maintenance to women who work outside the home and to poor women, combined with unwillingness to allow women more than half of the accrued assets, seems to imply that women can fend for themselves in the labour market as effectively as men. This means that courts disregard the impact of structural discrimination against female workers. In *Qoza*, for instance, a nurse received only half the salary of her husband who was a manual labourer, yet obtained no maintenance.[80]

If, at divorce, a wife does not obtain maintenance, she cannot later approach the court for such an order.[81] In order to mitigate the effect of this rule, courts have in the past been willing to order token maintenance of R1 per year. If the wife were to lose her ability to support herself or had to stop working to look after ill children, the amount could be increased to meet her needs.[82] The Appellate Division has not yet decided this issue, but provincial courts seem increasingly unwilling to order token maintenance, arguing that a divorced wife should make her own provision against loss of income and not look to her ex-spouse for help.[83] In effect, therefore, unless the wife succeeds in obtaining spousal maintenance at divorce she can never afterwards be compensated for the loss of earning power caused by curtailing her career in order to look after children, either during or after marriage.

Even when obtaining a maintenance order at divorce, an ex-wife may nevertheless encounter legal problems in claiming sufficient maintenance. On the principle that, if she had succeeded in maintaining herself on a lesser amount, this proves that she did not need more, a woman cannot claim for increased arrears maintenance unless she had contracted debts to maintain herself.[84] However nonsensical, this argument is still accepted by South African courts.[85] The other rationale for refusing arrears maintenance is to encourage spouses who need increased amounts of maintenance to claim it promptly, since claims for large amounts of arrears may unduly burden the other spouse. Thus arrears maintenance will be ordered only from the time of the institution of the maintenance claim.[86] Because there is a common law duty on parents to maintain children after divorce, arrear child maintenance is recoverable. If the custodian parent had incurred expenses in addition to that agreed between the parties, the same principle holds.[87]

---

78 Slaughter (fn 7) 74; Phillips (fn 18) 35–65.

79 Phillips (fn 18) 17; Maclean and Weitzman (fn 2) 198. For South Africa see Orkin "Earning and spending in South Africa: Selected findings of the 1995 Income and Expenditure Survey" 1997 *South African Central Statistics* figure 3. Budlender "Women and men in South Africa" 1998 *South African Central Statistics* figure 19 shows that more women than men are employed in unskilled and low-paying jobs. Figures 22 and 23 show that women are less well remunerated than men generally and than men with the same educational achievements.

80 839H–I.

81 *Schutte v Schutte* 1986 1 SA 872 (A) 882D–E.

82 *Brink v Brink* 1983 3 SA 217 (D) 220G–221B.

83 *Portinho* 597G–H; *Qoza* 843E–F.

84 According to the maxim *in praeteritum non vivitur.*

85 *Dodo v Dodo* 1990 2 SA 77 (W) 94H–J.

86 *Dodo* 95A–J; *Cary v Cary* 1999 3 SA 615 (C) 622E.

87 *Kemp* 1958 3 SA 736 (D) 737H; *Herfst* 130C–131B.

The problem caused by these rules is illustrated by *Herfst*. Maintenance orders existed in favour of both the mother and child. The mother also worked and managed to save some money. As result of illness she had to stop working and lost her job, remaining unemployed for two months. Subsequently she claimed that for the period of her unemployment, her ex-husband had been liable to pay the full amount of the child's maintenance, since she had to use her savings to pay her portion. She also claimed increased maintenance for herself for that period. The court refused increased maintenance for the mother on the *praeteritum* principle. It argued that her savings constituted income for the purposes of child maintenance and that she was therefore not entitled to be reimbursed by the father. The debts that she had incurred during this time were offset against her remaining savings and she could not claim any contribution from the ex-husband.[88]

Together, these rules can cause serious difficulties for women who work at the time of divorce. A wife who did not obtain maintenance or token maintenance at divorce will be unable to claim maintenance for herself if she subsequently has to curtail her employment to care for ill or disabled children. If she had a maintenance order, she would only be able to claim an increase from the time of lodging her claim, and would be unable to recover lost wages. If she had savings, she would be unable to claim an increase for herself or for her child, since she would be expected to exhaust her savings before turning to her ex-husband for a contribution.

5 2 Child-care as maintenance of children

Custody is not only a privilege. It involves a considerable amount of work. Courts, when apportioning the maintenance of children between the parents, should recognise and take into account the value of women's childcare labour. Funder suggests that

> "the earning decrement which is associated with the ongoing care of children after the separation might be seen as part of the costs of maintaining children, albeit indirect costs, and be taken into account in calculating periodic child maintenance".[89]

Current theory about dividing maintenance responsibilities is that each parent should contribute to the needs of the child according to his or her ability.[90] The procedure is first to determine what the needs of the child are, then to place a monetary value on them and apportion this between the parents according to their income.[91] These needs are described as

> "such support as a child reasonably requires for his or her proper living and upbringing and includes the provision of food, clothing, accommodation, medical care and education".[92]

It does not include those needs of children which are met by their mothers – the cooking, cleaning, counselling and homework help which, had someone been hired to do it, would constitute a considerable financial burden. Like the work done by women during marriage, women's work as custodian parents remains unrewarded.[93]

88 131G–H.
89 (fn 2) 150.
90 Maintenance Act 1998 s 15(3).
91 *Herfst* 130C–F.
92 Maintenance Act 1998 s 15(2).
93 Okin (1989) 162.

In *Mentz v Simpson*, for instance, the wife remarried the ex-husband of her ex-husband's second wife. Since the couples had just changed partners, the original maintenance orders in favour of the children were never updated. When the applicant applied for increased maintenance for her children, the court made extensive calculations to determine the reasonable needs of each of the children. It then apportioned the amount according to the incomes of the parents, R2 200 for the father and R240 for the mother adding: "It would not be unreasonable in the circumstances of the case to require the appellant to devote her entire income to the maintenance of the girls."[94]

Although the value of the accommodation supplied by the mother was included in her contribution, the value of her caring work was obviously not. It was a "labour of love" which courts would not take into account in economic calculations.

Hunter provides an explanation for this blindness on the part of the courts.[95] Courts use a model of cost sharing in which the minimum costs of maintaining a child is used as a starting point. These are then shared between the parents according to their income. However, only those costs that can be easily ascertained in terms of monetary value are taken into account. This also explains why the costs of women's lost career assets are excluded from calculations of child maintenance.

5 3 Children's needs

5 3 1 Calculation

The cost-sharing model raises the question of whether child maintenance should be based on actual money expended, or on the minimum needed to maintain the child at a certain level. One effect of this model is that the amounts ordered are generally low, resulting in a lower standard of living for the custodian parent and her children.[96] For instance, arrears maintenance for children can be claimed only if "the item of maintenance in question (was) reasonably required by the child for its due living and upbringing".[97] Mothers are generally not satisfied with giving their children only the minimum provided for by maintenance orders and will bear the full costs for extra lessons, gifts and so forth.[98] In addition, practitioners interviewed by Budlender indicate that parents and courts generally underestimate the costs of raising children.[99]

This is illustrated by *Hawthorne*, where the father absconded shortly after divorce and the mother was forced to place the five boys in children's homes and religious schools. She visited them regularly and gave them such extras as rugby boots, eggs, malt, cod-liver oil, toiletries and pocket money as she could afford from her modest salary. When, after the youngest became self-supporting, she traced the father and claimed from him a portion of the money which she had spent, the court allowed claims for food items and sports equipment which could be classified as being necessary for their improved health. However, extra comforts like cakes, sweets, toiletries and pocket money could not be recovered because they were not strictly necessary.[100]

---

94 1990 4 SA 455 (A) 462E–F.
95 "Child support law and policy: The systematic imposition of costs on women" 1983 *Harvard Women's LJ* 1 7–13.
96 Hunter (fn 95) 10.
97 *Herfst* 131B.
98 Hunter (fn 95) 7–13.
99 (1996) 28–29.
100 1950 3 SA 299 (C) 307H–308H.

Courts accept that maintenance should increase as children grow older and that fathers are responsible for the expenses of tertiary education where this is reasonable in the light of children's academic ability and parents' economic position.[101] However, as soon as the child reaches majority, existing maintenance agreements lapse, unless they specify the contrary. This is the case whether or not the child attends university at the time.

If there is still a need for maintenance, the child bears the burden of proving this and claiming maintenance from the father at common law.[102] Maintenance obligations are also terminated when children leave the home or find some kind of employment.[103] In fact, many children do not become independent immediately on reaching a certain age, but continue to receive accommodation, clothing and pocket money from mothers. Where these are not considered necessary, mothers have no claims for contributions from fathers.[104]

5 3 2 The family home

Women who have custody of children need to provide not only for themselves, but also for their children. This is not limited to the direct expenses of maintaining children like food, clothing, school fees and the like. It also includes the fact that mothers' accommodation bills for electricity, water, vacations and other living expenses are increased.[105] South African courts seem to recognise this link:

> "Her needs, however, as appeared from her evidence, cannot be strictly speaking divorced from those of her children, for she dealt with their collective needs, such as expenses relating to the home, food and the like . . ."[106]

However, when it comes to giving economic effect to this connection, courts are inconsistent. Before divorce or separation, parents and their children shared the available assets. If after divorce the father obtains half of the assets, this means that mother and children have to share the other half, which decreases their share of the enjoyment of communal assets.[107] A more uniform approach would take the needs of children into account when dividing property.

In rich families, courts may order that the custodian parent keep the family home to accommodate herself and her children.[108] As soon as assets become scarce, however, courts may order that the family home be sold and the profits divided

---

101 *Mentz v Simpson* 459B–D. See Wallerstein and Corbin "Father-child relationships after divorce: Child support and educational opportunity" 1986 *Fam LQ* 109 118–125 for the position in the United States.

102 *Sikatele v Sikatele* [1996] 2 All SA 95 (T) 99*b–c*; *B v B* [1997] 1 All SA 598 (E); *Bursey v Bursey* 1999 3 SA 33 (A).

103 *Kemp*. In *Beaumont* 1985 182H the mother claimed a contribution towards the pocket money for her son, who earned a small amount while doing his national service. Kriegler J refused, saying: "That is not maintenance, it is spoiling." In *Kroon* 627F; 628D–E the fact that one of the children would be at university, possibly (but not definitely) in a different city, the following year, was taken as an indication that the mother no longer needed the facilities of a large house.

104 Weitzman (fn 1) 279.

105 *Mentz v Simpson*; *Joffe v Lubner* 1972 4 SA 521 (C) 524; *Vedovato v Vedovato* 1980 1 SA 772 (T) 775A.

106 *Grasso* 59H–I.

107 Weitzman (fn 1) 105.

108 *Archer*.

equally.[109] Women's generally lower salaries and their lack of access to housing subsidies combined with their need to provide accommodation for children mean that such divisions impact disproportionately on them.[110] In order to keep the family house, women may agree to lower maintenance. Dislocating them from their familiar surroundings at the time of marital breakdown exacerbates the emotional consequences of divorce for children.[111]

This problem is not, however, limited to poor families. In *Kroon* a woman had been married out of community of property for twenty years to an acting judge with good prospects of a permanent appointment. She had stayed at home to raise three children. She had no income or prospects of finding employment but the family home was registered in her name. The husband had, apart from his substantial salary, some income from a family trust. He agreed to pay maintenance but argued that the family home should be sold to augment this sum, while the wife argued that it would disrupt the lives of the children. The court held that:

> "The house, however, is too big for plaintiff and three children, the elder of whom will be at the university next year, maybe in some other city . . . We are dealing with a boy of 14 or 15 and a girl or 13 or so, who will be less and less inclined to remain home. They do not need a garden or a large house with a 'family room' such as the big house contains . . . [T]these children, particularly as they are apparently intelligent above the average, will adapt to a new house very quickly . . . I can see no valid objections to plaintiff's moving into a three bedroomed flat at R600 per month."[112]

The court acknowledged the wife's need for maintenance, but emphasised the limitations on the husband's ability to provide such maintenance, which included the fact that "[a]s a Judge of the Supreme Court he ought to maintain a certain style".[113] The end result was that the family home, which was not even part of the husband's estate, had to be sold so that the husband did not need to bear an onerous maintenance burden.[114] A delayed division of property whereby the family home is sold only after children reach majority could avoid such an unacceptable result.

5 3 3 Enforcing maintenance orders

Despite the improved mechanisms for claiming and enforcing maintenance contained in the 1998 Maintenance Act,[115] the burden of instigating prosecutions or claims for increases in maintenance remains on the claimant, who has to expend time and energy to set the process in motion whenever payment is late. This burden is particularly onerous in the case of rural and illiterate women who may lack access to courts and may have problems in understanding complicated court procedures.

Women who have custody of children not only have to approach courts for spousal maintenance, but also for maintenance for their children. Unless parties agree that maintenance will increase periodically according to some fixed scale, like the consumer price index, the onus is on the custodian parent to convince the other parent or the courts to increase maintenance from time to time. Unlike spousal

---

109 For instance *Van Onselen v Kgengwenyane* 1997 2 SA 423 (B).
110 Budlender (fn 5) 33.
111 Weitzman (fn 1) 71–109; Weitzman (fn 2) 101–105.
112 627F 628D–E.
113 637B.
114 Also *Chizengeni v Chizengeni* 1989 1 SA 454 (ZH).
115 See Bonthuys and Mosikatsana "Law of persons and family law" 1998 *Annual Survey* 130 149–152.

maintenance, which courts are sometimes reluctant to increase to accommodate increased costs of living,[116]courts readily accept this reason for augmenting child maintenance.[117] Although maintenance orders may include provision for automatic escalation at the annual inflation rate, this is not compulsory. Women's significant burden of having to apply for increases could easily have been removed by amending the 1998 Maintenance Act, but such a provision is lacking.

6 CUSTODY AND PROPERTY SETTLEMENT AGREEMENTS

6 1 Fair bargains

Instead of being sensitive to the dangers posed by settlements to the post-divorce economic welfare of women and children, courts choose to stress aspects of voluntarism and contract when dealing with property division agreements. They evoke liberal concepts of autonomy, rationality and freedom of choice, regarding spouses as rational individuals who can separate their economic from their emotional interests when bargaining. The altruism expected of women during marriage should end abruptly at divorce. Unless there has been very obvious exploitation, the legal system will not come to their aid when they strike bad bargains.

In *Baart v Malan* a wife had conducted an extra-marital affair with a man whom she married the day after her divorce. She signed a consent paper allocating custody of all four children to her ex-husband and undertook to pay, as maintenance for the children, her gross salary and all bonuses.[118] She later sought to have the orders for both custody and maintenance set aside on the basis that her agreement was vitiated by undue influence. She had settled on the understanding that she would have extensive contact with the children, but the father subsequently decided to move to a different city. Her claim for custody was refused on the bases that the children were well provided for by the husband and that her changed circumstances did not justify a change in custody arrangements.[119] The agreement as to maintenance, however, was set aside as being contrary to public policy, since it entailed the wife obtaining no benefit from her employment and effectively paying more than her income for a period of twenty years.[120] The court did not decide the maintenance issue on the basis of duress or undue influence, which would have also tainted the consent with regard to the custody. Instead, the *content* of the maintenance agreement was regarded as contrary to public policy.

In *Schutte* the Appellate Division declared that there is no common law objection to the waiver of the right to claim maintenance or subsequent increases in maintenance.[121] In *Reid* the court made it clear that

> "[t]o allow an ex-spouse freely to attack the justness of the divorce order could open a door to abuse of the Court process. A litigant who finds himself in difficulties in a divorce could agree to an unfavourable settlement in the knowledge that he could later, under the guise of the variation, undo the settlement agreement."[122]

---

116 *Hossack* 165H, but see also *Pommerel*.
117 *Green v Green* 1976 3 SA 316 (RA) 318E–F; *Joffe v Lubner* 524H–525A; *Vedovato* 775A.
118 1990 2 SA 862 (E) 863A–F.
119 864I–866F.
120 868H–869I.
121 883A–E.
122 447D–E.

This policy of accepting agreements at face value means that several factors which adversely affect women's bargaining power in relation to men are ignored.

6 2 Trading property for custody

Having invested more emotional and physical energy in child-care, women are generally more eager than men to retain custody of children. In a United States study by Weitzman, 96 per cent of divorcing women reported wanting custody. Initially 57 per cent of men wanted custody, but when faced with the reality of raising children, only 13 per cent of them persisted in their petitions.[123] This creates an opportunity for husbands to use custody as a bargaining chip to obtain greater financial advantages at divorce. Even the threat of suing for custody could persuade women, for whom this issue is not negotiable, to accept lower maintenance or property settlements.[124]

Despite ostensible legal rejection of this kind of bargaining, it occurs frequently.[125] In *Beaumont*, the husband initially claimed custody of the four children, but abandoned this claim and instead disputed the amounts of spousal and child maintenance.[126] The court observed that "he tried to starve her into submission".[127] In *Vedovato* the court accepted the woman's evidence that she had been persuaded by her legal advisors to accept a ridiculously low amount of maintenance for her children while the father was able to pay whatever the children would actually need.[128]

In *Shepstone*[129] a wife obtained custody of the four children and maintenance for herself and the children at divorce. Eight months later, when her ex-husband found out about her cohabitation with a married man, he threatened to sue for custody. In order to avoid this, she agreed to a drastic reduction of the maintenance for the children, cancellation of her own right to maintenance and to pay him a certain percentage of the proceeds of the house. When she later retracted, the court *a quo* gave summary judgment for the husband on the following reasoning:

> "I do not consider that the threat to proceed for such a variation was a threat made *contra bonos mores*. The plaintiff, in seeking to amend the custody order was exercising a legitimate right to approach the Court for relief because of changed circumstances brought about by the defendant's conduct as a custodian parent. In my view a threat to take lawful action in the Courts cannot, in these circumstances, be regarded as *contra bonos mores*."[130]

This was subsequently overturned on appeal but illustrates the power of threats of losing custody. Custody rules that decrease women's chances of obtaining custody, like the current move away from the maternal preference, therefore increase the likelihood that women will be willing to relinquish economic claims in order to

---

123 Weitzman (fn 1) 243–244.

124 Brophy "Child care and the growth of power: The status of mothers in child custody disputes" in Brophy and Smart (eds) *Women-in-law: Explorations in law, family and sexuality* (1985) 97 110–111.

125 Budlender (fn 5) 57 70.

126 1985 172J.

127 177J.

128 774E.

129 1974 2 SA 462 (N).

130 1974 1 SA 411 (D) 413G–H.

obtain custody. They also reduce women's bargaining power during marriage by increasing the potential costs to them of leaving the marriage, thereby possibly contributing to women's remaining in abusive relationships.[131]

The perception of bargaining as a rational transaction between equals obscures the fact that women's economic, educational and socially inferior position in the public sphere is reflected in their bargaining power within the realm of the family.[132] Equally, their position within the family affects women's bargaining power outside the family and renders them economically dependent on their husbands.[133]

Feminists point out that men's economic advantages result from societal structures which systematically deny women access to education, prestigious jobs and equal pay.[134] The law ignores the economic dependence upon men of women who take care of children or elderly relatives, and the fact that this dependence does not cease on divorce.[135] This inequality also influences the bargaining powers of the parties at divorce.

6 3 Maintenance as an incentive/Incentives to pay maintenance

Especially in the case of illegitimate children, courts link maintenance and rights of access. Maintenance is regarded as a sign of affection and bonding between parent and child which justifies granting access to fathers of illegitimate children, while access is held up as an incentive for fathers to take financial responsibility for children.[136] In effect, men are offered contact with children in return for shouldering a part of the economic burden of childrearing.[137] Krause puts the most acceptable face on this argument by saying that the preoccupation with the non-paying father's culpability has shifted the focus from societal responsibility for all children. He argues that fathers who have no stake in children, other than having a biological link with them, should not have to assume a financial burden for eighteen years as civil "punishment" for extra-marital sexual activity, which has long been de-criminalised.[138] This argument is extended to fathers who, through marriage, have acquired rights of access, but who lack a social link with their children as result of losing custody at divorce. He calls the difference between them and unmarried fathers "one of degree only".[139]

In *Van Vuuren* the court cautioned legal practitioners to guard against parents exchanging rights to property for rights in relation to children, since this may be detrimental to the interests of the children.[140] However, this is exactly what courts do when they endorse the increase of fathers' rights in exchange for maintenance.

---

131 Wax (1998) 640–642.
132 O'Donovan *Sexual divisions in law* (1985) 134.
133 *Idem* 157; Fineman (1995) 161–166.
134 Boyd "Child custody, ideologies, and employment" 1989 *Canadian J of Women and the Law* 111 123.
135 See Fineman's (1995) discussion of the discourse of dependency and need in ch 6.
136 *Van Erk v Holmer* 1992 2 SA 636 (W); *F v L* 1987 4 SA 525 (W); *Douglas v Mayers* 1987 1 SA 910 (ZH); *Chodree v Vally* 1996 2 SA 28 (W).
137 Graycar "Equal rights versus fathers' rights: The child custody debate in Australia" in Smart and Sevenhuijsen (eds) *Child custody and the politics of gender* (1989) 158 180–181.
138 "Child support reassessed: Limits of private responsibility and the public interest" in Eekelaar and Maclean (eds) *Family law* (1994) 209 223–227.
139 226.
140 1993 1 SA 163 (T) 167B–F.

This exchange takes place at the expense of financially less secure wives and may further weaken their bargaining position.

7 AFRICAN WOMEN

7 1 Custody and the division of assets in customary law

According to the "official" version of customary law,[141] children whose fathers had paid or agreed to pay *lobola* belong to their fathers' families. When spouses divorce, very young children are allowed to remain with their mothers until joining their fathers' families when they are older.[142] This rule fails to reward women for their care and nurture of children. Giving custody of only very young children to women means that women shoulder the burden of caring for children who require close personal attention. When, however, children become capable of performing household and other tasks, the fathers' families obtain custody.

The problem is compounded by the customary distribution of matrimonial property at divorce. Even if the wife may have contributed much of economic value during the subsistence of the marriage, the customary rule is that all the property amassed by the wife, except for certain personal items, becomes house property and at divorce vests in the husband.[143] Women are only entitled to a head of cattle for rearing of children, which hardly represents sufficient compensation for the costs of rearing a young child. Neither does the division of property upon divorce compensate women for past child-care work. This means that their economic activity may be constrained by unrewarded child-care.

The Recognition of Customary Marriages Act retains this system for marriages concluded before its commencement and makes no attempt to ameliorate women's positions by any form of forfeiture or redistribution.[144] This impacts detrimentally, particularly on older women who were further disadvantaged by apartheid restrictions on their education and freedom of movement. Although parties may change the patrimonial consequences of such marriages,[145] rural, uneducated women, who are most vulnerable, are unlikely to be able to utilise this procedure which involves an application to court.

Customary marriages concluded after commencement of the Act will have similar patrimonial consequences to civil marriages. Because African women constitute the poorest sector of society, arguments raised in relation to the effects of the current civil system will affect them in particular.[146]

7 2 Civil maintenance law and customary marriages

The Recognition of Customary Marriages Act states that a court which orders the payment of maintenance may take account of customary provisions for maintenance

---

141 See Sanders "How customary is customary law?" 1987 *CILSA* 405 for a discussion of the difference between official, academic and autonomic customary law.

142 Bennett *A sourcebook of African customary law for Southern Africa* (1991) 358–366; *Mokoena v Mofokeng* 1945 NAC (C&O) 89 90; *Mohapi v Masha* 1939 NAC (N&T) 154; *Zwana v Zwana and Twala* 1945 NAC (N&T) 59; *Mkize v Mkize* 1951 NAC (NE) 336; *Kabe and Inganga v Inganga* 1954 NAC (C) 220.

143 Bennett (fn 142) 276–277. Marriages concluded after commencement of the Recognition of Customary Marriages Act 120 of 1998 are, however, subject to s 7 of that Act.

144 S 7(1).

145 Recognition of Customary Marriages Act s 7(4).

146 See pars 3, 4 and 5.

of wives and children.[147] However, special problems with obtaining maintenance in customary law make it unlikely that poor women will claim or obtain custody of their children or be able to maintain them.[148] Customary law makes no provision for payment of maintenance for wives and children after divorce. The assumption is that the wife will return to her own family and be maintained by them, while the children will remain with their fathers' family who will look after them.[149]

A paternal family that has paid *lobola* will not take kindly to a wife's obtaining custody of children and claiming maintenance. Since they are the guardians of the ancestral spirits of the children, it is in the interests of the children that the mother does not antagonise them by claiming maintenance.[150] In customary law a man is obliged to maintain his wife, who must, in return, render household and sexual services. If a woman claims maintenance for her children, but especially for herself, a former husband may assume a continuation of this relationship. Women may avoid claiming maintenance to avoid this. Customary principles which sanction "reasonable chastisement" of wives by husbands may furthermore discourage women from claiming maintenance for fear of physical violence.[151]

Since the application of civil maintenance rules to customary marriages, African women have had a choice of claiming maintenance according to civil or customary law.[152] Replacing the customary law of maintenance with civil law does not mean that customary attitudes to families disappear. They persist and render problematic the application of civil law:

> "He does not contend that such amounts are unreasonable and not justified by the evidence led at the enquiry nor does he contest the fact that his children are struggling to survive in the absence of such maintenance. His ... attitude is that he will not maintain his children, whatever their circumstances, unless complainant returns them to his home".[153]

Family members feel that access to the civil law gives women autonomy to claim maintenance and reduces the community influence over family matters. Men commonly argue that women will use maintenance money for purposes other than child support, or for supporting the children of other men. They especially resent paying maintenance for children who live with other men.[154]

8 CONCLUSIONS

8 1 Connections between custody and property

The position of women in relation to property division at divorce is relevant to custody of children in three respects. First, the devaluation of women's child-care work reflected in custody rules is mirrored in rules on division of property and maintenance which deny compensation for this work. Secondly, women's need to

147 S 8(4)(e).
148 Banda "Custody and the best interests of the child: Another view from Zimbabwe" 1994 *International J of L and the Family* 191 196.
149 Bennett (fn 142) 277–289.
150 Armstrong (1992) 67.
151 *Idem* 125–126.
152 *Lekwakwe v Diale* 1979 BAC (C) 299; *Gcumisa v Gcumisa* 1981 AC 1 NE; *Ngcobo v Nene* 1982 AC (NE) 342–348; *Muru v Muru* 1980 AC (S) 39.
153 *Nguza v Nguza* 1995 2 SA 954 (Tk) 956E.
154 Armstrong (fn 150) 138–142.

have custody of children renders them more likely to forgo economic claims to secure custody. Finally, women's access to employment and promotion depends on their child-care responsibilities. Together, custody allocation and the division of assets will determine the post-divorce circumstances of custodian parents and children.

As the marital bond is dissolved, two things happen simultaneously: the division of the rights and responsibilities relating to the children and a division of the economic assets of the marriage. It appears that there is a dissonance between the two processes. When courts argue about custody, they take account of factors which have a strong "gender encoding" and depend on emotional and nurturing bonds between children and parents. When they divide property, however, they seem to disregard the economic, emotional and other social bonds between spouses and between spouses and children. The division takes place as if the parents were strangers who have no children. By removing children and other dependent relationships from the picture, courts are free to focus on outside wage labour and its products, ignoring the impact of child-care and homemaking labour on women's earning capacity.

This dichotomy reflects and draws legitimacy from the pervasive distinction between the public and private spheres of life. It constructs the family as the realm of warmth and intimacy where actions are motivated by altruism towards family members. The state should not impose "public" norms of exchange in this area, but should rather encourage altruistic norms within the family. On the other hand, rational economic actors, guided by individualistic pursuit of self-interest inhabit the public sphere. Acts of altruism are not required and will not be rewarded, unless they have been translated into the language of contractual obligation.[155] This model postulates a radical opposition of the two spheres and does not allow for seepage of norms between them.

Ignoring what happens in the "private" sphere renders inequalities between people legally irrelevant, and thus condones them. The link between private exploitation and public inequality is denied, as is that between public inequality and vulnerability to private exploitation.[156]

> "The ideologies of both the free market and the family tried to legitimate actual inequality by emphasising the equality of all with respect to the state. Inequality was said to result from the private relations among people and was thus a natural attribute of civil society rather than the responsibility of the state."[157]

The powerful discourses of "nature" and biology are harnessed to mask the tension between an ideology of equal partnership in marriage and the reality that women do most of the unremunerated housework and child-care. What is unequal becomes "natural" and the results of social practices become "biological", and therefore immutable.[158] I suggest dissolving the dissonance by re-integrating legal thinking about property division and custody.

---

155 Olsen "The family and the market: A study of ideology and legal reform" 1983 *Harvard LR* 1497 1505; Horsburgh (1992) 485–497.

156 Olsen (fn 155) 1504.

157 *Idem* 1528.

158 Stolcke (fn 14) 38–39.

8 2 Re-integrations

The best interests of children, so central to issues of custody and access, are rarely encountered in maintenance cases and even less frequently in cases involving the division of property or spousal maintenance. For instance, the need for stability in the lives of children, which is important in custody, seems not to apply in monetary matters. Courts agree that family homes be sold, though that would disrupt the lives of children severely.[159] Any reduction in the wife's standard of living as a result of the divorce also affects her children. Her living arrangements are necessarily shared by them, her anxiety affects the level of care she can provide and the fact that she has to engage in wage labour for the first time, or increase overtime work, influences the lives of children[160] who may, moreover, be aware of problems with maintenance payments and differences between the lifestyles of their fathers' and mothers' households.[161] I would argue that courts should integrate the interests of children with the division of property on divorce, and construct paradigms of property division which take their interests into account.

Secondly, systems of property division and spousal maintenance should be re-integrated with women's child-care labour during and after marriage. They should compensate women for the work they have done during marriage and the work inherent in exercising custody as well as the loss of earnings which this brings about.

Thirdly, I would argue for a re-integration between the needs of children and the responsibilities of society to provide:

> "Such a strategy would emphasize: (1) increased societal support for day care, parental leave, education, nutrition, medical care and other subsidies that directly benefit children and their primary caretakers; (2) allocation of property and post-divorce income for the children's benefit before the spouse's individual claims are considered; and (3) recognition of the parent's continuing responsibility for, and benefit from, children as a primary basis for divorce adjustments."[162]

Since women's childcare labour benefits society as a whole, and given the widespread poverty among many, especially black, South Africans, collective responsibility for child-care should be considered. Burdening individual women with the social costs of child-raising contributes to the feminisation of poverty.[163] One suggestion for reform of maintenance is that standards for child support should be adopted to guide the amount of maintenance. Where parents cannot afford these standards, state welfare should supply the rest. This could be coupled with a collection system which shifts the burden of claiming maintenance from custodian parents to the state. The state could, for instance, advance maintenance payments and reclaim them from the maintenance debtor in the from of taxes.[164]

The current state support system is, to say the least, unsatisfactory, involving pitifully small amounts being distributed inefficiently. On the other hand, the reality

---

159 See however, *Grasso*: "Plaintiff did not work prior to the dissolution of the marriage and it is manifestly in the best interests of the parties' two school-going children that they remain and are brought up in the same milieu as had existed for the past few years . . ." 58H–I.

160 Weitzman (fn 1) 319, 352–356.

161 Wallerstein and Corbin (fn 101) 115 117.

162 Carbone and Brinig (fn 20) 1007–1008.

163 Hunter (fn 95) 19. See also Delphy and Leonard (fn 8) 23.

164 Hunter (fn 95) 24–26.

of poverty in South Africa makes it unlikely that the state will be able to afford large increases in welfare.[165]

Fisk contends:

> "Employers have been able to use human resources in the existing form (ie eight or more consecutive hours a day, five or more days a week) only because the family structure provided the services necessary to make the labor available. The real cost of employing a worker who has children includes the cost of hiring someone to care for the children so that the parent-worker is free to devote his or her services elsewhere. Child care is a cost of producing that employers have avoided paying until recently."[166]

She argues that employers are constitutionally bound to advance gender equality by providing child-care facilities for their workers.[167] Phillips maintains that the nature of paid labour should be restructured to enable both men and women to parent by allowing parents special working hours and other privileges.[168]

8 3 A consistent basis for the division of assets

Fineman makes a useful distinction between property allocations based on principles of fault, need and contribution. She traces a movement from need-based to contribution-based allocations, running parallel to the shift from perceptions of marriage as a status to marriage as a contract. Status-based factors, like need, operate on the principle of paternalism, while contract-based decisions operate in terms of equality.[169]

If one applies this analysis to South African law, one finds that the older legal regime was based on a mixture of need and fault. The situation where women generally obtained custody after divorce and could be sure of obtaining maintenance had the merit of theoretical consistency. The gendered division of labour which persisted explicitly in post-divorce custody rules, was also reflected in the division of property where men continued to maintain spouses and children.

The current system, which merges elements of fault with the principle of contribution, lacks consistency. Courts are furthermore willing to recognise needs-based factors in cases involving older women who had never engaged in wage labour and the wives of rich men. However, since the resurrection of the old order is neither possible, nor in the interests of women, I would suggest that a modified contribution model be adopted. This model should be applied equally to the division of assets at divorce, spousal maintenance after divorce and maintenance of children. In addition, different forms of property distribution should be integrated so that courts making maintenance orders should also take account of the division of assets and *vice versa*.

The current application of the principle of contribution is inadequate because it is based primarily on women's economic contributions whilst other contributions to men's career assets, creating and maintaining relationships with children, husbands,

---

165 Simkins and Dlamini "The problem of supporting poor children in South Africa" in Burman and Preston-Whyte (eds) *Questionable issue: Illegitimacy in South Africa* (1992) 64 64–75; Clark (1996) 82–86.

166 "Employer-provided childcare under Title VII: Toward an employer's duty to accommodate child care responsibilities of employees" 1986 *Berkeley Women's LJ* 89 95–96.

167 104–105.

168 (fn 18) 64–65. See also Slaughter (fn 7) 97.

169 "Societal factors affecting the creation of legal rules for distribution of property at divorce" in Fineman and Thomadsen (eds) *At the boundaries of law: Feminism and legal theory* (1991) 265 269–271.

families and communities are excluded. Also excluded are contributions which women make by child-care after divorce. This latter omission justifies the application of the clean break principle. At the same time, assets are defined conservatively as those resources which can, at the time of divorce, be measured in monetary terms. The economic and social contexts within which women contribute and the wider effects of their contributions on their economic welfare are disregarded. Men and women are perceived as detached economic actors, disconnected from their relationships with children and each other, meaning that the effects on post-divorce settlement agreements of women's childcare responsibilities and relationships become legally invisible.

These definitional features of current contribution models are premised upon and accept as the standard the kinds of contribution which men generally make, while women's contributions are regarded as purely altruistic and thus devalued. A wider, more contextual notion of contribution which takes account of these criticisms will cater more adequately for the needs of women and children after divorce.

Fineman argues that contribution models are inadequate to meet the economic dependencies which women develop as a result of their childrearing and nurturing roles. These cannot be cured by awards of half the property at divorce.[170] Contribution models further reward only those women who conform to stereotypically male roles and behaviours.[171] Her argument, however, conflates contribution and "formal" equality. I would argue that while contribution models can be recast to take account of those things which women value, their contributions and the social contexts in which they make them, this does not necessarily have to be the case. I offer some examples of extended contribution models which deal adequately with the needs of women and children.

Property division could be based on an extended model of partnership, the fruits of which continue to be allocated after the dissolution of the marriage.[172] A different version of the same argument is that women, when they undertake the major responsibility for child-care, rely on their marriage enduring and their receiving continued economic support from their husbands in return. When the marriage breaks down, their "reliance interest"[173] should be fulfilled by granting them and their children a share in the ex-husbands' post-divorce income. Where both parents earn, the children should receive a share of their parent's income.[174]

A further possibility is the idea of income equalisation, based on the notion that during marriage parties and their children shared equally in the income generated by the union. Since one party should not bear more than half of the share of the economic costs of the divorce, the aim of maintenance and property division should be to equalise the incomes and living standards of spouses after divorce, taking into account their child-care responsibilities.[175]

A contribution model has several further advantages. First, articulating women's demands as linked to their contributions moves them from the positions of

---

170 *The illusion of equality: The rhetoric and reality of divorce law reform* (1991) 41–51.

171 "Societal factors" (fn 169) 274–278.

172 Starnes (fn 52) 130–138.

173 *Idem* 109–119.

174 Hunter (fn 95) 10; Brackney "Battling inconsistency and inadequacy: Child support guidelines in the States" 1988 *Harvard Women's LJ* 197 201.

175 Brackney (fn 174) 201.

supplicants, appealing to paternalistic care. Instead of alimony drones they become subjects of moral and legal rights. Paternalism is a dangerous sentiment for women to appeal to, linked to discourses with resonances of helplessness and positioning as legal objects rather than subjects.[176]

Practically, concentrating on women's needs means that women bear the burden of showing their neediness and inability to maintain themselves.[177] Where women engage in wage work, their lesser needs could mean smaller proprietary awards than they would be entitled to under an extended contribution model. Highly detrimental policies, like the refusal to award arrears maintenance except where women have contracted debts to maintain themselves, are based on the principle of need. Contribution as basis for entitlement is preferable because it provides a stronger foundation for women's claims.

> *[E]ach legal system, intertwined with a particular legal tradition, is predicated on a number of integrated elements, and to look at each piece-meal through a magnifying glass cannot provide an accurate picture of the whole nor can such an exercise take into account differences between the systems . . . Fundamental justice may take different forms in different societies, given their own legal traditions.*
>
> *L'Heureux-Dube J in* Thomson Newspapers Ltd v Director of Investigation and Research (1990) 67 DLR (4th) 161 279f–g, *quoted by Ackermann J in* Ferreira v Levin NO and Vryenhoek v Powell NO 1996 1 BCLR 1(CC) *par* 101.

176 O'Donovan *Family law matters* (1993) 90–100.

177 However, this is not an onus in the evidentiary sense of the word. See *Mgumane v Setemane* 251B–C.

Die herlewing van vergelding as regverdiging vir straf*

CR Snyman
BA LLD
Professor in Straf- en Prosesreg, Universiteit van Suid-Afrika

SUMMARY

The revival of retribution as justification for punishment

Until around 1975 retribution as justification for punishment was frowned upon in Anglo-American law. Instead, the emphasis was placed on deterrence and especially rehabilitation. Because of the consistent increase in crime, retribution has experienced a revival since approximately that time. According to the new construction of retribution, the concept has nothing to do with vengeance, but with the restoration of the juridical balance which has been disturbed by the commission of the crime. The emphasis is on an equal distribution of the advantages and protection flowing from the legal order, on the one hand, and the duties of citizens to respect the law, on the other. Retribution thus construed is sometimes referred to as "protective" or "restorative retribution". This construction of retribution is closely linked not only to the requirement of culpability (*mens rea*) in criminal law, but also to respect for human dignity. The same cannot necessarily be said of the utilitarian theories of punishment. The views about the purposes of punishment held by the South African courts still seem to reflect the earlier, outdated views of Anglo-American law. It is argued that the time has come for South African courts to reassess the true meaning of retribution and to apply it in practice.

1 INLEIDING

Die toepassing van die strafreg lei tot pynlike ervarings vir die misdadiger, omdat strafoplegging 'n ingrypende inbreukmaking op sy regte, soos sy reg op bewegingsvryheid, waardigheid of besittings tot gevolg het. Hierdie ingrypende inbreukmaking op 'n ander se regte vereis 'n regverdiging. Die verskillende argumente wat deur die loop van die eeue as regverdiging vir straf ontwikkel en aangevoer is, staan bekend as "strafteorieë". Hierdie teorieë is belangrik, nie slegs om te dien as regverdiging vir strafoplegging in die algemeen nie, maar ook om wetgewers en howe te help om die belangrike vrae te beantwoord oor watter soort gedrag strafbaar behoort te wees en wat die aard en omvang van die straf behoort te wees. Die vloedgolf van misdaad waaronder Suid-Afrika die afgelope tyd gebukkend gaan, noop strafregjuriste en kriminoloë om weer met nuwe oë na hierdie strafteorieë te kyk.

* Die navorsing wat die skryf van hierdie artikel moontlik gemaak het, is onderneem met geldelike bystand van die Navorsings- en Beursekomitee van die Universiteit van Suid-Afrika. Die navorsing is gedoen aan die Universiteit van Amsterdam, Nederland. Die skrywer betuig hiermee sy dank aan die Universiteit van Suid-Afrika vir die geldelike ondersteuning wat hierdie navorsing moontlik gemaak het. Menings in hierdie artikel uitgespreek of gevolgtrekkings waartoe geraak is, is dié van skrywer en moet nie beskou word as dié van die Universiteit van Suid-Afrika nie.

2 DIE VERSKILLENDE STRAFTEORIEË

Die strafteorieë kan, aan die hand van die argumente wat hulle onderlê, in drie onderafdelings verdeel word, te wete die absolute teorie, die relatiewe (ook genoem utilitaristiese) teorieë en die gekombineerde teorie. Aangesien laasgenoemde teorie niks anders as 'n kombinasie van die eerste twee teorieë is nie, sou dit nie verkeerd wees nie om te sê dat die strafteorieë in slegs twee onderafdelings verdeel word, naamlik die absolute en die relatiewe teorieë.

Daar is net een absolute teorie, en dit is die vergeldingsteorie. Volgens hierdie teorie is straf geregverdig omdat dit die oortreder se verdiende loon is. Die oortreder word gestraf sonder inagneming van die een of ander toekomstige doel, soos afskrikking of hervorming, wat deur die strafuitdiening bereik kan word. Anders as by die relatiewe teorieë is die fokus by vergelding nie op die toekoms nie, maar op die verlede, dit wil sê op die misdaad wat gepleeg is of die regsbepaling wat verbreek is. Terwyl die relatiewe teorieë gekenmerk word deur 'n hedonistiese en rasionele instelling tot menslike gedrag, val die klem by die vergeldingsteorie op die wilsvryheid van die mens en, voortspruitend daaruit, die verwyt wat die oortreder toegeslinger kan word dat hy die samelewing se norme oortree het.

Onderliggend aan die vergeldingsteorie is die sogenaamde deontologiese redenasie, wat die aandag vestig op 'n handeling as 'n doel op sigself, en waarvolgens handelinge reg of verkeerd is ongeag die gevolge wat dit op ander mense mag hê.[1]

Die relatiewe teorieë staan ook bekend as die "utilitaristiese teorieë", "doelteorieë", "teleologiese teorieë", of "gevolgsteorieë". Verskillende teorieë kan hieronder tuisgebring word, soos die afskrikkings- en hervormingsteorie. Wat al hierdie teorieë in gemeen het, is die klem wat by strafoplegging op die gevolge van menslike handelinge geplaas word. Anders as wat die voorstanders van die vergeldingsteorie met hulle deontologiese argument glo, glo die voorstanders van die relatiewe teorieë dat 'n handeling slegs as goed of sleg beskryf kan word deur na die uitwerking of gevolg van die handeling te kyk. Slegs handelinge wat wenslike gevolge het, kan volgens hierdie teorieë as moreel korrek beskryf word.

Volgens die klassieke utilitarisme, soos verkondig deur Jeremy Bentham,[2] behoort dit die doel van alle wette en regsreëls te wees om die grootste moontlike geluk aan die grootste aantal mense te bewerkstellig. Die reg behoort sover moontlik gebruik te word om alle pynlike of onaangename ervarings uit te skakel. Vir 'n utilitaris is sowel misdaad as straf iets onaangenaams en derhalwe onwenslik. In 'n perfekte wêreld sal albei ontbreek. Ons leef egter nie in 'n perfekte wêreld nie, en derhalwe betoog die utilitariste dat die oplegging van straf slegs geregverdig is indien dit na alle waarskynlikheid aanleiding sal gee tot 'n vermindering van die pyn wat met misdaadpleging verband hou.[3]

---

1 Dressler *Understanding criminal law* (1995) (hierna Dressler *Criminal law*) 8; Moore "The moral worth of retribution" in Schoeman (red) *Responsibility, character, and the emotions* (1987) (hierna Moore *Moral worth*) 179 182; Murphy *Retribution, justice and therapy. Essays in the philopophy of law* (1979) 223; Aranella "Convicting the morally blameless: reassessing the relationship between legal and moral accountability" 1992 *Univ of California LR* 1511 1529 1534.

2 Bentham *An introduction to the principles of morals and legislation* (1843). Nog 'n groot grondlegger van die utilitarisme was John Stuart Mill. Sien Mill *Utilitarianism* (1863).

3 Dressler *Criminal law* (vn 1) 9, Murphy (vn 1) 226; Aranella (vn 1); Ashworth *Sentencing and criminal justice* (1992) 59–60.

Volgens die klassieke utilitarisme kan die dreigement van strafoplegging misdaadpleging verminder, omdat die ervarings van pyn en plesier die belangrikste motiverings van menslike gedrag is. Dit kom daarop neer dat die mens van nature 'n hedonis is, omdat hy of sy altyd strewe na plesier en geluk, oftewel die vermyding van die pynlike of onaangename. Die mens is ook rasioneel, want hy oorweeg die voor- en nadele van sy voorgenome handeling voordat dit verrig word en besluit dan op optrede wat volgens hom sal bydra tot sy geluk. Hy sal misdaadpleging vermy as hy van mening is dat die moontlikheid van pyn (straf) swaarder weeg as die moontlike plesier of voordeel wat hy uit die handeling kan put.

Binne die utilitarisme kan verskillende strafteorieë onderskei word.

Eerstens is daar die algemene afskrikkingsteorie, waarvolgens die doel van straf die afskrikking van die gemeenskap as geheel van misdaadpleging is. Tweedens is daar die individuele afskrikkingsteorie, waarvolgens die doel van straf die afskrikking van die individuele beskuldigde (in teenstelling tot die gemeenskap as geheel) van verdere misdaadpleging is. Derdens is daar die rehabilitasie- oftewel hervormingsteorie, waarvolgens die doel van straf die verbetering of opvoeding van die misdadiger is sodat hy weer 'n verantwoordelike lid van die gemeenskap kan wees. Vierdens is daar die voorkomingsteorie, waarvolgens die doel van straf die voorkoming van misdaadpleging is. Hierdie teorie oorvleuel sowel die algemene as die individuele afskrikkingsteorieë, vir sover afskrikking tegelykertyd ook 'n manier is om misdaadpleging te voorkom. Vyfdens word daar in die jongste tyd, veral in die Anglo-Amerikaanse regstelsels, dikwels gepraat van "buitestaatstelling" (*incapacitation*) as strafoogmerk. Hiervolgens is die doel van straf om dit vir die misdadiger onmoontlik te maak om weer te oortree. Nadere ontleding van hierdie begrip bring aan die lig dat die gedagte van buitestaatstelling wesenlik maar dieselfde is as die oorwegings wat die voorkomings- of selfs individuele afskrikkingsteorieë ten grondslag lê.

'n Sesde teorie wat ook as 'n verskyningsvorm van die utilitaristiese teorieë beskou kan word, is die sogenaamde "veroordelingsteorie". Die bekende Engelse term wat gebruik word as beskrywing van hierdie teorie is "*denouncement*". Soms word na hierdie teorie verwys as die "expressive theory of punishment".[4] Hiervolgens het straf ten doel die openbare uitdrukking van die gemeenskap se afkeur in die misdaadpleging. Sodoende word die gemeenskap in 'n sekere sin ook opgevoed, deurdat dit aan die gemeenskap duidelik gemaak word watter soort gedrag nie geduld sal word nie. Deur klem te lê op hierdie aspek van straf, word die gemeenskap se gramskap gekanaliseer weg van moontlike eierigting (persoonlike wraakuitoefening) deur die verontregte party.[5] Die gedagte van uitdruklike openbare veroordeling kan egter ook as 'n verskyningsvorm van vergelding beskou word, omdat die straf hiervolgens die misdadiger as persoon stigmatiseer as iemand wat verdien om gestraf te word.

Die doel van hierdie artikel is om aan te toon dat die bedenkinge wat daar (veral nog in Suid-Afrika) teen vergelding bestaan, grootliks ongeregverdig is; dat vergelding die enigste strafteorie is wat straf regstreeks koppel aan die waardigheid

---

4 Moore *Placing blame* (1997) (hierna Moore *Placing blame*) 84; Walker en Padfield *Sentencing: Theory, law and practice* (1996) 117; Feinberg "The expressive theory of punishment" in Duff en Garland (reds) *A reader on punishment* (1994) 71.

5 Moore *Moral worth* (vn 1)181; Moore *Placing blame* (vn 4) 84; Dressler *Criminal law* (vn 1) 13–14.

van die mens, die erkenning van die mens as 'n vrye outonome wese en die skuldvereiste in die strafreg, en dat die groot klem wat tans nog in Suid-Afrika op die relatiewe teorieë geplaas word, in beginsel gegrond is op 'n uitgediende positivistiese, kousaal-meganistiese siening van die mens.

3 DIE HERLEWING VAN VERGELDING AS REGVERDIGING VIR STRAF

Gedurende omstreeks die vyftiger- en sestigerjare was vergelding amper 'n vloekwoord in die Anglo-Amerikaanse reg. Die utilitaristiese teorieë, soos afskrikking en hervorming, het die septer geswaai as regverdiging vir straf.[6] Die groei in misdaadpleging het egter tot ontnugtering in die bestaande opvattings omtrent straf gelei. Vanaf omstreeks die sewentigerjare het die pendule in die VSA weg van die utilitaristiese teorieë na die vergeldingsteorie geswaai. Skrywers, howe en wetgewers het al hoe meer skepties geraak oor die aansprake van veral die hervormingsteorie, en die vroeëre afwysende houding teenoor die vergeldingsteorie het geleidelik plek gemaak vir 'n aanvaarding van baie van die waarhede vervat in hierdie teorie.[7] Miskien is die duidelikste aanduiding van die terugkeer van vergelding in die Verenigde State in die invloedryke *Minnesota Sentencing Guidelines* van 1982. Hierdie stel reëls lê 'n hof se wye diskresie by strafoplegging aan bande en lê voorgeskrewe strawwe neer, waarvan slegs in uitsonderlike omstandighede afgewyk mag word. Die komitee wat dit opgestel het, het uitdruklik verklaar dat vergelding "the primary sentencing goal" is.[8]

Omdat die woord "vergelding" verkeerdelik deur party mense bloot as wraakuitoefening gesien word, word die woord "verdienste" of "verdiende loon" ("just deserts") in die jongste tyd al meer as plaasvervangende term vir "vergelding" gebruik.[9]

Op die Europese vasteland is die klassieke strafreg, met sy klem op die mens se wilsvryheid en vergelding ('n stroming wat terugherlei kan word tot die denke van Kant en in 'n mindere mate ook Hegel), as gevolg van die opkoms van die

---

6 In *Williams v New York* (1949) 337 US 241 248 het die Amerikaanse Hooggeregshof nog verklaar: "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

7 Hampton "Correcting harms versus righting wrongs: the goal of retribution" 1992 *Univ of California LR* 1659 1659; Bainbridge "The return of retribution" 1985 *Am Bar Assoc J* 1985 (May) 61: "Retribution has returned to criminal justice. Rehabilitation is being passed over like a dish that didn't digest well . . . Liberals as well as conservatives appear to be learning that rehabilitation as we know it does not work." Sien ook Allen "The decline of the rehabilitative ideal" in Von Hirsch en Ashworth *Principled sentencing* (1992) 23–30; Ashworth (vn 3) 66; Moore *Placing blame* (vn 4) 83; Van der Merwe *Sentencing* (1991) 3–23.

8 Bainbridge (vn 7) 63; Sien ook die uitspraak van Davis R in *S v Jansen* 1999 2 SASV 368 (K) 375, waarin die geskiedenis van die *Minnesota Sentencing Guidelines* binne die konteks van 'n vertolking van a 51 van die Strafregwysigingswet 105 van 1997 bespreek word. Tereg verklaar die hof 375*b*: "The sentencing commission . . . decided upon a primary rationale for sentencing, namely desert". "Desert" ("verdiende loon") is maar slegs 'n eufemisme vir vergelding. Terloops moet genoem word dat daar nie met Cloete R saamgestem kan word nie wanneer hy in *S v Homareda* 1999 2 SASV 19 (W) 323*g* verklaar dat "the very reason for the enactment of a prescribed minimum sentence [in die bogemelde artikel 51 van die Strafregwysigingswet] is to act as a deterrent". Dat afskrikking een van meer redes kan wees vir die uitvaardiging van minimumstrawwe word nie ontken nie; wat ontken word is die houding dat vergelding geen oorweging by die invoering van minimumstrawwe in die gemelde a 51 was nie. Die *Minnesota Sentencing Guidelines* verskyn as *Annexure* 2 in Van der Merwe (vn 7).

9 Ashworth (vn 3) 66; Walker en Padfield (vn 4) 110.

natuurwetenskappe, veral die biologiese wetenskap, en die positivisme wat daaruit ontstaan het, in die loop van die negentiende eeu verdring deur 'n instrumentalistiese, meganistiese siening van die mens se plek in die samelewing. Hiervolgens is die mens beskou as iemand wie se lewe gedetermineer is deur erflike, biologiese aanleg en omgewingsfaktore. In plaas van die skuld en vergelding, is die klem geplaas op beveiliging van die samelewing. Die Belg Prins, die Nederlander Van Hamel en veral die Duitser von Liszt was invloedryke figure in hierdie beweging.[10] In die loop van die negentiende eeu het die positivisme egter sy houvas op Europa verloor. Die Nederlander Leo Polak, byvoorbeeld, het reeds aan die begin van die twintigste eeu die hervestiging van die vergeldingsgedagte as regverdiging vir straf bepleit.[11]

Ruimte ontbreek om binne die bestek van hierdie artikel die Suid-Afrikaanse regspraak omtrent die regverdiging vir straf, en die (enigsins afwysende) houding teenoor vergelding deur die Suid-Afrikaanse howe in enige besonderhede te bespreek.[12] Ook die netelige vraag of 'n moontlike herlewing van vergelding daartoe behoort te lei dat die doodstraf heringestel behoort te word, kan, weens die omvang van hierdie vraag, nie in hierdie artikel bespreek word nie.

4 DIE VERSKILLENDE GEDAANTES VAN VERGELDING

Vergelding het deur die eeue en in verskillende kultuurgemeenskappe nie altyd dieselfde vir alle mense beteken nie. Dit is een van die redes waarom daar dikwels misverstand is oor wat die begrip behels, en kritiek teen die vergeldingsteorie soms misplaas is omdat dit op 'n wanbegrip van die inhoud van die teorie berus. Die verskillende betekenisse van vergelding wat hieronder geïdentifiseer sal word, kan nie in waterdigte kompartemente ingedeel word nie; daar is gevolglik 'n onvermydelike mate van oorvleueling tussen hulle. Daar sal nietemin, in belang van 'n wetenskaplike ontleding van die begrip, gepoog word om die verskillende betekenisse sover moontlik uit mekaar te hou.

4 1 Vergelding as wraakuitoefening

Daar is eerstens die siening van vergelding as niks anders as wraakuitoefening nie. Dit is seker die oudste betekenis wat die begrip "vergelding" dra. Hierdie betekenis kan teruggevoer word tot die Ou Testamentiese gedagte van 'n oog vir 'n oog en 'n

---

10 Remmelink "De wetenschappelijke betekenis van Leo Polak voor het strafrecht 1968 *Tijdschrift voor Strafrecht* (hierna Remmelink *Polak*) 115 116–117; Maurach en Zipf *Strafrecht Allgemeiner Teil Teilband I. Grundlehren des Strafrechts un Aufbau der Straftat* (1983) 70–79; Jescheck en Weigend *Lehrbuch des Strafrechts. Allgemeiner Teil* (1996) 72–75.

11 Polak *De zin der vergelding* (1947) *passim*. Vir 'n bespreking van Polak se standpunt, sien Van Bemmelen en Van Veen *Het materiële strafrecht: Algemeen deel* (1994) 18–19; Remmelink (vn 10) *passim*, maar veral 121–123; Remmelink *Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandsche strafrecht* (1995) (hierna Remmelink *Strafrecht*) 891–892.

12 Sien oor die algemeen die besprekings, met verwysings na die regspraak, in Terblanche *The guide to sentencing in South Africa* (1999) (hierna Terblanche *Sentencing*) hfst 6, veral 190–197, 198–200; Van der Merwe (vn 7) 3–17; en Rabie, Strauss en Maré *Punishment. An introduction to principles* (1994) hfst 5 en 6. Sien verder Terblanche: "Die oogmerk van vergelding uit die oogpunt van die Konstitusionele Hof" (hierna Terblanche *Vergelding*) 1996 *THRHR* 267, waarin op 268–269 geregverdigde kritiek uitgespreek word teen Didcott R se stelling in *S v Makwanyane* 1995 2 SASV 1 (KH) 72*i* "that retribution smacks too much of vengeance to be accepted . . . as a worthy purpose of punishment in the enlightened society to which we South Africans have now committed ourselves . . ." Soos hieronder onder punt 4.1 aangetoon sal word, word vandag allerweë aanvaar dat vergelding iets anders as wraakuitoefening is.

tand vir 'n tand, ook bekend as die *lex talionis*.[13] Hier val die klem op straf as uiterlike gedrag wat 'n spieëlbeeld van die werklik gepleegde misdaad moet wees. Soms word na hierdie gedagte verwys as "assaultive retribution", "public vengeance" of "societal retaliation".[14] Sir James Stephen het byvoorbeeld verklaar dat gestraf moet word

> "for the sake of gratifying the feeling of hatred – call it revenge, resentment, or what you will – which the contemplation of such [criminal] conduct excites in healthy constituted minds", en dat "the feeling of hatred and the desire of vengeance . . . are important elements of human nature which ought . . . to be satisfied in a regular public and legal manner".[15]

Hierdie betekenis van die begrip moet verwerp word.[16] Straf kan geregverdig word selfs indien die slagoffer glad nie eens omgee of die oortreder gestraf word of nie, of indien die slagoffer selfs teen strafoplegging gekant is. Die houding van die slagoffer is dus nie noodwendig relevant nie, en daarom kan vergelding nie beperk word tot wraak nie. Dit is onmoontlik om die rykdom van betekenis wat in die begrip vergelding opgesluit lê, tot wraakuitoefening te beperk.

4 2 Vergelding as boetedoening

Tweedens is daar die opvatting dat vergelding neerkom op boetedoening of goedmaking ("expiation" of "atonement") van die gepleegde wandaad. Volgens hierdie betekenis van vergelding, wat veral deur Hegel voorgestaan is, is vergelding 'n manier waarop die onreg wat deur misdaadpleging geskied het, reggestel of uitgewis word. Misdaad is volgens Hegel 'n negering of loëning van die reg, maar straf is op sy beurt weer die negering van hierdie negering. Straf is dus die regstelling van 'n wandaad. Straf kanselleer die onreg en herstel die oppergesag van reg en geregtigheid.[17]

Foucault beweer dat hierdie siening van straf daarop neerkom dat die misdaadpleging weer op die een of ander manier uitgevoer of "heropgevoer" word op die oortreder se liggaam ten einde die kwaad wat die oortreder aangerig het, uit te wis.[18] Dit is 'n ekstreme opvatting wat slegs op 'n baie abstrakte, simboliese vlak gehandhaaf kan word, omdat die meeste misdade van so 'n aard is dat dit tog nie op die oortreder se liggaam heruitgevoer kan word nie.[19]

---

13 Genesis 9:6; Eksodus 21: 23–25: "As sy blywend beseer is, is die straf: 'n lewe vir 'n lewe,'n oog vir 'n oog,'n tand vir 'n tand, 'n hand vir 'n hand, 'n voet vir 'n voet, 'n brandwond vir 'n brandwond, 'n wond vir 'n wond en 'n kneusplek vir 'n kneusplek."

14 Dressler *Criminal law* (vn 1) 12.

15 Stephen *Liberty, equality, fraternity* (1967) 152, soos aangehaal in Moore *Moral worth* (vn 1) 180–181.

16 Terblanche *Vergelding* (vn 12) 269–270; Terblanche *Sentencing* (vn 12); Van der Merwe (vn 7) 3–7–3–18; Moore *Moral worth* (vn 1) 180; Moore *Placing blame* (vn 4) 88; Rabie, Strauss en Maré (vn 12) 23.

17 Hegel *Grundlinien der Philosophie des Rechts* (vol 7 van *Werke in zwanzig Bänd*en) (1970) par 99: "Die Verletzung dieses als eines daseienden Willens also ist das Aufheben des Verbrechens, das sonst gelten würde, und ist die Wiederherstellung des Rechts." Sien ook par 101. Vir 'n bespreking van Hegel se standpunt, sien Jakobs *Strafrecht: Allgemeiner Teil* (1993) 17–19; Roxin *Strafrecht: Allgemeiner Teil* (1994) 141. Walker en Padfield (vn 4) 113 verklaar dat hierdie soort regverdiging vir straf bloot simbolies van aard is.

18 Foucault *Discipline and punish: the birth of the prison* (1977) 3–16.

19 In 'n samelewing soos dié in Suid-Afrika waar die doodstraf en lyfstraf nie meer bevoegde strawwe is nie, kan die opvatting slegs tov die misdade menseroof en diefstal van geld letterlik as korrek aanvaar word.

Die volgende siening kan beskou word as 'n afgewaterde weergawe van hierdie opvatting van vergelding: deur 'n misdaad te pleeg, verkry of wys die oortreder dat hy die slagoffer se meerdere is en hom domineer. Straf trek die oortreder weer "af na ondertoe" en kanselleer sodoende die oortreder se dominasie van die slagoffer.[20] Straf is dus 'n uitdrukking van solidariteit met die slagoffer. Deur misdaadpleging stuur die misdadiger 'n boodskap aan die slagoffer dat hy die slagoffer se meerdere is en hom minag. Deur te straf word hierdie vernederende boodskap uitgewis en die misdadiger en slagoffer weer op 'n gelyke voet met mekaar geplaas. Die boodskap wat die straf uitstuur is: jy (die misdadiger) is nie die slagoffer se meerdere nie.[21]

Soms word daar in hierdie verband geargumenteer dat as die regsorde nie optree en die oortreder straf nie, die verontregte party of sy vriende of familie die reg in eie hande sal neem en self wraak sal neem. Hierdie argument is egter 'n utilitaristiese argument, gerig op die bereiking van 'n doel in die toekoms, en dus nie suiwer 'n uitvloeisel van die vergeldingsgedagte nie.[22]

4 3 Vergelding as handhawing van geregtigheid

Derdens is daar die opvatting dat vergelding neerkom op die handhawing van geregtigheid, omdat straf die oortreder se morele verdienste is. Hierdie opvatting van vergelding bring 'n mens veel nader aan wat na my mening die aanvaarbaarste siening van vergelding is.

Hierdie siening van vergelding beklemtoon die feit dat straf noodsaaklik is ten einde geregtigheid te handhaaf. Word die oortreder bewustelik nie gestraf nie, is die res van die samelewing en veral die beamptes wat belas is met die handhawing van die reg, aandadig in die onreg wat gepleeg is. Wat nou hiermee saamhang, is die belangrike begrip van "morele verdienste", wat deur menige voorstaander van vergelding sterk op die voorgrond geplaas word.

Om onskuldiges te straf is 'n onreg. Dit is nie eers nodig om to soek na utilitaristiese argumente om hierdie vanselfsprekende waarheid te onderskraag nie. Dog om oortreders ongestraf te laat is net so 'n groot onreg as om onskuldiges te straf. Hoekom, vra Moore[23] moet nog na utilitaristiese argumente gesoek word om hierdie vanselfsprekende waarheid te verklaar?[24] Om misdaad ongestraf te laat, is om dit te kondoneer, of minstens te duld. Vergelding is, eenvoudig soos wat dit mag klink, eenvoudig 'n erkenning van die beginsel dat misdaadpleging sonder strafoplegging 'n ontkenning van die hele bestaansgrond van die strafreg is.

---

20 Fletcher *Basic concepts of criminal law* (1998) (hierna Fletcher *Basic concepts*) 38.

21 Fletcher "What is punishment imposed for?" 1994 *J of Contemporary Legal Issues* 101 (hierna Fletcher *Punishment*) 110: "Punishment expresses solidarity with the victim and seeks to restore the relationship of equality that antedated the crime . . . The failure of the state to come to the aid of victims, as expressed in a refusal to invoke the institutions of prosecution and punishment, generates moral complicity in the aftermath of the crime. The failure to punish implies continuity in the criminal's dominance over the victim. Not only the criminal can trigger a relationship of dominance and subservience. The state can effect the same relationship by failing to invoke the customary institutions of arrest, prosecution and punishment." Sien ook Dressler "Hating criminals: how can something that feels so good be wrong?" 1990 *Michigan LR* 1448 (hierna Dressler *Hating criminals*) 1455.

22 Moore *Moral worth* (vn 1) 181; Lensing *Amerikaans strafrecht: Een vergelijkende inleiding* (1996) 37.

23 *Moral worth* (vn 1) 185.

24 Fletcher *Punishment* (vn 21) 110: "[P]unishment is imposed in order to avoid the evil of not punishing." Nieboer *Schets materieel strafrecht* (1991) 9–10: "Het opleggen van een straf betekent hier alleen maar het waar maken van die bedreiging."

4 4 Vergelding as herstel van geskonde juridiese ewewig

In die vierde en laaste plek is daar die opvatting dat vergelding die herstel van 'n geskonde juridiese ewewig is. Daar word aan die hand gedoen dat hierdie opvatting die aanneemlikste beskrywing van die wese van vergelding is. Dit word deur 'n hele aantal moderne skrywers, veral in die VSA gehuldig, alhoewel daar wel sekere klemverskille tussen skrywers is. Onder die hoof wat volg, word hierdie opvatting in meer besonderhede beskryf.

5 VERGELDING AS HERSTEL VAN GESKONDE JURIDIESE EWEWIG IN MEER BESONDERHEDE

Een van die invloedrykste Amerikaanse apologete van vergelding is Herbert Morris.[25] Sy siening van vergelding, wat al beskryf is as "beskermende vergelding" ("protective retribution"),[26] behels die volgende: Die regsorde verleen aan elkeen in die samelewing sekere voordele, terwyl dit tegelykertyd elkeen ook met sekere verpligtinge belas. Die menslike samelewing is 'n sisteem waarin daar 'n wederkerige verhouding tussen voor- en nadele is. Die voordele wat 'n individu geniet, is dat ander mense sy reg op sekere waardes, soos lewe, liggaamlike integriteit en eiendom, respekteer en hulle daarvan weerhou om daarop inbreuk te maak. Die bestaan van hierdie voordele is egter slegs moontlik indien die reg tegelykertyd elkeen in die samelewing ook belas met die verpligting om hulle daarvan te weerhou om op die waardes wat vir ander kosbaar is, inbreuk te maak. Die voordele wat iemand uit die regsisteem kry, het dus 'n prys, en dit is die opofferings wat elke lid van die gemeenskap bereid moet wees om te bring. Elkeen moet selfbeheersing aan die dag lê en hom van die gemelde skadelike gedrag weerhou. As almal selfbeheersing aan die dag lê en niemand anders skade berokken nie, is daar ewewig in die samelewing, want elkeen word in 'n gelyke mate bevoordeel en belas. Die twee bakke in die skaal van geregtigheid weeg dan ewe veel.[27]

As iemand egter vrywillig nalaat om selfbeheersing aan die dag te lê, terwyl hy in staat is om dit te doen, doen hy afstand van sy verpligting en verkry sodoende 'n onregverdige voorsprong bo diegene wat hulle wel dissiplineer. Hy doen afstand van 'n las wat ander vrywilliglik op hulle neem, en kry sodoende 'n voordeel wat ander mense, wat die las respekteer, nie het nie. Hy word dan 'n "gratis passasier" ("free rider"). Sodoende versteur hy die ewewig in die skaal. Hy geniet dan die voordele van die sisteem sonder om ook sy verpligtinge na te kom.[28]

Die reg duld nie dat iemand 'n voordeel verkry uit die pleging van 'n onreg nie. By implikasie stuur die oortreder 'n boodskap aan die slagoffer en die gemeenskap dat sy regte en begeertes meer waardevol is as dié van ander. Hy het nou 'n skuld of rekening wat hy aan die samelewing moet betaal. Deur sy rekening te betaal word die versteurde ewewig in die skaal van geregtigheid weer herstel. Die "telling word weer gelykop gemaak".[29] Implisiet in hierdie redenasie is die idee van "uitdelende

---

25 Morris *On guilt and innocence* (1976) 31–50. Sien ook die opsommende uiteensetting van Morris se beskouings in Falls "Retribution, reciprocity, and respect for persons" 1987 *Law and Philosophy* 25 27–30; Lensing (vn 22) 30; Dolinko "Three mistakes of retributivism" 1992 *Univ of California LR* 1623 1644 en Dressler *Hating criminals* (vn 21) 1452.

26 Dressler *Hating criminals* (vn 21) 1452.

27 Morris (vn 25) 32–33.

28 *Idem* 33–34.

29 Murphy (vn 1) 100.

geregtigheid" (*iustitia distributiva* of "distributive justice"),[30] wat reeds deur Aristoteles[31] en Thomas Aquinas[32] uiteengesit is. Dit behels dat voordele en verpligtinge gelyk verdeel word.

Jean Hampton se opvattings kan beskou word as 'n verdere verfyning van dié van Morris. Volgens haar behoort die werking van vergelding beperk te word tot situasies waarin daar as gevolg van die misdaadpleging "morele skade" is, dit wil sê waar die slagoffer se menswaardigheid geskend word. Vergelding is volgens haar die herstel van die erkenning van die slagoffer se menswaardigheid ("re-establishment of the acknowledgement of the victim's worth").[33] Die straf handhaaf ("vindicates") die slagoffer se menswaardigheid, wat deur die oortreder geskend is. Deur die pleging van die misdaad stuur die oortreder 'n boodskap uit dat hy die slagoffer se meerdere is. Deur straf te ondergaan, word 'n gebeurtenis gekonstrueer wat hierdie boodskap repudieer en sodoende die oortreder en slagoffer se menswaardighede weer gelykstel. Die oortreder kan weer met 'n "skoon bladsy" sy lewe voortsit. Hy kan sy medemens weer in die oë kyk omdat hy sy skuld betaal het en weer gelyk is met sy medemens.

Sendor[34] bou voort op die opvattings van Morris en Hampton en ontwerp 'n siening van vergelding wat hy noem "herstellende vergelding" ("restorative retribution"). Volgens hom is die wese van vergelding die herstel van geskonde sosiale verhoudings, en meer bepaald die herstel van die beteueling wat 'n kenmerk van geslaagde sosiale verhoudings is ("the restoration of relations of restraint"). In normale, ideale sosiale verhoudings beteuel of dissiplineer 'n mens sy optrede teenoor ander lede van die gemeenskap. Misdaadpleging is 'n skending van hierdie beteueling of in-toom-houding van die sosiale ewewig, en wel in die volgende drie opsigte: Eerstens matig die oortreder hom beheer aan oor 'n ander se regte, of gee voor om dit te doen. Tweedens stuur hy 'n boodskap uit dat ander se regte nie belangrik genoeg is in verhouding tot die misdadiger se eie regte of belange nie en sodoende verlaag misdaadpleging die waarde van hierdie regte relatief tot die misdadiger se eie belange of regte. Derdens veroorsaak die misdaadpleging onveiligheid of 'n gevoel van onveiligheid aan die kant van sowel die slagoffer as die gemeenskap, omdat hulle voel dat die beskerming van hulle regte in gevaar verkeer. (Hierdie siening behoort goed bekend te wees by die meeste Suid-Afrikaners, omdat hulle die afgelope tyd in 'n gemeenskap leef wat swaar gebukkend gaan onder misdaadpleging.)

Deur vergelding tree die gemeenskap volgens Sendor dus eerstens op om die aanmatiging deur die oortreder van beheer oor die misdadiger se regte te verydel. Tweedens bevestig die gemeenskap deur strafoplegging die verwerping en mislukking van die misdadiger se boodskap wat hy by implikasie deur die misdaadpleging uitstuur (naamlik dat die slagoffer se regte of belange nie belangrik genoeg is om gerespekteer te word nie). Derdens word deur strafoplegging daarna gestreef

---

30 Lensing (vn 22) 31; Aranella (vn 1) 1534.

31 Aristoteles *Ethica Nicomachea* (vertaal in Engels deur Ross) 1966 (vol IX van *The works of Aristotle translated into English*) V 1131b ev: "The just, then, is a species of the proportionate . . . This, then, is what the just is – the proportional; the unjust is what violates the proportion."

32 *Summa Theologiae* ii–ii Q 61, 68. Sien die uiteensetting van Aquinas se beskouings in hierdie verband deur Middleton *Judicial considerations concerning the imposition of criminal punishment*, ongepubliseerde LLD-proefskrif, UNISA (1983) 145–147.

33 Hampton (vn 7) 1686.

34 "Restorative retribution" 1994 *J of Contemporary Legal Issues* 323 337–343 350–357.

om die gevoel van onveiligheid by sowel die slagoffer as die gemeenskap uit te skakel of minstens teen te werk.[35]

Vir Sendor is vergelding nie, soos Morris aanvoer, die herstel van ewewig tussen voordele en opofferings nie, maar eerder die herstel van die "relationship of restraint". Die sosiale skade is geleë in die feit dat die oortreder hom beheer oor ander mense se belange aanmatig en sodoende die waarde van die gemelde belange van ander in verhouding tot sy eie belange verlaag, wat daartoe lei dat daar gevaar vir sowel die slagoffer as die gemeenskap se veiligheid ontstaan.[36]

Daar word aan die hand gedoen dat hierdie drie skrywers se opvattings oor vergelding daarin slaag om tot die kern van die begrip deur te dring. Vir sover hulle van mekaar verskil is die verskille bloot klem- of terminologiese verskille. "Herstellende vergelding" is 'n uitdrukking wat die ware werking van vergelding goed tipeer.

6 DIE INVLOED VAN KANT

Wat onmiddellik opval indien 'n mens die kommentare oor vergelding (en veral dié besprekings waarin die idee van herstellende vergelding gepropageer word) in die VSA bestudeer, is die sterk invloed wat die denke van die agtiende-eeuse Duitse filosoof van die Verligting, Immanuel Kant, op die denke omtrent strafregteorieë in die VSA uitgeoefen het.

Volgens Kant kan daar net een regverdiging vir straf wees, en dit is vergelding. Hy verklaar dit soos volg: Die enigste oorspronklike reg waarmee elke mens beklee is uit hoofde van sy menslikheid, is die reg op vryheid, mits hy hierdie reg op so 'n manier uitoefen dat hy nie inbreuk maak op ander mense se reg op hulle vryheid nie. 'n Mens behoort slegs op te tree ooreenkomstig 'n beginsel wat hy tegelykertyd kan begeer om 'n universele beginsel te wees, dit wil sê 'n beginsel wat op almal in die samelewing van toepassing is. Dit is 'n universele wet.[37] Omgekeerd is 'n handeling verkeerd indien die handeling 'n ander mens of ander mense se vrye keuse-uitoefening aan bande lê, omdat dit dan onversoenbaar is met die universele wet. Indien iemand verkeerd optree soos pas beskryf, het die persoon teen wie die verkeerde optrede gerig is, 'n reg om hom te verset teen sodanige wederregtelike handeling, soos wanneer 'n aangevallene in noodweer teen 'n aggressor optree.[38]

Dat elke mens 'n reg op vryheid het en op die manier so pas beskryf uitgeoefen moet word, is vir Kant 'n universele wet, of, om Kant se eie beroemde uitdrukking te gebruik, 'n "kategoriese imperatief". 'n Handeling is reg indien die dader se vrye keuse-uitoefening versoenbaar is met hierdie universele wet. Die straf wat die staat oplê en uitvoer, is volgens Kant selfverdediging in die naam van die burgerlike gemeenskap, ten einde te verseker dat elke mens se reg op vryheid staande bly.[39]

---

35 Sendor (vn 34) 341–342, 350.

36 *Idem* 354.

37 Kant *Die Metaphysik der Sitten, Werkausgabe*, vol 8 (1977) 339: "Eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetze zusammen bestehen kann." Sien ook 338: "Also ist das allgemeine Rechtsgesetz: handle äusserlich so, dass der freie gebrauch deiner Wilkür mit der Freiheit von jedermann nach einem allgemeinen Gesetze zusammen bestehen könne, zwar ein Gesetz, welches mir eine Verbindlichkeit auferlegt, aber ganz und gar nicht erwartet, noch weniger fordert."

38 *Idem* 343.

39 Byrd "Kant's theory of punishment: Deterrence in its threat, retribution in its execution" 1989 *Law and Philosophy* 152 169–170 186.

Vergelding is niks anders as 'n aspek van geregtigheid nie. Dit is die middel waardeur die kategoriese imperatief en die universele wet gehandhaaf word. Utilitarisme word deur Kant verwerp omdat dit in stryd is met die grondbeginsel van menslike waardigheid, wat vereis dat 'n ander nooit as 'n middel tot 'n verdere doel gebruik mag word nie, maar slegs as 'n doel op sigself.[40]

7 VERGELDING EN WILLEKEURIGE GEDRAG

Ontleed 'n mens beskouings oor vergelding van skrywers soos Morris, Hampton en Sendor, is daar enkele belangrike implikasies wat die vergeldingsgedagte inhou waarop die aandag gevestig moet word.

Die eerste implikasie is dat daar 'n verband bestaan tussen die vergeldingsteorie, enersyds en die vereiste van willekeurige gedrag wat vir strafregtelike aanspreeklikheid gestel word, dit wil sê die vereiste dat die oortreder in staat moes gewees het om sy liggaamlike bewegings deur sy verstand of wil te beheer, andersyds.[41] Volg 'n mens die relatiewe teorieë, is dit denkbaar dat iemand 'n straf opgelê kan word al was sy gedrag nie willekeurig nie. Dit is veral die geval indien die hervormingsteorie toegepas word. As iemand in die loop van byvoorbeeld 'n slaapwandeling of 'n epileptiese aanval 'n ander se liggaamlike integriteit skend, kan hy volgens die hervormingsteorie kwalifiseer vir terapeutiese behandeling in 'n poging om hom van sy kwaal te genees, ten spyte van die feit dat hy die skending van iemand anders se liggaamlike integriteit nie kon verhoed het nie.[42]

8 VERGELDING VERONDERSTEL DIE SKULDVEREISTE IN DIE STRAFREG

'n Belangrike implikasie van die aanvaarding van die vergeldingsbegrip, en veral van vergelding in die betekenis van "herstellende vergelding" soos hierbo uiteengesit, is dat niemand aan 'n misdaad skuldig bevind mag word nie tensy hy persoonlik verwytbaar vir sy wederregtelike gedrag is.

Dit beteken dat die persoon wat die juridiese balans in die samelewing versteur het, *vrywillig* moes besluit het om dit te doen en *in staat* moes gewees het om hom van die misdadige gedrag te weerhou. Die regsorde moes redelikerwys van hom *kon verwag* het om hom van die inbreukmaking te weerhou. Ontoerekeningsvatbares, soos jong kinders of geestesversteurdes, sal derhalwe nie tot verantwoording geroep kan word nie. Dieselfde geld vir mense wat die inbreukmakende handeling verrig het terwyl hulle byvoorbeeld nie geweet het dat 'n omstandigheid wat 'n wesenlike voorvereiste vir aanspreeklikheid vir 'n bepaalde misdaad is, bestaan het nie, of indien hulle weens byvoorbeeld dwanguitoefening nie vrylik kon kies tussen die pleeg van die skadeveroorsakende handeling en weerhouding daarvan nie.[43] Die hele

---

40 Vir 'n bespreking van Kant se opvattings, sien oor die algemeen Byrd (vn 39) *passim*; Hampton (vn 7) 1667–1670; Murphy (vn 1) 82–92 229 232; Jescheck en Weigend (vn 10) 70; Maurach en Zipf (vn 10) 71–72; Jakobs (vn 17) 16–17.

41 Sien omtrent die vereiste van willekeurige gedrag in die strafreg Snyman *Strafreg* (1999) 55–57; Burchell en Hunt *South African criminal law and procedure, vol I, general principles of criminal law* (1997) 41–43.

42 Morris (vn 25) 40–41 43.

43 Falls (vn 25) 39.

vergeldingsbegrip is onlosmaaklik gekoppel aan die skuldvereiste in die strafreg. Die een kan nie sonder die ander bestaan nie.[44]

Hierdie onlosmaaklike koppeling word duidelik indien in gedagte gehou word dat volgens die vergeldingsbegrip straf die oortreder se *verdiende loon* is.[45] Dit is nie vergesog nie om te beweer dat die oortreder "self die straf op hom gebring het".[46] Terwyl die idee van "verdiende loon" een van die hoekstene van vergelding is, is daar binne die relatiewe strafteorieë geen ruimte vir hierdie begrip nie.[47] Utilitaristiese beskouings oor die regverdiging van straf is gegrond op 'n deterministiese uigangspunt omtrent die plek van die mens in die samelewing. Die mens word by strafoplegging bloot gebruik as 'n instrument ter bereiking van 'n verdere doel, naamlik die ordening van die samelewing. Hy word nie gesien as 'n outonome morele wese wat 'n keusevryheid het wat hy aan die hand van sekere norme uitoefen nie. Binne die utilitaristiese paradigma is daar geen of min ruimte vir 'n skuldgevoel, of 'n vereiste van morele blaamwaardigheid as algemene voorvereiste vir strafregtelike aanspreeklikheid.

Verwerp 'n mens die idee van die mens as 'n vrye outonome wese wat verantwoordelik gehou kan word vir sy keuses, en aanvaar 'n mens die utilitaristiese alternatief, val die klem op afskrikking en hervorming. Deur afskrikking gebruik jy jou medemens as 'n middel tot 'n doel, en deur hervorming dwing jy hom in 'n terapeutiese of mediese model: die oortreder word beskou as 'n "siek" mens wat deur terapie (behandeling) weer "gesond" gemaak moet word. Dit lei tot 'n depersonalisering van die mens. Die mens word 'n objek vir gedragsmodifikasie, en word 'n pion in die hande van die sosiale wetenskappe.[48] Die owerheid se houding teenoor die onderdaan is paternalisties.[49]

Hierdie aspek van die vergeldingsbegrip is belangrik. Volg 'n mens die relatiewe teorieë, is dit denkbaar dat straf geregverdig kan word selfs in gevalle waar die wederregtelike handeling nie met skuld gepaard gegaan het nie. 'n Hof kan 'n individu of die samelewing as geheel van misdaadpleging *afskrik* selfs deur skuldlose daders te straf, soos mense wat nie self die verbode misdadige handeling verrig het nie, maar wat familie of naasbestaandes van die werklike daders is.[50] Insgelyks kan 'n hof wat hom blindstaar teen die hervormingsteorie of die individuele afskrikkingsteorie, besluit om selfs 'n skuldlose dader te straf, ten einde hom "op

---

44 Remmelink *Polak* (vn 10) benadruk dat indien 'n mens die hervormingsteorie volg, dit nie meer nodig is om 'n verskil tussen misdadigers en geestesiekes te maak nie; Rabie, Strauss en Maré (vn 12) 50; Taylor "Retribution, responsibility and freedom: the fallacy of modern criminal law from a Biblical-Christian perspective" 1981 *Law and Contemporary Problems* 50 57–65; Dolinko (vn 25) 1626. In *Tison v Arizona* 481 US 139 (1987), 95 L Ed 127 139 het die hof verklaar: "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."

45 Moore *Placing blame* (vn 4) 83; Falls (vn 25) 39 45; Murphy (vn 1) 229 Moore *Placing blame* (vn 4) 83; Falls (vn 25) 39 45; Murphy (vn 1) 229.

46 Murphy (vn 1) 100–102; Aranella (vn 1) 1534: "Deontological retributivists tend to view the criminal law as a system of authoritative norms that bind together a community of rational moral agents who must be treated with dignity and respect. Criminal liability requires a demonstration of the actor's moral desert because the purpose of criminal punishment is to give criminals their 'just desert'."

47 Aranella (vn 1) 1611; Taylor (vn 44) 60–63.

48 Taylor (vn 44) 75 praat van "slaves of the therapeutic state".

49 Dolinko (vn 25) 1642; Taylor (vn 44) 57 62.

50 Taylor (vn 44) 57; Ashworth (vn 3) 61.

te voed" deur hom te leer waar hy gedwaal het (dws 'n verkeerde voorstelling van omstandighede gehad het).[51]

Indien 'n dader per ongeluk iets verkeerd gedoen het, of indien hy iemand is wat 'n geneigdheid openbaar om sekere verkeerde dade te doen, is dit denkbaar dat 'n toepassing van die hervormingsteorie daartoe kan lei dat hy beveel word om terapeutiese behandeling te ondergaan in 'n poging om sy geneigdheid om ongelukke te maak, uit te skakel. Indien hy dus wel toerekeningsvatbaar is maar kleptomaniese of psigopatiese neigings openbaar, is dit denkbaar dat hy ingevolge die hervormingsmodel vir terapeutiese behandeling na 'n inrigting verwys word selfs al is daar nie bewys dat hy hom werklik aan 'n misdaad skuldig gemaak het nie. Die vergeldingsteorie is en bly gevolglik die enigste teorie wat straf regstreeks in verband bring met 'n reeds gepleegde misdaad.

9 VERGELDING AS ERKENNING VAN MENSLIKE WAARDIGHEID

Daar is 'n onlosmaakbare verband tussen die vergeldingsteorie en die erkenning van die waardigheid van die mens. Dieselfde kan nie van die relatiewe teorieë gesê word nie.[52] Die vergeldingsteorie, anders as die relatiewe teorieë, behandel die oortreder nie as 'n instrument ter bereiking van die een of ander doel in die toekoms (soos afskrikking of voorkoming) nie, maar eerbiedig die Kantiaanse oproep dat 'n medemens behandel moet word as 'n doel op sigself. Kant se mensbeskouing, wat 'n groot invloed uitgeoefen het op die konstruksie van 'n humanistiese vergeldingsbegrip, behels dat dit nie 'n individu se fisieke krag, intelligensie, aanleg of vaardigheid is waaraan sy waarde gekoppel is nie, maar dat sy waarde spruit bloot uit sy menslikheid, *iets wat alle mense in gelyke mate besit*.[53]

Veral die hervormingsteorie kan gekritiseer word op grond daarvan dat dit die oortreder nie as 'n vrye, outonome mens behandel nie, maar as iemand wat sonder 'n bewuste wilskeuse "siek" is en soos enige ander siek mens deur ander mense "behandel" moet word totdat hy weer gesond is. As iemand ingevolge hierdie terapeutiese model 'n ander behandel vir 'n kwaal, is die persoon wat behandel word normaalweg nie verantwoordelik vir sy kwaal nie. Die besluit om iemand te "behandel", impliseer nie noodwendig dat die persoon wat behandel word enigsins verwytbaar is vir sy verkeerde daad nie. Van verwyt en skuld kan daar immers slegs sprake wees as iemand die geestesvermoëns gehad het om te kan kies tussen reg en verkeerd en ooreenkomstig so 'n insig kon opgetree het, en toe besluit het om die verkeerde in plaas van die regmatige handeling te verrig. Verwytbaarheid veronderstel met ander woorde menslike wilsvryheid.

Die terapeutiese model funksioneer anders as die vergeldingsmodel. In plaas van verwyt, het 'n mens eerder medelye met die persoon wat "behandel" word, net soos ons medelye het met 'n dier wat vir 'n besering behandeling moet ondergaan. Die kwaal hoef geensins te spruit uit 'n vrye keuse van die persoon wat behandel word nie. Die samelewing het hom nie toegelaat om self te besluit wat met hom moet gebeur nie. Die terapeutiese model impliseer dus nie respek vir die morele status van 'n individu nie. Die beskuldigde is bloot 'n objek of 'n lewelose voorwerp wat (soos 'n mens met 'n dier maak) gemanipuleer of gekondisioneer moet word. Dit is nie die

---

51 Sien hieroor veral Hart *Punishment and responsibility* (1968) 1–27.
52 Hampton (vn 7) 1692.
53 Sien die bespreking van Kant se standpunt deur Hampton (vn 7) 1692.

oortreder se vrye wilsuitoefening waaraan erkenning gegee word nie, maar die wil van 'n ander, naamlik die owerheidsinstansies wat die straf oplê en uitvoer. Hierdie degradering van die mens tot 'n blote rat in 'n masjien is die gevolg van die invloed van die natuurwetenskappe op die geesteswetenskappe, waaronder ook die regswetenskap. Daar word geglo dat gedragsmodifikasie deur gedragsterapeute van die oortreder 'n ander mens sal maak.[54] Treffend verklaar Morris[55] in hierdie verband:

> "[I]n the therapy world nothing is earned and what we receive comes to us through compassion, or through a desire to control us. Resentment is out of place. We can take credit for nothing but must always regard ourselves . . . as fortunate recipients of benefits or unfortunate carriers of disease who must be controlled. We know that within our own world human beings who have been so regarded and who come to accept this view of themselves come to look upon themselves as worthless."

Selfs buite die terapeutiese model (dws die hervormingsteorie) funksioneer die voorkomings- en algemene afskrikkingsteorie binne 'n deterministiese wêrelsbeskouing waarin daar vir menslike wilsvryheid en derhalwe waardigheid nie plek is nie: Die oortreder word gemanipuleer deurdat hy as 'n gedepersonaliseerde instrument gebruik word om ander af te skrik van misdaadpleging en om sodoende misdaadpleging te probeer voorkom.

Die utilitarisme impliseer dat vir sover 'n mens 'n waarde het, dit gekoppel is aan sy nuttigheid of die funksie wat hy in die samelewing vervul. Deur, soos die voorstaanders van vergelding redeneer, die klem te plaas op verdiende loon, word die mens erken as iemand wat 'n waarde het wat heeltemal onafhanklik is van sy nuttigheid.[56]

Hierdie verband tussen vergelding en menslike waardigheid lei daartoe dat Morris self so ver gaan as om te verklaar dat die vergeldingsteorie impliseer dat 'n oortreder *'n reg het om gestraf te word*, want deurdat hy gestraf word, word sy menswaardigheid erken.[57] Die misdadiger baat deur gestraf te word en sy straf uit te dien, want sodoende vereffen hy sy rekening teenoor die samelewing en kan hy weer daarnatoe terugkeer en sy medemens in die oë kyk omdat hy nou weer sy gelyke is. Om hom nie te straf nie, beteken dat hy die geleentheid ontsê word om weer op 'n gelyke voet met sy medeburgers te kom.[58] In dieselfde trant verklaar Moore:[59]

> "We are justified in punishing because and only because offenders deserve it. Moral responsibility ('desert') in such a view is not only necessary for justified punishment, it is also sufficient. Such sufficiency of justification gives society more than merely a *right* to punish culpable offenders. It does this, making it not unfair to punish them, but retributivism justifies more than this. For a retributivist, the moral responsibility of an offender also gives society the *duty* to punish."

---

54 Morris (vn 25) 41–43; Taylor (vn 44) 60 65 en Lensing (vn 22) 39.

55 Morris (vn 25) 42.

56 Falls (vn 25) 35 39 49; Murphy (vn 1) 230; Dressler *Hating criminals* (vn 21) 1452; Lensing (vn 22) 39; Nieboer (vn 24) 10; Dolinko (vn 25) 1642–1643; Taylor (vn 44) 60–61. Moore *Placing blame* (vn 4) 86–87 verklaar: "Punishment of the guilty is thus for the retributivist an *intrinsic* good, not the merely *instrumental* good that it may be to the utilitarian or rebabilitative theorist." Vgl ook Hegel (vn 17) par 100: " . . . dass die Strafe darin als sein eigenes Recht enthaltend angesehen wird, darin wird der Verbrecher als Vernünftiges geehrt".

57 Morris (vn 25) 41.

58 Dressler *Hating criminals* (vn 21) 1452.

59 *Placing blame* (vn 4) 91.

10 DIE WEDERKERIGHEIDSBEGINSEL BY VERGELDING

Die idee van herstellende vergelding berus op die beginsel dat geregtigheid altyd 'n element van wederkerigheid ("reciprocity") bevat. In Herbert Morris se uiteensetting van die werking van vergelding, byvoorbeeld, is daar 'n wederkerigheid tussen die voordele en die verpligtinge wat die regsorde vir elke individu inhou.

Herstellende vergelding sluit aan by die Sosiale Kontraksteorie van Rousseau.[60] Hoewel die sosiale kontrak nie as 'n historiese feit aanvaar hoef te word nie, is dit tog aanneemlik as 'n model van 'n rasionele besluit wat die mens sou geneem het. Die uitgangspunt is dat die mens 'n rasionele wese is wat, indien hy 'n keuse sou gehad het, sou gekies het om die beskerming van die reg te aanvaar en as prys die aanvaarding van verpligtinge te betaal. 'n Rasionele mens sou nooit ingestem het tot 'n bedeling waarin 'n ander 'n voordeel ten koste van homself sou kon verkry nie.[61] Die bedeling wat deur die sosiale kontrak in werking gestel is, werk immers tot sy voordeel.

Die wederkerigheidsbeginsel wat ingebou is in vergelding benadruk die noodsaak van 'n eweredige verhouding tussen die strafmaat en die graad van regskending of skade wat die oortreder gepleeg het. Is die strafmaat te hoog, pleeg die regsorde 'n onreg teenoor die oortreder. Is dit te laag, word 'n onreg nog steeds gepleeg omdat die strafoplegger in werklikheid die persepsie bekragtig dat die oortreder die slagoffer se meerdere is.[62]

11 VERGELDING AS HANDHAWING VAN GELYKHEID

Vergelding is onlosmaaklik gekoppel aan die gelykheidsbeginsel, wat 'n kernelement van geregtigheid is. Daar moet 'n eweredige verhouding tussen die omvang van die straf, aan die een kant, en die skade of graad van regskrenking wees.[63] Daar moet ook 'n eweredige verhouding tussen die omvang van die straf en die graad van skuld (opset of nalatigheid) wees.[64] Die reg op gelykheid is trouens vervat in die Suid-Afrikaanse Menseregtehandves.[65]

Hoe geringer die skade, hoe geringer behoort die straf te wees, want die "rekening" of "skuld" wat die oortreder moet betaal, is dan geringer. Dit word onder meer bewys deur die feit dat poging om 'n misdaad te pleeg in die reël ligter bestraf word as die voltooide misdaad, en dat nalatige bestuur wat die dood van iemand anders veroorsaak, swaarder bestraf word as nalatige bestuur wat (gelukkig vir die bestuurder) nie op enige besering vir ander mense of skade aan eiendom uitloop nie.

Hierdie eweredigheid tussen skade en straf wat 'n uitvloeisel van die vergeldingsteorie is, speel 'n baie belangrike rol by strafoplegging. Gooi 'n mens die vergeldingsteorie heeltemal oorboord, en werk jy net met die relatiewe teorieë, sou dit beteken dat strawwe wat buite verhouding tot die misdaad is, opgelê kan word. Val die klem net op voorkoming, sou dit die beste wees om elke dief wat selfs maar die

60 Kelk *Studieboek materieel strafrecht* (1998) 20; Murphy (vn 1) 101–102.
61 Murphy (vn 1) 101–102.
62 Hampton (vn 7) 1690–1691.
63 Nieboer (vn 24) 9; Murphy (vn 1) 232 235; Ashworth (vn 3) 66; Falls (vn 25) 29–30.;Walker en Padfield (vn 4) 111–112; Von Hirsch "Censure and proportionality" in Duff en Garland *A reader on punishment* (1994) 125–130.
64 Lensing (vn 22) 40.
65 A 9(1) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 bepaal dat elkeen gelyk voor die reg is en die reg op gelyke beskerming en voordeel van die reg het.

geringste sakie steel, gevangenisstraf vir 'n baie lang tyd op te lê. So 'n buitengewoon hardvogtige straf sou tegelykertyd ook die beste afskrikmiddel wees, terwyl die hervormingsteorie alleenstaande ook daartoe kan lei dat 'n oortreder van 'n geringe misdaad vir 'n lang periode opleiding sal moet ondergaan om hom van sy kwaal te genees. 'n Mens kan nie in 'n kort tydperk hervorm word nie.

Om die vergeldingsteorie oorboord te gooi ten gunste van die relatiewe teorieë sou impliseer dat daar inbreuk gemaak word op die reg op gelykheid, deurdat die oortreder 'n straf opgelê word wat byvoorbeeld swaarder is as wat die eweredigheidsbeginsel vereis. Slegs die vergeldingsteorie, en nie die utilitaristiese teorieë nie, kan hierdie belangrike beginsel bevredigend verklaar.

In die sewentigerjare het daar in die VSA verset gekom teen die groot diskresie wat die howe by straftoemeting gehad het. Die groot diskresie het gelei tot willekeur en ongelykheid in strafmaat, en die kritiek dat die howe hulle verantwoordelikheid afgeskuif het op paroolrade, wat moes besluit het of die oortreder klaar gerehabiliteer is.[66] Die wye diskresie wat die howe gehad het, is moeilik versoenbaar met die Amerikaanse Grondwet, wat so uitgelê word dat gelykheid ook in die verhouding tussen die omvang van die straf en die graad van skade of regskrenking vereis word. Daar is opnuut betoog, en in toenemende mate ook aanvaar, dat vergelding lei tot beskerming van die individuele oortreder teen regterlike willekeur. Dit was die rede vir die ontstaan van die "determinate sentencing movement".[67]

12 GEVOLGTREKKING

Vergelding is nie wraakuitoefening nie en dit is gevolglik verkeerd om die begrip te beperk tot die Ou Testamentiese *ius talionis*. Die korrekte betekenis van vergelding is die herstel van die juridiese ewewig wat deur die pleging van die misdaad geskend of "skeefgetrek" is. Dit impliseer 'n wederkerigheid tussen die voordele of beskerming wat die regsorde die individu bied, aan die een kant, en die verpligting wat die regsorde 'n mens oplê om ander mense se regte te respekteer, aan die ander kant. Hierdie herstel van die ewewig is noodsaaklik om 'n gelyke verdeling van maatskaplike regte en pligte te waarborg.

Anders as die utilitaristiese teorieë, is die vergeldingsbegrip onlosmaaklik gekoppel aan die persoonlike verwytbaarheid (skuld) van die oortreder, en voortspruitend hieruit, aan 'n erkenning van die individu se menswaardigheid. 'n Toepassing van vergelding verhoed dat die oortreder gedegradeer word tot bloot 'n rat in 'n groot onpersoonlike masjien, of bloot beskou word as 'n siek pasiënt wat op paternalistiese wyse deur die staat of gemeenskap aan terapeutiese behandeling onderwerp moet word om hom van 'n kwaal te genees en in die proses van hom 'n ander mens te maak. Anders as die utilitaristiese teorieë, respekteer vergelding die oortreder se vrye keuse-uitoefening en lei dit daartoe dat die oortreder, deur sy straf uit te dien, weer op 'n gelyke voet met sy medeburgers geplaas word, omdat hy sy straf, sy verdiende loon, uitgedien het. Vergelding is ook onlosmaaklik gekoppel aan die gelykheidsbeginsel in die begrip geregtigheid, omdat dit vereis dat daar 'n eweredige verhouding tussen die strafmaat en die erns van die misdaad moet wees. Dieselfde kan nie van die utilitaristiese teorieë gesê word nie.

---

66 Lensing (vn 22) 39.
67 *Ibid.*

Die ondersteuning van vergelding as regverdiging vir straf hierbo moet nie beskou word as 'n onderskrywing van die gedagte dat vergelding die *enigste* aanvaarbare regverdiging vir straf is en dat al die ander utilitaristiese teorieë derhalwe as verkeerd en waardeloos afgemaak moet word nie. Nêrens in die beskaafde wêreld word slegs een strafteorie ter uitsluiting van alle andere toegepas nie. Al wat bepleit word, is dat die gedagte van vergelding herstel word as die onmisbare ruggraat van strafoplegging. Die relatiewe teorieë moet dien as korrektief wat verhoed dat in sekere situasies 'n straf opgelê word wat in die besondere omstandighede onvanpas sal wees. 'n Praktiese voorbeeld van 'n geval waar die vergeldingsbegrip alleenstaande nie tot 'n bevredigende straf lei nie, is by die bestrawwing van residiviste. 'n Oortreder wat reeds (sê) twee vorige veroordelings vir dieselfde soort misdaad op sy kerfstok het, moet, in belang van die beskerming van die gemeenskap, 'n straf ontvang wat swaarder is as 'n straf wat, ingevolge 'n toepassing van die vergeldingsteorie alleenstaande, bloot proporsioneel tot die misdaad is waaraan hy so pas skuldig bevind is.

Uit bogenoemde volg dat dit verkeerd is om, soos dikwels in Suid-Afrika gebeur, vergelding te beskryf as slegs maar 'n *doel* van straf.[68] Vergelding is veel eerder 'n uitdrukking van die onveranderlike struktuur van straf.[69]

Paradoksaal soos wat dit mag klink, is vergelding 'n uitvloeisel van billikheid, wilsvryheid en menslike waardigheid – presies die waardes wat moderne Westerse denke respekteer en wil bevorder. Vergelding beteken dat as mense keuses maak oor wat hulle doen, hulle verantwoordelik gehou word vir die gevolge van daardie keuses, en dat hulle die skuld vir die gevolge van hulle daad nie op iemand anders of "op die samelewing" kan afstoot nie.

Indien die bogemelde gevolgtrekkings op Suid-Afrika toegepas word, word aan die hand gedoen dat dit hoog tyd geword het dat die Suid-Afrikaanse howe die nou reeds holruggeryde drietal oorwegings (die sogenaamde "trits in *Zinn*"),[70] te wete die misdaad, die misdadiger en die belange van die gemeenskap, aanpas om by die nuwe veranderde omstandighede in die land (naamlik die ongekende toename in misdaadpleging) aan te pas. Die bogemelde *Zinn*-maatstaf lei tot groot regterlike diskresie en gevolglik merkbare verskille in strafmaat, veral weens die rol wat die beskuldigde se persoonlike omstandighede en oorwegings in verband met rehabilitasie op die keuse van die strafmaat speel. Dit het tyd geword om, aansluitend by die res van die Westerse wêreld, weg te beweeg van die groot diskresie by vonnisoplegging en, in aansluiting by die vergeldingsgedagte, meer te beweeg in die rigting van 'n vaste strafmaat by vonnisoplegging.

Die regering verdien in hierdie verband na my mening krediet vir die uitvaardiging van artikel 51 van die Strafregswysigingswet 105 van 1997, wat voorsiening

---

68 Vir soortgelyke kritiek, sien Terblanche *Vergelding* (vn 12) 272; Terblanche *Sentencing* (vn 12) 190.

69 Rabie, Strauss en Maré (vn 12) 24–25: "The essence of punishment . . . can only be explained from a retributive basis . . ."; Maurach en Zipf (vn 10) 66: "Die sog. *absoluten* Theorien sind zwar Straf-, aber keine Strafzwecktheorien. Sie leugnen die Möglichkeit einer Verbindung des Wesens der Strafe mit konkreten verbrechensprophylaktischen Zwecken. Das Wesen der Strafe ist für sie Ausgleich, sei es als Wiedergutmachung, sei es als Vergeltung und in diesen Funktionen erschöpt sich die Strafe."

70 Die uitdrukking verwys na die drietal grondoorwegings wat volgens die Appèlafdeling se beslissing in *S v Zinn* 1969 2 SA 537 (A) 540 by strafoplegging in aanmerking geneem moet word.

maak vir die oplegging van minimumstrawwe by van die belangrikste misdade. Ten spyte van sekere punte van kritiek in die regspraak teen hierdie bepalings[71] getuig die bepalings van 'n besef aan die kant van die wetgewer van die noodsaaklikheid om weg te beweeg van 'n te vrye diskresie by strafoplegging ten gunste van 'n meer vasgestelde strafmaat. Dit is in lyn met die filosofie wat die vergeldingsbegrip onderlê.

Verder is dit ook verblydend om te sien dat die Suid-Afrikaanse Regskommissie in een van sy onlangse besprekingsdokumente[72] 'n nuwe strafopleggingsraamwerk voorstel waarin daar eweneens wegbeweeg word van 'n te vrye diskresie by straf-oplegging en voorkeur gegee word aan 'n strafopleggingsfilosofie wat deur 'n vaster strafmaat gekenmerk word. Alhoewel die woord "vergelding" in die studiestuk vermy word, is die klem wat geplaas word op wat "restorative justice"[73] genoem word tog in lyn met die vergeldingsbegrip.

In the Middle Ages, when it was very difficult to reach offenders, the judges inflicted frightful sentences on the few who were arrested: but this did not diminish the number of crimes. It has since been discovered that when justice is more certain and more mild, it is more efficacious.

Alexis de Tocqueville: Democracy in America (1835) *vol* 1 *ch* 6 *Everyman's Library* (1994) 104.

71 *S v Mofokeng* 1999 1 SASV 502 (W) 525*h*–526*i*; *S v Homareda* 1999 2 SASV 319 (W) 323–325; *S v Jansen* 1999 2 SASV 368 (K) 373*f*–*g*; *S v Budaza* 1999 2 SASV 491 (OK) 503–506; *S v Khanjwayo*1999 2 SASV 651 (O) 659*g*–*i*.

72 SA Law Commission, discussion paper 91, project 82.

73 *Idem* 8.

A few plain rules? A comparative perspective on exclusionary rules of expert evidence in South Africa

Lirieka Meintjies-Van der Walt
BJur LLB LLM
Senior Lecturer in Law, Rhodes University
Advocate of the High Court of South Africa and Associate Member of the Grahamstown Bar

A few strong instincts and a few plain rules
Wordsworth

OPSOMMING

'n Regsvergelykende perspektief op die reëls van deskundige getuienis in Suid-Afrika

Die onderhawige artikel handel oor die vraag of bepaalde bewysregtelike reëls ten opsigte van deskundige getuienis in Suid-Afrika identifiseer kan word. Die vraagstuk word uit 'n regsvergelykende oogpunt beskou. Nederland synde verteenwoordigend van 'n inkwisitoriese systeem en England en Wallis van 'n akkusatoriese sisteem, word gebruik om 'n regsvergelykende perspektief op die basies Anglo-Amerikaanse reëls wat in Suid-Afrika van toepassing is, te verkry.

Die analise toon aan dat relevansie en betroubaarheid van bewysmateriaal die vernaamste oorweging is by sowel die reëls wat geld ten opsigte van argumentasie en geregtelike besluitneming in Nederland as by die toelaatbaarheidsreëls van toepassing in Engeland/ Wallis. Hoewel bewysmateriaal wat van 'n deskundige getuie afkomstig is onteenseglik nougeset beoordeel behoort te word, word aangevoer dat dit nie raadsaam is om *relevante* deskundige bewysmateriaal op grond van bepaalde "common law" bewysreëls uit te sluit nie. Streng toelaatbaarheidsreëls mag weliswaar nodig wees om 'n jurie teen potensieel misleidende getuienis te beskerm, maar in Suid-Afrika waar professionele regters (soos in Nederland) die finale beoordelaars van die feite is, is streng toelaatbaarheidsreëls oorbodig. Ten slotte word 'n argument ten gunste van 'n vryer bewysstelsel aangevoer.

1 INTRODUCTION

Trial proceedings in South Africa, the Netherlands, and in England and Wales are subject to certain rules which govern the nature of the trial in terms of both the order of events and (to a greater or lesser extent – depending on jurisdiction) questions of admissibility, presentation and justification of expert evidence.

English law of evidence is characterised by exclusionary rules of evidence, which prevent certain evidence from being brought before the trier of fact.[1] The origin of

1 *Phipson on evidence* (1928) par 1.02; Twining *Theories of evidence: Bentham and Wigmore* (1989).

these rules has traditionally been associated with jury trials.[2] Even though trial by jury has been abolished in South Africa, the exclusionary rules of evidence have been retained. This fact supports the view of some commentators which suggests that a second factor responsible for the origin and continuance of the exclusionary rules is the adversarial procedure itself.[3]

The Dutch criminal justice system, by contrast, is not characterised by an intricate system of admissibility rules. The difference in approach between the common law and continental law is succinctly stated by Mannheim:[4]

> "English law of evidence is mainly concerned with the question of *admissibility*, continental law more with the question of *value*. English law eliminates a great deal of evidence at the very beginning, because it may mislead the jury. Continental law comparatively seldom prohibits the admission of evidence. That was originally a consequence of trial without jury"[5] (my emphasis).

This does not mean that rules of evidence are not present in continental law. In civil law jurisdictions, as Nijboer explains, these rules are modelled as decision and argumentation rules.[6] They determine the bases on which courts may decide whether or not to hear experts and other witnesses presented by the prosecution or defence, as well as the grounds for determining the means of proof which a court may use in coming to a decision.[7] Although the Dutch system is inherently a system of free proof, those rules of evidence that do exist, have as their purpose the same objectives as the exclusionary rules of evidence in common-law jurisdictions.[8] Those objectives are to vouchsafe that evidence used by the trier of fact is not only relevant, but also reliable.[9]

Given that relevance and reliability are the respective aims of the rules of evidence and procedure, this article investigates the development of certain rules of evidence pertaining specifically to the realm of expert evidence. Section 2, by way of introduction, looks briefly at the concepts of relevance and reliability. The extent to which it may be said that these rules exist in all three comparator countries, either in the guise of admissibility rules or as decision and argumentation rules, is also

---

2 Love "The applicability of rules of evidence in non-jury trials" 1951–1952 *Rocky M LR* 480: "It is no secret that the Anglo-American system of evidence is a product of the jury system. The theory of the rules is bottomed on a deep-rooted distrust of the lay mind, based in turn on the supposition that a jury is unable to hear doubtful evidence without giving to it the same weight as the direct evidence of a truthful witness. Even today the jurymen are considered children who cannot be trusted. The system has been likened to a sieve and is premised on the principle of exclusion, consisting as it does of a body of rules of admissibility. As such, the system is distinctly a thing apart from an approach to the problem of discovering truth by reference to a pure science of logical proof."

3 Tapper and Cross *Evidence* (1985) 1. A third factor is said to be the importance attached to the oath.

4 Mannheim "Trial by jury in modern continental criminal law" 1937 *LQR* 388.

5 *Idem* 388–389.

6 Nijboer "Common law tradition in evidence scholarship observed from a continental perspective" 1993 *Am J Comp L* 299 314.

7 According to a 338 *Sv* of the Dutch Criminal Code only the following categories of evidence may serve as a "legal means of proof": (i) the judge's own observations; (ii) statements made by the accused; (iii) statements made by a witness; (iv) statements made by an expert; and (v) written documents.

8 Nijboer *supra* 318–319.

9 *Ibid.* See also the United States FRE Rule 702, which requires admissible expert evidence to be reliable and relevant.

dealt with. The primary focus is on the rules which in common-law jurisdictions can be described as "admissibility rules of expert evidence". The extent to which the objectives of reliability and relevance are realised within the comparator jurisdictions is therefore investigated under the convenience headings of "The field of expertise rule", "The common knowledge rule", "The ultimate issue rule" and "The basis rule".[10]

This article also sets out to analyse and to evaluate critically the *rationes* for the different rules of evidence pertaining to the evidence of expert witnesses in South Africa, the Netherlands and England and Wales. Finally, the question whether these so-called rules of expert evidence should, continue to function as rules of admissibility in the South African context, is considered.

2 RELEVANCE AND RELIABILITY

No matter how qualified an expert is or how incontrovertible the proofs of the field of expertise to which he attests, such evidence is meaningless to the criminal justice process, unless the evidence is relevant to the issues concerned.[11]

Experts testifying to their opinions are customarily regarded as an exception to the opinion rule in English and South African law.[12] The general rule of evidence is that evidence of opinion is excluded, and that witnesses may only testify about what they themselves have perceived with one of their five senses. The opinion of an expert is, however, admissible if it is relevant. It is relevant if the expert, by reason of his special knowledge or skill, is better qualified to draw an inference than the trier of fact.[13] An expert witness is therefore not deemed to be of assistance to the court where the area of his testimony falls within the common knowledge of the trier of fact. This test for relevance contains within it two of the rules of evidence customarily applied to expert evidence, namely the so-called "field of expertise rule" and the "common knowledge rule". In *Holtzhauzen v Roodt*[14] the admissibility of the opinion evidence of two witnesses whom the defendant in a defamation action proposed to call, was challenged. The one witness, a psychologist, social worker and counsellor, would testify that women who have been raped often would not report the incident to third parties immediately after it has occurred and that it was common for such victims to exhibit radical changes in behaviour. The evidence of this witness was received because it was helpful and of assistance to the court, since the witness was better qualified than the judicial officer to draw the inferences in question.

The other witness, a clinical psychologist, would testify that the defendant had consulted him on a number of occasions and had told him that she had been raped by the plaintiff, that she had said so twice whilst under hypnosis during therapy sessions, and that it was his opinion that she was telling the truth. This challenge

---

10 Freckelton *The trial of the expert* (1987).

11 *S v Shivute* 1991 1 SACR 656 (Nm) 662*e*; *S v Loubscher* 1979 3 SA 47 (A) 57F–G 60B–C.

12 Zeffertt "Opinion evidence" 1976 *SALJ* 275. It should be noted that the opinion rule assumes that there is a clear distinction between fact and opinion which does not accord with reality, as observed by Thayer *A preliminary treatise on the law of evidence* (1898): "In a sense all testimony as to matters of fact is opinion evidence: ie it is a conclusion from phenomena and mental impressions."

13 Hoffmann and Zeffertt *The South African law of evidence* (1988) 97.

14 1997 4 SA 766 (W).

was, however, successful, the court holding that evidence of that kind was irrelevant, since it would lead to the balancing of opinion between witnesses which would "tend to shift responsibility from the Bench to the witness-box" and to a procedure which would resemble a "gladiatorial pit between witnesses rather than a cool and hopefully calm assessment of the evidence in its entirety as received from all witnesses, not just experts".[15] This successful challenge to the expert opinion of the clinical psychologist in *Holtzhauzen v Roodt* can be seen as the court's application of what has become to be known as the "ultimate issue rule". Historically, the courts have always striven to prevent any witness from expressing his opinion on an issue which the court has to decide.

As has been indicated above, the primary requirement which any piece of evidence tendered in common law courts must satisfy, is that it must be relevant.[16] Relevance usually relates to the probative potential of an item of information to support or negate the existence of a fact of consequence (*factum probandum*). Any item of evidence must therefore have the potential rationally to affect the decision.[17]

However, as Damaska[18] indicates, "relevance" is not an issue that determines admissibility in the Continental legal tradition. On the Continent, the probative potential of an item of evidence is seldom considered apart from the reliability of its source. Where this is done, it would be to determine whether an item is "material". "Materiality" in turn deals with the issue whether an item of information is capable of establishing a fact that would make a difference in terms of the case's legal theory.[19]

Although logically relevant, evidence may be excluded at common law, if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or by considerations of undue delay.[20] The reliability of the

---

15 774 I–J.

16 See s 210 of the Criminal Procedure Act: "*Irrelevant evidence inadmissible*. No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings." The following definition of "relevant" by Stephen *Digest of the law of evidence* (1930) a 1 was approved by Watermeyer CJ in *R v Katz* 1946 AD 781: "The word relevant means that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself, or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other."

17 Thayer *Preliminary treatise on evidence at common law* (1969) 265 states: "The law furnishes no test of relevancy. For this, it tacitly refers to logic and experience." See also Thayer "Law and logic" 1900 *Harvard LR* 139.

18 Damaska *Evidence law adrift* (1997) 55.

19 *Ibid.*

20 *Makin v AG for New South Wales* [1894] AC 57; *R v Katz* 1946 AD 71; *Gosschalk v Rossouw* 1966 2 SA 485 (A). The weighing up of the prejudicial effect against the probative value of the evidence as exclusionary standard, is clearly distinguished by Sopinka J in the Canadian case of *R v Mohad* 1994 114 DLR (4th 419 (SCC) from the relevance enquiry: "Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis . . . Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule" (427–428).

evidence could therefore influence its juridical relevance and hence its admissibility. This is illustrated in *R v Trupedo*[21] where evidence of the behaviour of a police dog in identifying an intruder was rejected on the grounds of irrelevance.[22] Chief Justice Innes stated: "We have no scientific or accurate knowledge as to the faculty by which dogs of certain breeds are said to be able to follow the scent of one human being, rejecting the scent of all others." It was further held that even if the evidence is not regarded as hearsay "there is too much uncertainty as to the constancy of [the dog's] behaviour and as to the extent of the factor of error involved to justify us in drawing legal inferences therefrom".[23] He concluded that the evidence was not relevant, but that relevance is a question of fact.[24] In *S v Shabalala*[25] it was shown that expert testimony of tracking by dogs, if shown to be reliable, may very well be admissible. One way in which an expert can convince the court of the reliability of his evidence, could be by clearly showing the bases for his opinions. This requirement has developed into what has become known as the "basis rule".

The following sections deal with the significance of evidential rules for expert evidence under different headings.

3 THE FIELD OF EXPERTISE RULE

Although expert witnesses have been permitted to give evidence on an indefinite number of subjects, it has always been based on the principle that they should be properly designated experts. In South Africa, England and Wales the testimony of experts who do not possess the required expertise is inadmissible.

In English and South African law, the requirement of expertise does not mean that the witness needs to be professionally trained in the particular area, neither does it mean that the fact that the witness is a professional, necessarily qualifies him as an expert.[26] The latter was concisely stated by Addleson J in *Menday v Protea Assurance Co (Pty) Ltd*: [27]

---

21 1920 AD 58 62.

22 *Idem* 63.

23 *Ibid.*

24 *Trupedo*'s case, for instance, is not authority for the broad proposition that evidence of tracking by dogs is in all circumstances or in any situation irrelevant, but merely that the evidence on the facts of that particular case was irrelevant. See Hoffmann 1974 *SALJ* 237 238. As Nestadt AJA pointed out in *S v Shabalala* 1986 4 SA 734 (A) 742, *Trupedo*'s case did not decide that evidence of tracking by dogs may never be relevant in any situation, but rather that it was irrelevant given (a) the proven body of scientific knowledge and (b) the system of trial by jury. Of these two variables, only the first was treated in *Shabalala*'s case as being significant. If, eg, acceptable expert testimony had been adduced in that case which established the reliability of tracking by dogs, the court would be free to consider whether a proper foundation had been laid for the reception of the evidence.

25 1986 4 SA 734 (A).

26 See *Wigmore on Evidence* (1988) vol 2 750: "The object is to be sure that the question to the witness will be answered by a person who is fitted to answer it. His fitness, then, is a fitness to answer on that point. He may be fitted to answer about countless other matters, but that does not justify accepting his views on the matter in hand. Since experiential capacity is always relative to the matter in hand, the witness may, from question to question, enter or leave the class of persons fitted to answer, and the distinction depends on the kind of subject primarily, not on the kind of person." In *Mohamed v Shaik* 1978 4 SA 523 (N) the court held that a general medical practitioner, even though he held the degrees MB ChB and had four years' experience, was not qualified to speak authoritively on the significance of findings in a pathologist's report concerning the fertility of semen.

27 1976 1 SA 565 (E).

> "However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. The dangers of holding otherwise – of being overawed by a recital of degrees and diplomas – are obvious; the Court has then no way of being satisfied that it is not being blinded by pure "theory" untested by knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on knowledge or experience of experts other than themselves who are shown to be acceptable experts in that field."

The Dutch Code of Criminal Procedure does not set out any specific criteria for expertise, and Article 299, which deals with the involvement of the expert in the criminal process, merely states that a person submitting a written report should be an expert and should furnish reasons. The issue of what constitutes expertise in terms of article 343[28] of the Dutch Criminal Code was decided by the Hoge Raad in 1928.[29] The term "wetenschap" (knowledge) in that provision was said to include

> "all special knowledge one possesses or is assumed to possess, even though such knowledge does not qualify as 'science' in the more limited sense of the word, corresponding to the fact that since long, experts have been heard in criminal processes whose special knowledge did not make them practitioners of science".[30]

How Dutch courts consider whether experts are sufficiently qualified to act as such is often not apparent from decisions of the courts. Therefore, as in South Africa and in England and Wales, experts need not be professionals or academically qualified, as long as they have relevant experience and knowledge in the particular field.[31]

In practice, experts are seldom called to testify in open court and judges therefore limit themselves to documented expert evidence contained in the *dossier*. In the absence of *viva voce* evidence, the court in consequence seldom has the opportunity to elicit information from expert witnesses regarding their expertise. Van Kampen[32] offers a further reason why Dutch courts do not query the expertise of expert witnesses, namely that the majority of Dutch expert reports are compiled by permanent forensic experts or specially trained police officers, who are under permanent oath[33] and are deemed to testify only within the bounds of their professional expertise. Potential problems can arise in the case of documented expert evidence emanating from other experts, who do not fall within these categories and who therefore do not possess the same credentials. This has led to a growing concern among academics in the Netherlands who suggest that the Dutch courts and prosecutors should scrutinise the qualifications of persons reporting to them more closely.[34] Extreme care and scrutiny are therefore required, particularly in the areas of new and sometimes ill-defined areas of so-called expertise.

---

28 A 343 *Sv*: A statement by an expert is understood to be his opinion, made in the course of the investigation of the trial, as to what his knowledge teaches him about that which is the subject of his opinion.

29 HR 24 July 1928 *NJ* 1929.

30 *Idem* 150. Cf Borst *De bewijsmiddelen in strafzaken* 262–264 who argues for a more restricted meaning of "wetenschap" to mean only "an ordered system of knowledge".

31 Hielkema "Experts in Dutch criminal procedure" in Malsch and Nijboer (eds) *Complex cases perspectives on the Netherlands criminal justice system* (1999) 28.

32 Van Kampen *Expert evidence compared rules and practices in the Dutch and American criminal justice system* (1998).

33 A 228.2 *Sv*; a 152 *Sv*, a 229.4 *Deskundigen in Nederlandse strafzaken* (1996).

34 Nijboer *Forensische expertise* (1990) 65; Hielkema 43 134; Crombag, Van Koppen and Wagenaar *Dubieuze zaken de psychologie van strafrechtelijk bewijs* (1992) 314–315.

Hoge Raad decisions indicate that the decision whether someone is an expert or not, falls within the province of the trial court, a discretion with which the Hoge Raad will not interfere.[35] Traditionally, trial courts were under no obligation to justify their determination whether a person was an expert or not.[36] This practice exhibits similarities to the common-law admissibility rules where, as a general rule, reasons for holding expert evidence admissible need not be given by trial courts. If on face value the expert has the qualifications and competence to perform the necessary procedures to come to a conclusion, there is no requirement that reasons should be given for admitting such evidence.[37] Reasons are only required to substantiate a decision that accords weight to such admitted expertise.[38] As a result of the "Anatomically Correct Dolls" decision[39] as well as the so-called "Shoeprint"[40] case, where the defence explicitly[41] challenged the reliability of experts and their reports, trial courts in the Netherlands relying on the evidence of experts are now required to explain why the experts' methods are considered reliable and to what extent the experts are deemed to be adequately qualified.[42] These Hoge Raad decisions seem to imply that if a trial court cannot justify why a person should be considered an expert, such a person will not be deemed so and no reliance can be placed on his opinion.[43] Where trial courts have not substantiated why an expert is considered such and his statement is preferred on a crucial aspect despite a challenge, the Hoge Raad can reverse the decision.[44]

From the above analysis one can therefore infer that the degree and nature of the expert's specialised knowledge is an issue which needs to be determined by the trial court in all three comparator countries. Where the expertise of the expert is contested, the courts in all three comparator countries will have to give reasons why reliance is placed on that evidence. These court practices prompt one to ask whether the differences between South Africa and England and Wales on the one hand and the Netherlands on the other, are not in fact more apparent than real. Whether the "expertise rule" is formulated as an admissibility rule or as a decision rule, the effect

---

35 HR 27 March 1933 *NJ* 1933 907; HR 18 October 1977 *NJ* 1978 534; HR 13 January 1981 *NJ* 1981 79 m nt 'tH WvV; HR 12 January 1993 *DD* 93.239.

36 HR 18 October 1977 *NJ* 1989 534; HR 18 September 1978 *NJ* 1979 120; HR 12 January 1993 *DD* 93 239. See further Knigge "Het wettelijk bewijsstelsel" in Knigge (ed) *Leerstukken van strafprocesrecht* (1991) 115.

37 *S v Williams* 1985 1 SA 750 (C) 753G–I; *S v Nyathe* 1988 2 SA 211 (O) 215I; *S v Adams* 1983 2 SA 577 (A); *S v Januarie* 1980 2 SA 598 (C) 600B–C; *S v Ramgobin* 1986 4 SA 117 (N).

38 *S v Nyathe* 1988 2 SA 211 (O) 216.

39 HR 28 February 1989 *NJ* 1989 748 M nt >tH; see also HR 14 March 1989 *NJ* 1989 747.

40 HR 27 January 1998 *NJ* 1998 404 m nt JR (this case concerned an orthopaedic shoemaker as a shoeprint expert).

41 It is not necessary for the court to respond to general or implicit challenges regarding whether or not the expert is sufficiently qualified to testify to a particular field of expertise. See HR 3 March 1998 *NJB* 1998 No 52.

42 See HR 30 March 1999 NJ 415 where the judge of appeal held that the court had not given sufficient consideration to the controversial nature of the methods applied by the psychologist *in casu*.

43 In the Dutch criminal justice system it is the court and not the prosecutor who bears the burden of proving the case beyond a reasonable doubt: Langemeier "Beweringslast en bewijsrisico in het strafproces" 1931 *TVS* 73. See also Nijboer and Sennef "Justification" in Malsch and Nijboer *Complex cases* (1999) 11–26 for a critical commentary on the approach in Dutch courts to the justification of their decisions: *motivering van de bewezen-verklaring*.

44 Reintjes note HR 27 January 1998 *NJ* 1998 404.

in practice is really the same. The evidence of experts who do not possess sufficient skill will be held to be inadmissible in South Africa as well as in England and Wales. By contrast, in the Netherlands such evidence will be admissible. However, although admissible, evidence by experts who are not adequately qualified, cannot be used by judges as a basis for their findings. Thus even though the rule in the Netherlands is couched as a decision-making rule, the effect in practice would be the same as if the evidence had been excluded at the outset.

The application of the common-law "field of expertise" rule in South Africa and England and Wales has focused on the skill, experience and training of the particular expert. Court experts are therefore required to indicate to the court that they have been trained in a particular discipline or have gained experience in a particular field. Court *dicta* are usually silent about the particular fields or areas of expertise and skill which would qualify a witness as an expert.

In the past, when court experts came from widely accepted fields of knowledge, an enquiry such as the above would have been superfluous. However, in the rapidly developing world of science and technology, new and novel theories and techniques are constantly emerging. This area between the acknowledged and accepted fields of expertise and cutting-edge experimentation has been aptly referred to as the "twilight zone" of expertise.[45] These novel techniques could be potentially powerful tools of inculpability[46] as well as exculpability.[47] The issue of how the legal system should deal with expert evidence that has not fully "emerged from the experimental to the demonstrable" confronted the United Court of Appeals for the District of Columbia as early as 1923.[48] In *Frye*, the court was confronted with the admissibility of a primitive precursor to the polygraph. The criterion for admissibility was held to be whether the basis of the theory or technique had gained "general acceptance" within the relevant field:

> "While the courts will go a long way in admitting expert testimony deduced from a well recognised scientific principle of discovery, the thing from which the detection is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[49]

In 1993 the "general acceptance in the scientific community" test as propounded by the *Frye*[50] case, was superseded in federal courts by the so-called "reliability" test propounded in the *Daubert*[51] case. The majority in *Daubert v Merrell Dow Pharmaceuticals* noted the distinction between scientific "validity" (does the principle support what it purports to show?) and "reliability" (does application of the principle produce consistent results?). The court further maintained that in a case involving scientific evidence, evidentiary reliability (which it defined as "trustworthiness") was necessary as a precondition to admissibility. This would be "based upon scientific validity". It held that the requirement that the evidence "assist" the trier of fact necessitates a valid scientific connection to the pertinent inquiry as a condition of admissibility. The court held that the following series of *indicia* would generally be

45 *Frye v United States* 293 F1013 (1923).
46 Eg DNA fingerprinting, voice identification, polygraph and offender profiling.
47 Eg DNA fingerprinting, battered woman syndrome and post traumatic stress syndrome.
48 *Frye v United States* 293 F1013 (1923).
49 *Ibid.*
50 *Ibid.*
51 *Daubert v Merrell Dow Pharmaceuticals* 113 S Ct 2786 (1993).

relevant to the inquiry whether particular scientific evidence would assist the trier of fact:

(i) whether it can be or has been tested;

(ii) whether the theory or technique has been subjected to peer review and publication as a means of increasing the likelihood that substantive flaws in methodology will be detected;

(iii) whether the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation have been established; and finally

(iv) whether a technique has gained general acceptance within the scientific community.

In England, Wales and South Africa there are no reported cases where courts have had to decide on the admissibility of novel forms of scientific[52] expertise.

In contrast to the American approach, it seems that in these two countries the reliability of scientific evidence is usually a factor to be considered in the determination of the weight which should be accorded to the evidence, rather than a factor determining its admissibility.[53] Nor have novel scientific techniques been the subject of jurisprudential analysis in the Netherlands. In the Netherlands it is practice, rather than admissibility rules, that dictates that certain novel methods of expert evidence such as bite mark evidence, the results of lie detectors, hypnosis and the use of truth serum, will not be used by trial courts.[54]

It can be expected that with the rapid development of new scientific, technical and social scientific techniques and procedures, part of an on-going debate would be consideration by all three comparator countries of ways and means to develop criteria and standards by which to determine whether certain types of evidence should be admitted by courts. However, as the American experience has indicated, such criteria are often difficult to define, giving weight to the existing practice in South Africa, England and Wales as well as in the Netherlands, to admit such evidence and leaving it to the parties and the trier of fact to determine the degree of reliance that should be placed on the evidence. In the determination of the *value* that should attach to such evidence, courts may, I suggest, borrow profitably from the guidelines set out in *Daubert*.[55]

4 THE COMMON KNOWLEDGE RULE

Courts in the common-law legal system have traditionally refused to hear expert evidence on matters they have classified as areas of common knowledge, declaring that in such circumstances no assistance is required from experts.[56] Evidence would usually be deemed to be of assistance or "helpful" if it has the capacity to add to the

---

52 However, see *R v Trupedo* 1920 AD 58 and *S v Shabalala* 1986 4 SA 734 (A) dealing with admissibility of evidence of the behaviour of tracking dogs and how the reliability of the procedure could influence the admissibility of the evidence.

53 Unless it can be shown that it is so unreliable that it is irrelevant.

54 Van Kampen *Expert evidence compared* (1998) 269.

55 However, this topic does not fall within the parameters of this article.

56 *R v Turner* [1975] 1 QB 834 841.

knowledge of the triers of facts and to assist in their deliberations.[57] In the leading English decision on the common knowledge rule, *R v Turner*,[58] it was held:

> "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limit of normality any more helpful than that of jurors themselves; but there is a danger that they may think it does."[59]

In *S v Nel*[60] the Cape Provincial Division approved and applied the rule set out in *Turner* on the basis that after 30 May 1961 English decisions have persuasive authority in South Africa.[61]

In the Netherlands, the helpfulness or otherwise of expert evidence is not a criterion that determines the admissibility of the evidence. However, in practice, when an investigating or trial judge calls upon experts, it would be because their assistance and advice are considered to be helpful and necessary. Article 339 *Sv* specifically states that no proof is required of facts or circumstances that belong to the realm of common knowledge. The defence may on the basis of artiċle 263 *Sv* request the prosecutor to summons a particular expert for the court hearing. Where this request is refused, and the accused appeals to the court to accede to the request, it may be refused on the basis that it is not necessary. In my view, the potential of being of assistance to the trier of fact would in this context also be a factor that would inform the court in reaching its decision.

Where "assistance to the trier of fact" is, therefore, a touchstone that can prevent expert evidence from being introduced, the rationale for the exclusion needs to be closely scrutinised. Whereas both common-law and continental judges are likely to consider evidence in the field of physical and medical science as likely to be beyond the realm of common knowledge, evidence relating to human behaviour has the potential to present difficulties.

Judges in England/Wales seem to have an ambivalent attitude towards the evidence of experts on mental conditions. To some extent, they recognise that a psychiatrist or psychologist may be able to provide useful testimony about matters that are outside the experience of judges or jurors. At the same time, it is feared that mental experts will usurp the role of the jury or other trier of fact,[62] unless a clear line is drawn between abnormal and normal mental states. The latter have been held to include lust, anger and other undesirable emotions which, judges believe, are

---

57 Raitt "A new criterion for the admissibility of scientific evidence – The metamorphosis of helpfulness" in Reece (ed) *Law & science current legal issues* (1998) vol 1 153. See also *S v Van As* 1991 2 SA 65 (W) 86E; *Colgate Palmolive (Pty) Ltd v Elida-Gibbs (Pty) Ltd* 1989 3 SA 759 (W).

58 [1975] 1 QB 834.

59 841.

60 1990 2 SACR 136 (C).

61 See also s 252 of Act 51 of 1977.

62 See the Ultimate Issue Rule *infra*.

perfectly capable of being understood by ordinary people without expert assistance.[63] In practice this has meant that experts can testify only about the "abnormal".[64] It has even been suggested[65] that for expert testimony to be admissible, there must not only be a degree of abnormality in the accused's mental state, but there should also be a degree of abnormality sufficient to take his condition "beyond the experience of non-medical people".[66]

Therefore, where an accused puts forward a defence such as provocation or duress, which depends on subjective criteria, expert evidence will be inadmissible. In *R v Turner*,[67] in which the appellant relied upon a defence of provocation at his trial for the murder of his girlfriend, whom he had killed with a hammer upon hearing of her infidelity, the trial judge, Bridge J, refused to admit psychiatric evidence. His decision was upheld by the Court of Appeal.[68] This decision confirmed the Court of Appeal's earlier judgment in *R v Chard*[69] and has subsequently been followed in *Weightman v The Queen*[70] but distinguished the Privy Council's decision in *Lowery v R*[71] on its own special facts.[72]

Some recent decisions of the Court of Appeal, such as *R v Humphreys*[73] and *R v Thornton (no 2)*,[74] seem to suggest that expert evidence may in the context of

---

63 See *R v Turner* [1975] 1 QB 834 841: "Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life."

64 *R v Reynolds* [1989] Crim LR 220; *Weightman v The Queen* [1991] Crim LR 204.

65 Experts have been permitted to give evidence on the following issues: *R v Holmes* (1953) 1 WLR 686 (whether an accused was suffering from a disease of the mind within the *M'Naghten* rules); *R v Bailey* (1977) 66 Cr App R31 (whether an accused is suffering from diminished responsibility, but note the distinction made between diminished responsibility and other forms of incapacity, eg drunkenness in *R v Tandy* [1989] 1 All ER 267); *R v Smith* (1979) 1 WLR 1445 (whether the accused who had put forward a defence of sane automatism, was sleep-walking); *Toohey v Metropolitan Police Commissioner* [1965] AC 595 HL; (whether a witness is suffering from a mental disability such as to render him incapable of giving reliable evidence – but expert evidence will not be admitted on the question whether a witness who has a normal capacity for reliability is actually giving reliable evidence, see *R v Mackenney* (1983) 76 Cr App R27*); R v Toner* (1991) 93 Cr App R 382 (as to the possible effects of a medical condition on a person's mental processes and ability to form an intent); *R v Silcott, Braithwaite and Raghip The Times* 1991-12-09 (as to the reliability of a confession made by a person who was abnormally susceptible to suggestion).

66 *Weightman v The Queen* [1991] Crim LR 204.

67 *Supra* fn 63.

68 [1975] QB 834 840.

69 (1971) Cr App R 268.

70 [1991] Crim LR 204. In *Weightman* the Court of Appeal upheld the trial court's refusal to admit psychiatric evidence about the existence of a personality disorder known as "la belle indifference", characterised by emotional superficiality, impulsive behaviour when under stress and a reduced capacity to develop enduring relationships with others. This case is discussed by Mackay and Colman "Excluded expert evidence: A tale of ordinary folk and common experience" [1991] Crim LR 800.

71 [1974] AC 85.

72 The court distinguished the case of *Lowery v The Queen*, saying that the issues in that case were "unusual" and that therefore it was not considered "an authority for the proposition that in all cases psychologists and psychiatrists can be called to prove the probability of the accused's veracity".

73 [1995] 4 All ER 1008.

74 [1996] Crim LR 597.

"battered woman syndrome" be relevant in provocation cases.[75] In the case of defences of duress, expert evidence is as a general rule inadmissible to show that an accused suffered from a predisposition that would likely make him vulnerable to duress.[76] An exception has, however been recognised in *R v Emery*[77] where the appellant relied on duress as a defence to a charge of child cruelty. Expert evidence was allowed to show that a woman in the position of the appellant, though initially a person of reasonable firmness, may, if exposed to long term violence and abuse, come to suffer from a condition of "dependent helplessness" that would prevent her from defending her child from similar abuse.[78] It has been accepted that "in a proper case",[79] psychiatric evidence may be led that a person is incapable of giving reliable evidence because of a "psychiatric disability" which "substantially affects the witness's capacity to give reliable evidence".[80]

Expert psychiatric or psychological evidence relating to the *mens rea* of an accused person is, however, inadmissible,[81] as is expert evidence about the reliability of witnesses in general. More recently, in *R v Robinson*[82] it was held that evidence of a psychiatrist or psychologist may be admissible to show that a witness or a confession is unreliable, where the mental condition of the witness or accused is such that it is outside the ordinary experience of the jury, including where the person is suffering from a personality disorder so severe that, although not a mental illness, it may be categorised as a mental disorder. A psychiatrist or psychologist may not, however, give reasons why a witness should be regarded as reliable.

Although the *Turner* rule has been held to form part of South African law,[83] an overview of criminal cases does not manifest a strict adherence to the normal/abnormal test as a criterion for exclusion. This development in South African law may be the result of the fact that adjudication lies within the province of professional judges. South African courts have held that where an accused relies on the defence of sane automatism or non-pathological criminal incapacity,[84] it is necessary for the defence to lay a proper basis to upset the inference[85] that sane persons who engage in conduct which would ordinarily give rise to criminal liability, do so consciously and voluntarily.[86] This could in certain circumstances require the

---

75 However, it is difficult to reconcile these cases with the House of Lords' decision in *R v Morhall* [1996] 1 AC 90 or that of the Privy Council in *Luc Thiet-thuan v R* [1996] 3 WLR 45.

76 *R v Hegarty* [1994] Crim LR 353; *R v Horne* [1994] Crim LR 584 and *R v Hurst* [1995] 1 Cr App R 82.

77 (1993) 14 Cr App R 394.

78 398.

79 *R v Mackenney* (1983) 76 Cr App R 271.

80 *Ibid.*

81 *R v Reynolds* [1989] Crim LR 220. Cf Zuckerman *Principles of criminal evidence* (1989) 67 who indicates that although it has been supposed at times that expert opinion about the existence or non-existence of a constitutive fact such as *mens rea* is inadmissible, he is doubtful whether such a rule has ever been in operation as cases purportedly supporting it are often explicable on different grounds.

82 (1994) 98 Cr App R 370.

83 *S v Nel supra.*

84 *S v Campher* 1987 1 SA 94 (A); *S v Laubscher* 1988 1 SA 163 (A); *S v Smith* 1990 1 SACR 130 (A); *S v Potgieter* 1994 1 SACR 61 (A); *S v Kensley* 1995 1 SACR 646 (A); *S v Cunningham* 1996 1 SACR 631 (A); *S v Di Blasi* 1996 1 SACR 1 (A); *S v Wiid* 1990 1 SACR 561 (A); *S v Nursingh* 1995 2 SACR 331 (D); *S v Gesualdo* 1997 2 SACR 68 (W).

85 *S v Kok* 1998 1 SACR 532 (N) 346*e–f*. See also *S v Cunningham supra.*

86 *S v Kok supra* 346*f*.

defence to call on psychiatric expertise. In South Africa the emphasis in the application of the *Turner* rule seems to be different. The test is far less concerned with the question whether the evidence falls within the common knowledge of the trier of fact; it is rather an enquiry whether the expert evidence proffered can assist or be helpful to the trier of fact.[87] In such a system there is far less reason for trial judges to act in a gate-keeping capacity, as they, like their continental brethren, are also the ultimate triers of fact.

This does not, however, mean that South African courts do not subscribe to the normal/abnormal distinction of the *Turner* rule. In *S v Nel*[88] the court held that there is no real analogy between cases of physical affliction which adversely affect the capacity of a witness to testify accurately and reliably (in which instances expert evidence to establish such affliction would be admissible), and intellectual and psychological disabilities of a relatively normal kind.[89] The appellant *in casu* sought to lead psychiatric evidence of the fact that one of the witnesses who had been called to testify on her behalf was "mildly to moderately retarded" and likely to become uncommunicative when subjected to the strain of testifying in a court. Such evidence was held inadmissible. The reason was that where such disabilities affect personality, powers of exposition and articulation, they are capable of being assessed by the court reasonably adequately while the witness is giving evidence.[90] While the court acknowledged that expert evidence may contribute to a more reliable and accurate assessment, it held that the cost of expert evidence far outweighed the marginal benefit of a more accurate assessment of the witness.[91] Where the courts are concerned with defective intelligence not within the realm of the normal, expert evidence will be admissible. In the English case of *R v Masin,*[92] the accused, who had an IQ of 72, was extremely immature and had limited understanding of the ways of the world, was charged with rape. Expert evidence was sought to be adduced to the effect that he would have been unable to comprehend adequately the nuances of sexual interplay and may have misconstrued the girl's willingness or unwillingness to engage in sexual intercourse.[93] Lord Lane held that in cases where an accused is formally classified as "mentally defective" (where the IQ level is 69 or below), then, subject to its relevance to the particular case, psychiatric evidence will be admissible.[94] This would enlighten the jury on a matter of abnormality which would *ex hypothesi* not be common knowledge. However, where an accused is within the scale of normality, expert evidence will not be necessary and would therefore be excluded.[95] This approach manifests similarities with the decision in *S v J*[96] in South Africa. *In casu* a paediatric registrar was permitted to testify that the rape complainant's IQ level was 34.9, to lay the foundation for other non-expert testimony of how she would have come across to the accused and thus whether the accused could

87 A magistrate or, in the high court, a judge sitting with assessors.
88 1990 2 SACR 136 (C).
89 143*c–d*.
90 143*d–e*.
91 143*e–f*.
92 [1986] Crim LR 395.
93 *Ibid.*
94 *Ibid.*
95 *Ibid.* See also Beaumont "Psychiatric evidence: Over-rationalising the abnormal" [1988] *Cr LR* 290.
96 1989 1 SA 525 (A).

subjectively have appreciated her incapacity to consent. The assumption that lay persons are competent to evaluate human behaviour in certain circumstances, as Colman and Mackay[97] indicate, may rest on the false premise that "[t]he behaviour of normal human beings is essentially transparent". This notion is likely to be challenged by most psychologists on the basis of research that has established that many areas of human behaviour, although occurring on a daily basis, may be so complex as to defy simple comprehension.[98] Colman and Mackay indicate that there is a considerable body of research in support of the argument that much common sense is "demonstratively counter intuitive in the sense that 'ordinary men and women' generally misunderstand [it]".[99]

It was shown above that judges in the Netherlands have the power to call for the introduction of expertise when they deem it necessary. It has also been argued that such evidence will be deemed necessary where it is considered helpful to the trier of fact. There is, therefore, no likelihood of the Dutch criminal justice system being inundated with expert evidence that is unnecessary and irrelevant. Likewise the "common knowledge" rule which is applied in South Africa and in England and Wales, serves the same purpose in preventing courts from being overwhelmed by expert evidence that is irrelevant on the basis that it is unlikely to be helpful to the trier of fact or that it pertains to areas which can be understood by ordinary people without expert assistance. It has also been indicated that proof with regard to facts and circumstances that belong to the realm of common knowledge is not required in the Netherlands.[100] Consequently judges in all three comparator countries need to grapple with the question of the scope of common knowledge. The analysis above, however, indicates that the application of the normal/abnormal dichotomy as enunciated in *Turner* with regard to human behaviour may result in arbitrary distinctions with regard to the normal/abnormal distinction. These concerns were articulated by the High Court of Australia in *Murphy v Queen.*[101]

> "The court based its comment on the remark by Lawton LJ in *Turner* that '[j]urors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life': There are difficulties with such a statement. To begin with, it assumes that 'ordinary' or 'normal' has some clearly understood meaning and, as a corollary, that the distinction between normal and abnormal is well recognised. Further, it assumes that the common sense of jurors is an adequate guide to the conduct of people who are 'normal' even though they may suffer from some relevant disability. And it assumes that the expertise of psychiatrists (or, in the present case, psychologists) extends only to those who are 'abnormal'. None of these assumptions will stand close scrutiny."

I submit that the *Turner* rule needs to be reconsidered, since the uncritical application of this rule could result in the exclusion of expert evidence that has the potential to contribute to the understanding of the issue before the court.

---

97 Colman and Mackay "Legal issues surrounding the admissibility of expert psychological and psychiatric testimony" 1993 *Issues in Criminology and Legal Psychology* 46.

98 Mackay and Colman "Equivocal rulings on expert psychological and psychiatric evidence: Turning a muddle into a nonsense" 1996 *Crim LR* 88.

99 Colman and Mackay 1993 *Issues in Criminology and Legal Psychology* 46. They describe (48–49) five examples of situations including obedience to authority and bystander apathy where the outcome of experiments was contrary to what the average person predicted.

100 A 339 *Sv.*

101 (1988–1989) 167 CLR 94 110.

5 THE ULTIMATE ISSUE RULE

As indicated in the discussion above, expert psychiatric or psychological evidence relating to the *mens rea* of an accused is inadmissible. Recently the classical approach expounded in *S v Harris*[102] was once again followed by the South African Supreme Court of Appeal in *S v September*:[103]

> "[I]n the ultimate analysis, the crucial issue of appellant's criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the Court itself. In determining that issue the Court . . . must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as witness and the nature of his proved action throughout the relevant period."

Although it does not say so expressly, this *dictum* reflects the sentiment that expert witnesses may not express an opinion on the question which the court has to decide – the so-called ultimate issue rule.[104] Jackson[105] defines ultimate issues in criminal trials as "material facts which must be proved by the prosecution beyond reasonable doubt before a defendant can be found guilty of a particular offence". The ultimate issue rule is said to be based upon the fear that the function of the tribunal of fact may be "usurped" by the expert's provision of expert evidence which touches upon issues integral to the determination of the case. Traditionally, therefore, common-law courts have been loath to admit an expert witness to give evidence which involves interpreting and/or applying a legal concept[106] or on any issue that the trier of fact must decide on for the ultimate resolution of the case. The problem with the ultimate issue rule is that it does not recognise that in some cases an expert witness will have difficulty expressing a relevant opinion without answering the ultimate issue itself.

However, Hodgkinson[107] indicates that the rule, as an exclusionary measure, is not strictly applied in England and Wales and has assumed a narrow application.[108] This has led commentators to regard the rule as obsolescent,[109] redundant[110] or designed to force experts into "expressing their opinions on crucial aspects of the proceedings in indirect and elusive terms, rather than using the terminology that they customarily employ".[111] In *R v Stockwell*[112] Lord Taylor CJ, acknowledging that the issue whether an expert can give an opinion on what has been called the ultimate issue, has long been a vexed question, continued by saying:

---

102 1965 2 SA 340 (A).

103 1996 1 SACR 325 (A).

104 Wigmore *A treatise on the Anglo-Amercian system of evidence in trials at common law* (1940) described the rule as "simply one of those impossible and misconceived utterances which lack any justification in principle" (2557) and its justification as avoiding usurpation of the function of the jury as a "mere bit of empty rhetoric" (2556).

105 Jackson "The ultimate issue rule: One rule too many" 1984 *Crim LR* 75.

106 Robertson and Vignaux *Interpreting evidence: Evaluating forensic science in the courtroom* (1995) 62. See also *IBM SA v CIR* 1985 4 SA 852 (A) 874A–B; *Metro Transport v National Transport Commission* 1981 3 SA 114 (W) 120A; *S v H* 1981 2 SA 586 (SWA) 589A.

107 Hodgkinson *Expert evidence: Law and practice* (1990) 150.

108 See *DPP v A & BC Chewing Gum Ltd* [1968] 1 QB 159. See also *S v Haasbroek* 1969 2 SA 624 (A) 631A–C.

109 *Ibid.*

110 Jackson "The ultimate issue rule: One rule too many" 1984 *Crim LR* 75.

111 Freckelton *The trial of the expert* (1987) 75.

112 (1993) 97 CAR 260.

> "The rationale behind the supposed prohibition is that the expert should not usurp the functions of the jury. But since counsel can bring the witness so close to opinions on the ultimate issue that the inference as to his view is obvious, the rule can only be . . . a matter of form rather than substance. In our view an expert is called to give his opinion and he should be allowed to do so. It is, however, important that the judge should make clear to the jury that they are not bound by the expert's opinion, and that the issue is for them to decide."

However, Robertson and Vignaux argue that the rule should remain as it is based on logic.[113] According to their argument, an analysis of cases in which expert evidence has been challenged on the basis of the ultimate issue rule provides instances where the experts have expressed an opinion on the ultimate issue assuming certain prior odds.[114] This could occur where an expert testifies to the probability of a match found to exist, for example, between a blood stain found at the scene of the crime and the accused's blood, by expressing his opinion as a likelihood of the accused being guilty where expert evidence is based on probabilities, Robertson and Vignaux point out that the value of all probabilities depends on the assumptions and information used in assessing them. By using Bayes Theorem they illustrate that knowledge about a hypothesis starts with odds in favour of it. In a murder case it could be the testimony of an eyewitness observing the accused in the vicinity of the place where the body of the victim was found. These are known as "prior odds".[115] According to the theorem, the prior odds must be multiplied by the likelihood ratio of every new piece of evidence to give the "posterior odds".[116] If an expert therefore gives an opinion on the likelihood of the accused being guilty (the ultimate issue), such an expert is not only testifying about the strength of the scientific evidence, but is basing his opinion on an assumption of prior odds. Robertson and Vignaux suggest that forensic scientific evidence which has a likelihood ratio (R), is best presented in the following form:

> "This evidence is R times more probable if the accused left the mark than if someone else did. This evidence therefore supports the proposition that the accused left the mark"
>
> OR
>
> "whatever odds you assess that the accused was present on the basis of other evidence, my evidence multiplies those odds by R".[117]

For this reason, the Court of Appeal held in *R v Doheny*[118] that an expert giving evidence which has a quantifiable likelihood ratio, should confine himself to explaining or quantifying that ratio.

The concerns highlighted by Robertson and Vignaux need not be addressed by retaining the ultimate issue rule as an exclusionary measure. I suggest that their fears can be assuaged in two ways: on the one hand, the evidence of experts who base their conclusions on prior odds (the cogency and weight of which still need to be assessed in coming to their conclusion) can be countered by excluding such evidence as goes beyond the scope of the expert's expertise. On the other hand, it can be argued that even where expert evidence is admitted on the ultimate issue, it

---

113 *Supra* 64.
114 Robertson and Vignaux 65.
115 *Idem* 17.
116 *Ibid.*
117 *Idem* 65.
118 [1996] TLR 504.

remains, like any other issues testified to, mere evidence, which must be weighed by the ultimate trier of fact. It does not mean that once such evidence has been admitted, fact finders necessarily need to rely on it. Acknowledgement of this reality explains why the ultimate issue rule is seen in the Netherlands as a decision-making rule. While in the Netherlands experts are also not allowed to draw conclusions, since this is the task of the legal decision-maker, awareness of these problems can inform decision-makers of the pitfalls of relying on such evidence.[119]

In the South African context where there is no need to protect a jury against powerful expert opinions and where professional judges are free to decide what weight they will attach to an expert's opinion, there is certainly no need for the perpetuation of the ultimate issue rule as an exclusionary rule. The problem surrounding experts expressing probabilities in such a way that they trespass on the ultimate issue is, however, an issue to which decision-makers should give careful consideration when evaluating such evidence.

6 THE BASIS RULE

An expert opinion given in the absence of reasons for reaching such a conclusion can have negligible probative value. Experts in all three comparator jurisdictions are expected to state the facts or data upon which their opinions are based.[120] In *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung Mbh*[121] it was said:

> "[A]n expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other witness. Except possibly where it is not controverted, an expert's bold statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."[122]

The so-called basis rule is usually not seen as an admissibility rule of expert evidence, but rather as relevant to factors that could impact on the evaluation of expert evidence.[123] At common law, admissibility does, however, become an issue as a result of the practice that experts often give opinion evidence on information provided by others.[124] The common-law rule against hearsay, if strictly applied, would often prevent the expert from giving his opinion, because his reasoning and conclusions will be governed by matters which he has come to know in the course of his training and profession, from what he has read or from what he has heard from

---

119 Sjerps "Pros and cons of Bayesian reasoning in forensic science" in Nijboer and Sprangers *Harmonisation in forensic expertise* (2000).

120 *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämfung Mbh* 1976 3 SA 352 (A); *R v Jacobs* 1940 TPD 142 146. See also *R v Morela* 1947 3 SA 147 (A); *S v Mthize* 1999 1 SACR 256 (W).

121 1976 3 SA 352 (A).

122 371.

123 *S v Baleka* 3 1986 4 SA 1005 (T) 1021C–D; *S v Ramgobin* 1986 4 SA 117 (N) 146D–G; *S v Adams* 1983 2 SA 577 (A) 586A–B.

124 Hodgkinson 181 remarks: "The use of hearsay by experts occurs both at an explicit level, at which particular hearsay sources are specifically referred to or produced in evidence, and at an implicit level, at which it is assumed that many of the expert's views will be informed by knowledge gained externally to the case, and in particular from the books, articles, papers and statistics through which the learning of a specialist discipline is disseminated to its members."

others who have the specialised knowledge. The logistical difficulties posed where every original source is to be called as a witness, have prompted a practice of circumvention of the hearsay rule. Where expert opinion evidence is given when not all its bases have been proved to the court, the rule is that such basis material must be proved by admissible evidence.[125] An expert testifying on information which has been supplied to him could, however, be the thin end of the wedge by which certain inadmissible material (which would not otherwise have been introduced) is brought to the attention of the tribunal of fact. Schuller[126] raises the additional danger that hearsay transmitted by an expert, as opposed to a lay witness, may carry convincing weight:

> "The oft-expressed concern that expert testimony will be over-valued by the jurors because of its aura of scientific reliability and trustworthiness (see Vidmar & Schuller, 1989) suggests that hearsay conveyed via an expert, as opposed to a non-expert witness, may carry greater weight. The 'paramessage' elements, such as prestige and expertise, that accompany the expert's 'message' (Rosental, 1993) may lend greater credibility to the hearsay information."

Common-law courts are faced with the dilemma of reaching an appropriate balance between the admission of such hearsay and the ability of the tribunal adequately to evaluate the quality and reliability of such expert evidence. Too much hearsay will not only make evaluation of the evidence difficult, but could impinge on the other party's right to cross-examine in circumstances where the witness is a mere conduit pipe of another who cannot be confronted. This dilemma had to be confronted by the English Appeal Court in *R v Abodom.*[127] Scientists from the Home Office gave evidence of the similarity of glass samples taken from the appellant's shoes and the composition of a window found to be broken at the scene of the crime. One of the experts testified that the refractive index of the particles found embedded in the appellant's shoes was identical to that of the window glass and gave evidence that according to statistics compiled by the Home Office, only four per cent of glass samples tested possessed that specific refractive index.[128]

On appeal it was argued that the expert evidence was based upon what was at that time[129] inadmissible hearsay and so should not have been admitted, since the experts had no personal knowledge of the tests from which the statistics had been assembled. In dismissing the appeal, the court made an important distinction between "primary facts" as bases of expert evidence, which have to be strictly proved and "secondary facts", as *in casu*, which the court held were exempt from the operation of the hearsay rule.[130] The court in the course of its *ratio decidendi* acknowledged "[that] the process of taking account of information stemming from the work of others in the same field is an essential ingredient of the nature of expert evidence".[131]

---

125 In *R v Turner* [1975] 1 QB 834 Lawton LJ succinctly explained the English law position to be the following: "It is not for this court to instruct psychiatrists how to draft their reports, but those who call psychiatrists as witnesses should remember that the facts upon which they base their opinions must be proved by admissible evidence. This elementary principle is frequently overlooked."

126 Schuller "Expert evidence and hearsay" 1995 *Law and Human Behaviour* 345.

127 [1983] 1 WLR 126; 1 All ER 364 369; 76 Crim App R 48 53.

128 *Ibid.*

129 The published statistics would now be admissible under s 24 of the Criminal Justice Act 1988.

130 *Idem* 129–130.

131 *Idem* 131.

The expert will still be at an advantage over the tribunal of fact when analysing and drawing information from specialised sources within his field.[132] As Hodgkinson[133] indicates, this exception to the hearsay rule is allowed because the expert cannot be prevented from relying on these sources when giving his opinion. The proper approach, according to the *Abadom* case, is that where experts have drawn on the work of others in arriving at their conclusion, "they should refer to this material in their evidence so that the cogency and probative value of their conclusion can be tested and evaluated by reference to it".[134] The *Abadom* decision extended the rule that experts may express their views based on secondary sources that are standard in their discipline to include "knowledge of unpublished material and . . . their evaluation of it".[135]

The various sources that an expert can rely on were commented on in *S v Kimimbi*[136] and *Menday v Protea Assurance Co Ltd.*[137] In the latter case Addleson J set out the approach to be followed where an expert relies on passages in a text book:

> "[The expert] must [show] firstly, that he (or, by reason of his own training, affirm at least in principle) the correctness of the statements in that book, and, secondly, that the work to which he refers to is reliable in the sense that it has been written by a person of established repute or proved experience in the field. In other words, an expert with purely theoretical knowledge cannot in my view support his opinion in a special field (of which he has no personal experience or knowledge) by referring to passages in a work which has itself not been shown to be authoritative. Again the dangers of holding the contrary are obvious."[138]

One way for a trial judge to decide whether to admit evidence by an expert who relies on unadmitted data, is to determine whether these data are of a type reasonably relied upon by experts in that field.[139] In the Netherlands the use by an expert of sources that constitute hearsay is unlikely to pose problems in view of the general practice of courts to use hearsay statements as evidence.[140]

There is also no "basis rule" that determines the admissibility of evidence: an expert is required at least to base his opinion upon that which "his knowledge teaches him" regarding the specific field.[141] In addition, article 299.2 of the Dutch Code of Criminal Procedure states that not only should a person submitting a written report to the court be an expert, but he should also substantiate his opinion by including reasons for that opinion. Despite the fact that article 299.2 *S v* requires that

---

132 Hodgkinson *supra* 116.
133 *Ibid.*
134 [1983] 1 WLR 126 131.
135 *Ibid.*
136 1963 3 SA 250 (E).
137 1976 1 SA 565 (E).
138 569H.
139 Carlson "Experts, judges and commentators: The underlying debate about an expert's underlying data" 1996 (47) *Mercer LR* 481 491.
140 HR 20 December 1926 1929 85ff.
141 A 343 *Sv*. A statement by an expert is understood to be his opinion, made in the course of the investigation at the trial, as to *what his knowledge teaches him about* that which is *the subject of his opinion*. (My emphasis.) A 344 *Sv*: 1 Written documents are understood to be: (4) reports of experts entailing their opinion as to *what their knowledge teaches* them about that which is the *subject of their opinion*. (My emphasis.)

experts should support their conclusions with reasons, the Hoge Raad[142] is hesitant to hold that failure to supply "reasons for knowing" constitutes reversible error. The Hoge Raad[143] had to consider an appeal from the Court of Appeal of s'Hertogenbosch, which had relied on a medical report finding an accused guilty of sexual abuse. The report did not explain what investigation was performed by the medical expert, nor did it state the basis or method on which the expert had made a diagnosis of sexual abuse. Defence counsel argued on appeal that the expert's opinion of sexual abuse was unacceptable as means of proof, on the grounds of the expert's failure to substantiate it with reasons. The Hoge Raad held that the appellate court could consider the expert's documentary statement as expressing his expert opinion on the issue and hence that no reversible error had been committed.

In the light of the decisions in the "Anatomically Correct Dolls" and the "Shoeprint" case[144] it can be said that Dutch trial courts need not justify their decisions, unless the defence has made a specific and detailed challenge as to the reliability of the method that the expert used to draw his conclusions. If, however, the expert is not required by practice to state his reasons and methodology used, such a challenge will be difficult for the defence to launch. According to the "Anatomically Correct Dolls" case and the "Shoeprint" case, where the reliability of expert reports is contested by the defence, trial courts relying on such expert evidence would need to explain why they consider the expert's method to be reliable. If the expert report does not state the reasons and the methodology used by the expert, the court will be without the means to justify its decision. The line of reasoning in the "Anatomically Correct Dolls" case and the "Shoeprint" case seems difficult to reconcile with the decision in the s'Hertogenbosch sexual abuse case. Surely, good science and good law would require that an expert should state his "reasons for knowing" when submitting a written report to court, especially as this is required by the Code of Criminal Procedure.

The basis rule as applied in South Africa and England/Wales appears to function as it does in the Netherlands, more as a decision-making rule than an exclusionary rule. Stating the basis for experts' conclusions is essential to the judicial decision-making process, since without the facts or data upon which such opinions are based, their bald statements provide no means of accountability. The requirement that an expert should state the reasons for his opinion, serves as an important touchstone of reliability.

7 CONCLUSION

In all three comparator countries, rules which determine the admissibility and/or the probative value of expert evidence are apparent. Whether the "expertise", "common knowledge" or "basis" rules are seen as admissibility or as decision-making rules, is immaterial. Their ultimate objectives are the same. Most of the rules of evidence followed in England/Wales and South Africa were designed to withhold evidence from the jury that may unduly bias them against the accused that is potentially too unreliable to be of any use. The South African criminal justice process, however, no

142 HR 23 June 1930 *NJ* 1930 1477; HR 18 October 1977 *NJ* 1978 534; HR 26 September 1995 *NJ* 1996 41.

143 HR 26 September 1995 *NJ* 1996 41.

144 Discussed *supra*.

longer functions with a judge and jury. Damaska[145] remarks that it is the environment of the bifurcated court that facilitates the effective enforcement of the exclusionary rules. South African criminal tribunals can be seen as unitary courts, where the judge determines not only the admissibility of evidence, but is also the ultimate trier of fact. In this respect, South Africa more closely resembles the Dutch System. It is also for this reason that it is argued here that the debate about threshold tests[146] for expert evidence need not, as in the United States of America, concern South African courts as a vexed admissibility issue. John Jackson[147] observes that there has, in recent years, generally been an increasing move away from rules of evidence in favour of the principle of free proof. In terms of this principle, triers of fact are permitted to evaluate all evidence that is sufficiently relevant without the need for stringent exclusionary rules. Likewise, I should like to argue here that, since South Africa has unitary courts staffed by professional judges, a strict application of the so-called rules of expert evidence is no longer essential. Where expert evidence is likely to assist the trier of fact and is therefore logically relevant, it should be admitted. If during the course of the trial, it appears to be unreliable, the trier of fact is free not to rely on such evidence as he is in the Netherlands. Problems associated with experts testifying to the ultimate issue, such as the guilt of an accused, can usually be excluded on the grounds that such evidence goes beyond the field of expertise of the particular expert, making the independent existence of the ultimate issue rule superfluous. Abolishing the "ultimate issue" rule in South Africa would be in line with law reform[148] in many other countries. Where experts do give evidence on the ultimate issue that the court has to decide it should, however, be balanced by an appropriate system of testing the quality, reliability and accountability of their evidence.[149] This does not mean, however, that the criteria traditionally contained in the exclusionary rules cannot be used as decision-making rules by triers of fact.

Die Hugo de Groot-prys vir die beste bydrae oor die Grondwet is toegeken aan professor Henk Botha vir sy artikel "Democracy and rights: Constitutional interpretation in a postrealist world".

---

145 Damaska "Evidence: Legal perspective" in Carson and Bull (eds) *Handbook of psychology in legal contexts* (1995) 170.

146 *Frye v United States* 293 F 1013 1014 (1923); *Daubert v Merrell Dow Pharmaceuticals* 125 L Ed (2d) 469; 113 S Ct 2786 (1973). See also *Kumho Tire Co Ltd v Carmichael* 131 F 3d 1433 (1998).

147 Jackson "Evidence: Legal perspective" in Carson and Bull (eds) *Handbook of psychology in legal contexts* (1995) 170.

148 See the recommendations of law commissions from other Commonwealth countries. Australian Law Reform Commission *Evidence* Report No 36 (1988); Ontario Law Reform Commission *Report of the Law Reform Commission* (1976), Scottish Law Commission *Law of evidence* Memo No 46 (1983); Federal Provincial Task Force on Uniform Rules of Evidence *Report* (1982); New Zealand Law Commission *Evidence law: Expert evidence and opinion evidence* Preliminary Paper No 13 (1991).

149 Carson "Beyond the ultimate issue" in Lösel, Bender and Bliesener (eds) *Psychology and law: International perspectives* (1992) 447.

Relativism versus universalism in international research ethics: a discursive solution?*

Christa van Wyk
BA LLM LLD
Professor in the Department of Jurisprudence, University of South Africa

OPSOMMING

Transkulturele mediese navorsing neem by die dag toe. Wanneer sulke navorsing in ontwikkelende lande deur navorsers uit ontwikkelde (Westerse) lande gedoen word, ontstaan verskeie probleme. Moet universele etiese beginsels geld, of moet plaaslike beginsels, wat van land tot land kan verskil, toegepas word? Die universalistiese benadering hou die gevaar in van kulturele imperialisme, terwyl relatiwisme tot die miskenning van navorsingsdeelnemers se regte kan lei. 'n Oplossing vir die probleem van botsende waardes (en verskille in sosio-ekonomiese omstandighede), kan moontlik in waarde-pluralisme gevind word. Botsende waardes kan egter waarskynlik die beste versoen word deur 'n toepassing van die beraadslagende proses, soos beskryf deur Habermas en Mannheim. Hierdie beraadslagende proses van onderhandeling, waartydens die outonomie van die onderhandelaars vooropgestel word, kan waarskynlik ook die beste voldoen aan die navorsingsbehoeftes van ontwikkelende lande wanneer dit kom by siektes soos HIV/VIGS.

1 INTRODUCTION

1 RELATIVISM: AN IMPORTANT FACET OF POSTMODERNISM

1 1 Postmodernism

The postmodern approach developed for a number of reasons, notably the dethronement of Europe as a world power, the decolonisation of Africa and Asia, which brought hitherto oppressed and marginalised voices to the fore, and the shrinking of the globe, which brought historically divergent and disparate cultures increasingly into contact with one another.

Postmodernism challenges and questions the central tenets of modernism/liberalism/rationalism, such as that all phenomena may be rationally and objectively explained and that generally valid and neutral value systems and absolute and universal truths, principles and essentials exist. Postmodernism is sceptical towards the idea of universal and essential ideas, and questions the co-called mainstream or master "narratives". It argues that such mainstream narratives should not be more important than other narratives, but that all views should compete on an equal footing. All attempts to articulate universally valid principles and views of the social order are regarded as oppressive projections of power which cannot be justified. Postmodernism emphasises the voices (or "narratives") of marginalised groups in society:

> "Postmodern critique illuminates the underside of master narratives, and thereby exposes the subordination and marginality of alternative social visions whose relegation to the status of exception to the rule . . . or minority perspective can no longer be objectively justified."[1]

Postmodernism emphasises *relativism*, contingency and pluralism. It moves away from universal and abstract rules to local and contextualised ones, from fixed and rigid categories and principles to contingency, from mainstream approaches and master narratives to the personal and unique. It moves from fixed frameworks to diversity and open-endedness, from authoritarianism to participation. It denies absolute or objective truths and holds that there is only truth for a given context and moment in history. It regards all knowledge, including scientific knowledge, as provisional and relative. It sees reality as being in a state of flux where objective certainties are not possible, and where only interpretations and not rational facts, exist. Postmodernism turns away from the rational, rights-based[2] and independent model of personhood so characteristic of liberalism. Postmodernism emphasises social interdependence and the embeddedness of the individual within society, and defines a person by means of his or her relations to others. Postmodernism further holds that the West's way of life is not (necessarily) superior to all others, and that other civilisations, including non-literate ones, are not necessarily inferior, less civilised or more primitive than Western ones.[3]

1 2 Relativism

1 2 1 Relativism in antiquity

Relativism is nothing new. Examples of cultural[4] differences such as slavery and cannibalism abound in antiquity. It is evident from the *History of Herodotus* that the ancients were already aware of cultural and ethical diversity. Herodotus made the following remarks:[5]

> "For if one were to offer men to choose out of all the customs in the world such as seemed to them the best, they would examine the whole number, and end by preferring their own; so convinced are they that their own usages far surpass those of all others. . . . That people have this feeling about their laws may be seen by very many proofs: among others, by the following. Darius, after he had got the kingdom, called into his presence certain Greeks who were at hand, and asked – 'What he should pay them to eat the bodies of their fathers when they died?' To which they answered, that there was no sum that would tempt them to do such a thing. He then sent for certain Indians, of the race called Callatians, men who eat their fathers, and asked them, while the

---

* This is an expanded version of a paper delivered at the 13th World Congress on Medical Law, Helsinki, Finland, 2000-08-09.

1 Cook "Reflections on postmodernism" 1992 *New England L Rev* 751.

2 Liberalism regards human rights as pre-political or pre-social in nature and as a limitation on the legislature. Everybody is entitled to these rights simply by being born, and these rights do not have to be negotiated or earned in any way.

3 Herskovits *Cultural relativism* (1972) 22 *et seq*.

4 Culture refers to the total way of life of a society, its traditions, habits, beliefs and art (Macklin *Against relativism: Cultural diversity and the search for ethical universals in medicine* (1999) 6; culture is learned, not inborn, and it carries validity only to the members of the society that lives in accordance with it (Herskovits 98).

5 5th century BC. He was a Greek historian who reported on the customs of the peoples he visited during his travels. The translation is taken from Ladd *Ethical relativism* (1973) 12 and is based on an adapted translation of Rawlinson (1859–1861).

> Greeks stood by, and knew by the help of an interpreter all that was said – 'What he should give them to burn the bodies of their fathers at their decease?' The Indians exclaimed aloud, and bade him forbear such language. Such is men's wont herein; . . . 'Custom is the king over all.'"

Plato[6] saw his task as philosopher to restore the idea of an unchanging and eternal cosmological order, which had been questioned by the moral relativism of the Sophists. He believed that it was possible for man to attain knowledge of eternal and immutable truths, for example of "goodness" and "justice". Such moral principles would have universal validity, existing above and unaffected by changing human attitudes or beliefs, and they would be the touchstones against which all human actions and views would be judged.[7] In his theory of Forms he endeavoured to establish an absolute foundation for morality.[8]

1 2 2 Modern examples of relativism

Modern examples of differences in culture and ethics[9] are probably not as dramatic as the example by Herodotus quoted above, but they nevertheless abound: There are remarkable differences as to the ethics of using leftover blood samples for blind HIV seroprevalence studies. In some European countries this is regarded as unacceptable, while in South Africa it is accepted practice. Female genital mutilation (euphemistically called circumcision) is practised in some African countries; husbands' permission is needed for their wives to participate in research in many orthodox Muslim countries; in some Indian communities widows still have to immolate themselves upon the death of their husbands; in China forced abortions take place, and the authority of husbands and mothers-in-law prevails. In South Africa the death sentence is considered to be an unusual and cruel punishment which has been declared unconstitutional, while in some of the states in the United States of America, this sentence is still carried out. Likewise, ideas about the termination of pregnancy and euthanasia differ from country to country.

1 2 3 Relativism explained

According to the doctrine of *ethical* relativism, ethics are relative to time and place. Ladd[10] describes it as a doctrine which accepts that the moral rightness or wrongness of actions varies from society to society and that there are no absolute universal moral standards binding on all men at all times. The doctrine holds that whether or not it is right for an individual to act in a certain way depends on or is relative to the society to which he belongs. What is right in one society may well be wrong in another society and may be neither right nor wrong in a third society.

Relativism holds that there are no universally valid moral principles, and that every moral principle is equally valid. If pursued consistently, this view becomes ethical scepticism or nihilism which denies the distinction between right and wrong. All attempts to judge impartially between different cultures are abandoned: since everything is understood, everything is pardoned. All systems of moral values and ethics, all concepts of right or wrong, are acceptable. Nothing is inherently wrong, and no moral principles are inherently legitimate. Value judgements should never be made, and tolerance should be shown toward all cultures and traditions.

---

6 ± 427–348 BC.
7 Riddall *Jurisprudence* (1991) 53 *et seq.*
8 Cf Plato's *The republic* and his *Dialogue.*
9 Cultural differences imply that ethical differences as ethics are part of culture.
10 *Ethical relativism* 1.

Relativism, if taken to extremes, is a crippling and pernicious doctrine which indiscriminately and passively accepts anything, even the neglect of human rights. Applied to research, this could result in developing countries being regarded by Western investigators as cheap research opportunities. The danger of double standards and exploitation arises and the result may be that projects which are deemed ethically questionable in a developed country, may be conducted in a developing country where different ethics apply.

The positive aspect of relativism is that it makes available fresh, cross-cultural data gained from the study of the underlying value systems of societies having diverse customs, and that it nurtures mutual respect and emphasises that many ways of life are worth living. It affirms the values of each culture and does not lead to the disregard of those ideas that do not dovetail with one's own.

The question arises whether only cultural differences, and not socio-economic differences between countries, could give rise to ethical relativism. It is submitted that this is indeed possible, although this view is not shared by, for example, Ruth Macklin.[11]

2 UNIVERSALISM: AN IMPORTANT FACET OF MODERNISM

Universalism[12] is the belief that a system of set principles establishes a formal standard against which all thought must be tested. In the realm of research, this means that universally applied ethical principles govern the conduct of research wherever it is conducted. It holds that the validity of moral beliefs, rules and practices is logically independent of the cultural or social background of the person accepting them. Universalists focus on the common, permanent, and universal aspects of human nature, that which is morally essential in human nature and society.

Advocates of universalism in research ethics argue that it is only natural to apply Western-oriented[13] principles, as contained in, for example, the Nuremberg Code and the Declaration of Helsinki. It is natural because most therapeutic innovations are developed in industrialised nations and because biomedical research,[14] research methodologies and medicine can be regarded as predominantly Western in character. They concede that research ethics in the West is also a relatively recent phenomenon which has largely been articulated since World War II,[15] but argue that the above-mentioned international codes have been endorsed by most countries, including developing ones.

---

11 *Against relativism* 213.

12 I will not go into the differences between the two forms of anti-relativism here. Herskovits 31–32 argues that the difference between absolutes and universals is as follows: Absolutes are fixed and enduring principles of rationality, reflecting pure, idealised forms of concepts. They are unchanging and do not admit of any variation from culture to culture or from time to time. Absolutism conforms to formal principles of reasoning which cannot be impeached by anyone, for they are the ground for any and all thinking. Universals are common denominators extracted from the range of variation that all phenomena of the cultural world manifest. They are values that seem to be appropriate and necessary to all men and that transcend cultural variation. Universals are found in all cultures.

13 Ie Judeo-Christian, technocratic and rationalistic in nature.

14 Cf eg the concept of randomisation and placebos (for which there is often no word in other cultures). Macklin 13 *et seq* mentions that there is no word for "privacy" in Mandarin Chinese and she recounts the public posting of women workers' menstrual cycles in the workplace as something which is quite acceptable in China.

15 Christakis "Ethics are local: engaging cross-cultural variation in the ethics for clinical research" 1992 *Social Science and Medicine* 1079 1088.

To apply a universal standard is seen as a way to prevent the exploitation of people in developing countries. It is felt that there must be a core of ethics and human rights that should be honoured universally, despite local variations in their superficial aspects, and that the force of local custom or law cannot justify abuses of certain fundamental rights.[16]

The dangers inherent in universalism are cultural imperialism,[17] neo-colonialism (which may be regarded as another form of exploitation), ethnocentrism,[18] and failure to show respect for other traditions, or even worse, to admit that real cross-cultural differences exist. Often foreign researchers do not believe it is appropriate for the West to dictate their ethical standards. The imposition of Western ideas is regarded as deeply humiliating by other cultures, and as cultural and moral arrogance on the part of countries with the greatest economic power who are often ignorant of real situations in the developing world and of different socio-economic and cultural settings. Furthermore, the application of universal guidelines marginalises alternative visions of what is ethically correct and sees the Western view of life as preferable to all others.

3 PROBLEMS IN TRANSCULTURAL INTERNATIONAL RESEARCH

The proliferation of trans-national and trans-cultural biomedical research – where the investigator and the research participants come from different cultural and economic settings – has given rise to the question of which ethics should govern such research. In many non-Western countries the liberal legal heritage of individuality, freedom and human rights does not exist. How far can Western countries impose their concepts of research ethics and human rights? As ethical rules are generally based upon profound religious and philosophical beliefs held by a given people, the ethics regarding research with human subjects might be expected to vary cross-culturally[19] and many problems arise. To name a few examples: The concepts of informed consent, autonomy and the idea of personhood/individualism – as opposed to membership of a family or community – may differ fundamentally from those held in Western countries. Some African languages may not even have a term corresponding to the English word "person".[20] Some cultures[21] do not reflect the Western perspective of radical individualism and may not consider individual consent as essential.[22] The consent of the social group instead of or in addition to that of the individual may be needed, and research protocols which may be

16 Angell "Ethical imperialism? Ethics in international collaborative clinical research" 1988 *New England J of Medicine* 1081.

17 When a host country is forced to maintain foreign standards when taking part in joint research, this may rekindle past resentment of colonialism.

18 Ie the point of view that one's way of life is to be preferred to all others.

19 Christakis 1992 *Social Science and Medicine* 1079 1080.

20 Barry "Ethical considerations of human investigation in developing countries" 1988 *New England J of Medicine* 1083.

21 Eg Japan (Levine "Informed consent: some challenges to the universal validity of the Western model" Fall-Winter 1991 *Law, Medicine and Health Care* 207 209).

22 Ijsselmuiden and Faden "Research and informed consent in Africa – another look" 1992 *New England J of Medicine* 832, however, argue that the view of the individual as an extension of the family or group cannot be seen as typical of African culture. The reasons they advance are that such views are often based on dated anthropological literature that does not reflect the rapid change African societies have undergone, and further that there is no such thing as a single African culture.

unacceptable in the West may be seen as totally acceptable in non-Western countries. Furthermore, the requirement of *written* informed and free individual consent, which is regarded as a fundamental protection for research participants in the West, may not be a meaningful way to protect research subjects in countries where literacy is low.[23] In such instances, the researcher may have to choose between the principle of autonomy of the research participants and the principle of beneficence, which aims at enhancing the well-being of people in that society who are in the same position as the would-be research participants.

3 1 The revision of the Declaration of Helsinki

The Declaration of Helsinki[24] has recently been revised.[25] It provides international guidelines for medical research, including medical research combined with medical care, in which case additional standards apply to protect the patients who are the research participants.

The proposals for the revision of the Declaration of Helsinki elicited strong criticism, and were seen as a way of introducing relativism,[26] as a lowering of the standards of research ethics in developing countries, and as introducing double standards of care for research participants in such countries.

With regard to medical research which is combined with medical care, the previous version of the Declaration stated that in any medical study, every patient – including those in a control group who would be receiving inert placebos – had to be assured of the "best proven diagnostic and treatment methods". Although it was not made clear who would be responsible for the treatment, or in which part of the world the treatment had to be the best proven, the "universalists" held that this standard should apply to all clinical and vaccine trials in all countries, including developing ones. It was argued that "best proven" standard was a scientific and rational concept and for this reason acceptable.[27]

A heated debate ensued when the revision of the Declaration was mooted. Various "relativist" proposals referred not to the "best proven" methods, but to the "local standard of care", the "highest attainable and sustainable standard" of care, the "care that would otherwise be available",[28] or "proven effective prophylactic, diagnostic and therapeutic methods".[29] The "relativists" were criticised by the "universalists" for introducing economic and political undertones. They pointed out that limited financial resources were not an ethical issue and that it was dangerous to put the

---

23 Wichman, Smith, Mills and Sandler "Collaborative research involving human subjects: a survey of researchers using international single project assurances" 1997 *IRB* 1.

24 This declaration was adopted in 1964 by the World Medical Association as a measure further to the *Nuremberg Code* to protect society against possible abuses. It is essentially a document written for physicians by physicians.

25 October 2000, Edinburgh, Scotland.

26 Macklin 213 does not agree that this is a case of relativism: "The controversy had little to do with the different norms or values in different countries and everything to do with the economic disparity between developed and developing countries . . . the real double standard lies not in the way the trials are being conducted, but in the inequity in access to medicines in different countries."

27 Cf Rorty *Objectivism, relativism, and truth: Philosophical papers* (1991) 35 *et seq* for the idea that in the Western world the notions of "science", "rationality", "objectivity" and "truth" are bound up with one another.

28 "Declaration of Helsinki – nothing to declare?" (editorial) *The Lancet* April 1999.

29 That of May 2000.

"highest attainable and sustainable standards of care" in an international guidance document, as such standards would depend on a national or local interpretation. It was further argued that the proposed changes were "the ethical equivalents of the deregulation, low wages, exploitative working conditions, and reduced environmental protections that are the inevitable consequence of globalisation".[30] (It must be noted that in the end, the revised 2000 version of the Declaration of Helsinki neatly side-stepped the issue of affordability and costs by providing as follows: "At the conclusion of the study, every patient entered into the study should be assured of access to the best proven prophylactic, diagnostic and therapeutic methods identified by the study.")

3 2 AIDS research in developing countries

This debate also has relevance for the controversy about placebo-controlled studies carried out in developing countries to determine the efficacy of a short course of zidovudine (AZT) to prevent mother-to-child transmission of HIV. The studies were generally condemned by Western "universalist" critics as unethical. They charged that, since the full regimen of AZT was shown to be effective in the well-known ACTG 076 study – reducing transmission rate by approximately two thirds, no pregnant woman should be given a placebo, but should be given the "076" (or full) regimen of AZT, being the "best proven therapeutic treatment". The trials were seen as applying double standards in research, since the standard applied in the host countries differed from that in the investigating country because women in developing countries were being denied a drug that was readily available in the Western world.[31]

This criticism elicited strong response,[32] also from South Africa,[33] where one of these trials was being carried out in two public hospitals, in Johannesburg and Durban. The placebo-controlled trials were undertaken to find cheaper and simpler ways of limiting perinatal transmission. It is a well-known fact that Africa, and in particular South Africa, are of the regions in the world most affected by HIV/AIDS. An estimated 22,4 per cent of pregnant women in South Africa were infected with HIV by 1999,[34] and of the 550 000 children born with HIV annually, nine of every ten are born in Africa.[35] It is also true that the full AZT regimen would be out of reach for most Africans. In 1997, the regimen cost at least US $800 per mother and

---

30 Lurie "International ethics codes update" INTAIDS@hivnet.ch 1999-10-15.

31 Cf Angell "The ethics of clinical research in the third world" 1997 *New England J of Medicine* 847; Lurie and Wolfe "Unethical trials of interventions to reduce perinatal transmission of the HIV in developing countries" 1997 *New England J of Medicine* 853. A comparison was drawn between the placebo trials and the notorious Tuskegee Study of Untreated Syphilis, carried out from the 1940s to the 1970s in the USA. This study allowed US blacks with syphilis to remain untreated even when penicillin became available.

32 Cf Bloom "The highest attainable standard: ethical issues in AIDS vaccines" January 1998 *Science* 186; Henderson "AIDS experts quit New England Journal over editorial" October 1997 *AIDS Weekly Plus* 24.

33 Cf Cameron "Resources and ethics in prevention of mother to child transmission of HIV – a lawyer's perspective": paper delivered at the Australasian Society for HIV Medicine, 11th Annual Conference 1999-12-9–11, Perth, Western Australia; Karim "Placebo controls in HIV perinatal transmission trials: a South African's viewpoint" April 1998 *American J of Public Health* 239.

34 June 2000 *AIDS Bulletin* 9.

35 "The HIV/AIDS epidemic in SADC" August-September 1999 *AIDS Analysis Africa* 11.

infant, while the annual per capita income of most Africans ranges between US $150 and $750 per year.[36]

Besides the full regimen not being affordable for most developing countries, including South Africa, it is also not feasible owing to the exacting nature of compliance with it. Antenatal oral administration of AZT begins during the early stages of pregnancy and continues throughout pregnancy.[37] This is followed by intravenous AZT during delivery and AZT given orally four times a day for six weeks to the newborn babies. During this time the mothers are expected not to breastfeed, but to use milk formula substitute instead. In the typical African setting, most women do not receive the necessary antenatal and obstetric care that would allow implementation of this regimen, even if the drug were easily available and affordable. Medical infrastructure is inadequate to deliver intrapartum infusions safely, and the safety of AZT for mothers and children with a high prevalence of anaemia and little access to health care has not been proved. According to De Cock,[38] the above-sketched realities meant that a placebo control was ethical. He points out that it was also scientifically sound: If the short course regimen were found to be less effective than the full regimen, the researchers would still not know whether the short regimen was better than no treatment at all, which is the current standard of care. It was further pointed out that without the research, "nothing" would be all that would be available to those from whom the research participants are drawn.[39] The full regimen would not become the standard of care, *no* treatment as the current standard would be perpetuated and the hope of an affordable and feasible intervention to reduce the burden of paediatric HIV infections would be greatly diminished. The underlying charge of the counter-critique was that of ethical imperialism which ignored the realities of economic conditions in the developing world.[40]

This debate also revolved around the question of who are in the best position to decide what research would be ethical or not. The counter-critique suggests that the circumstances and the reality of health care in a particular country should be taken into account, and that the opinions of scientists and ethicists from the countries where the studies were taking place, should be sought and listened to. It is not merely ethical imperialism, but also insulting to imply that the approval of an African ethics committee is valueless.[41]

William Makgoba, president of the South African Medical Research Council, in his address to the XIIIth AIDS conference held in Durban, South Africa during July 2000, remarked that ethics is loaded with value and power, and that "one often has to question the relevance of the concept of international ethics . . . Every nation is

---

36 Crouch and Arras "AZT trials and tribulations" November 1998 *The Hastings Center Report*; "A growing dichotomy: the gap between the haves and the have-nots" January 1998 *AIDS Alert* 1 (quoted by Cameron Australasian Society for HIV Medicine, 11th Annual Conference 1999-12-09–11, Perth, Western Australia).

37 It involves taking medication five times a day for at least twelve weeks.

38 De Cock "Publicity, politics, and public health: the case of placebo-controlled trials for the prevention of mother-to-child transmission of HIV in resource-poor countries" paper delivered 1999-07-02 at the International Research Ethics programme offered at the Johns Hopkins University 17th Annual Graduate Summer Institute of Epidemiology and Biostatistics.

39 Cameron Australasian Society for HIV Medicine, 11th Annual Conference 1999-12-09–11, Perth, Western Australia 10.

40 Bloom January 1998 *Science* 186.

41 "Pragmatism in codes of research ethics" (editorial) *The Lancet* January 1999.

constrained by its . . . level of development . . . and should practise the best ethics that is attainable within its own constraints." Edwin Cameron, a judge of the Supreme Court of Appeal of South Africa and by his own admission a person with AIDS, observed:

> "The critics lay themselves open to the charge that their preoccupation is with the comfort levels of first-world ethicists in their contemplation of third-world trials – rather than with confronting the underlying moral issues [namely the unavailability of drugs in resource-poor countries] . . . Stopping trials in Africa that are trying to improve the health of poor people so that those in affluent countries can have peace of mind seems a tortured form of ethical logic."[42]

Clinical trials for HIV vaccines[43] are due to start in South Africa in early 2001. Much of this vaccine work will take place in under-resourced communities, where people are at high risk of HIV infection. The candidate vaccines may not prevent HIV infection, but may prevent AIDS disease. One of the ethical problems[44] that may arise, is whether it will now be required that individuals in vaccine trials who have acquired HIV infection, should be offered anti-retroviral therapy. Assuming that the resources will be available to provide anti-retroviral drugs, this treatment will compromise the ability of the trial to measure the efficacy of the vaccine in preventing disease. Much the same controversy as the one discussed above may be expected to arise.

4 POSSIBLE SOLUTIONS TO TRANSCULTURAL CONFLICT

4 1 Universalism or relativism?

Conflicts regarding ethics in the international research arena may be addressed in a number of different ways:[45] All transcultural research could be abandoned and contact eliminated; a relativistic attitude could be adopted without any guidance as to which system should be regarded as superior; or Western research ethics could apply universally. Another possibility is to distil universal principles from different cultures which could form a universal standard. This approach seems attractive, but is unlikely to yield many constant conceptions, especially if ethics governing clinical research on humans is looked for. Christakis mentions that ancient systems of Ayurveda and traditional Chinese medicine do not have comparable conceptions that could be of help in research ethics, as they are mostly guides to the professional conduct and etiquette of healers.

4 2 Pluralism

A middle road between relativism and universalism is advocated by some writers, such as Levine and Macklin. Their approach boils down to pluralism. Levine[46] holds that pluralists accept some standards as universal, but argues that other standards must be adapted to accommodate the mores of particular culture. Although he endorses certain forms of cultural relativism, he argues that there are limits to how

---

42 Cameron Australasian Society for HIV Medicine, 11th Annual Conference 1999-12-09–11, Perth, Western Australia.

43 The VEE-based clade C vaccine.

44 Bloom January 1998 *Science* 87–88 lists a number of other disturbing questions, such as whether, in further trials, a poorly effective vaccine should be given instead of placebos; also whether it will be unethical to carry out placebo-controlled trials in countries that have not yet accepted vaccines proven to be effective elsewhere.

45 Christakis 1992 *Social Science and Medicine* 1079 1081 *et seq.*

46 Fall-Winter 1991 *Law, Medicine and Health Care* 207 210.

much cultural relativism ought to be tolerated. He suggests that the principle of respect for persons is one of the universally applicable ethical standards.[47] Macklin argues that there are fundamental principles (such as the right to liberty) that should be universally applied, but she accepts that privacy may be a value which can vary from culture to culture, and that such variation is not an ethical deficiency, but a cultural difference. However, as soon as harm, suffering or lifelong disability is inflicted on the individual, such practice is, according to her, ethically wrong.[48] She tends to equate universal ethics with some (fundamental) human rights. It is, however, not exactly clear where Levine and Macklin would draw the line with regard to the level of relativism which is to be tolerated.

4 3 The discursive process

A more attractive solution would the totally different philosophical approach of a discursive, self-critical inquiry, of debate and of listening to others, as propagated by the philosophies of Mannheim and Habermas. Mannheim[49] emphasises the values of the interpretative, discursive process, instead of adopting universal frameworks or formalised models. According to the discursive process, any disagreement may be settled. He regards an ongoing process of investigation and deliberation as better able to bring about legitimate rules than recognising a formal set of authoritative principles. Mannheim argues that knowledge cannot be gained by an appeal to timeless principles and that the discursive process widens horizons and understanding of issues and helps one to grasp other positions. The continuous investigation and evaluation of opposing positions requires not only authentic access to the position of others, but also a critical and self-reflective grasp of one's own position, and of one's own life and tradition. In this way one can transcend the limits of understanding born of personal experience, and learn from the experience of others. The debate should be aimed at uncovering the sources of disagreement, and at looking for common denominators and the broadest possible extension of horizons. Uncertainty, rather than faith in the value of absolutes or universals, may bring people a good deal closer to truth and reality. Habermas's[50] ideas on the discursive process and the values of public debate can also fruitfully be applied in the sphere of international research ethics.[51] Rules are legitimised by the deliberative process: a rule is legitimate only if everybody who is affected by it, consents to it after having taken part in a free and rational debate on the topic. Such debate is made possible by the observance of the right freely to express oneself, the right to equality and the right to take part in the deliberative process. Consensus can be reached among participants in the process of inquiry, which presumes equal participation by all, and universal moral respect for all. Undistorted communication is needed in order that the best arguments may prevail. In the ideal debating situation, all that is said will be clear, true, legitimate and sincerely meant and the end result will be that communities will be held to rules chosen and debated by themselves, not by others.

---

47 *Idem* 207 212.

48 Eg footbinding of Chinese women (Macklin 28).

49 Simonds *Karl Mannheim's Sociology of knowledge* (1978) 170 *et seq.*

50 Cf eg "Human rights and popular sovereignty: the liberal and republican versions" 1994 *Ratio Iuris* 1 and "On the internal relation between the rule of law and democracy" 1995 *European J of Philosophy* 12. Cf also Benhabib *Situating the self* (1990) 89 *et seq.*

51 Habermas endeavours to reconcile the ideas of liberalism (including the idea of the rights-bearing and autonomous individual) with those of republicanism (including the idea of the sovereignty of the political community) and argues that law is legitimised by the deliberative process.

In the context of medical research, and in line with the broader philosophical discussions by Habermas and Mannheim, Christakis holds that one must *engage* in conflict, rather than abolish it and that the ongoing discourse exists of a confrontation of situations that pose ethical dilemmas:

> "We must navigate, in short, between the simplicity of ethical universality and the evasion and complexity of ethical relativism, between intellectual hubris and moral paralysis . . . We must face and accept the indeterminacy of ethical variability."[52]

Christakis and Panner[53] emphasise the process of negotiation between the representatives of the research participants and the researchers. Mutually acceptable standards can be agreed upon if an ethical review is approached jointly, and if use is made of a local review board, composed of professionals and laymen who represent the local community.[54] Christakis further proposes that a new type of international ethical code be developed which will outline dispute resolution principles for conflicting ethical expectations: "Implicit in this recommendation is support for an ongoing international dialogue that privileges all perspectives on the ethics of clinical research (not just Western perspectives)."[55] For this would be needed, *inter alia*, good faith and legitimate representatives. When research that is considered desirable by either party is proscribed by existing international standards or by either party's own standards, Christakis holds that formal negotiations should take place between the parties to understand the source of disagreement and to arrive at a consensus. If consensus is ultimately reached, the research should be viewed as ethical, its deviation from any international standards notwithstanding.[56]

5 CONCLUSION

In the light of the above discussion, and in view of the daunting socio-economic and health problems experienced in the developing world, is submitted that the *discursive* process may be the best way to overcome the conflict and problems associated with universalism, relativism and pluralism in the context of medical research ethics. It is submitted that the discursive approach could bridge both cultural and socio-economic divides. The autonomy of the various role players, namely the investigating researcher, the host country representatives and research participants, should be respected above all. Their views should be listened to, their specific circumstances should be taken into consideration, and if research participants are represented by other people, the latter should be truly representative of the former. In this way a truly negotiated settlement may be arrived at which will address the needs of all involved. If consensus is ultimately reached, the research should be viewed as ethical.

---

52 Christakis 1992 *Social Science and Medicine* 1079 1089.

53 Christakis and Panner "Existing international ethical guidelines for human subjects research: some open questions" Fall-Winter 1991 *Law, Medicine and Health Care* 218.

54 Cf Barry 1988 *New England Journal of Medicine* 1083.

55 "Existing international ethical guidelines for human subjects research: some open questions" Fall-Winter 1991 *Law, Medicine and Health Care* 218.

56 Christakis's approach would then differ from that contained in the International Ethical Guidelines for Biomedical Research involving Human Subjects prepared by the Council for International Organisations of Medical Sciences (CIOMS) in collaboration with the World Health Organisation (WHO). Guideline 15 provides that an external sponsoring agency should submit a research protocol to ethical and scientific review according to the standards of the country sponsoring the agency, and that the ethical standards should be no less exacting than they would be in the case of research carried out in that country. The appropriate authorities in the host country, including a national or local ethical review committee should also satisfy themselves that the proposed research meets their own ethical demands.

Contemporary issues in South African banking law

FR Malan
Judge of the High Court of South Africa

JT Pretorius
Professor of Banking Law, University of South Africa

OPSOMMING

Teenswoordige probleme in die Suid-Afrikaanse bankreg

Die Engelse reg het 'n baie groot invloed op die Suid-Afrikaanse bankreg gehad. Dit het dikwels gebeur dat die beginsels van die Engelse reg gebots het met die beginsels van die Romeins-Hollandse reg, veral op die gebied van die bankreg en die reg met betrekking tot verhandelbare dokumente. In hierdie verband kan gelet word op die besondere invloed van die Engelse reg op die *in duplum* reël. Die invloed van die Grondwet op die insolvensiereg en die versekeringsreg word ook onder die loep geneem. Die invloed van die *bona fides* op die borgkontrak word in die laaste instansie oorweeg.

1 INTRODUCTION

1 The common law of South Africa is Roman-Dutch law, a system that has survived major political changes and perhaps also the transformation of the past few years. Roman-Dutch law is the product of the reception and acceptance of Roman jurisprudence in the Netherlands in the 15th and 16th centuries. It was this body of law that became part of the legal system of the Cape of Good Hope in 1652. The second British occupation of the Cape in 1806, however, heralded the beginning of the growing influence of English law in Southern Africa. Much of this is history: the English influence was swift and far-reaching. Legislation was based almost entirely on English statutes: bills of exchange, companies, insolvency and civil and criminal procedure all reflected, often word for word, the corresponding English statute. The new language made recourse to English precedents easy and more accessible. All of this leads to the classification of the South African system of law as a hybrid one – partly common and partly civil law.

The English influence is most noticeable in areas of commercial and mercantile law, but despite this large-scale reception of English law, the essentially Roman character of the law remained intact. The principal reason for the relative "purity" of private law is the heritage of the Roman scientific system. Where whole branches of law had to be created, such as company law, it was possible to do so by introducing English legislation without disrupting the essential character of the Roman-Dutch system. However, English intrusions in the sphere of private law seldom fitted the basic pattern of Roman-Dutch law. In the 1950s and perhaps as a result of the political change, a renewed interest in the "pure" and "unblemished" Roman-Dutch law became noticeable. South African law had to be "restated" in

terms of Roman-Dutch principles. There were, of course, moments of excessive nationalism, but generally the purist line of the fifties and later concerned not an attempt to revive the common law, but rather

> "to recognise that certain legal rules borrowed from the common law simply do not fit into the Roman pattern or system of our private law, and that this in turn leads to certain anomalies or difficulties in application. That being so, the judges are simply attempting to bring these parts of the law into line with our common law, or perhaps one should rather say with the principles, concepts and divisions inherited from Roman law"[1] . . . "It is rather a question fitting a specific legal rule, which until its 'fitting' stood alone as a foreign importation, into a broader sub-division of our system of law."[2]

2 The formulation of the duties of a customer when drawing cheques and other instruments of payment will illustrate this. Although the bank-customer relationship can be characterised as an instance of the contract of *mandatum* imposing as natural consequences of the contract the obligation on both parties to act in good faith and without negligence, South African courts have taken a different route, following English law. First, they have classified the contract between banker and customer as a "debtor and creditor relationship" and not as one of the common-law contracts. Secondly, in setting out the duties incumbent on the customer, they have, with a few exceptions, refrained from generalising these duties as ones to act in good faith and without negligence but instead imposed "selective duties" on the customer. It is said:[3]

> "A customer's duty to his banker is a limited one. Save in respect of drawing documents to be presented to the bank and in warning of known or suspected forgeries he has no duties to the bank to supervise his employees, to run his business carefully, or to detect frauds."

The "purist" would go about this in a different way. Pretorius[4] remarks:

> "[T]o say that a customer has no duty to the bank to supervise his employees, to conduct his business carefully or to detect fraud disguises the real problem. The reason for non-liability is not the existence or non-existence of 'selective' duties but the fact that either the customer was not negligent or that his conduct did not cause the particular loss."

Ironically, the South African Parliament at the end of 2000 passed legislation imposing on a person who is required to have his financial statements audited by a person registered in terms of section 15 of the Public Accountants' and Auditors Act, 1991 or by the Auditor-General and a person who has to appoint an accounting officer in terms of the Close Corporations Act, 1984 the obligation to "exercise reasonable care in the custody of cheque forms and in the reconciliation of its bank statements".[5] To some extent the proposed amendment follows earlier, now overruled, Hong Kong[6] and Canadian[7] cases. Whether the imposition on selected

---

1 Hosten "South African law" 1969 *CILSA* 192 198.

2 Hosten 199.

3 *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) 283A.

4 1985 *Annual Survey* 349. See Pretorius "The forgery of a drawer's signature on a cheque: proposals for the reform of the South African law" in Visser (ed) *Essays in honour of Ellison Kahn* (1989) 271.

5 Cl 72B of the Bills of Exchange Amendment Bill, 2000. See ss 269–271 and 275 (1)(g) of the Companies Act, 1973; s 188(1) of the Constitution of the Republic of South Africa, 1996; ss 3 and 9 of the Reporting by Public Entities Act, 1992.

6 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1984] 1 Lloyds Rep 555, but see *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947 (PC).

7 *Canadian Pacific Hotels Ltd v Bank of Montreal* 122 DLR (3d) 519 and 139 (3d) 575, but see *Canadian Pacific Hotels Ltd v Bank of Montreal* [1987] 1 SCR 711.

persons, and not on *all* customers, of the duty to take care of cheque forms and to reconcile bank statements is in accordance with the constitutional requirement of equality is not self-evident, but can perhaps be accepted as differentiation which does not constitute unfair discrimination, and, moreover, as "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . .".[8]

3 Other imports remained and are flourishing. Although frequently criticised by the purists as being an unnecessary concept and a "fifth wheel to the coach", the duty of care is an established feature of the South African law of delict. The underlying theory of the duty of care facilitates the introduction of liability for pure economic loss, as it has done in the case of the recognition of liability for negligent misrepresentation causing pure economic loss.[9] Where liability for investment advice is concerned, the "negligence" aspect of the duty is effortlessly blended with the Roman maxim *imperitia culpae adnumeratur*. In *Durr v Absa Bank Ltd*[10] it was said that the relevant standard or care is not that of the "average or typical broker". What is required was that one must first determine what skills the particular kind of broker needs to have, and this "must depend to a large degree on what skill he is held out to possess . . .".[11] Lack of skill or knowledge is not *per se* negligence, but it is negligent

> "to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity".[12]

In the context, the investor was entitled to accept that the adviser was skilled to advise her on her investments and as one backed by a major financial organisation. He was thus under a duty to investigate the investment before offering his advice. His failure to do resulted in liability.[13] In addition, he should have been alerted by the high commissions payable and the limited track record of the third undertaking. He should have realised that his own skills were inadequate:

> "What he was not entitled to do was to venture into a field in which he professed skills which he did not have and to give them [the investors] assurances about the soundness of the investments which he was not properly qualified to give."[14]

This decision is perhaps not of particular significance itself. Its approach, however, can equally well be applied to cases of investment advice concerning derivatives.[15]

4 Frequently, imported legislation clashed with the basic concepts and principles of Roman-Dutch law. The Bills of Exchange Act, 1964 is based entirely on the 1882

---

8 Ss 9 and 36 of the Constitution. A bank owes no duty to the public at large to safeguard its blank bank cheque forms: *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* 1998 4 SA 1102 (W) overruling *Centre for Mechanised Cleaning Equipment (Pty) Ltd v First National Bank of Southern Africa Ltd* (WLD) 1993-12-27 (case no 92/23865). This situation can be distinguished from the duty a customer owes its bank because there is no contractual relationship between a bank and the public at large.

9 Neethling, Potgieter and Visser *Law of delict* (1999) 147ff and Hutchison "Aquilian liability II (Twentieth Century)" in Zimmermann and Visser (eds) *Southern Cross Civil law and common law in South Africa* (1996) 595 620ff.

10 1997 3 SA 448 (SCA).

11 463GI.

12 *LAWSA* 8 *First Reissue* par 94.

13 *Durr v Absa Bank Ltd* 469B.

14 469H.

15 Malan "Investment advice, derivatives and banker's liability" 1996 *TSAR* 596–599.

Bills of Exchange Act – the "best drafted Act of Parliament which was ever passed"[16] with its imposing structure, logical order and simple language.[17] Despite fundamental differences in the legal framework within which negotiable instruments function, such as consideration and conversion, the legislative structure of the 1882 Act has remained basically unchanged. Its interpretation and application, however, have taken an entirely different route: one of "fitting" into the conceptual structure of the South African or Roman-Dutch law the concepts used in this Act. One example will suffice: conversion, with its notion of strict liability, is unknown in South African law. The Bills of Exchange Act, 1964, however, in various sections relating to cheques, regulates the payment and collection of cheques against a background of liability for conversion. At one stage, indeed, the provincial legislation absolved the collecting bank from liability where it acted in good faith and without negligence. This made no sense since a collecting bank was not liable on conversion and there was, consequently, no need to free it from liability! It was only in the 1990s that the Appellate Division, after a long and tortuous process spanning some seventy years, held what many thought to have been obvious, namely that a collecting bank owed a duty to the owner of a lost or stolen instrument to take reasonable care in the collection of cheques. The resulting similarity in the laws of England and South Africa was brought about by entirely different techniques: in the one case by excluding liability for conversion where the collection is undertaken without negligence and in the other by holding that a duty to care is owed to the owner of a lost or stolen cheque.[18]

5 The Roman-Dutch heritage has sometimes left South African law with anachronisms. One of these is the *in duplum* rule derived from the Roman-Dutch law of the sixteenth century. This rule, entailing that interest on a debt ceases to run when the amount of unpaid interest equals the outstanding capital,[19] was extensively considered by the Supreme Court of Appeal in *Standard Bank of South Africa Limited v Oneanate Investments (Pty) Ltd (in liquidation).*[20] The rule was introduced as a measure of public policy to protect debtors. Huber, a Frisian jurist of the seventeenth century, said that "[f]or curtailing interest the legislators have in view that debtors whose affairs are declining should not be entirely drained dry . . .".[21] At the time the rule was formulated, interest rates were low.[22]

---

16 *Bank Polski v KJ Mulder & Co* [1942] 1 All ER 396 398.

17 Schmitthoff *Commercial law in a changing economic climate* (1981) 7.

18 *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A); Malan and Pretorius *Malan on Bills of exchange, cheques and promissory notes in South African law* (1997) 348ff. For similar issues involving consideration and accommodation parties, see *Sundelson v Knuttel* 2000 3 SA 513 (W).

19 *Van Coppenhagen v Van Coppenhagen* 1947 1 SA 576 (T) 582: "But the rule that interest may not be accumulated beyond the amount of the capital, does not mean that if, by payment the accumulated interest is reduced to an amount less than the amount of the capital, interest does not again begin to run. Interest always runs until the amount of the capital sum is reached and may again be accumulated up to the amount of the capital." See the discussion of Otto "Oud-wêreldse purisme in 'n nuwerwetse bankregkleed. Of was dit pragmatisme?" 2000 *TSAR* 76.

20 1998 1 SA 811 (SCA). See the discussion in *Malan* par 205 339ff. The decision of the court *a quo* is reported in 1995 4 SA 510 (C).

21 *Hedendaegse rechtsgeleertheyt* 3 37 39 (Gane's translation).

22 Otto 81 refers to Voet *Commentarius ad Pandectas* (Gane's translation) 22 1 19: "If a person were to claim interest at 5 per cent per annum in one sum at one time for twenty-five years, the authority mentioned below lays down that he is to be awarded payment only for twenty years which makes up a sum equal to the principal."

Zulman JA in the Supreme Court of Appeal correctly accepted that the fact that interest is capitalised does not imply that it thereby loses its character as interest.[23] A different approach could lead to the circumvention of the *in duplum* rule, a rule which the parties cannot alter by agreement or conduct and which may not be waived. The rule is one based on a policy designed to protect borrowers from exploitation by lenders.[24]

Linked to the *in duplum* rule is the rule in *Clayton*'s case (*Devaynes v Noble, Clayton*'s case)[25] which was expressly disapproved of, as it was in Zimbabwe.[26] The rule entails that on a current account the first item on the debit side is discharged by the first item on the credit side,

> "because the parties intend that the current account should be kept alive, and this the creditor would not allow if the debtor could appropriate the payments to the later items and so cause the earlier items to be prescribed . . .".[27]

The *in duplum* rule is difficult to reconcile with the rule in *Clayton*'s case.

Clayton's case is something of an anomaly in South African law. The common-law rules governing the appropriation of payments are simple and were set out in *Jefferson, Executor of Stewart v De Morgan*:[28]

> "[T]he whole doctrine of the Roman-Dutch law as to appropriation of payments turns upon the intention of the debtor, either express, implied, or presumed; express, when he has directed the application of the payment, as in all cases he has a right to do; implied, when he knowingly has allowed the creditor to make a particular application at the time of payment, without objection; presumed, when in the absence of any special appropriation, it is most to his benefit to apply it to a particular debt . . ."

The rules that govern "in the absence of special appropriation" are that interest is paid before capital; due debts before those that are not due; onerous debts before those that are less onerous. One's own debt is discharged before the debt of another (secured eg by suretyship).[29] However, in several cases it was accepted that *Clayton*'s case applied to the appropriation of payments in an overdrawn current account.[30]

The court *a quo* in *Oneanate* held that

> "in the absence of effective appropriation by the customer or the bank, the rule in *Clayton's case* applies in our law to current accounts with banks for so long as the account is not affected by the *in duplum* rule. As soon as – and for so long as – the *in duplum* rule suspends the running of further interest, all credits to the account should be appropriated to pay the interest before they are applied to pay the capital".[31]

The debtor could therefore, once interest had reached the amount of the capital, receive a double benefit if the rule in *Clayton's* case were to be applied: payment at

---

23 828.
24 828CD.
25 (1816) 1 Mer 529 572 608 [35 ER 767 781].
26 *Commercial Bank of Zimbabwe Ltd v MM Builders and Suppliers (Pvt) Ltd* 1997 2 SA 285 (ZHC).
27 *Clayton*'s case as paraphrased by Wessels 1 *The law of contract in South Africa* (1937) par 2310.
28 2 EDC 205 213.
29 See the summary by Otto 83–84.
30 *Volkskas v Meyer* 1966 2 SA 379 (T) 382; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd* 1995 4 SA 510 (C) 574.
31 576C–D.

that moment would have to be appropriated to capital, that being the oldest debt. One payment would therefore reduce both the capital and the interest recoverable.

However, on appeal Zulman JA, following a Zimbabwean decision,[32] observed that the account in *Clayton*'s case concerned a passbook showing the bank as debtor and the customer as creditor and drawn in two columns for debtor and creditor with chronological entries on each side as the transactions were effected. All the debits in that case were capital debits. Moreover, the rule in *Clayton*'s case is not a rule of law but rather a presumption based on the facts of the matter that may be rebutted by showing that the parties did not intend those consequences to follow.[33] Zulman JA concluded[34] that once one accepts that the *Clayton* rule amounts to no more than a presumption, there is no warrant for its adoption. Furthermore, nothing is to be derived from the way in which banks keep their books to support such a factual presumption. The evidence led at the trial also revealed no more than that banking practice is to calculate interest accrued on a daily balance and then to simply to add it monthly to the previous balance owing so as to reflect a single balance figure from which deposits made to the account are deducted. The judge continued:[35]

> "A further difficulty posed by the application of the *Clayton* rule in a case such as this . . is the incompatibility of the *Clayton* rule with the *in duplum* rule. This incompatibility is evident in the application of the *Clayton* rule when the *in duplum* rule is in operation. It results in the debtor being granted a double benefit. Selikowitz J sought to overcome this difficulty by tempering the application of the *Clayton* rule at the conclusion of his judgment by applying it only to 'current accounts with banks for so long as the account is not affected by the *in duplum* rule', and stating that 'as soon as – and for so long as – the *in duplum* rule suspends the further running of interest, all credits to the account should be appropriated to pay the interest before they are applied to pay the capital' . . . . Such a qualification would obviously not be necessary if one applied the clear rule of our common law and appropriated payments, where neither the debtor nor the creditor did so, first to interest and then only to capital."

The next issue that arose was whether, if during the course of litigation the double was reached, interest ceased to run and only began to run again once judgment is pronounced.[36] Zulman JA said:[37]

> "It appears . . . that the rule is concerned with public interest and protects borrowers from exploitation by lenders who permit interest to accumulate. If that is so, I fail to see how a creditor, who has instituted action can be said to exploit a debtor who, with the assistance of delays inherent in legal proceedings, keeps the creditor out of his money. No principle of public policy is involved in providing the debtor with protection *pendente lite* against interest in excess of the double . . . A creditor can control the institution of litigation and can, by timeously instituting action, prevent the prejudice to the debtor and the application of the rule. The creditor, however, has no control over delays caused by the litigation process . . . The present case is a good illustration of such delays. Summons was served in November 1990, the trial commenced in June 1993, the final judgment of the court a quo was given in May 1995. This appeal was heard in August 1997. If one accepts that interest and indeed compound interest is 'the life-blood of finance' in modern times I am of the opinion that one should not apply all of 'the old Roman-Dutch Law to modern conditions

32 316–317.
33 *Deeley v Lloyds Bank Ltd* 1912 AC 756 (HL) 771; *Commercial Bank of Zimbabwe* case 318B.
34 831F.
35 832D.
36 832ff.
37 834C–H.

> where finance plays an entirely different role' (per Centlivres, CJ in *Linton v Corser* 1952 3 SA 685 (A) at 695 H) . . . Once judgment has been delivered the question again arises as to what the public interest demands. It is arguable that the creditor is in duty bound to execute and bring to a close the further accumulation of interest. That can be achieved by accepting the approach . . . that interest on the amount ordered to be paid may accumulate to the extent of that amount, irrespective of whether it contains an interest element. This would mean that (i) the *in duplum* rule is suspended *pendente lite*, where the *lis* is said to begin upon service of the initiating process, and (ii) once judgment has been granted, interest may run until it reaches the double of the capital amount outstanding in terms of the judgment."

6 Frequently bonds and other financial agreements provide for the payment by the debtor of interest at a variable rate. The limits within which the rate may vary may be expressed in the document, such as where the initial rate may be varied "to the rate determined by the bank as payable for the class of bonds into which this bond falls",[38] but an unqualified discretion may also be given to the creditor, such as where a power is given to vary "at any time and from time to time".[39] The obligations of the parties under a contract should be determined or determinable: there is no room for vagueness.[40] Whether a clause of this nature providing for the *unilateral* variation of the interest rate is enforceable was the subject of several conflicting provincial judgments, some in favour of validity,[41] others against.[42] Matters finally came to a head when the Supreme Court of Appeal held clauses of this nature to be valid and enforceable. Relying on English authority,[43] it was held that

> "save, perhaps where a party is given the power to fix his own prestation, or to fix a purchase price or rental, a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable . . . All this does not mean that an exercise of such a contractual discretion is necessarily unassailable. It may be voidable at the instance of the other party. It is . . . a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made arbitrio bono viri . . . An analogous conclusion may well be reached if one applies the modern concept of the role of public policy, bona fides and contractual equity to the question in issue".[44]

A whole matrix of factors determines interest rates. Thus when a court is called upon to resolve whether the exercise of a discretion was "reasonable", the varied rate may be related to a variety of factors, for example, the class of person of the debtor and the rate charged for persons in that category; the customary rate for loans of that nature; the nature of the facility; the time of the loan and security offered.[45] By having recourse to these factors, a court would essentially be exercising the

---

38 *NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste BK* 1998 3 SA 729 (W).

39 *Standard Bank of South Africa Ltd v Friedman* 1999 2 SA 456 (C).

40 See Otto "Kontraktuele bedinge wat eensydige rentekoersvasstellings deur banke magtig" 1998 *TSAR* 603; and "Unilateral determination of interest rates by creditors: The Supreme Court of Appeal (almost) settles the matter" 2000 *SALJ* 1.

41 *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd* 1988 4 SA 73 (N); *Boland Bank Bpk v Steele* 1994 1 SA 259 (T); *Standard Bank of South Africa Ltd v Friedman* 1999 2 SA 456 (C); *Investec Bank (Pty) Ltd v GVN Properties CC* 1999 3 SA 490 (W).

42 *NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste BK* 1998 3 SA 729 (W); *NBS Boland Bank Ltd v One Berg River Drive CC* 1998 3 SA 765 (W).

43 *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918 (CA).

44 Pars 24, 25 and 28.

45 See Otto "Unilateral determination" 6–7 and cf Wunsh J in *Investec Bank Ltd v GVN Properties CC* 499.

Roman-Dutch power of the courts to determine a "reasonable" rate of interest where an extortionate or exorbitant rate was charged.[46]

7 An entirely new perspective was introduced into South African law with the adoption, first of all, of the interim Constitution of 1993[47] and later the final Constitution of the Republic of South Africa in 1996.[48] The Constitution is the supreme law of the Republic, and law or conduct inconsistent with it is invalid.[49] Chapter 2 of the Constitution sets out the fundamental rights *binding the legislature, the executive, the judiciary and all organs of state*. It binds natural and juristic persons and calls upon the courts to develop the common law in accordance with the Bill of Rights.[50] Any infringement of or threat to an entrenched right may be vindicated by an individual acting in his own interest or on behalf of another; as a member of, or in the interest of a group or class of persons; in the public interest; or by an association acting in the interest of its members.[51] This far-reaching provision entrenches both the class action and a public interest action, thereby greatly expanding the scope of these remedies.[52]

The fundamental rights to equality before the law and equal protection of the law[53] are constitutionally entrenched, as well as the right to have disputes settled by a court of law.[54]

Section 39(1) of the Constitution requires a court in interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. In so interpreting the Bill of Rights a court must consider international law and may have regard to foreign law.[55] When interpreting any legislation and when developing the common law, a court is obliged to promote the spirit, purport and objects of the Bill of Rights.[56] The rights in the Bill of Rights

---

46 Otto "Unilateral determination" 6 refers to *Reuter v Yates* 1904 TS 855 where Innes CJ listed the following factors: "[The court] will not only look at the scale at which interest has been stipulated for, but will have regard to the ordinary rate prevalent in similar transactions, to the security offered and the risk run, to the length of time for which the loan was given, the amount lent, and the relative positions and circumstances of the parties."

47 Constitution of the Republic of South Africa 200 of 1993.

48 Act 108 of 1996.

49 S 2.

50 S 8(1). S 8(1) provides that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state". S 8(2): "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." S 8(3): "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; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)." S 8(4): "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

51 S 38.

52 See generally Loots "Standing to enforce fundamental rights" 1994 *SAJHR* 49 58–59. On group or public interest actions in the South African law see De Vos *Verteenwoordiging van groepsbelange in die siviele proses* LLM dissertation RAU (1984).

53 S 9(1).

54 S S4.

55 S 39(1).

56 S 39(2). S 39(3) provides: "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

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.[57] The terms of the Bill of Rights leave one in no doubt that they also apply to all law that regulates private relationships or, to use the somewhat inappropriate terminology, both "vertically" and "horizontally".[58] Rautenbach formulates the width of application of the Bill of Rights thus:[59]

> "The Constitution leaves no room for the infringement of constitutional rights under a private law pretext. Legislation or common law may not authorise the infringements of rights by private persons and private persons may not perform actions that infringe upon rights, unless the limitations comply with the limitation clauses in the bill of rights. The bill of rights confirms and entrenches the values of human dignity, freedom and equality, in respect of all branches of law and in all relations amongst private persons and between organs of state and private persons. This is how it should be in a democratic state."

The interim and subsequently the final Constitution introduced a new dimension into South African law. The Constitution contains a "new and fundamental commitment to human rights" and is "not merely a contemporisation and incremental articulation of previously accepted and entrenched values shared in our society".[60] Its effect goes much further than the entrenchment of specified rights. In addition to the customary rights, the Bill of Rights provides expressly for affirmative action;[61] the right to make decisions concerning reproduction;[62] the right to a healthy environment;[63] the possibility of restrictions on property rights in order to redress past discrimination;[64] the right of access to housing;[65] health care services, sufficient food and water and social security;[66] children's rights;[67] education rights;[68] the right to use the language and to participate in the cultural life of one's choice;[69] and the right of members of cultural, religious and linguistic communities to enjoy their culture, practise their religion and use their language.[70] The customary fundamental rights such as the right to equality before the law, the right to life, dignity, freedom of expression, freedom and security of the person, privacy, and freedom of movement are not, as one commentator[71] has remarked, "normal" in the South African context.

---

57 S 36(1) requires a court to take into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

58 Rautenbach "The Bill of Rights applies to private law and binds private persons" 2000 *TSAR* 296 304 and cf *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 597F–G.

59 316.

60 *Shabalala v Attorney-General of the Transvaal* [1996] 1 All SA 64 (CC) 77.

61 S 9(2).

62 S 12(2)(a).

63 S 24.

64 S 25.

65 S 26.

66 S 27.

67 S 28.

68 S 29.

69 S 30.

70 S 31.

71 Malherbe "Human rights in South Africa: A preliminary assessment" 2000 *Chroniques de Droit Public* 150 153.

> "Under apartheid these rights were largely negated and . . . each right now has the potential of far-reaching change throughout society. Furthermore, the meaning and limits of many rights have not been tested yet, either by way of legislative and executive action, or by the courts. At this early stage, therefore, one can only assume that the full impact of the Bill of Rights on the whole of society will only become clear over an extended period of time."

8 The Constitution[72] does not replace the common law but enhances it. Some of the fundamental rights, now constitutionally protected, are recognised and enforced by the common law. Future developments could well lead to the characterisation of these common-law rights as fundamental, "constitutional", rights leading to a certain tension between the common law and the Constitution.[73] Some rights, now termed "constitutional", relating to, for example, civil proceedings, have long been established by the high court in the exercise of its inherent jurisdiction.[74] The inherent jurisdiction of the high court entails that, in addition to powers conferred by statute, the court can entertain any claim and give any order which it could have done at common law: it is a reservoir of power enabling the court to dispense justice where no specific law authorises it to do so.[75] In the exercise of its inherent jurisdiction, the high court has emphasised the procedural guarantees a litigant may rely upon. For example, the requirement, now embodied in the Constitution, that the proceedings of courts take place in open court unless in special cases the court directs otherwise,[76] has been part of South African jurisprudence since 1813, when the Governor of the then Cape Colony by proclamation instructed that all judicial proceedings be carried out with open doors as a matter of

> "essential utility, as well as the dignity of the administration of justice; it would imprint upon the minds of the inhabitants of the Colony the confidence that equal justice was administered to all in the most certain, most speedy and least burdensome manner".[77]

Another example[78] concerns the granting of an attachment order without the respondent having been given the opportunity of being heard. The court accepted, as a fundamental principle, the proposition that a court would not normally grant an order that may directly affect the rights of a person and involve far-reaching consequences without giving him the opportunity of being heard.[79]

---

72 The interim Constitution with its very similar Bill of Rights has had in the very short period of its existence a profound effect on all branches of law. Most important is the judgment of the Constitutional Court in *S v Makwanyane* 1995 6 BCLR 665 (CC) declaring the death penalty unconstitutional as contrary to s 11(2) which prohibited "cruel, inhuman or degrading treatment or punishment".

73 Cf Van der Merwe "Constitutional colonisation of the common law: A problem of institutional integrity" 2000 *TSAR* 12.

74 *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 1 SA 773 (A) 783; *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 2 SA 734 (A) 754.

75 *Ex parte Millsite Investment Co (Pty) Ltd* 1965 2 SA 582 (T) 585. See Taitz *The inherent jurisdiction of the Supreme Court* (1985) 9ff. The rule-making power of the high court must be distinguished from its inherent jurisdiction: Erasmus "The history of the rule-making power of the Supreme Court of South Africa" 1991 *SALJ* 476.

76 S 16 Supreme Court Act 59 of 1959.

77 *Financial Mail (Pty) Ltd v Registrar of Insurance* 1966 2 SA 219 (W) 220. See *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd* 1984 4 SA 149 (T) 158–159; *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 2 SA 734 (A) 755.

78 *Network Video (Pty) Ltd v Universal City Studies Inc* 1984 4 SA 379 (C) 381 and De Vos "Grondwetlike beskerming van siviele prosesregtelike waarborge in Suid-Afrika" 1991 *TSAR* 353 364.

79 *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd* 1984 4 SA 149 (T) 157.

9 In commercial and banking law[80] the influence of the Constitution is not as marked as in the areas of criminal procedure, affirmative action, health, social welfare and education.[81] The right to equality, however, has a "cross-cutting"[82] influence and forms one of the underlying values of the Constitution:

> "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 offends fundamental human dignity."[83]

The equality clause[84] has led to the striking out of section 44 of the Insurance Act, 1943, which provided that when a husband cedes a life insurance policy to his wife and then dies insolvent, the policy returns to his insolvent estate.[85] The provision did not apply the other way round and the Constitutional Court held that this amounted to unfair discrimination which could not be justified in terms of the general limitation provision.[86] On the other hand, the differentiation between the trustee in an insolvent estate and the liquidator of company for the purposes of the payment of income tax on post liquidation income was held not to be unfair discrimination.[87]

In insolvency inquiries under section 415 of the Companies Act, 1973 the presiding officer is obliged to inform the witness of his right to be assisted by counsel. In

---

80 For a more comprehensive discussion see Stander and Jansen van Rensburg "Invloed van die Grondwet op sekere aspekte van die handelsreg" 2000 *SA Merc LJ* 291.

81 See Malherbe "Human rights in South Africa: A preliminary assessment" 2000 *Chroniques de Droit Public* 150.

82 Malherbe 154.

83 *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) par 41 quoting from Canadian authority; *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) pars 31 and 33; *Harksen v Lane NO* 1997 11 BCLR 1489 (CC) pars 50–53.

84 S 9 of the Constitution.

85 *Brink v Kitshoff NO* 1996 6 BCLR 752 (CC).

86 S 33 of the Interim Constitution. In her judgment O'Regan J pars 46–48 substantiated the decision as follows: "For sections 44(1) and (2) to be held to be permissible limitations in terms of section 33, it must be shown that they are reasonable and justifiable in an open and democratic society based on freedom and equality, and that they do not negate the essential content of section 8. It is now well established that section 33 involves a proportionality exercise, in which the purpose and effects of the infringing provisions are weighed against the nature and extent of the infringement caused. Sections 44(1) and (2) appear to have been enacted with two purposes in mind: the first was to provide married women with a benefit which would otherwise have been denied to them because of the effect of the common law rule prohibiting donations between spouses. As discussed above, this beneficial purpose is no longer achieved because the common law rule was abolished in the mid-1980s. The provisions are now therefore disadvantageous to married women. The second apparent purpose of the section is to protect the interests of creditors of insolvent estates. This purpose is still achieved by the provisions. There is no question that protecting creditors is a valuable and important public purpose. There can be no dispute either that the close relationship between spouses may sometimes lead to collusion or fraud. However, I am not persuaded that the distinction drawn between married men and married women, which is the nub of the constitutional complaint in this case, can be said to be reasonable or justifiable. No cogent reasons were advanced by the respondent as to why sections 44 (1) and (2) apply only to transactions in which husbands effect policies in favour of, or cede them to, their wives, and not to similar transactions by wives in favour of their husbands. There seems to be no reason why fraud or collusion does not occur when husbands, rather than wives, are the beneficiaries of insurance policies. Avoiding fraud or collusion does not suggest a reason as to why a distinction should be drawn between married men and married women." See further *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) par 25; *Harksen v Lane NO* 1998 1 SA 300 (CC) par 43; *City of Cape Town v AD Outpost (Pty) Ltd* 2000 2 BCLR 130 (C) 137–138.

87 *Van Zyl NO v Commissioner for Inland Revenue* 1997 3 BCLR 404 (C).

a matter dealing with this section the court emphasised the legitimate goals of the insolvency laws and the public interest in the disclosure by directors and individuals of information relevant to the particular estate.[88] However,

> "[e]veryone has inherent dignity and the right to have their dignity respected and protected. In my view such right relates to the relevant individual affected, who would be examined with reference to any given set of facts or documents, compelled to answer questions the import of which he may or may not fully understand or comprehend, and literally be warned to appear at one hearing after the other without being able to have an effective say in the matter, and all this whilst he is 'blissfully' unaware that he is entitled to legal representation. This situation could well be a blatant affront to such person's right to dignity, and this particular right ought to be respected, protected and promoted, certainly within the present context . . . Human dignity is violated when persons are subjected to conduct that is degrading and humiliating. This is a core right, but in its very nature there is no precisely defined content. I agree that it is deceptively elusive, but the concept does require that persons be treated as recipients of rights and not as objects subjected to statutory mechanisms without a say in the matter. The State exists for the people, not the other way round . . . ."[89]

The provincial Northwest Agricultural Bank Act, 1981 confers drastic powers on that bank:[90] section 38(2) gives it the right, without recourse to a court of law, to require the messenger of the court to seize and sell by public auction a defaulting debtor's property. The section thus authorises the bank to decide the outcome of a dispute it has with the debtor. In confirming the order of the court *a quo* the Constitutional Court said:

> "Section 38(2) authorises the Bank, an adversary of the debtor, to decide the outcome of the dispute. The Bank thus becomes a judge in its own cause. The authority to adjudicate over justiciable disputes and to order appropriate relief and the enforcement of the order by attachment and sale of the debtor's goods in a civil matter vests in the courts of the land. Section 38(2), however, limits the debtor's rights in s 34 by vesting that authority in the Bank. The Bank itself decides whether it has an enforceable claim against the debtor; the Bank itself decides the outcome of the dispute and the subsequent relief; and the Bank enforces its own decision, thereby usurping the powers and functions of the courts. The fact that the debtor may have recourse to a court of law after the attachment takes place does not cure the limitation of the right; it merely restricts its duration. For the period of limitation, the debtor has been deprived of possession of the assets in question without the intervention of a court of law and in a manner consistent with section 34."[91]

In enacting these provisions the legislature intended protecting the Bank's funds to the utmost; the Bank should be able to raise the greatest possible amount on its security with the least possible costs or delay. The Bank, of course, is a public body entrusted with public funds and charged with the duty of using them in the national interest. A speedy and cost-effective remedy was therefore given to the Bank. In deciding whether the limitation of a debtor's constitutional rights was justified in terms of section 36, the limitations analysis was described as "the weighing up of

---

88 *Advance Mining Hydraulics (Pty) Ltd v Botes NO* 2000 2 BCLR 119 (T) 126 and cf *De Lange v Smuts NO* 1998 3 SA 785 (CC) pars 33–35. Other matters dealing with inquiries under ss 417 and 418 are: *Leech v Farber NO* 1999 9 BCLR 971 (W); *Ferreira v Levin NO Vryenhoek v Powell NO* 1996 1 SA 984 (CC); *Bernstein v Bester* 1996 2 SA 751 (CC).

89 *Advance Mining Hydraulics (Pty) Ltd v Botes NO* 2000 2 BCLR 119 (T) 126–127.

90 *Lesapo v Northwest Agricultural Bank* 1999 10 BCLR 1195 (B); 2000 1 SA 409 (CC).

91 417.

competing values, and ultimately an assessment based on proportionality . . . which calls for the balancing of different interests."[92] Mokgoro J said:[93]

> "The limitations inquiry and the requirements that must be considered aim to 'strike the appropriate balance of proportionality between means and end'. Applying the above analysis in the present matter, the importance of the purpose of s 38(2) – ie the interest of the Bank in speedy and inexpensive realisation of its securities – may only properly be evaluated by considering its weight relative to the interest of its debtors in having disputes that can be resolved by the application of law decided before a court and the importance of the principle against self help. In addition, the Bank is able to utilise less restrictive means to achieve its purpose. The purpose and significance of s 38(2), when weighed against the object and importance of s 34, make it clear that s 38(2) is not a justifiable limitation of the right to access to court. Thus it is clear that s 38(2) is unconstitutional and cannot stand."

10 The three "sources" of South African law to which reference has been made, namely Roman-Dutch and English law as well as the Constitution, all have a bearing on the issue of the so-called "sexually transmitted debt". Not only does the question of suretyship interposed by married women raise questions about equality, but it also concerns ancient institutions that were abolished three decades ago and, moreover, accentuates a very recent call in a minority judgment of the Supreme Court of Appeal to follow a modern English decision.

Many Roman institutions were discarded in South African law. The repeal of the *authentica si qua mulier* and the *senatusconsultum Velleianum* in the 1970s is an example. These ancient measures prohibited a wife from acting as surety for her husband or for another person. The justification for their enactment and survival for many centuries in South Africa and elsewhere was that women had to be given relief "on account of the weakness of their sex",[94] their "facile optimism" because they could not withstand the "importunacy of husbands or friends".[95] These laws are anomalies, fossils from ancient times and have been repealed elsewhere.[96] In South

---

92 Following *S v Makwanyane* 1995 3 SA 391 (CC) par 104.

93 419–20. In another matter, s 34(3)(b) to (7), s 34(9) and (10) and s 55(2)(b) of the Land Bank Act, 1944 were declared unconstitutional (*First National Bank of SA Ltd v The Land and Agricultural Bank of SA Ltd* (1995/98 OPD); but in *First National Bank of SA Ltd v Land and Agricultural Bank of SA HN Sheard v Land and Agricultural Bank of SA* (CCT 15/00) when the matter was referred to the Constitutional Court for confirmation, it was held that s 34(b) and 34(5) comprise an important form of security in the absence of a contractual arrangement between the Land Bank and its clients. The instant removal of the sections would prejudice the bank. The order of invalidity was therefore suspended pending rectification of the legislation by parliament. (This matter was distinguished from the *Lesapo* case above.) See Fourie "Attachment of a debtor's assets without a court order" 2000 *SA Banker* 104.

94 *D* 16 1 2.

95 Voet *Commentarius ad Pandectas* 16 11.

96 *Van Rensburg v Minnie* 1942 OPD 257 259 (see Kahn "Farewell Senatusconsultum Velleianum and Authentica si qua mulier" 1971 *SALJ* 364 365). Van den Heever J said (259): "One of the incongruities of this inconsequent age is the fact that women, while enjoying full rights of citizenship, including that of making or marring policies of State as effectively as any male, are able in their private affairs to invoke a defence based on their innate fecklessness and incapacity and so avoid liability in respect of obligations which they have deliberately assumed." These thoughts are echoed in the minority judgment in *Garcia v Australia National Bank* (1998) 155 ALR 614 (HCA) 633–634 where Kirby J asked: "[W]hy should this court, in 1998, endorse a principle expressed to apply to one class of citizens only, namely 'married women'? For several reasons it should not. It should instead search for, and identify, a broader principle which is not confined to one group whose members have attributed to them particular needs

continued on next page

Africa this happened only in 1971,[97] and the event was regarded as a victory for women's rights. But was it? asked George Gretton from Edinburgh.[98] He was, of course, referring to "sexually transmitted debt" to use the expression coined in Australia when discussing whether a wife or partner should be liable for the debt of the husband or other partner. He discussed English cases allowing a wife or partner to resile from the contract in certain circumstances, notably where the creditor was made aware that the surety reposed trust and confidence in the principal debtor.[99]

11 Suretyship has always been controversial,[100] and raises questions of the benefits that are granted to sureties and their renunciation as well as issues of unfair contractual terms.[101] Not all these questions can be dealt with here. Of importance, however, is the Roman praetorian remedy, the *exceptio doli generalis,* which was granted to ward off the claim of a creditor acting unconscionably. This general equitable remedy was thought to have been received into South African law. There is indeed good authority for such a view,[102] and in earlier cases the *exceptio doli generalis* was available where a creditor sought to use the suretyship for a purpose never envisaged at the time the suretyship was concluded.[103] However, the decision

---

and vulnerabilities which are certainly not confined to that group and which, in many cases, will not be present in members of that group. It is inappropriate to Australian circumstances today. It should not now receive the indorsement of this court." See Weerasooria and Turner "High Court re-affirms and re-enthrones *Yerkey v Jones* and disapproves of House of Lords decision in *Barclays Bank v O'Brien*" 1998 (14) *Australian Banking & Finance Law Bulletin* 33.

97 Act 57 of 1971.

98 "Sexually transmitted debt?" paper read at the 1998 *Annual Banking Law Update* held at Johannesburg 1998-04-23.

99 *Barclays Bank v O'Brien* [1993] QB 109; [1992] 4 All ER 983 (CA); 1994 1 AC 180 and *CIBC Mortgages v Pitt* 1994 1 AC 200. There are numerous other cases: see *Royal Bank of Scotland plc v Etridge (No 2)* [1998] 4 All ER 705 (CA) and O'Sullivan "Undue influence and misrepresentation after *O'Brien*: Making security secure" *SPTL Annual Conference 1997* 1997-09-17–20. The leading decisions in Australia are: *Yerkey v Jones* (1939) 63 CLR 649 (HCA); *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447 (HCA) and *Garcia v Australia National Bank* (1998) 155 ALR 614 (HCA) all discussed by Fehlberg "Australian law and surety wives: *Garcia v National Australia Bank Limited"* 1999–2000 (15) *Banking and Finance LR* 163.

100 *Caney's The law of suretyship in South Africa* (1992) 4ed by Forsyth and Pretorius (hereafter referred to as "Caney") 1ff; Phillipson "Development of the Roman law of debt security" 1968 (20) *Stanford LR* 1230; Zimmermann *The law of obligations* (1990) 114ff; Forsyth "Suretyship" in Zimmermann and Visser (eds) *Southern Cross* (1996) 417ff.

101 Caney 14ff. See *Onbillike kontraksbedinge en die rektifikasie van kontrakte*, Discussion Paper 54 of Project 47, South African Law Commission 60ff; Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakvryheid in die Suid-Afrikaanse reg" 1993 *THRHR* 65; and "Beheer oor onbillike kontraksbedinge – Quo vadis vanaf 15 Mei 1999" 2000 *TSAR* 33.

102 Pretorius "Continuing suretyships" 1988 *MBL* 85 90–91 and *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) 27GH (per Jansen JA); *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W); *Oceanair (Natal) (Pty) Ltd v Sher* 1980 1 SA 317 (D); *SAPDC (Trading) Ltd v Ferreira* 1980 3 SA 507 (T); *Neuhoff v York Timbers Ltd* 1981 4 SA 666 (T) esp 671D–673C. See also Botha "Die *exceptio doli generalis*, rektifikasie en estoppel" 1980 *THRHR* 255, *Die exceptio doli generalis in die Suid-Afrikaanse reg* unpublished LLD thesis, UOFS (1981); Lotz "Die billikheid in die Suid-Afrikaanse kontraktereg" unpublished inaugural lecture, Unisa (1979); Forsyth and Pretorius "Recent developments in the law of suretyship" 1993 *SA Merc LJ* 181 and Van der Walt "Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontraksbedinge" 1986 *SALJ* 646.

103 In *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W) such a case was described as "tailor-made for the general defence of the *exceptio doli*" (214H).

of the then Appellate Division in *Bank of Lisbon and South Africa Ltd v De Ornelas*[104] frustrated all such hope of forging a modern remedy suitable for all cases of unconscionability. In this matter a bank had extended overdraft facilities to a fishing company on the strength of deeds of suretyship executed by the joint managing directors (the respondents) of the company, as well as by mortgage bonds in favour of the bank passed over the directors' dwellings. In due course the company discharged its entire indebtedness to the bank under the overdraft and the sureties sought the discharge of the deeds of suretyship and the mortgage bonds. The bank resisted this on the ground that it had an unsettled claim against the company arising out of a forward purchase of foreign exchange on the company's behalf. The deeds of suretyship provided that the sureties undertook liability for "the due payment of every sum . . . of money . . . owing by [the company to the bank] from whatsoever cause or causes arising". The foreign exchange dispute apparently fell within the terms of the suretyship, although this dispute had nothing to do with the original overdraft. Without any investigation into whether the bank's conduct possibly amounted to *dolus,* the Appellate Division held that the *exceptio doli generalis* never formed part of Roman-Dutch law,[105] that it was therefore not part of modern South African law and that

> "the time [had] . . . now arrived . . . once and for all, to bury the exceptio doli generalis as a superfluous, defunct anachronism. *Requiescat in pace.*"[106]

It followed that the sureties could not raise the *exceptio doli* as a defence and that the bank succeeded in having the deeds of suretyship enforced. The *Bank of Lisbon* decision has been the subject of severe criticism.[107] There is clearly a clash between different (and perhaps conflicting) principles, namely legal certainty and equity.[108] It is noticeable that both the majority judgment (Joubert JA with Rabie ACJ, Hefer, and Grosskopf JJA concurring) and the minority judgment (Jansen JA) in the *Bank of Lisbon* case are almost entirely enmeshed in the historical and technical developments of Roman and Roman-Dutch law: there is little comparative analysis, nor are considerations of justice and equity and of commercial needs referred to.[109]

---

104 1988 3 SA 580 (A).

105 Notwithstanding several earlier decisions of the AD holding or taking for granted that the *exceptio* formed part of South African law: *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) 27GH (per Jansen JA).

106 *Supra* 607B per Joubert JA; Rabie ACJ, Hefer and Grosskopf JJA concurring – Jansen JA dissenting.

107 See Lewis "Demise of the exceptio doli: Is there another route to contractual equity?" 1990 *SALJ* 26; Van der Merwe, Lubbe and Van Huyssteen "The exceptio doli generalis: requiescat in pace – vivat aequitas" 1989 *SALJ* 235; Lambiris "The exceptio doli generalis: An obituary" 1988 *SALJ* 644; Hawthorne and Thomas "The exceptio doli" 1989 *De Jure* 143; Caney 191–193: Forsyth 426ff and Van der Walt "Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontraksbedinge" 1986 *SALJ* 646. See, however, *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) 322, where it is suggested that the criticism may well be misplaced: "As 'n mens die breë, dinamiese werking van die *bona fide*-beginsel aanvaar, dan volg dit eintlik vanselfsprekend dat die *exceptio doli generalis* by daardie naam en as 'n spesifieke beperkte verweer wat nou juis gepleit moet word, oorbodig is."

108 See further the discussion and the authorities referred to in Kahn, Lewis and Visser *Contract and mercantile law through the cases*: *General principles of contract; Agency and representation* (1988) 31–36 and Van der Walt "Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontraksbedinge" 1986 *SALJ* 646.

109 Van der Merwe *et al* 240; Lewis 29; Caney 192.

The rejection of the *exceptio doli generalis* called for the consideration of other approaches to the question of unconscionable contracts. Indeed, in his dissent in *Bank of Lisbon* itself, Jansen JA envisaged that *public policy* might play just such a role.[110]

One of the requirements for the validity of a contract is that the agreement must be lawful. Agreements are lawful unless they are prohibited by statute or at common law. Agreements are prohibited by common law where they are against public policy or *contra bonos mores*. Both concepts (public policy and *boni mores*) are difficult to define and change constantly.[111] The role of public policy in striking down an unconscionable bargain is illustrated by *Sasfin (Pty) Ltd v Beukes*:[112] a medical practitioner entered into a finance agreement with a financing company in terms of which he also sold his book debts to the company. At the same time and as security for his indebtedness, he entered into a cession to cede to the company all his future income and claims *in securitatem debiti*. The cession was interpreted in such a way that the finance company was placed in effective control of all income of the practitioner whether he was indebted to the company or not. The result of this is that the practitioner

> "could effectively be deprived of his income and means of support for himself and his family. He would to that extent, virtually be relegated to the position of a slave, working for the benefit of Sasfin (or, for that matter, any of the other creditors)".[113]

The contract was held to be unenforceable by reason of being contrary to public policy.

Several issues were raised in *Botha (now Griessel) v Finanscredit (Pty) Ltd*,[114] one of which was an attack on a clause in a suretyship agreement providing that the suretyship "shall not be cancelled save with the written consent of the creditor". It was said that the court should consider whether the clause was "clearly inimical to the interest of the community, whether [it is] contrary to law or morality, or run[s] counter to social or economic expedience" but that it should bear in mind

> "(*a*) that, while public policy generally favours the utmost freedom of contract, it nevertheless properly takes into account the necessity for doing simple justice between man and man; and (*b*) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest."[115]

It was decided that the clause was not contrary to public policy. It was commercially sound and morally unexceptionable that sureties should remain bound until the creditor is no longer owed money or until alternative sureties acceptable to him had been found. Moreover, the clause did not leave the surety "helpless in the clutches of the plaintiff"; in other words, if the surety paid the principal debt the suretyship would fall away notwithstanding the clause.[116]

---

110 617G. Others have had different suggestions. Van der Merwe *et al* 242 suggest a greater reliance upon the concept of *bona fides* to introduce equity into the law, while Lewis 42ff considers that a change in our law's current approach to the interpretation of contracts is called for.

111 Corbett "Aspects of the role of public policy in the evolution of our common law" 1987 *SALJ* 52 63ff.

112 1989 1 SA 1 (A).

113 13HI.

114 1989 3 SA 773 (A), relying on *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A). See also *Interland Durban (Pty) Ltd v Walters NO* 1993 1 SA 223 (C).

115 782I–783C.

116 783J.

In the controversial case of *D Engineering Company (Pty) Ltd v Morkel*[117] a full bench of the Transvaal Provincial Division also considered the reach of public policy in the context of suretyship. Here the suretyship contained a wide range of clauses designed, inevitably, to improve the position of the creditor at the expense of the surety. The clauses under attack included the following: that all admissions and acknowledgments of debt by the debtor bound the surety; that the creditor could apply moneys paid by the surety in respect of the debtor's indebtedness "in such manner as the [creditor] thinks fit"; that the suretyship remained in force notwithstanding settlement of account with the debtor; that the surety could be released only by written notice from the creditor;[118] that the sureties undertook not to prove claims in the insolvent or deceased estate of the debtor until the creditor had been paid in full; and an undertaking to cede to the creditor all claims present or future and whether against the debtor or any other party.

The court did not ask whether the clause under attack was "clearly inimical to the interests of the community" but whether the clauses went "beyond the reasonable business requirements of suretyship", whether there was a "commercial justification" for them, or whether they made "unnecessary inroads upon a surety's rights". Not surprisingly – for *collectively* the clauses were indeed unattractive to sureties – the court found that the clauses fell foul of the approach formulated, that they were not severable from the rest of the contract, and that the suretyship itself was accordingly unenforceable. It is difficult to escape the conclusion that the judge simply asked himself whether the clauses were fair and reasonable; he concluded that they were not, and struck them down. Although *D Engineering* may indeed present an extreme example of bad drafting of a suretyship, it sent shock waves through the financial community.[119]

It is not surprising that other courts[120] have sought to distinguish the judgment in *D Engineering*.[121] A more realistic approach was followed in *Standard Bank of*

---

117 TPD 1992-03-27 (case A823/91), 1992 (3) *Commercial Law Digest* 228.

118 A less stringent but similar clause had in fact been upheld *in Botha (now Griessel) v Finanscredit (Pty) Ltd supra*.

119 Friedland "In the eye of the beholder" *Financial Mail* 1992-10-02 31; Stranex "Credit transactions" 1992 (3) *Commercial Law Digest* 201, *Sureties the latest law: Superior court judgments since 1992* (1996). In *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 4 SA 206 (W) 210 Marais J observed that *D Engineering* "has been avidly seized upon by sureties bereft of any other defence against claims by banks, financial institutions and others. The sureties now discover that the suretyships that they willingly signed contain provisions so grossly immoral that it is offensive that the agreement should be enforced against them and that they should have to pay. It has become a favourite defence of last resort".

120 *Supra*. See in this regard *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd supra*; *Volkskas Bank Beperk v Theron* TPD 1992-05-22 (case 4606/91), 1992 (4) *Commercial Law Digest* 336; *Mark Enterprises Incorporated v Malebrand (Pty) Ltd* WLD 1992-09-08 (case 10518/92), 1992 (4) *Commercial Law Digest* 331; *First National Bank of Southern Africa Ltd v Sphinx Fashions CC* 1992 (4) *Commercial Law Digest* 305 (W); *Crassas v Standard Bank of South Africa Ltd* WLD 1992-09-17 (case 34263/91); *Standard Bank Financial Nominees (Pty) Ltd v Bamberger* 1993 4 SA 84 (W); *Conshu Holdings Ltd v Lawless* 1992 (4) *Commercial Law Digest* 301; *Standard Bank of South Africa Ltd v Berkley Consultants CC* 1993 *Commercial Law Digest* 37 (W); *First National Bank v Soller* 1993 *Commercial Law Digest* 113 (W); *Standard Bank of South Africa Ltd v Thyssen* 1993 *Commercial Law Digest* 120 (W); *Standard Bank of South Africa Ltd v Wilkinson* 1993 3 SA 822 (C); *Standard Bank of South Africa Ltd v Meechan* 1993 *Commercial Law Digest* 301 (T). See further Stranex *Sureties the latest law: Superior court judgments since 1992* (1996) 31ff.

121 The interpretation of clauses in deeds of suretyship has not been consistent. Eg in *D Engineering* Preiss J held that a clause that provided that "all admissions or acknowledgments

continued on next page

South Africa Ltd v Wilkinson[122] where a Cape full bench noted that the standard clauses in suretyship agreements have over the passage of many years been regarded as the normal ones governing the relationship between creditor and surety. They have gone unchallenged and most of them have been declared unobjectionable. They can be justified in a broad commercial context:

> "[B]anks and financial institutions draw up individual agreements in but rare instances. They would, if the test were not to be whether a clause is inimical to the interests of the community as a whole but rather oppressive to the individual surety because of his relationship to the principal debtor, be constantly at risk of having their agreements struck down. The conducting of what are normal and ordinary everyday commercial transactions ie the furnishing of suretyships would become extremely difficult, if not impossible . . . Once a clause appearing in a standard suretyship is justifiable in the broad commercial context, that is to say, once there is good reason in circumstances which frequently arise for its inclusion in a suretyship, it is difficult to see why such a clause should be regarded as inimical to the interests of the community if in the particular circumstances of the case in question it should not be readily applicable or may even appear to be somewhat harsh. Unless a clause or clauses are clearly inimical to the interests of the community as a whole – not to the individual surety because of any circumstances pertaining only to him – and the public harm manifest, the court should be slow to exercise its power to declare such clause or clauses objectionable."

---

of indebtedness by the debtor bind or shall bind the sureties" goes "beyond the reasonable requirements of suretyship" (229). Yet such a clause was passed as unobjectionable by the same judge in his subsequent judgment in *Volkskas Bank Beperk v Theron supra*. In *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* Marais J referred to this conflict and remarked that although he was "bound by the collective wisdom of two Judges of the Transvaal Provincial Division" there is nevertheless an explanation for the differing approaches of Preiss J in the *D Engineering* and *Volkskas Bank* cases: "In both cases the full facts were before the Court and I can only assume that on the facts the Court found in the *D Engineering* case that the clause was unreasonable and unconscionable whereas on the facts it found in the *Volkskas Bank* case that the clause did not even merit comment and was not objectionable. The difference almost certainly must lie in the relationship between the principal debtor and the sureties" (215). Marais J therefore held that the "finding in the *D Engineering* case that the clause at issue is contrary to public policy was a finding only in the context of the facts of the *D Engineering* case. The judgment in the *Volkskas Bank* case shows that the finding was not of general or universal application" (216). In *Standard Bank Financial Nominees (Pty) Ltd v Bamberger supra* Levy AJ expressed agreement with the approach in *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* In *Standard Bank of South Africa Ltd v Wilkinson supra* Tebbutt, Scott and Brand JJ warned against the approach of considering the clauses in the contract in the context of the particular relationship between the surety, the principal debtor and the creditor of the case: "If this be so it illustrates the danger of seeking to apply individual considerations of possible hardship to the question of whether a clause is inimical to the interests of the community as a whole. It would, in our opinion, become an intolerable situation for men of business if they had, in each instance in which they require a surety to bind himself, to run the risk of a court declaring a certain clause or clauses in the suretyship agreement contra bonos mores because of the background of the debtor or the surety or the circumstances in which the latter came to bind himself"(831G–I). Other clauses have also been interpreted differently. See 1992 (3) *Commercial Law Digest* and *Sureties the latest law: Superior court judgments since 1992* (1996) 31ff for a schematic exposition on how the different courts have interpreted the various clauses.

122 1993 3 SA 822 (C) 831H–832D. It has been suggested that "[p]erhaps . . . [the] whole question of *contra bonos mores* has been misconstrued in the context of suretyships, [and] . . . has simply been taken too far. The *Sasfin* judgment has been the basis of the 'fairness' or 'reasonable business requirement'. Such criteria are inappropriate to a system which turn on legal principle rather on the vagaries violation of the bonos mores . . ."; Stranex in his editorial to the 1992 *Commercial Law Digest* 270.

12 To return to the question of *bona fides* and the *exceptio doli generalis* in South African law. A constructive approach[123] is that the "substantive" content of the *exceptio* had been absorbed into the requirement of good faith underlying the conclusion, performance and execution of all consensual contracts. An example of the operation of the good faith principle lies in the application of the so-called "fraud exception" when payment of a documentary letter of credit is enforced. South African courts accept the autonomy and independence of the issuing bank's obligation in terms of a documentary letter of credit,[124] and have had little difficulty in absorbing the fraud exception of *Sztejn v J Henry Schroder Banking Corporation*[125] into South African law.[126] The issuing bank's obligation to pay and the beneficiary's abstract and autonomous claim can both be characterised as instances of the duty to perform and execute contracts in good faith.[127]

Support for this approach can be found in the minority judgment of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*.[128] An elderly lady had signed a deed of suretyship in favour of First National Bank to secure the indebtedness of her son. She also ceded certain share certificates to the bank. She was hard of hearing and almost blind when she did this. At the time she had often been confused and disoriented. The majority of the Supreme Court of Appeal concluded on the expert and factual evidence that the probability was that she lacked contractual capacity to understand the nature or the consequences of her actions when she had entered into the suretyship agreements. In a concurring minority judgment, Olivier JA disagreed with the view that she had lacked contractual capacity when she had signed the agreements. However, his lordship concluded that the appeal had to be dismissed on the basis of the application of the good faith principle. He reconsidered the role of public policy and good faith in the modern law of contract, remarking that the Appellate Division had since the early years of the century taken the lead in recognising and applying the principle to establish new and equitable rules of law and to find equitable solutions where the strict application of the existing rules of law would have resulted in injustices.[129] Mrs Malherbe had

123 Zimmermann "Good faith and equity" in Zimmermann and Visser (eds) *Southern Cross* (1996) 217 239ff and Zimmermann *The law of obligations Roman foundations of the civilian tradition* (1990) 672–677. See also Kerr *The principles of the law of contract* (1998) 563ff.

124 *Philips v Standard Bank of South Africa Ltd* 1985 3 SA 301 (W) and see Hugo *The law relating to documentary credits from a South African perspective with special reference to the legal position of the issuing and confirming banks* (1996) unpublished LLD thesis, US 11ff; Oelofse *The law of documentary letters of credit in comparative perspective* (1997) 463ff.

125 31 NYS 2d 631 (1941).

126 *Loomicroft Fabrics CC v Nedbank Ltd* 1996 1 SA 812 (A).

127 The autonomy of the independence of the bank's obligation had an interesting development where the question whether a purchaser could attach *ad fundandam jurisdictionem* the right of the seller under the credit to found jurisdiction in a dispute concerning a collateral matter. The autonomy of the documentary credit was such, the court held, that the attachment was excluded because it was impliedly agreed that the purchaser would have no such right: *Ex parte Sapan Trading (Pty) Ltd* 1995 1 SA 218 (W); Malan "Letters of credit and attachment ad fundandam jurisdictionem" 1994 *TSAR* 150 and Hugo 331ff.

128 1997 4 SA 302 (SCA).

129 319B–C 320D–E. The judge was of opinion that there is an intimate relationship between the concepts *bona fides*, public interest, public policy and *justa causa*. See further in this regard Lubbe "*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg"

continued on next page

clearly been persuaded by her beloved son to sign one utterly prejudicial document after the other while under the impression that she was merely making the shares available to him, without any prejudice to her rights. She had also signed the documents without having their import explained to her and without having read them. In these circumstances Olivier JA held that public policy did not require the strict application of the general rule that a contracting party must always be bound by the contents of the agreement. Where a surety was obviously physically weak and confused and possibly unable to understand fully the contents of the agreement, or where the surety was, to the knowledge of the creditor, the debtor's spouse[130] or elderly parent, public policy required that the creditor ensure that the surety understood the full import of the agreement and of any consequent cessions. This could be achieved, the judge said, by insisting that the surety obtain independent legal advice or by having the creditor explain to the surety the full implications of the agreement and any related documents.[131] *Bona fides* or good faith, the judgment continued, therefore required that the suretyship agreement and cession in question not be enforced.

It follows from this judgment that Olivier JA did not restrict the remedy to women or married women only. This is, it is suggested, in accordance with the constitutional precept of equality, for to afford special protection to women or married women only would demean them and would be tantamount to unfair and unacceptable discrimination.[132]

However, it is one thing to subject all contracts to *bona fides* as the principle governing their conclusion, performance and execution and another to typify conduct that would fall short of that standard. *Bona fides* is not, or should not be, an "irritant"[133] in South African law: it is rooted deep in the Roman-Dutch tradition and history of our law. As an abstract concept it will, however, add little to the resolution of specific issues. It cannot – and does not profess to – resolve specific problems. These issues, including those falling under the category of "sexually transmitted debt" have to be dealt with in accordance with the accepted and evolving rules of *justus error*, fraud, undue influence, misrepresentation and the like.[134] It follows that a creditor's knowledge of the surety's mistake or misapprehension can no longer be

---

1990 *Stell LR* 11ff who argues that good faith requires that parties to a contract show a minimum level of respect for each other's interest. The unreasonable and one-sided promotion of one's own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest and the sanctity of contracts. Under these circumstances public policy requires the courts to refuse to enforce the contract.

130 With reference to the decision of the Court of Appeal in *Barclays Bank plc v O'Brien* [1993] QB 109; [1992] 4 All ER 983 (CA) where a similar view was taken. The House of Lords affirmed the decision of the Court of Appeal, but on different grounds: [1994] 1 AC 180 (HL).

131 331D–H.

132 Cf Kirby J's minority judgment in *Garcia v National Australian Bank Ltd* (1998) 155 ALR 614 (HCA) 633; *Garcia v National Australian Bank Ltd* (1998) 155 ALR 614 (HCA) 633–634ff 639.

133 Teubner "Legal irritants: Good faith in British law or how unifying law ends up in new divergencies" 1998 *MLR* 11.

134 *Prins v Absa Bank Ltd* 1998 3 SA 904 (C) and see Glover "Mistake, financial institutions and the contract of suretyship" 1998 *THRHR* 456.

regarded as the only circumstance in which his claim will be excluded.[135] The circumstances may be such that a duty, if it may be called a "duty",[136] to warn the surety or to advise him or her to take independent advice is imposed on the creditor.[137] To deduce specific rules from *bona fides* in the abstract and without reference to the circumstances would distort it and destroy its systematising and corrective value.

Die Butterworths-prys vir die beste eerstelingbydrae is toegeken aan professor Sonia Human vir haar artikels "Die historiese onderbou van die privaatregtelike ouer-kind verhouding – fondament vir of struikelblok in die implementering van kinderregte?" en "Die effek van kinderregte op die privaatregtelike ouer-kind verhouding".

135 *Silver Garbus & Co (Pty) Ltd v Teichert* 1954 2 SA 98 (N) 105 and on undue influence in general Lubbe "Voidable contracts" in Zimmermann and Visser (eds) *Southern Cross* (1996) 261.

136 See par 2 above.

137 *Smith v Bank of Scotland* 1997 SC (HL) 111 117–118 121. See Rickett "The financier's duty of care to a surety" 1998 *LQR 17.*

AANTEKENINGE

DIEFSTAL IN BIOPSIGIESE OORLEWINGSNOOD: OPMERKINGE OOR DIE STRAFREGTELIKE SPANNINGSVELD TUSSEN DIE MENSLIKE LEWE EN LEWENSKWALITEIT*

1 Inleiding

Dit is merkwaardig dat daar so min moderntydse inligting bestaan oor die vraag of diefstal in biopsigiese oorlewingsnood tot strafregtelike aanspreeklikheid aanleiding kan gee. Die begrip "biopsigiese oorlewingsnood" word as oorkoepelende begrip gebruik om honger- en dorsnood, kledingnood, medisyne- en siektenood, sintuignood asook psigiatriese nood in te sluit. Normaalweg sou mens die begrip "biologiese oorlewingsnood" as voldoende kon beskou. Die begrip "biopsigiese oorlewingsnood" word egter gebruik om verwarring uit te skakel en ook daardie gevalle te ondervang waar 'n persoon byvoorbeeld medisyne steel om 'n selfdodingsdrang of akute angstoestand te oorkom of te verlig (sien Labuschagne "Aanranding en misdaadkondensering: Opmerkinge oor die strafregtelike beskerming van biopsigiese outonomie" 1995 *De Jure* 367; "Kennispyn: 'n Bewussynsantropologiese perspektief op die evolusieproses van die persoonlikheidsreg" 1998 *THRHR* 313; "Die dinamiese aard van die inhoud van die misdaad aanranding en geregtigheidskonforme analogie in die strafreg" 1998 *THRHR* 482).

Die onderhawige bydrae ondersoek die vraag na die strafregtelike aanspreeklikheid weens diefstal vir optrede in biopsigiese oorlewingsnood gepleeg. Die bydrae beklemtoon ook die hedendaagse belangrikheid van ons gemenereg, nie slegs vir historiese doeleindes nie maar ook as 'n belangrike regsbron. Trouens, 'n studie van ons gemeenregtelike bronne is in onderhawige verband onontbeerlik. Na 'n oorsig van ons gemeenregtelike bronne, asook verwysing na enkele ander regstelsels, word die riglyne geanaliseer wat, onderskeidelik, in ons gewysdereg en Grondwet uitgekristalliseer het en geartikuleer word.

In 'n studie soos die onderhawige is dit onvermydelik dat die vraag sal opduik of regsonderdane prinsipieel op 'n sekere minimum lewenskwaliteit, dit wil sê sosiojuridies en veral ekonomies iets meer as die lewe as sodanig, aanspraak kan maak. Die problematiek onderliggend aan dié vraag kom wesenlik neer op 'n soeke na die (regstaatlike) betekenis van die begrip "biopsigiese oorlewingsnood".

---

* Dank word hiermee uitgespreek teenoor die Alexander von Humboldt-Stiftung en die Universiteit van Pretoria wat my finansieel in staat gestel het om 'n deel van dié navorsing in 1999 aan die Ludwig Maximilians-Universität in München (Duitsland) te onderneem. Die menings hierin uitgespreek, word nie noodwendig deur dié instellings gedeel nie.

2 Gemeenregtelike oorsig

Duidelike aanknopingspunte vir die hedendaagse verweer van noodtoestand word in ons gemenereg aangetref (sien Cicero *De inventione rhetorica* lib 2 cap 57; Rein *Das Kriminalrecht der Römer* (1844) 143; Mommsen *Römisches Strafrecht* (1899) 653). Uit tekste in die *Corpus iuris civilis* sou afgelei kon word dat skade/benadeling wat in noodtoestand aangerig word nie aanspreeklikheid tot gevolg het nie, indien die gevaar wat afgeslaan word dreigend was en nie op 'n ander wyse vermy sou kon word nie (*D* 9 2 49 1; 40 12 16 1; 43 24 7 4; 49 9 3 7; 9 16 1; 50 17 169). Inligting dui daarop dat gedurende die tydperk van die Romeinse reg ouers in geval van hongersnood die dienste van hulle kinders kon "verhuur" (Paulus *Sententiae* 5 1). Wat presies onder hongersnood verstaan moet word en of diefstal in hongersnood geregverdig sou kon word, word egter nie direk in die Romeinse reg aangespreek nie. Wilda *Das Strafrecht der Germanen* (1842) 939, wat oor die Germaanse reg skryf, wys daarop dat 'n arm man wat kos "steel" om hom en sy afhanklikes te voed, nie aanspreeklikheid opdoen nie. Herhaal hy dit egter meer as twee keer word hy nie van aanspreeklikheid onthef nie.

In die Kanonieke reg word noodtoestand feitlik deurgaans in algemene slagspreuke met (ook 'n) direkte Bybelse onderbou, uitgedruk (sien in die algemeen Corvinus *Ius canonicum* (1651) 4 25). So word in 'n dekreet van Gregorius IX (*Decretum Gregorii ix, extra* lib 5 tit 41 c 4) verklaar dat dit wat regtens ontoelaatbaar is, in 'n toestand van nood toelaatbaar word (sien ook Gandinus *Tractatus de malificiis* rub *De poenis reorum in genere et de percussione et insultu* 60; a 3 en 10 van die *Corebrief* van die stad Mechelen van 1310). Hiervolgens val "diefstal" in hongers- of kledingnood gepleeg buite die trefkrag van regsanksies; noodtoestand hef eiendomsreg op en goedere (van andere) word gemeengoed (Gregorius ix, *extra* lib 5 tit 18 c 3 met glos; sien in die besonder De Wet en Swanepoel *Die Suid-Afrikaanse strafreg* (1960) 73 vn 74). Dit is insiggewend om daarop te let dat die weiering van aalmoese aan behoeftiges in die Kanonieke reg aan diefstal gelyk gestel is (*Corpus iuris canonici* dist 4 c 8 soos vermeld deur Von Weber "Vom Diebstahl in rechter Hungersnot" 1947 *MDR* 78).

Waar noodtoestand as verweer in die Kanonieke reg oorwegend Bybelmatig in algemene slagspreuke geformuleer is, vind ons dat skrywers in die Romeins-Europese fase van die ontwikkeling van ons gemenereg ook 'n natuurregtelike grondslag daaraan toeken (vgl in die algemeen Labuschagne "Van instink tot norm: Noodweer en noodtoestand in strafregtelik-evolusionêre perspektief" 1993 *TRW* 133 134–135). So verklaar Hugo de Groot *De jure belli ac pacis* (1939-uitg) 2 2 6 2 dat noodtoestand in alle menslike regstelsels aanspreeklikheid ophef (sien ook Carpzovius *Responsa iuris* (1683) 6 9 94 1; Pufendorf *De iure naturae et gentium* (1759) 2 6 1; Müller *Promptuarium iuris novum* (1794) par *furtum in extrema necessitate commissum*). Aansluitend hierby is daar diegene wat dit oor die boeg van menslike vryheid gooi. Strykius *Ad Schützius-Lauterbachianus thesaurus iuris civilis, sive succincta explanatio compendii Digestorum* (1717) 12 6 46 merk in dié verband op: *in necessitatibus nemo liberalis praesumitur* (in omstandighede van nood word niemand vermoed vry te wees nie). Laasgenoemde sienswyse vind ook in die kanonieke reg ondersteuning. In 'n dekreet van Gratianus (*Decretum Gratiani* tertia pars *De consecratione* dist v c 26) word naamlik die volgende aangetref: *Raptorem vel furum non facit necessitas sed voluntas* ('n rower (plunderaar) of dief word deur die wil en nie deur 'n toestand van nood gevorm nie).

Die vermaarde Duitse strafregwetenskaplike Hans Welzel wys tereg daarop dat skrywers in die Middeleeue noodtoestand aanvanklik in hoofsaak tot diefstal

(in hongersnood) beperk het, totdat vrye geeste soos Pufendorf en Kant die deure oopgestoot het en die *favor necessitatis* (vry vertaal: die verweer van noodtoestand) na ingrepe op liggaam en lewe uitgebrei het ("Zum Notstandsproblem" 1951 *ZStW* 47 53). Dat die begrip "Romeins-Europese reg", dit wil sê die (ontwikkelende) *ius commune* in Europa, 'n beter beskrywing van ons gemenereg as die begrip "Romeins-Hollandse reg" is, word treffend deur 'n studie soos die onderhawige bevestig (sien verder Labuschagne "Ons gemenereg en wetsuitleg" 1984 *De Jure* 364 en verwysings daarin opgeneem). Soos reeds uit bogaande uiteensetting blyk, herlei vroeë Europese skrywers die noodtoestandsprobleem, spesifiek ook met verwysing na diefstal in hongersnood, tot die Christelike godsdiens (die Bybel) en die natuurreg, wat nie noodwendig in konflik tot mekaar staan nie. Nóg die Christelike godsdiens nóg die natuurreg is aan staats- en regsgrense gebonde.

Die Italiaanse juris Clarus, wie se werk uit die 16de eeu dateer, huldig die standpunt dat 'n persoon wat in uiterste nood optree nie weens diefstal aanspreeklik gehou word nie. Sou dit later moontlik wees, moet die dader die skade vergoed wat hy veroorsaak het (*Opera omnia* (1579) lib v par *furtum* 24–25). Vgl ook Zypaeus *Notitia iuris Belgici* (1642) lib 4 tit *de furtis* wat oor die oud-Belgiese reg skryf). Volgens Damhouder *Practijke in criminele saken* (vert Van Nispen (1656) hfst 103) word diefstal verskoon wat uit noodsaak van honger of andersinds gepleeg word en nie uit "boosheyd of om proffijt te doen" nie. In die oorspronklike Latynse teks van dié werk (*Praxis rerum criminalium* (1646) cap 112 37) word laasgenoemde aanhaling aangedui met die volgende frase: *non vero animo fraudulenter lucrandi*, dit wil sê Damhouder is van mening dat strafregtelike aanspreeklikheid wegval omdat die diefstalopset (later deur verskeie skrywers bloot aangedui as *animus lucrandi*) ontbreek (sien in die algemeen Snyman "Die vereistes van contrectatio en lucrum by furtum in die Romeinse reg" 1973 *Acta Juridica* 271). Damhouder beklemtoon verder dat daar 'n uiterste nood moet bestaan en dat die "diefstal" nie van 'n groot omvang moet wees nie.

Volgens die Spanjaard Perezius *Praelectiones in duodecim libros Codicis Justiniani* (1653) 6 2 10 word iemand wat in uiterste nood "diefstal" pleeg nie aanspreeklik gehou nie omdat van die veronderstelling uitgegaan word dat dit met die toestemming van die eienaar geskied het. Volgens hom word alle goedere, in ooreenstemming met beide die natuur- en positiewe reg, in 'n noodtoestand gemeengoed. Indien dit later met die "dief" beter sou gaan, rus daar 'n plig op hom om die skade van die "slagoffer" goed te maak. Covarruvias *Opera omnia* (1661) 2 6 1 3–4 deel hierdie siening. Hy wys daarop dat daar van uiterste nood (*necessitas extrema*) sprake is indien 'n dreigende lewensgevaar bestaan (*imminet vitae periculum*), wat nie op 'n ander wyse vermybaar is nie (vgl ook die standpunt van die volgende ander Europese skrywers: Oinotomus *In quattuor institutionum imperialium Justiniani imp libros commentarii* (1673) 2 1 par *gallinarum autem additiones*; Zoesius *Commentarius ad Digestam seu Pandectas* (1718) 47 2 16).

De Groot, in navolging van die destyds gangbare teologiese benadering, onderskryf die standpunt dat aanspreeklikheid weens diefstal deur 'n toestand van nood opgehef word. Ziegler, in 'n kommentaar op die werk van De Groot (*In Hugonis Grotii de jure belli ac pacis* (1674) 2 2 6 par *in gravissima necessitate*), vermeld dat diefstal in 'n ernstige noodtoestand van siekte, honger en kleding (*in grave necessitate morbi, famis, nuditatis*) strafregtelik verskoon word. De Groot 2 2 6–9 stel egter drie kwalifikasies in dié verband: (a) Die noodtoestand mag nie op 'n ander wyse vermybaar wees nie, soos deur hulp van die owerheid te bekom of afsmeking van die saak van die eienaar. Ziegler 2 2 7 opper die volgende interessante vraag in dié verband: Wat sou gebeur indien die eienaar weier om sy saak af te gee en dit word

gewelddadig van hom ontneem? Hy antwoord dat die eienaar hom op noodweer sou kon beroep. Het die noodtoestanddader dan onregmatig opgetree? Of sou mens in sekere omstandighede ook 'n regmatige aanval in noodweer kon afslaan? (Sien hieroor Labuschagne "Noodweer teen 'n regmatige aanval?" 1974 *De Jure* 108; "Die verweer van lokvinkbetrapping: Watter misdaadelement word uitgeskakel?" 1999 *De Jure* 168 172.) (b) Die eienaar van die saak moet hom nie in 'n soortgelyke noodsituasie (*in pari necessitate*) bevind nie. (c) Die noodtoestanddader moet die skade later goedmaak, sou dit moontlik wees.

Van der Muelen wat meer spesifiek oor die posisie in Utrecht skryf (*Costumen, usantien, policien ende styl van procederen der stadt, jurisdictie ende vryheid van Utrecht* (1709) 39 1 8) is van mening dat diegene wat, deur honger gedryf, kos in tyd van hoë pryse "steel", nie aan diefstal skuldig is nie. Die rede wat hy hiervoor aangee, is dat die diefstalelement van bevoordeling of verryking (*lucri faciendi gratia*) afwesig is.

Volgens Moorman *Verhandelingen over de misdaden en der zelver straffen* (1779) 3 2 2 is diegene wat iets van 'n ander neem "om zich zelven daar door te behouden" nie aan diefstal skuldig nie. Hy wys egter daarop dat sodanige persoon hom nie daardeur mag verryk nie en dat hy verplig is om, wanneer hy die gevaar te bowe gekom het of in geval van uiterste armoede tot "een beter staat geraakt", die veroorsaakte skade goed te maak. Volgens Van der Keessel *Praelectiones ad Ius Criminale* (1969-uitg) 47 2 8 word diefstal nie in uiterste nood gepleeg nie. Aanspreeklikheid word volgens hom uitgesluit omdat die diefstalopset (*animus furandi aut lucri faciendi*) in sodanige omstandighede ontbreek. Optrede in uiterste nood verg dat 'n ander (minder skadelike) uitweg nie moontlik is nie. Matthaeus *De criminibus* (1661) 47 1 1 7 en Voet *Commentarius ad Pandectas* (1704) 47 2 8, in teenstelling met ander Nederlandse juriste, staan op die standpunt dat diefstal wat in hongersnood gepleeg word slegs by strafversagting ter sprake kom. Volgens hulle ontbreek ook die diefstalopset (*animus lucrandi*) nie in geval van hongersnood nie (sien ook die mening van die Duitse juris Carpzovius *Verhandeling der lyfstraffelyke misdaden* (vert Van Hogendorp 1772) hfst 76 13–18).

Skrywers in die Duitssprekende wêreld huldig insgelyks 'n verskeidenheid menings. "Diefstal" in hongersnood (*necessitas famis*) lei volgens Brunnemann *Commentarius in quinquaginta libros Pandectarum* (1701) 23 2 43 8 nie tot strafregtelike aanspreeklikheid nie. Hy wys daarop dat in 'n toestand van hongersnood die gebruik van sake, anders as dié van die liggame van andere, gemeengoed word (*in necessitate famis usus bonorum fortunae communis, non ita corporum*). In die lig hiervan sou ontug (*fornicatio*) en owerspel (*adulterium*) volgens hom derhalwe nie op grond van noodtoestand ("seksuele nood") geregverdig kon word nie (sien ook hieroor die menings van Covarruvias 2 6 1 5 en Menochius *Consiliorum sive responsorum* lib pr (1628) cons 31 8). Hoppius *Commentatio succincta ad Institutiones Justinianeas* (1746) 4 1 2 is van mening dat diefstal nie in uiterste nood gepleeg word nie. Drie kwalifikasies word egter gestel: (a) 'n lewensgevaar, wat nie op 'n ander wyse vermy kan word nie, moet teenwoordig wees; (b) die eienaar van die saak moet nie sonder merkbare benadeling daarsonder kan klaarkom nie; en (c) die eienaar moes na nederige afsmeking (*imploratus*) geweier het om die hongerslagoffer tegemoet te kom. Latere restitusie, indien moontlik, moet deur laasgenoemde gedoen word.

Pufendorf 2 6 5–6 is van mening dat iemand in 'n uiterste noodtoestand (*in extrema necessitate*) kos of klere van 'n ander mag neem, desnoods met geweld, om aan die lewe te bly of hom teen koue te beskerm. Hy kwalifiseer sy siening egter

soos volg: (a) Die noodtoestanddader moet eers poog om die saak met die toestemming van die eienaar te bekom, naamlik deur afsmeking of die aanbied van sy dienste; (b) 'n ander mag nie van sy besittings ontneem word indien hy dan in dieselfde noodsituasie sou verval nie; en (c) restitusie moet later, indien moontlik, gemaak word. Indien die saak wat (af)geneem is van geringe waarde was, sou 'n (latere) teken van dankbaarheid voldoende restitusie wees.

Artikel 166 van die *Constitutio Criminalis Carolina* (*CCC*) bepaal dat diegene wat "durch rechte Hungersnot" iets van 'n ander neem om hom of sy vrou of sy kinders te voed, nie strafregtelik aanspreeklik is nie (Von Weber 78). Boehmer *Meditationes in CCC* (1744) par 166 is van mening dat hierdie reëling onder alle volkere/stamme (*inter omnes gentes*) geld. Ware hongersnood ("rechte Hungersnot"; *summa necessitas*) is teenwoordig wanneer lewensgevaar bestaan. Boehmer wys daarop dat oorskryding van die grense van noodtoestand sou kon plaasvind indien die dader (*famelicus*) meer neem as wat die teenwoordige nood (*praesens necessitas*) vereis of as hy geweld aanwend terwyl 'n ander uitweg moontlik is. By sodanige oorskryding word 'n ligter straf opgelê (sien ook Müller vol 3 par *furtum in extrema necessitate commissum*; Leyser *Medidationes ad Pandectas* (1717) spec 537 1–6; Von Weber 79). Volgens Püttmann *Elementa iuris criminalis* (1802) par 450, een van die laaste skrywers van die gemeenregtelike era, val nie slegs "diefstal" in uiterste nood buite die trefkrag van die strafsanksie nie, maar ook gelyksoortige gevalle, dit wil sê gevalle waar dieselfde *ratio* geld (*ubi eadem adest ratio*), soos "diefstal" om koue te ontkom. Laasgenoemde benadering van Püttmann, naamlik dat die verweer na gevalle met dieselfde *ratio* uitgebrei kan word, is insiggewend. Veral die evolusie van (wetenskaplike) kennis en die veranderende waardesisteem in die menslike gemeenskap verg dikwels analogiese uitbreiding van strafregtelike verwere (sien Labuschagne "Evolusielyne in die regsantropologie" 1996 *SA Tydskrif vir Etnologie* 40; Roxin *Strafrecht ATI* (1997) 113–114; Labuschagne "Die dinamiese aard van die inhoud van die misdaad aanranding en geregtigheidskonforme analogie in die strafreg" 1998 *THRHR* 482). "Diefstal" van geld of 'n ander saak met die doel om dit aan te wend om iets anders ter noodverligting te bekom, val ook buite die trefkrag van die strafsanksie (sien verder Carpzovius hfst 76 11–18).

Uit bogaande uiteensetting blyk duidelik dat "diefstal" in biopsigiese oorlewingsnood – wat as 'n moderne beskrywing van *in extrema necessitate* beskou sou kon word – dit wil sê in geval van hongersnood, kledingnood, siektenood en soortgelyke noodtoestande, nie tot strafregtelike aanspreeklikheid aanleiding gee nie. Sou dit later beter gaan met die dader, moet restitusie of goedmaking van die skade plaasvind (sien verder Labuschagne "Noodtoestand" 1974 *Acta Juridica* 73 78–79; Van der Westhuizen *Noodtoestand as regverdigingsgrond in die strafreg* LLD-proefskrif UP (1979) 180ff).

3 Positiewe reg binne regstaatlike verband

Noodtoestand kan in beginsel 'n strafregtelike verweer ter beskerming van lewe, liggaam, goedere, eer en ander belange wees (sien Labuschagne 1974 *Acta Juridica* 96–98; Snyman *Strafreg* (1999) 118; Burchell *South African criminal law and procedure* vol 1 (1997) 87–88; Van der Westhuizen 583–585; Labuschagne "Gewetensnood as strafregtelike verweer" 1996 *SALJ* 607 ev). Uit *R v Canestra* 1951 2 SA 317 (A) 324 blyk dat noodtoestandoptrede suiwer ter beskerming van ekonomiese lewensverbetering nie as verweer kan staan nie. Gestel dat A deur aan B R10 000 se ekonomiese skade te berokken R10 000 wins kon maak. Die beskermde belang is tog baie groter as die opgeofferde belang. Sou A hom op noodtoestand kon

beroep? Die antwoord op dié vraag sal sekerlik ontkennend moet wees. Om verbetering van sosio-ekonomiese lewenskwaliteit as sodanig as verweer te erken, sou die basiese behoefte aan orde(likheid), waarop moderne gemeenskappe gefundeer is, in sy wese aantas. Dit is duidelik dat die gemeenregtelike regsposisie soos hierbo uiteengesit steeds die grondslag van ons positiewe reg vorm.

Anders as in ons gemenereg was diefstal in hongersnood volgens die Engelse *common law* met die dood strafbaar (sien die standpunt van Hale en Blackstone aangehaal deur Remmelink *Mr D Hazewinkel-Suringa's inleiding tot de studie van het Nederlandse strafrecht* (1996) 301 vn 1). In *London Borough of Southwark v Williams* 1971 2 All ER 175 (CA) 179 verduidelik lord Denning MR dat "in case of great and imminent danger, in order to preserve life, the law will permit of an encroachment on private property". Hy voeg dan by dat die howe, ter handhawing van wet en orde, 'n ferm standpunt moet inneem en "must refuse to admit the plea of necessity to the hungry and the homeless" (vgl Labuschagne "Medemensdwang as strafregtelike verweer" 1998 *Stell LR* 205 211 ev; Van der Westhuizen 553–554). In die Engelse reg rus daar, paradoksaal genoeg, 'n plig op die staat (polisie; gevangenisowerheid) om selfbesering of -doding van 'n aangehoudene te voorkom (sien bv *Reeves v Commissioner of Police of the Metropolis* 1998 2 All ER 381 (CA) 393–395).

In 'n beslissing van 'n regbank van Amsterdam van Oktober 1888 is 'n persoon weens diefstal van 'n brood skuldig bevind nieteenstaande die feit dat hy die voorafgaande twee dae glad nie geëet het nie (*P v J* 1888 no 119 en 122; Remmelink 301 vn 1). In die lig van die hedendaagse benadering tot noodtoestand in Nederland is dit duidelik dat so 'n beslissing nie aanvaarbaar sou wees nie (Remmelink 301–302). Op 15 Oktober 1923 (NJ 1923, 1329) het die Hoge Raad 'n rigtinggewende beslissing in dié verband gelewer. 'n Oogkundige van Amsterdam het naamlik na sluitingstyd 'n swaksiende, wie se bril defektief was en wat nie veilig daarsonder op straat kon gaan nie, raakgeloop. Hy het vervolgens in stryd met artikel 9 van die Verordening op die Winkelsluiting aan hom 'n bril verskaf. Die Hoge Raad bevestig sy onskuldigbevinding. Die swaksiende persoon het 'n signood gehad wat die oogkundige regmatig buitetyds verlig het (vgl ook HR 5 Februarie 1957, NJ 1957, 448). In Nederland kan ondraaglike siekte- en pynnood in gepaste omstandighede selfs met aktiewe eutanasie beëindig word (Labuschagne "Die strafregtelike verbod op hulpverlening by selfdoding: 'n Menseregtelike en regsantropologiese evaluasie" 1999 *Obiter* 45 48 vn 17 en verwysings aldaar). In 'n bekende Franse saak van 4 Maart 1898 het 'n sekere mevrou Ménard 'n brood gesteel. Sy moes vir haar twee kinders sorg, was sonder werk en het geen geld vir lewensmiddele gehad nie. Sy is deur die regbank van Chateau-Thierry, met as president die beroemde regter Magnaud (bekend as "le bon juge"), op grond van noodtoestand onskuldig bevind. Die beslissing word in appèl deur die hof te Amiens bevestig. Laasgenoemde hof wys daarop dat 'n bedrieglike opset, wat 'n bestanddeel van die misdaad diefstal in Frankryk is, nie bewys is nie (sien hieroor Remmelink 301 vn 1). Hierdie benadering herinner sterk aan die standpunt van sommige van ons gemeneregskrywers soos hierbo bespreek.

Artikel 34 van die Duitse Strafwetboek (*Strafgesetzbuch*; *StGB*) bepaal tans dat diegene wat in die aangesig van 'n dreigende, nie anders afwendbare, gevaar vir lewe, liggaam, vryheid, eer, goedere of ander regsbelang, 'n handeling verrig om die gevaar van hom/haar of 'n ander af te weer, nie onregmatig optree nie, indien, by afweging van die betrokke regsbelange, die beskermde belang wesenlik meer gewig dra as die opgeofferde belang en die betrokke handeling die gepaste wyse vir afweer van die gevaar is. Von Weber, met verwysing na 'n vroeëre maar in dié opsig gelykluidende bepaling van die *StGB*, toon aan dat slegs 'n persoon wat kan

verkluim indien hy/sy nie oornag iets ter kleding of beskutting bekom nie, hom op 'n dreigende gevaar sou kon beroep (78). By honger is die posisie anders. Aanhoudende ondervoeding breek die liggaam geleidelik af en verlaag die weerstandsvermoë daarvan. Versaking van 'n liggaamsorgaan of ontstaan van 'n siektetoestand lei dikwels tot die dood en nie die voedselgebrek as sodanig nie. Verhongering word in so 'n geval nie as doodsoorsaak aangedui nie. Om die tydstip aan te toon waarop die lewensgevaar slegs deur 'n strafbare handeling, soos diefstal van voedsel, afgeweer sou kon word, is in geval van hongersnood onmoontlik. Die persoon wat ondervoed is, bevind hom/haar in 'n duursame gevaar ("Dauergefahr") wat enige tyd in 'n akute gevaar omskep kan word (vgl Keller *Die Dauernotstand im Strafrecht* (1934) 51). Hierdie duursame gevaar, waarin miljoene Duitsers hulle na die Tweede Wêreldoorlog bevind het, was volgens vroeëre beslissings van die voormalige *Reichsgericht* nie voldoende vir 'n beroep op noodtoestand nie (Urt v 26 April 1932, RG 66, 222 225 ev. Vgl ook van dieselfde hof Urt v 4 Julie 1918, RG 52, 296; Urt v 12 September 1935, RG 69, 313; Roxin 613). Artikel 35 *StGB* bepaal dat diegene sonder skuld optree wat 'n wederregtelike handeling verrig om 'n dreigende, nie op 'n ander wyse afwendbare gevaar vir lewe, liggaam of vryheid van hom/haar of sy/haar verwant (*Angehörige*) of 'n ander naasbestaande afweer. Hierdie artikel skep die verweer van onskuldigende noodtoestand (*entschuldigender Notstand*) (sien verder hieroor Roxin 826ff; Ludwig *"Gegenwärtiger Angriff", "drohende" und "gegenwärtige Gefahr" im Notwehr- und Notstandsrecht* (1991) 173 ev).

Uit bogaande bespreking blyk dat regstelsels die vraagstuk van diefstal in hongers- en ander vorme van biopsigiese oorlewingsnood nie eners hanteer nie. Sodanige diefstal sou ongetwyfeld volgens ons gemenereg in gepaste omstandighede 'n strafregtelike verweer kon daarstel. 'n Volgende vraag wat oorweging verdien, is of hierdie verweer binne konteks van die huidige Suid-Afrikaanse Grondwet verdedigbaar is. Artikel 10 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 waarborg die respektering en beskerming van die inherente reg op waardigheid van elke mens en artikel 11 waarborg die mens se reg op lewe. Hierdie twee fundamentele regte word deur die president van die Konstitusionele Hof as die belangrikste menseregte beskou (*S v Makwanyane* 1995 6 BCLR 665 (KH); 1995 3 SA 391 (KH) par 144). Volgens artikel 2(1) van die Duitse Grondwet (*Grundgesetz*; *GG*) word die individuele mens se reg op vrye ontplooiing van sy/haar persoonlikheid menseregtelik gewaarborg, vir sover die regte van andere respekteer word en dit nie strydig met die staatsregtelike ordening of gemeenskapsedes is nie. Volgens die Duitse Konstitusionele Hof (*Bundesverfassungsgericht*; *BVerfG*) verteenwoordig die vrye menslike persoonlikheid, wat met waardigheid toegerus is, die hoogste menseregtelike waarde (sien bv Urt v 5/6/1973, BVerfGE 35, 221). De Waal, Currie en Erasmus *The bill of rights handbook* (1999) 227 (teen die agtergrond van *S v Makwanyane* par 326–327 271 311, asook met verwysing na *Soobramoney v Minister of Health* (*Kwa Zulu-Natal*) 1998 1 SA 765 (KH); 1997 12 BCLR 1696 (KH) par 15 ev), merk soos volg op:

> "The right to life, thus understood, incorporates the right to dignity, and the rights to human dignity and life are thus entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished; and without life, there cannot be dignity."

Wat duidelik hieruit blyk, is dat die reg op lewe wesenlik 'n reg op 'n minimum lewenstandaard omvat (sien ook *Tellis v Bombay Municipal Corporation* (1987) LRC (Const) 51 (SC India) 68ff; Küper "Tötungsverbot und Lebensnotstand" 1981 *Juristische Schulung* 785 788). Die lewenskwaliteit-dimensie, wat 'n sinvolle en geregtigheidsmatige grondslag vir die reg op lewe bied, vorm inderdaad ook 'n

hoeksteen van die groeiende aandrang op juridiese erkenning van (aktiewe) eutanasie (Labuschagne "Regstaatlike waardegradering van die menslike lewe en lewenskwaliteit: Opmerkinge oor noodtoestand as verweer by aktiewe eutanasie" 2000 *THRHR* 133).

Blykens artikel 27(1) van ons Grondwet het iedereen die *reg op toegang* tot gesondheidsorgdienste, voldoende voedsel en water. Geeneen mag mediese noodbehandeling geweier word nie (a 27(3)). Artikel 28(1)(c) gee daarenteen aan elke kind 'n *reg* op basiese voeding, beskutting, basiese gesondheidsorgdienste en maatskaplike dienste (sien ook de Waal, Currie en Erasmus 434. Sien in die algemeen Brand "The right to food" 1998 (1) (3) *ESR Review* 5–7). In *Soobramoney v Minister of Health, (KwaZulu-Natal)* par 11 verklaar Chaskalson P soos volg:

> "What is apparent . . . is that the obligations imposed on the State in regard to access to health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them . . . an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which s 27(3) must be construed."

Teen die agtergrond van dié beslissing wys De Waal, Currie en Erasmus daarop dat "the positive dimension of the socio-economic rights is 'realised' or fulfilled through state action 'progressively' or over a period of time" (423). Wat duidelik blyk, is dat hierdie regte slegs sin maak in realistiese sosio-ekonomiese, landboukundige en ander gepaste omstandighede, dit wil sê in 'n regtevatbare en -vriendelike landskap. Gesondheidsorg is byvoorbeeld nie moontlik waar die nodige dienste, deskundigheid en mensekrag nie bestaan of bekombaar is nie.

Heyns en Brand "Introduction to socio-economic rights in the South African Constitution" in 1998 *Law, Democracy and Development* 153 159 maak die volgende opmerking:

> "The phrasing of the rights in the South African Constitution as rights 'to have access to' social goods points towards . . . the state's obligations. If one takes the example of the right to access to sufficient food, this means that the state is not ordinarily required to provide food to the population, but only to ensure that enough food of sufficient quality is available at affordable prices, so that ordinary people can reasonably access that food. Only where individuals or groups of people are objectively unable to acquire food for themselves, for example in the case of natural disaster or famine, or other forms of destitution, does the state become responsible for the actual provision of food. For the rights phrased as 'access' rights, there is in other words, at least in the first instance, no absolute entitlement to the provision of the social goods in question, free of charge and on demand."

(Vgl in die algemeen ook Stacy "Trilateral food aid arrangements" 1987 *Howard LR* 328.)

Om die staat, realisties gesproke, verantwoordelik te stel vir die verskaf van voedsel in ('n algemene en spesifieke) hongersnood sinchroniseer myns insiens onbetwisbaar met die grondbeginsels van geregtigheid in 'n regstaat (vgl Von Weber 81).

4 Konklusie

Diefstal, asook ander toepaslike (*ratio*-analogiese) misdade, in biopsigiese oorlewingsnood gepleeg, val in gepaste omstandighede buite die trefkrag van die strafsanksie. Hierdie reëling van ons gemenereg sinchroniseer met hedendaagse regstaatlike beginsels en is wesenlik gefundeer in wat genoem kan word 'n aksioma- of kernreg op 'n sekere minimum lewenskwaliteit, wat nie alleen omstandigheidsgebonde

is nie, maar ook 'n opwaartsneigende en 'n dinamiese onderbou het of behoort te hê. Die minimum lewenskwaliteit binne Noord-Europese regstate soos Swede of Nederland, is beslis hoër as dié in enige Afrika(reg)staat. 'n Verbeterde en steeds verbeterende menseregtelandskap is 'n ingeboude strewe of ideaal wat tot die wese van 'n effektiewe en dinamiese regstaat behoort.

JMT LABUSCHAGNE
Universiteit van Pretoria

IN LIEU OF BURIAL INSTRUCTIONS: A LEGAL EXPOSITION

1 Introduction

In most communities in the world funerals are very significant events. South African communities are no exception in this regard. In this country virtually in every community or cultural group, death, like birth, is treated with reverence and grace. For many a burial or cremation represents a certain paradox. While death terminates life and deprives a family of a beloved member, a burial or cremation symbolises the physical separation of the deceased from the community of the living. On the other hand, death also helps to celebrate life by bringing together the living in the form of family members, friends, neighbours and acquaintances of the deceased. They come to console one another and to give the deceased a united and proper send-off into life after death.

In accordance with traditional practice one family member is usually designated as chief mourner and burier of the deceased person. Such a designation may be made by the deceased person during his/her lifetime. Conversely, surviving relatives or heirs may make the choice. In families where Western practices have been adopted, a designation may be done by way of a will of the deceased. Where this happens, the deceased is said to have died testate. In other cases the deceased is said to have died intestate, namely without a will or instructions. Such cases are often the result of sudden death by accident or childhood deaths. In many others, though, intestate funerals arise from custom. In certain traditional communities it is not customary to plan for one's own death. Indeed, some may see it as a bad omen to do so. But, be this as it may, it is not uncommon for some intestate funerals to be characterised by feuds among mourners. Indeed, law reports and the media are not too infrequently coloured by reports of conflicting claims about inheritances and burial rights.

Thus some while back, the burial of a prominent person in Port Elizabeth was delayed for several hours while the deceased's bereaved wife and sister argued over who had the right and duty to bury the deceased (*Sunday World* 1999-08-5). The deceased's widow contended that it was her duty and right as the deceased's spouse to bury him. The deceased's sister, on the other hand, maintained that she had the

duty and right to do so since she had spent a fortune on the funeral arrangements including purchasing a coffin and hiring buses. It was not until the matter went to court that the dispute was resolved.

According to the report, despite the money the sister had spent, the court granted an interdict preventing a funeral services company from releasing the deceased's body to her. Although the burial took place later by mutual agreement between the women, it is clear that legal rules are needed to resolve similar problems.

In this note I discuss some of the legal solutions to feuds of this nature. As customary solutions will be the subject of a separate article, I shall focus here mainly on the common law and statutory solutions. I will first highlight the general principle of law on burial rights. Thereafter I shall proceed to examine situations relating to misleading or imprecise burial instructions. This will also cover instructions that are contrary to law or custom. The remainder of the contribution is devoted to a review of problems and solutions relating to burials and cremations in lieu of verbal or written instructions.

2 The general principle

The position in our law is that in the absence of instructions to the contrary, it is the duty of the heirs of the deceased to bury him. Coupled with this duty is the right to determine the deceased's last resting place. The deceased's verbal wishes concerning his burial will be given effect to if there is clear proof of such wishes (see Cronjé and Heaton *South African law of persons* (1999) 31) The deceased may appoint someone to attend to his/her burial either in a will or any other document or verbally. In all these instances effect should be given to them insofar as it is legally possible or permissible.

3 Burials in the absence of written or verbal instructions

3 1 Joint or co-heirs

In cases where there are no instructions, whether written or verbal, the law places the duty and right upon the heirs of the deceased. However, a problem often arises where there are joint or co-heirs who all claim to have the right and duty to bury.

The application concerning the burial of the deceased was brought before the Ciskei General division in the case of *Mankahla v Matiwane* 1989 2 SA 920 (Ck). In this matter the deceased was a widow with two surviving minor children. The deceased had died intestate and her nearest adult relatives were her father, the respondent, and her father-in-law, the applicant. The parties agreed on the date and place of burial, but the main dispute which remained to be resolved was the place where the burial service was to be conducted. It was contended by the applicant that the burial service should be conducted in the same area where the deceased was to be buried, while the respondent wished the service to be conducted in Bisho, where the deceased had lived at the time of her death.

The court held that, in the absence of a testamentary direction how, where and by whom one is to be buried, the duty of and the corresponding right to see to the burial of the deceased is that of the intestate heirs. As children were the heirs and as no guardian had yet been appointed, neither party had *locus standi* to apply for any relief as far as the burial of the deceased was concerned. The court, as upper guardian of the children, ordered that the funeral service should be held at the children's home town.

The judgment in this case indicates that if no one has been so named, the duty to bury falls upon or affects the children or the blood relations, each in their order of succession.

3 2 Co-heirs who include the surviving spouse

In disputes which involve the surviving spouse, marriage seems to be the major decisive factor. In *Saiid v Schatz* 1972 1 SA 491 (T) the court held that if the deceased had been married in terms of a civil marriage, the widow as an heir would have enjoyed preference to the heirs designated by customary law.

Another interesting case is *Tseola v Maqutu* 1976 2 SA 418 (Tk). Here the first applicant, the mother of the deceased, claimed an order authorising her to attend to the funeral arrangements of the deceased at Bizana. The first respondent, who was the widow of the deceased, opposed the application, claiming that she had the duty and right to bury the deceased in Johannesburg. The first respondent was married to the deceased in community of property and their marriage subsisted until the death of the deceased. Both the first applicant and the first respondent were deceased's intestate heirs, since he died intestate.

The court held that public policy and a sense of what is right dictated that in a dispute of this nature that the widow's wishes, where she is an heir, should prevail and it was her duty and right to bury her deceased husband where she pleased.

4 Written burial instructions

Written burial instructions/wishes will be carried out unless they are of an impracticable nature or impossible or involve or go beyond a just scale of expenditure. The directions/instructions need not be contained in a will. A person may die intestate but appoint or name someone to attend to his/her burial in any document, such as, a letter or an affidavit. If the testamentary directions are of an impracticable nature or involve or go beyond the just scale of expenditure, such instructions can be ignored. In determining what a just scale of expenditure is, regard must be had to the assets and manner of living of the deceased (*Tseola v Maqutu supra* 422H–I).

In *Sekeleni v Sekeleni* 1986 2 SA 176 (Tk) the deceased, a divorced man, died intestate. From his divorce until his death he lived with one Ndlwanda at the latter's house. Although they were never formally married, he handed a document to Ndlwanda in which he instructed her to attend to his burial, shortly before his death, but after he was admitted to hospital. The deceased's children by his former wife applied to court for an order authorising them to attend to their father's burial. They claimed that they were the rightful heirs and that they had the duty and right to do so. They further claimed that effect could not be given to the deceased's wishes since they were not contained in a will. The court dismissed their application and held that effect should be given to the deceased's instructions regardless of whether they were contained in a will or any other document. Thus even though the deceased died intestate, his written instructions were carried out.

5 Verbal burial instructions

The difficulty arises where the alleged wishes are disputed. In *Human v Human* 1975 2 251 (E) the court said that it could not take cognisance of statements made verbally to persons by the deceased during his/her lifetime about where he wished to be buried, since such evidence offended against the hearsay rule. The court decided that the heir in terms of the last will of the deceased must attend to his burial.

A contrary conclusion was reached in the case of *Sekeleni v Sekeleni* (*supra* 179H–I) where it was held that effect should be given to the wishes of the deceased even if they were expressed verbally and were not reduced into writing in a will or other document. The same view was taken in *Mnyama v Gxalaba* 1990 1 SA 650 (C) 654E–G. In this case the court decided that a wish expressed verbally by the deceased person during his lifetime about his/her funeral arrangements should be carried out if such a wish has sufficient cogency to justify its acceptance.

This was substantially the view taken in *Mabula v Thys* 1993 4 SA 701 (SE). It was decided in this matter that the wishes of a deceased person concerning his/her burial should be acceded to where there is clear proof of his wishes. A problem would arise where the wishes are disputed, since the deceased person who is alleged to have expressed the wishes can no longer be questioned about them. Then the difficulty of endeavouring to test the correctness of hearsay evidence would arise.

A recent application of this approach can be found in the following three unreported cases of the Bisho High Court:

Ntombikayise Ruth Ntshoko v Joyce Mkrakra (Mzaza) (Case No 203/99)

The applicant, the lawful wife of the deceased, contended that she had the duty and right to bury her husband. The respondent, the deceased's mother, alleged that the deceased during his lifetime expressed his burial wishes to her, the deceased's aunt and their neighbour. It was alleged that the deceased had appointed his mother as the person responsible for his burial and further that he wished to be buried next to his deceased son in Port Elizabeth. The alleged deceased's burial expression was confirmed by his aunt and their neighbour.

The applicant contested the averment that the deceased had expressed his burial wishes as alleged by the respondent. She further argued that the deceased would have convened a meeting of the clan at which his uncles would have been present if he was serious about expressing his death wishes. The court was not satisfied that the deceased had expressed his wishes verbally to his mother and others and ruled that the applicant had the duty and right to attend to the deceased's burial.

Silence Masika v Vumile Ntono Bayilimdaka (Case No 334/97)

In this case the deceased had for several years lived in separation from her husband, the respondent. The deceased had left the common home but the respondent remained there with their children, including a major son. During the separation the deceased visited her children, especially her major son, who was about 24 years of age at the time. The first respondent and the deceased's children had no knowledge of the allegations concerning the deceased's expression of her burial wishes and only learned of them after her death. The court found that the applicant's allegations concerning the deceased's expression of her burial wishes did not have sufficient cogency and ruled that the respondent and the children had to attend to the burial of the deceased.

Zukiswa Nomsombuluko Dana v Nobonile Olga Dana (Case No 205/99)

Here the court found that the respondent's allegations concerning the deceased's burial wishes were not confirmed. It was the court's view that the allegations did not have sufficient cogency to justify their acceptance and that in the absence of the deceased's testamentary direction, the heir(s) should decide where the deceased had to be buried and attend to his/her burial. The applicant, being the heir of the deceased, thus had the duty and right to bury the deceased.

6 Conclusion

From what has been said above, it is clear that problems and quarrels arise from the failure of deceased persons to give directions as to who should bury them and where the burial should take place.

Many people are obviously ignorant of the fact that the directions may be given not only in a will but also in a letter or on a piece of paper or verbally. However, verbal instructions are likely to create problems of proof. Disputes over bodies of deceased persons result in litigation, unnecessary legal costs and delays in burying the deceased persons. As a result, funeral undertakers charge more money for keeping corpses at their mortuaries. Disputes are likely to traumatise friends and the next-of-kin of the deceased.

Community law centres and law clinics should educate members of society on this very important matter. Churches can also play a meaningful role in educating their members.

MM MOKOTONG
University of South Africa

EMPLOYMENT TRANSFER AND ITS HISTORICAL AND LEGAL IMPLICATIONS IN BOTSWANA

1 Introduction

Public service organisations and corporations throughout the world use job transfers for a variety of reasons: (a) filling vacant positions quickly to minimise disruptions following retirement, death, termination or other form of turnover; (b) grooming junior employees for eventual promotions into senior slots; and (c) promoting or demoting employees while giving them a chance to establish a new reputation. In Botswana, transfer policy has been primarily designed to address the issue of equity in the distribution of resources. When Botswana attained independence in 1966, it was one of the poorest countries in the world. Through geographic transfers, government has progressively expanded the coverage of social and public services into the rural areas namely: health, education, food security, social welfare, community development, transport and communication and other social and public programs. Recent data show that Botswana has made significant progress in improving the standard of living of the rural poor. The implementation of the transfer policy has, on the other hand, produced unintended consequences. This note traces the history of the policy and its legal framework and finally addresses both the social and legal implications of this policy for public officers. First, the historical roots of the policy are examined.

2 History of transfer policy

The history of transfer policy dates back to 1885 when Botswana was still under British colonial rule. Available data show that as early as 1890, the British set up a small public service made up of police officers and magistrates (Temane *The evolution and development of the civil service* (unpublished manuscript 1989) 2–5).

The major goal of this sector was to protect the border areas and also to service the colonial administration. However, as social services continued to expand to meet the demands of the growing economy, more departments were created. At the same time, pressure was mounting to provide certain services in the rural areas. Hence, there was a compelling need to transfer officers from one part of the country to another in order to provide these services. Consequently, in 1934 the British administration formulated a transfer policy as part of the standing instructions for pubic officers. This policy stated:

> "Magistrates as well as police officers must be prepared to go where they are sent and that although an effort will be made to consult their personal convenience and wishes, as far as possible, the exigencies of the service must always be the decisive factor; further, it cannot be admitted that either seniority or marriage should be treated as a ground for exemption" (*idem*; Bechuanaland Government Standing Instructions (1934) s 153).

It is important to note that during this period public officers were not only expected to serve in Bechuanaland. (The British renamed Botswana "Bechuana" because they had difficulty in pronouncing and spelling this word. The name Botswana was retained after independence.) They were also called upon to serve in other "sister" colonies, namely Basotholand and Swaziland. In addition, public offers were expected and even forced to separate from their spouses and family members to "meet the exigencies of the service". Otherwise than in the past, when political leaders fostered family unity and adherence to village life, the new political order promoted a multiple pattern of settlement to suit the modern economic and political demands.

It is worth noting that when Botswana finally became independent in 1966, some of the laws, policies and governmental structures that were developed by the British were inherited. Transfer policy was one of the legislative instruments adopted without amendment. Despite the reluctance to change some provisions of this policy, government continued to wrestle with the problem of formulating the best strategy for maintaining a balance between work and family. Two major questions worried the rulers. First, should family ties override pubic interest when transfers are effected? Secondly, should married officers be given preferential treatment over single officers when transfer decisions are made?

In an effort to address this dilemma, government passed a regulation in 1967 making it mandatory for female officers to retire from public service upon marriage (Republic of Botswana Public Service Commission (1967) reg 23; also see Republic of Botswana General Orders (1969) s 174). These regulations provided:

> "1. It is the policy of the Public Service Commission that it will require a female officer to retire on marriage, unless in its opinion it is not in the interests of the Public Service that the officer should be required to retire.
>
> 2. If, therefore, a female officer holding a pensionable office marries, the Responsible Officer shall report the fact to the Commission, and if he considers that the officer should not be called upon to retire from the Public Service by reason of her marriage he shall state fully in writing his reasons for such a recommendation."

The rationale behind this provision was that upon marriage, women would naturally aspire to be full-time housewives. Moreover, they would resist transfers that entailed a separation from their spouse and children. In anticipation, female officers were encouraged or in some instances forced to retire from service upon marriage.

It is interesting to observe that during the review of salaries and conditions of service for public officers four years prior to this provision, the head of this commission, one Skinner, cautioned the British colonial administration about the injustices embedded in this regulation. Skinner's view was that

> "the choice as to whether a female officer should resign on marriage or remain in the Service should lie with the officer and resignation should not be compulsory. She and she alone should decide whether, as a married woman, she wishes to continue her career in the Service or whether she wishes to surrender it in preference for domestic life. In making that decision she will have to take into account that, as a member of the permanent and pensionable establishment, she will have to fulfil all the obligations which go with such membership. She will be liable to transfer and will be required to carry out her duties as a normal member of the staff. Failure to accept transfer or failure to carry out her normal duties arising from her status as a married woman will render her inefficient and the Government would then be free to remove her from the Service in the normal way" (*Review of emoluments of the public service* (1964) ss 205–206).

Following Skinner's evaluation, another commission was appointed in 1969 to address some anomalies in the public service regarding terms and conditions of service. Mr Okoh, a Ghanaian and former Permanent Secretary for Establishment, was appointed to head this review exercise. His terms of reference were:

(i) To review grading posts, salaries and conditions of service of civil servants, including the Industrial Class and Teaching Service, thereby providing a structure and conditions of service consonant with the general financial and economic conditions of the country.

(ii) To review conditions of service of expatriate officers on contract, pensionable or temporary terms (*Report of The Commission on Salaries and Conditions of The Public and Teaching Service* (1970) par 2).

With respect to transfer policy, Okoh's recommendations were similar to Skinner's. Commenting on the dilemma of separating couples when a transfer decision is made, Okoh remarked:

> "Married officers will naturally wish and sometimes even demand to be posted near their husbands and families. Any Public Service Commission would be likely to view with dismay its dilemma; the need to face either the difficulties involved in dismissing married officers in such circumstances or the discontent arising from the transfer of a single officer" (*idem* s 264).

Conversely, Okoh's commission advocated the principle of maximum use of scarce resources. In his view, the role played by married women in national development was critical. He challenged government to integrate women fully into the mainstream of development by removing all forms of discriminatory practices.

As a result of Okoh's commission report, transfer policy was reviewed and amended. For the first time, women were given the choice to decide whether they wanted to be employed on a temporary basis or on permanent and pensionable terms (Government of Botswana Personnel Directive 14 of 1973). Those who opted for the latter were subjected to mandatory transfers. Temporary conditions, however, offered women the flexibility to work close to their spouses and other family members. Despite this advantage, this provision was also punitive. For example, officers employed under these conditions were denied certain privileges (Government of Botswana Personnel Circular 2 DP 11/3 1 (143)):

- They were given low retirement benefits.
- They were not eligible to go for further training.
- They could not claim leave concessions.
- They could not apply for motor vehicle schemes.

Nevertheless, a large number of married women opted to be employed on temporary terms to avoid mandatory transfers. As the number of temporary employees continued

to rise, government became concerned. There was a strong feeling amongst policy makers that if more and more women opted for these conditions, some departments would become inoperative and this could cripple government's efforts to improve rural areas (Government of Botswana Personnel Directive 8 of 1982 2). Consequently, government took drastic steps to address this situation. On 16 September 1982, the Director of Public Service Management issued a cabinet directive making transfers mandatory for everyone. As a result of this directive, all serving female officers who were employed on temporary terms were now required to opt as follows:

- to continue to serve provided they accepted to be posted to any duty station in Botswana, or
- to terminate their temporary appointment, giving a month's notice if they did not accept temporary appointment with involuntary transferability (*ibid*).

The effect of this change was to eliminate the temporary service option; all positions now operated on a permanent position basis. The importance of this policy change is that it made it compulsory for both single and married women to accept transfer anywhere in the country.

Another policy shift in the transfer process was effected in August 1995. The government issued a circular savingram stating its intention to keep married couples together whenever it is possible. Key guidelines included in this savingram were:

- to give transferees at least three months notice to prepare for relocation
- where possible, to avoid separating married couples
- to assist transferees to secure accommodation
- to transfer officers during the months of December and January to allow school children to complete the calendar year uninterrupted (Government of Botswana Circular Savingram DP 19/72 of August 1995).

It is important to understand that this new development is a radical shift from the *status quo*. For the first time in the history of this policy, government is beginning to appreciate the unintended consequences of separating couples.

3 The legal framework of relocation and transfers

Section 2 of the Public Service Act defines "transfer" as the appointment of a public officer to another public office with no alteration or potential alteration to salary. The General Orders provide that an officer may be transferred from a post in a ministry or department to a post on a comparable grade in any other ministry or department in the interest of the public service. This is in some respects similar to section 1 of the South African Public Service Act 103 of 1994 which provides:

> "Subject to the provisions of this Act, every officer or employee may, when the public interest so requires, be transferred from the post or position occupied by him or her to any other post or position in the same or any other department, irrespective of whether such a post or position is in another division, or is of a lower or higher grade, or is within or outside the Republic."

In both Botswana and South Africa, the transfer must be in the interest of the service. In Botswana the transfer must be on a comparable grade to any department or ministry, whereas in South Africa it can be to a lower or higher grade in any department or division. While transfers may sometimes have a positive effect, more often than not they result in certain unintended consequences, some of which strike at the core of employment security. In an effort to address these concerns, section 12 of the Botswana General Orders 1966 provides: "Appointing authorities are

discouraged from recruiting officers who have resigned from the Public Service to avoid transfer."

In principle, an officer may not refuse a transfer, except when the proposed transfer is to a different Government service, but where practicable the appointing authority is required to discuss the matter with the officer in advance (s 12.2). The appointing authority is also encouraged where practicable not to effect transfers which have the effect of separating spouses (s 12.3). The question is whether an employee is entitled to a hearing prior to the decision to transfer being taken.

One of the earliest cases on the matter is the South African case of *Van Coller v Administrator, Transvaal* 1960 1 SA 111 (T). The applicant had been the principal of a high school. He was transferred to a post as lecturer at a different college following upon the findings by a commission appointed to enquire into a bad relationship alleged to have existed between the applicant and parents of pupils attending the school. At no time was the applicant asked to attend the sessions of the commission or to testify before it. He learnt of its findings when the respondent had decided to transfer him. The court expressed the view that the applicant had suffered a diminution of status even though he was receiving the same salary. Accordingly, as the respondent had taken a decision prejudicial to the applicant without first affording him a fair opportunity of stating his case, the decision to transfer him was set aside.

The reasoning in the above decision was followed with approval by Howard J in *Ngubane v Minister of Education and Culture, Ulundi* 1985 3 SA 100 (D). The applicant, a teacher, had been employed as a rector of a college of education. He was informed by respondent that a charge of misconduct had been laid against him and that he had been relieved of his post and transferred to a post as principal of a school pending determination of the enquiry against him. The applicant contended that the latter post was inferior in status to that of rector and that the decision to transfer him had been taken without affording him a hearing. In coming to its decision the court expressed the view that in deciding to effect a transfer, the official concerned would have to enquire into and consider various facts and circumstances which affected the applicant's rights and that such decision was a quasi-judicial one. Furthermore, that, in the absence of any indication to the contrary, the *audi alteram partem* rule was presumed to apply. Accordingly, as the applicant had not been given a hearing of any kind, that decision had not been validly made and was set aside.

In *Hlongwa v Minister of Justice, Kwa Zulu* 1993 2 SA 260 (D) the applicant, a public prosecutor, was transferred from Pietermaritzburg to the Nkandla court. She contended, *inter alia,* that she suffered from a medical condition which required access to medical and hospital facilities which were most accessible in the Pietermaritzburg area and that she had recently come engaged to a man who was permanently stationed in Pietermaritzburg. In his celebrated judgment Didcott J said:

> "Generally speaking it seems to me, however, people such as the applicant, people on the professional staff of concerns like the respondent's organization, would not one thinks be transferred willy-nilly and unilaterally without any consideration at all of their personal circumstances and wishes. One certainly knows of its having been said from time to time that someone or other, a magistrate let us say, has damaged his chances of promotion by not accepting a transfer from a large city where he may have been for many years, where his children may be attending school, where his wife may be in full-time employment, to some remote, rural area. I have never heard of its having happened, however, that such a person has been transferred against his will. Perhaps that does not happen, but at the very least, if it does, one would be surprised were his wishes and personal circumstances to be disregarded entirely in the matter.

> One would be surprised, in other words, if that were to be done without any reference to him at all. Indeed, one cannot imagine that it would be conducive to a feeling of satisfaction and well-being on the part of such officials if they were liable to summary transfer without any opportunity for being heard at all on the point."

Accordingly, the judge proceeded, full effect had not been given to the *audi alteram* principle and the decision to transfer was set aside. It is submitted that the approach in the above cases reflects and represents current law in both Botswana and South Africa on transfers. Contrast this approach, however, with the reasoning in *Chule and Ngema v Minister of Justice, KwaZulu* 1992 4 SA 349 (N). The applicants were public servants who were transferred from their existing stations to outward stations. They contested the legality of the transfers, it being common cause that they were transferred without prior consultation. The court pointed out that anyone who joins the public service must realise that the possibility of transfer is like an occupational hazard and that it may occur during his/her career. Inconvenience, hardship, health considerations or even the uprooting of the family did not entitle the applicants to be heard, the court opined. The *Chule and Ngema* decision has received critical attention from academic writers (see eg Grogan "Transferring employees: to hear or not to hear?" 1993 *ILJ* 295) and serves to emphasise the contention that transfers which are involuntary impact negatively on tenure in the public service.

Posting is another area within the realm of public employment which raises similar concerns. An officer is posted when he/she is moved from one post to another in the same ministry or department in circumstances not involving promotion. A transfer, on the other hand involves relocation from one area to another within the same designation or on promotion (Botswana General Orders (1996) s 13). Like transfers, postings may not be refused, but where practicable the Permanent Secretary is required to discuss the matter with the officer in advance. Again, in determining postings, permanent secretaries are enjoined, where practicable, to avoid separating spouses. The principles governing transfers discussed above are equally applicable here.

4 Conclusion

The Botswana General Orders provide that an officer may be transferred from a post in a ministry or department to a post on a comparable grade in any other ministry or department in the interest of the service. The appointing authority is discouraged from effecting transfers which have the effect of separating spouses. While public servants realise that the possibility of transfers may occur during their careers, it is no longer the occupational hazard it was before. The preponderance of judicial authority is that factors such as inconvenience, hardship and health considerations must be considered when the issue of a transfer without a hearing is brought before a court. This may alleviate, but not necessarily solve altogether, the range of problems arising from unacceptable transfers.

It is suggested that a clear policy should be formulated for the public service addressing thorny issues related to public service transfers. Such a policy, if formulated, should have as its basis consultation before, during and immediately after transfer. Consultation before the actual transfer, apprising the individual of such a possibility, forms the very core of good governmental practice which is a vital element of democracy. It is during that consultation process that the personal circumstances of the transferee will be addressed. At the very least an opportunity should be given to the transferee to state his/her case in relation to the proposed transfer. It is only after dialogue, when everything has been said and done, that the

harsh effects of unacceptable transfers can be minimised. Communication should be kept open between the parties during and immediately after the transfer so that if there is a reversal of circumstances leading to the transfer, it can be brought to an end. While the interests of the public service are paramount when effecting transfers, the above process also takes into account the individual needs of the transferee who should not be left in the cold. Other considerations which should influence the decision whether to effect a transfer or not should be the question of spouses/family and the special and peculiar needs of the transferee. Just as the paramount interests of the public service should not weigh unduly heavily against the transferee, so the question of separating spouses/families should not weigh too heavily against the transferor. A neat balance should be struck in order to accommodate the needs of the parties. The party to be transferred may be in need of constant medical attention, which in itself is a special and peculiar circumstance that may require consideration in reaching a proper decision to transfer. If all the above conditions are incorporated as part of a national policy on transfers in the public service, the transferee cannot proceed to court and argue that he/she was not accorded a proper opportunity to state his/her case.

DOLLY NTSEANE
KHOLISANI SOLO
University of Botswana

ASSOCIATIONAL STANDING STILL IN CHAINS – A MISSED OPPORTUNITY FOR LEGISLATIVE REFORM

This note seeks to explore the question whether associational standing can be implied from section 32(1)(c) of National Environmental Management Act 107 of 1988 (hereinafter NEMA), since it has not been expressly articulated.

The provision that relief may be sought by an association acting in the interest of its members is important because there have been a number of cases in which our courts have not allowed associations to claim relief on behalf of their members, insisting that the individual members must approach the court themselves (see *Ahmadiyya Anjuman Ihaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 4 SA 855 (C) 864E–F; *South African Optometric Association v Frames Distributors (Pty) Ltd* 1985 3 SA 100 (O) 103F–105C; *Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd* 1990 4 SA 749 (N) 758G–759D). Other courts have permitted organisations to represent the interest of their members (see *Transvaal Indian Congress v Land Tenure Advisory Board* 1955 1 SA 85 (W) 89G; *Ex parte Natal Bottle-Store Keeping and Off-Sales Licensees Association* 1962 4 SA 473 (D) 276C).

The fact that there are conflicting decisions with regard to this issue made it advisable for the drafters of both the interim and final Constitution expressly to include sections 7(4)(b)(ii) and 38(e) respectively. NEMA liberalises the position even further by extending standing to persons who approach the court in the interest of the protection of the environment.

However, it is disquieting to note that NEMA does not include a provision that deals with organisations or associations similar to section 38(e) of the Constitution. All that we have, is section 32(1)(c) – in the interest of or on behalf of a group or class of persons whose interests are affected. Such an omission is difficult to explain, given the fact that courts have been reluctant to grant legal standing to associations or organisations as was once manifested in the *Natal Fresh Produce* case *supra.*

As is indicated above, the reason for the inclusion of a similar clause by the drafters of the interim and final Constitutions was the lack of uniformity and consistency among the various divisions of the supreme court. Bearing that in mind, it is difficult to imagine how the drafters of NEMA could have omitted such a provision – after all, it formed one of the legislative seeds of NEMA. One possible explanation may be the indecent haste that characterised the environmental management policy development process to have the bill passed (see Kidd "The National Environmental Management Act and public participation"1999 6 *SAJELP* 21). Another possibility is that associational standing should be implied from section 32(1)(c).

It is uncertain at this stage whether the courts will regard associational standing as implied in section 32(1)(c) or as having been omitted altogether. This is particularly so because section 38 of the Constitution has two separate sucblauses – section 38(c) (anyone acting as a member of or in the interest of, a group or class of persons) and section 38(e) (an association acting in the interest of its members). There is accordingly some doubt whether, for the purposes of NEMA, the two subsections will be taken to mean one and the same thing, since such an interpretation would render section 38(e) of the Constitution redundant.

The above interpretation is reinforced by the definitions given to class action and public interest action by the Law Commission (*Report on the recognition of class action and public interest action in South African law* Project 88 (1998) 81–83) that organisational action does not fit neatly within the definitions of public and class actions. This rigid approach is, I believe, based on section 38 of the Constitution, which treats the three actions – public, class and organisational, as separate.

It is submitted that had the drafters of NEMA resisted the impulse to have the bill passed in such haste, and had kept the legislative seeds on the shelf for a while (so to speak), the fruit yielded by the Act could have been significantly better.

NTUSI MBODLA
Vista University

DIE OMGANGSREG VAN DIE ONGEHUDE VADER EN SY BUITE-EGTELIKE KIND EN DIE VRAAGSTUK VAN DELIKTUELE AANSPREEKLIKHEID BINNE KONTEKS VAN 'N INTERAKSIEREG

1 Inleiding

In *Jooste v Botha* 2000 2 SA 199 (T) was die feite kortliks soos volg: Die eiser, 'n elfjarige seun, het, bygestaan deur sy moeder (J), verweerder vir kompensasie van R450 000 aangespreek. J en verweerder (B) het gedurende Junie/Julie 1987 geslagsomgang gehad, as gevolg waarvan eiser verwek en gebore is. J en B was nooit

getroud nie en daar was geen getuienis dat hulle ooit saamgewoon het nie. J het feitelike en juridiese beheer en toesig, asook voogdy, oor eiser. Sedert sy geboorte het B geweier of nagelaat om te erken dat eiser sy kind is, met hom te kommunikeer, liefde te gee en hom te koester. Kortom, hy het nie in hom belang gestel nie en geen stappe gedoen om 'n normale vader-kind verhouding daar te stel nie. As gevolg hiervan, word beweer, het B 'n *iniuria* teenoor eiser gepleeg, het hy 'n emosionele letsel opgedoen en is hy van lewensgenietinge ontneem. Geen bewering is gemaak dat B onderhoud betaal of nie betaal nie, met ander woorde die eis handel nie primêr oor die materiële of ekonomiese nie.

Daar is aangevoer dat B genoegdoening verskuldig is, aangesien (1) daar 'n regsplig op hom rus om aan eiser aandag, liefde en koestering te gee en belangstelling aan hom verskuldig is; in die alternatief (2) dat hy volgens die Grondwet van die Republiek van Suid-Afrika 108 van 1996 verplig is om sodanige aandag, liefde, koestering en belangstelling, wat normaalweg tussen 'n vader en sy natuurlike kind bestaan, verskuldig is; en in die alternatief dat (3) hy as natuurlike vader 'n plig het om eiser te beskerm, wat die plig insluit om na sy welsyn om te sien, met die gevolg dat B verplig is om op te tree soos onder (1) en (2) hierbo uiteengesit.

In die onderhawige bydrae word die aard en inhoud van die omgangsreg tussen buite-egtelike kind en ongehude vader eerstens geïdentifiseer. Daarna word die vraag aan die orde gestel of deliktuele aanspreeklikheid weens skending van die persoonlikheidsreg van die kind deur die vader se optrede in dié verband fundeerbaar is of behoort te wees. Hierdie bydrae moet voorts gelees word as 'n glos op voorafgaande publikasies van die outeurs waarna hier verwys word. Onnodige duplikasie van verwysings en analise word in die onderhawige kommentaar doelbewus vermy.

2 Die omgangsreg as interaksiereg

Die reg van die ongehude vader (hierna: vader) om "kontak" met sy buite-egtelike kind (hierna: kind) te hê, word in die huidige Suid-Afrikaanse reg beskryf as 'n toegangsreg. Laasgenoemde begrip is misleidend en gee nie dit waarom dit werklik gaan na behore weer nie. In die lig hiervan word, soos in die Nederlandse en Duitse regstelsels, die begrip "omgangsreg" gebruik (sien verder hieroor Labuschagne "Persoonlikheidsgoedere van 'n ander as regsobjek: opmerkinge oor die ongehude vader se persoonlikheids- en waardevormende reg ten aansien van sy buite-egtelike kind" 1993 *THRHR* 416 428–429; "Aanvaarding van verantwoordelikheid as ontstaansbron van 'n omgangsreg vir 'n ongetroude vader met sy buite-egtelike kind" 1995 *TSAR* 162; "Vaderlike omgangsreg en die toepassing van die vermoede *pater est quem nuptiae demonstrant* op 'n konkubinaat" 1994 *Obiter* 266; "Vaderlike omgangsreg, die buite-egtelike kind en die werklikheidsonderbou van geregtigheid" 1996 *THRHR* 181 182; Van der Linde "Begrensing van die omgangsreg van die biologiese vader met sy natuurlike kind: Blote biologiese vaderskap onvoldoende" 1999 *De Jure* 181).

Artikel 1: 377a(1) van die Nederlandse Burgerlike Wetboek (*NBW*) bepaal dat die "kind en de niet met gezag belaste ouder hebben recht op omgang met elkaar". Ouer verwys in dié verband na 'n juridiese ouer, dit wil sê dit sluit, in ooreenstemming met die Nederlandse reg, 'n ongehude vader wat sy kind erken het, in (sien vir verdere inligting hieroor Jacobs "Het omgangsrecht in België en Nederland" 1996 *Tijdschrift voor Privaatrecht* (*TP*) 827 840ev; Wortmann "Ouderlike gezag en omgang" 1995 *FJR* 210; Van der Burght en Rood-de Boer *Personen en familierecht* (1998) 561ev; Van Wamelen "Omgang, informatie en consultatie" 1993 *FJR* 158).

In artikel 8 van die Europese Verdrag vir die Regte van die Mens (*EVRM*) word die eerbiediging van die gesinslewe (*vie familiale*; *family life*) as fundamentele reg gevestig (sien ook Hoge Raad (*HR*) 22 Februarie 1985, NJ 1986 3). Blykens die Europese Hof vir die Regte van die Mens (*EHRM*) is beide ouerlike gesag en die samesyn van ouer en kind bestanddele van die begrip "gesinslewe" (*Nielsen v Denmark* (1988) 11 EHRM 175; *Olsson v Sweden* (1988) 11 EHRM 259 283). Sou die samewoning van ouer en kind beëindig of onmoontlik word, kom die gesinslewe, soos bedoel in artikel 8 *EVRM*, nie noodwendig ten einde nie (sien Mosselmans "Een evolutie op het terrein van het ouderlijk gezag, het omgangsrecht, het hoorrecht van minderjarigen en het recht op informatie van ouders en hul minderjarige kinderen" 1997 *TP* 543 581; Vanlerberghe "Omgangsrecht in het licht van artikel 8 EVRM" 1990 *Jura Falconis* 149 151; *HR* 26 November 1999, NJ 2000, 85). In 1982, in *Hendriks v Nederland* (nr 8427/78, NJ 1983 191), het die Europese Menseregtekommissie te doen gekry met 'n geval waar 'n geskeide vader in Nederland reeds vir tien jaar probeer het om 'n omgangsreëling met sy seun te verkry. Sy versoek is telkens afgewys op grond van besware geopper deur die moeder en stiefvader. Vir onderhawige doeleindes is van belang dat uit die verslag van die Kommissie blyk dat 'n omgangsreg tussen ouer en kind voortvloei uit die reg op eerbiediging van die gesinslewe, soos beliggaam in artikel 8 *EVRM* (sien Siemer "Omgaan met omgang: omgang anders dan na echtscheiding" 1993 *FJR* 11). Teen dié agtergrond, asook in die lig van die moderne Nederlandse reg, wys Doek en Vlaardingerbroek daarop dat "het kind en zijn niet met het gezag belaste ouder recht op omgang met elkaar hebben" (*Jeugdrecht en jeugdhulpverleningsrecht* (1998) 150). Hierdie omgangsreg is by geleentheid, en tereg ook, as 'n *onvervreembare reg* beskryf (Broekhuizen – Molenaar "Spermadonor en omgang" 1990 *FJR* 30 35).

Uit artikel 14 *EVRM*, die verbod-op-diskriminasie artikel, blyk duidelik dat die reg op eerbiediging van die gesinslewe ook minderjariges toekom. In die lig hiervan wys Vanlerberghe daarop dat indien 'n ouer geen omgang met sy kind wil hê nie dit outomaties op 'n aantasting van die kind se reg, en omgekeerd, neerkom. Aangesien diskriminasie deur artikel 14 *EVRM* verbied word, het ouer en kind eweveel reg op die eerbiediging van die gesinslewe. Die omgang sou dan "afgedwongen kunnen worden door een dwangsom" (156).

Dit blyk ook uit artikel 1626(3) en 1684(1) van die Duitse Burgerlike Wetboek (*Bürgerliches Gesetzbuch*; *BGB*) dat 'n kind 'n omgangsreg met beide ouers het en dat elke ouer tot omgang met die kind verplig en geregtig is (sien Rummel "Die Kindschaftsrechtsreform – ein einführender Überblick" 1998 *Recht der Jungend und der Bildung* 156 158 en Schwab "Elterliche Sorge bei Trennung und Scheidung der Eltern" 1998 *FamRZ* 458 soos aangehaal deur Robinson "Moderne ontwikkelinge in die Duitse reg aangaande die regsposisie van buite-egtelike kinders: Enkele lesse vir Suid-Afrika" 1999 *De Jure* 259 276). Die motivering vir dié reg van die kind is gebaseer op die uitgangspunt dat omgang met beide ouers *in die reël* sy/haar belang dien (sien die nuut-ingevoegde art 1626(3) *BGB* en Rauscher "Das Umgangsrecht im Kindschaftsrechtsreform gesetz" 1995 *FamRZ* 329 336–337; Niepmann "Die Reform des Kindschaftsrechts" 1998 *MDR* 565 567). Die sogenaamde *ouerlike toegangsreg* tot 'n kind in die huidige Suid-Afrikaanse reg is anachronisties en onversoenbaar met 'n moderne menseregtekultuur (sien verder hieroor Labuschagne "Die vermoede *pater est quem nuptiae demonstrant*, sosio-morele transformasie en die reg op nakomskennis" 1996 *Obiter* 30 35ev; "Vaderlike omgangsreg, die buite-egtelike kind en regsantropologiese onveranderlikes" 1997 *THRHR* 553; "Publiekregtelike effek van die ongehude vader se omgangsreg met sy buite-egtelike kind" 1997 *Stellenbosch LR* 99). Die ouerlike omgangsreg van die kind kan slegs sinvol

uit 'n reg op afkomskennis voortvloei (sien hieroor Koens "Het recht op informatie" 1991 *FJR* 210 212; Leenen "Het recht van het kind op informatie over ouders, broers en zussen" 1999 *FJR* 58 61; HR 17 Des 1993, NJ 1994, 360; Labuschagne "Die reg op afkomskennis as mensereg" 1996 *Stellenbosch LR* 307 en "Die reg op afkomskennis en die buite-egtelike kind se reg op die familienaam van haar natuurlike vader" 1998 *TSAR* 790; BverfG, Beschl v 6/5/1997, FamRZ 1997, 869 870–871 Rauscher 338–339). Soos elders aangetoon, en dit blyk ook uit die regsposisie in Nederland en Duitsland, is die omgangsreg tussen ouer en kind wesenlik 'n interaksiereg (Labuschagne "'n Reg as teenkant van 'n reg: Opmerkinge oor die opkoms van interaksieregte" 1998 *THRHR* 137).

3 Deliktuele konsekwensies van die ouer se ignorering van die kind se omgangsbehoeftes

Nederlandse skrywers verskil oor die vraag of die kind se ouerlike omgangsreg 'n omgangsplig vir die ouer meebring. Jacobs, byvoorbeeld, is van mening dat sodanige plig outomaties geïmpliseer word (872). Vanlerberghe, daarenteen, staan op die standpunt dat artikel 8 *EVRM* "stelt duidelijk een recht op eerbieding van het gezinsleven vast en heeft het geenzins over het bestaan van een dergelijke plicht" en dat sodanige plig "zou onmiddellijk botsen met de rechten en vrijheden van die anderen, in casu het privé- en gezinsleven van de ouder die geen omgang wenst" (156). In 'n saak wat op 22 Desember 1995 (NJ 1996, 419) voor die *HR* gedien het, het die volgende feitestel na vore getree: J is op 21 Junie 1985 gebore uit 'n seksuele verhouding wat sy moeder tussen Julie en Oktober 1984 met sy vader gehad het. Hulle het egter nooit saamgewoon nie en toe sy vader van die swangerskap bewus geword het, het hy die verhouding verbreek. J, wat ten tyde van die saak in graad 6 was, wou graag met sy vader (V) kontak maak. V is intussen getroud en het vanaf J se geboorte geen kontak met hom gehad nie. V het hom nie bereid verklaar om in enige vorm met J omgang te hê nie, aangesien hy gevrees het dat hy dit nie emosioneel sou kon verwerk nie en sy huwelik onder druk geplaas sou word. Sy vrou het in Mei 1995 'n baba verwag. V het aangevoer dat hy nie tot omgang verplig kan word nie aangesien daar nie ingevolge artikel 8 *EVRM* sprake van 'n gesinslewe tussen hom en J is nie. Hy beroep hom daarop dat blote biologiese vaderskap onvoldoende is om 'n omgangsreg te vestig. Bykomende omstandighede moet bestaan waaruit afgelei kan word dat die verhouding waarin V met die moeder gestaan het met 'n huweliksverhouding gelykgestel kan word of uit feitelike kontak met J na sy geboorte (sien Labuschagne 1996 *Obiter* 35–36 en 1995 *TSAR* 162). Die hof *a quo* te Amsterdam is egter van mening dat indien die kind hom op artikel 8 *EVRM* beroep om sodoende 'n omgangsreg met sy vader te vestig daar ander voorwaardes gestel moet word. Die hof is van oordeel dat J "heeft de bovenbedoelde bijkomende omstandigheden in het geheel niet in die hand gehad", dat die bedoelde feitelike gesinslewe van J "verdient eerder en meer bescherming dan dat van de man" en dat V "draagt immers mede verantwoordelijkheid voor het bestaan van het kind". Die hof is vervolgens van oordeel dat, indien dit vir J se ontwikkeling wenslik is dat hy kontak, al sou dit beperk wees, met sy vader moet hê, dit vir V, ooreenkomstig sosiale maatstawwe van betaamlikheid, "niet vrij staat zich aan deze verantwoordelijkheid te onttrekken". Die feit dat V nie die swangerskap gewil het nie en self geen begeerte tot kontak met J het nie, maak hieraan geen verskil nie. Vir hierdie siening vind die hof ondersteuning in artikel 7 van die Verdrag oor die Regte van die Kind wat voorsiening maak vir die reg van 'n kind om sy ouers te ken en dit hou meer in as om bloot hulle name te ken. Hierdie interpretasie van die Amsterdamse hof het die effek dat J in 'n gesinslewe met V staan, maar dat V nie in 'n

gesinslewe met J hoef te staan nie. Von Brucken Fock ("Het recht van het kind om met zijn biologische vader contact te hebben" 1995 *FJR* 117 121) stel, ten einde dié paradoksale konsekwensie te vermy, 'n alternatiewe grondslag in dié verband voor. Volgens hom vloei hierdie reg van die kind uiteraard uit artikel 8 *EVRM* voort, maar hou eerder verband met die beskerming van die privaatheidslewe ("private life"), wat naas die gesinslewe, daarin gewaarborg word. Die kind het naamlik, soos hierbo genoem, 'n reg op afkomskennis wat meer omvat as die blote verneming van die vader se naam. Die beeld wat die kind van sy vader vorm, kan belangrik wees vir sy/haar identiteitsontwikkeling en 'n ewewigtige persoonlikheidsontplooiing. Die kind se reg op afkomskennis en ouerlike identifikasie moet deur die hof met die ouer se reg op privaatheid gekontrasteer word (Jacobs 874; Vanlerberghe 156). Volgens Von Brucken Fock moet ook in aanmerking geneem word dat die vader vir die kind se bestaan verantwoordelik is en dat die kind se belange gevolglik voorrang moet geniet (121).

By appèl stem die *HR* met die hof te Amsterdam saam dat "niet dezelfde voorwaarden behoeven gesteld als wanneer de biologische vader op enige vorm van contact met een door hem verwekt maar niet erkend kind aanspraak maakt" (22 Des 1995, NJ 1996 419). Die *HR* wys egter daarop dat ook vanuit die oogpunt van die kind 'n blote biologiese band nie voldoende is om 'n gesinslewe daar te stel nie. Die aard en bestendigheid van die verhouding tussen die moeder en die verwekker behoort ook verdiskonteer te word, aangesien dit aanduidend daarvan kan wees dat die verhouding nie van 'n geheel verbygaande aard was nie. Faktore soos gemeenskaplike huisvesting, gesamentlike huishouding en wedersydse versorging is in dié verband van belang. Die *HR* is van mening dat 'n seksuele verhouding van drie maande nie voldoende is om 'n gesinslewe daar te stel nie. Wat die verwysing na artikel 7 van die Internasionale Verdrag oor die Regte van die Kind (*IVRK*) betref, merk die *HR* op dat die hof *a quo* dit verkeerdelik op die feitestel van die onderhawige saak toegepas het en dat dit "(n)iet aannemelijk is dat de verdragsluitende staten een zo vergaand recht op het oog hebben gehad". Dit is te betwyfel of die bedoelingsteorie, wat die *HR* by die uitleg van 'n konvensie of verdrag klaarblyklik aanwend, die hedendaagse benadering in die internasionale reg korrek reflekteer (sien bv art 33 van die Weense Konvensie oor die Reg rakende Verdrae en Labuschagne "Interpretation of multilingual treaties" 1999 *SAYIL* 323 328–329). Volgens wat (i) betref, moes daar deur toepassing van artikel 8(2) bepaal word of die fiksheidsklub deur die Handves van Regte gebonde is. Artikel 9(4) wat private diskriminasie verbied, gaan net oor die gronde van diskriminasie wat in artikel 9(3) genoem word en is dus nie hier van toepassing nie. Von Brucken Fock ("De Hoge Raad laat Jeroen in de kou staat" 1996 *FJR* 62 63) val dit op dat die *HR* nie die bedoeling van die moeder en vader as faktor, by bepaling van die vraag of 'n gesinslewe tot stand gekom het, in aanmerking geneem het nie. In die lig van die beslissing van die *EHRM* in *Keegan v Ireland* (26 Mei 1994, NJ 1995 247) waar die feit dat die swangerskap beplan was as bepalend vir totstandkoming van 'n gesinsverhouding beskou is, lyk die *HR* se beslissing aanvegbaar. Von Brucken Fock verklaar in dié verband soos volg:

> "Van een vader die bewust heeft meegewerkt aan de totstandkoming van een zwangerschap mag niet alleen moreel doch ook rechtens meer inspanningen word gevergd dan wanneer dat niet het geval is ... Ik zou hier zelfs de vraag willen opwerpen of de intentie zelf niet reeds, wanneer deze in rechte is komen vast te staan, als een voldoende bijkomende omstandigheid dient te worden beschouwd om familieleven tussen de biologische vader en het kind aan te nemen" (63).

By vasstelling van hierdie bedoeling moet ook ag geslaan word op die maatreëls wat getref is om swangerskap te voorkom en die mate waarin die vader met moontlike

swangerskap rekening moes gehou het. Von Brucken Fock beweer vervolgens dat die *HR* fouteer het deur nie artikel 7 *IVRM* ekstensief uit te lê nie. Die natuurlikste wyse waarop 'n kind sy ouers kan leer ken, is immers by wyse van persoonlike kontak. Vir sover die vader hom beroep op artikel 8 *EVRM* (dws inbreukmaking op sy reg op privaatheid) behoort aan die welsyn van die kind, gelees met artikel 7 *IVRK*, voorrang gegee te word en behoort hy die reg te hê om sy vader te ken en vir dié doel (beperkte) kontak met hom te hê. Volgens Von Brucken Fock dra die *HR* se beslissing nouliks by tot die ontwikkeling van die regte van die kind (64). Die vraag is of 'n omgangsreg afgedwing kan word en, indien wel, wat die waarde van so 'n afgedwonge reg sou wees. Vanuit 'n suiwer etiese oogpunt gesien, sou geargumenteer kon word dat 'n persoon wat 'n kind verwek verantwoordelikhede teenoor sodanige kind het en, indien dit in belang van die kind is, kontak met hom/haar moet hou. Jacobs is van mening dat die afdwinging van so 'n reg in stryd is met dit wat juridies moontlik is. 'n Onderhoudsplig is wel afdwingbaar "omdat dit een minder vergaande en emotioneel belastende maatregel is en niet hetzelfde persoonlijke engagement vereist van de vader, zoals omgang impliceert" (870). Aansluitend hierby wys Vanlerberghe daarop dat om 'n ouer tot omgang met 'n kind te dwing beswaarlik in belang van die kind sou kon wees. Daar bestaan naamlik 'n groot kans dat 'n "omgangsplichtige ouder zijn misnoegen op het kind zal afreageren" (156).

In Duitsland het 'n kind tans 'n reg op omgang met beide ouers. Omgekeerd is 'n ouer, insluitende 'n ongehude vader, verplig en geregtig tot omgang met 'n kind (art 1684(1) *BGB* n F; Diederichsen "Die Reform des Kindschafts- und Beistandschaftsrecht" 1998 *NJW* 1983 1986–1987). Slegs indien die welsyn van die kind dit vereis, kan dié omgangsreg begrens of opgehef word. Hierdie wye formulering van die omgangsreg het die onrealistiese effek dat 'n "omgangsonwillige" ouer tot omgang met die kind verplig sou kon word. Skrywers verwys in dié verband na 'n plig-reg wat die ouers in belang van die kind sou hê (vgl Rauscher 331; Niepmann 567; Diederichsen 1986 vn 115). Of dit as algemene reël in belang van die kind sou wees, is twyfelagtig (sien ook Robinson 277). Uit die aanwending van die begrip "pligreg" blyk duidelik dat Duitse juriste bewus daarvan is dat die tradisionele konstruksie dat elke reg 'n plig as teenkant het, nie in onderhawige verband diensbaar aan geregtigheid kan wees nie. Dit is te betwyfel of die idee dat 'n persoon gelyktydig 'n reg en 'n plig in een en dieselfde verhouding kan hê, hoegenaamd rasioneel fundeerbaar is.

In *Jooste v Botha* wys regter Van Dijkhorst daarop dat eiser se eis slegs op die Grondwet fundeerbaar kan wees, aangesien daar gemeenregtelik geen grondslag vir sodanige eis bestaan het nie. Internasionale instrumente, soos die Verenigde Nasies se Verdrag oor die Regte van die Kind (1989), wat in 1995 deur Suid-Afrika geratifiseer is, het wesenlik slegs vertikale toepassing, asook die bepalings, en in besonder artikel 30(1)(b), van die tussentydse Grondwet 200 van 1993 (*Du Plessis v De Klerk* 1996 3 SA 850 (KH)). Artikel 28(1)(b) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 (hierna: die Grondwet) bepaal dat elke kind 'n reg op ouerlike sorg het. B is eiser se ouer. Blykens artikel 8(3) moet die hof die gemenereg ontwikkel om aan dié reg gevolg te gee. Artikel 9 verbied diskriminasie op grond van geboorte. Die argument lui dat die hof 'n remedie moet ontwerp, aangesien 'n reg nie sonder 'n remedie bestaanbaar is nie (*ubi ius ibi remedium*). Volgens regter Van Dijkhorst is 'n *mandamus* onvanpas, met die gevolg dat 'n deliktuele eis oorweeg moet word (203). Artikel 28(1)(b) van die Grondwet bepaal tans dat elke kind 'n reg op gesinsorg of ouerlike sorg of alternatiewe sorg in geval van verwydering uit die gesinsomgewing het. Regter Van Dijkhorst wys, teen die agtergrond van *Ex parte Chairperson of the Constitutional Assembly*: *In re Certification of the*

Cosntitution of the Republic of Southern Africa, 1996 1996 4 SA 744 (KH) par 54–56), daarop dat die vertikale aanwending van die Handves van Menseregte nie meganies of ongekwalifiseerd plaasvind nie, maar dat dit met groot omsigtigheid moet geskied (205). Na analise van voorafgaande regspraak, wetgewing en regsliteratuur, en die trek van analogieë met die posisie van die binne-egtelike kind, konkludeer regter Van Dijkhorst soos volg:

> "Despite recent statutory developments which have materially improved the rights of a natural father in respect of his illegitimate child, neither our common law nor our statutes recognise the right of a child to be loved, cherished, comforted or attended to by a non-custodian parent as creating a legal obligation. A bond of love is not a legal bond. Insofar as the plaintiff's claim is based on the common law it must fail" (207. Sien ook Labuschagne "Deïnjuriëring van owerspel" 1986 *THRHR* 336 en "Deïnjuriëring van verlowingsbreuk: Opmerkinge oor die morele dimensie van deliktuele aanspreeklikheid" 1993 *De Jure* 126 136–139).

Regter Van Dijkhorst verwys vervolgens na die verskeidenheid betekenisse wat die begrip "reg" ("right") kan aanneem – sien ook die uitstekende analise van Van Zyl "Die subjektiewe reg" in Van Zyl en Van der Vyver *Inleiding tot die regswetenskap* (1982) 412ev – en konkludeer:

> "It is clear that children have a legitimate interest in general physical, intellectual and emotional care within the confines of the capabilities of their care givers. Yet it is significant that the Constitution does not state that parents are obliged to love and cherish their children or give them their attention and interest. The Constitution is silent on the most important aspect of the alleged legal right" (207).

Wat vir die onderhawige doeleindes van wesenlike belang is, is die verwysing deur regter Van Dijkhorst na die stelreël *lex non cogit ad impossibilium* (sien verder tav die strafreg Van Oosten "Die aard en rol van die stelreël *lex non cogit ad impossibilium* en die strafreg" 1986 *THRHR* 375). Ten aansien hiervan vat hy saam:

> "The law will not enforce the impossible. It cannot create love and affection where there are none. Not between legitimate children and their parents and even less between illegitimate children and their fathers. That fact compellingly leads to the conclusion that the drafters of the Constitution could not have intended that result" (209).

Die voorgestelde reg, wat vierkantig binne die konteks van intieme menslike verhoudings val, kan volgens die regter nie tot regsverpligtinge aanbieding gee nie: "[a]ffection cannot be quantified and attention is relative" (209).

Binne konteks van die bestaande positiewe reg, regsfigure en regsdenke is hierdie konklusie stellig korrek. Die feitestel in *Jooste v Botha,* asook denkrigtings in sekere lande soos Nederland en Duitsland, bevestig egter 'n standpunt wat vroeër ingeneem is, naamlik dat 'n reg nie noodwendig 'n plig as teenkant moet hê nie, asook dat deliktuele aanspreeklikheid nie tot die skending van 'n subjektiewe reg, met 'n plig as teenkant, sinvol beperk kan wees nie (Labuschagne "'n Reg as teenkant van 'n reg: Opmerkinge oor die opkoms van interaksieregte" 1998 *THRHR* 137). Die opkoms van interaksieregte binne moderne regstaatlike konteks, wat die resultaat is van die groeiende proses van geregtigheidsmatige gelykbehandeling en -stelling van regsubjekte binne intieme menslike verhoudings en wat gegenereer word deur regsantropologies-universele evolusieprosesse, verg 'n nuwe en/of aangepaste benadering tot die bestaande grondslag van deliktuele aanspreeklikheid (sien Labuschagne "Evolusielyne in die regsantropologie" 1996 *SA Tydskrif vir Etnologie* 40). Hoewel dit ongetwyfeld korrek is dat 'n gedwonge omgangsreg wesenlik teenproduktief en sinneloos is, kan nie ontken word nie dat 'n ontkennende en verwerpende houding van 'n vader emosionele probleme en uiteindelik selfs psigiatriese letsel by 'n kind kan veroorsaak. Sou sodanige kind ondersteuning of

behandeling daarvoor kry, sou die finansiële onkoste daardeur veroorsaak by die onderhoudsbedrag in berekening gebring kon word. Daar bestaan verder geen rede waarom kompensasie vir ongerief en lyding van die kind deur die vader se optrede veroorsaak, nie ook betaalbaar moet wees nie. Elementêre geregtigheid verg dit!

4 Konklusie

Die bestaande regsposisie van 'n omgangsonwillige ouer, soos weerspieël in die beslissing van regter Van Dijkhorst in *Jooste v Botha* is nie versoenbaar met die moderne en steeds veranderende geregtigheidsbegrip nie. Binne die konteks van 'n interaksiereg behoort deliktuele aanspreeklikheid in gepaste omstandighede ook te vestig waar die konstruering van 'n regsplig teenproduktief, uitsigloos, oneffektief en selfs onsinnig is. Nuwewêreldse geregtigheid verg dit!

A VAN DER LINDE
JMT LABUSCHAGNE
Universiteit van Pretoria

The provisions of the Constitution are not time worn adages or hollow shibboleths. They are vital, living principles that authorise and limit government powers in our nation.

Earl Warren CJ in Trop v Dulles 356 US 86.

VONNISSE

VERJARING VAN BORGVERPLIGTINGE REDUX

Rand Bank Ltd v De Jager 1982 3 SA 418 (K)

In 'n poging om verjaring op 'n gesonde grondslag te plaas en aangesien die 1943 Verjaringswet 'n steen des aanstoots vir hom was, het professor JC de Wet 'n nuwe wet voorgestel en die Verjaringswet 68 van 1969 opgestel. Soos die statistieke van die HHA egter aandui, was sy poging nie juis uitermate suksesvol nie. Gedurende die September 2000-termyn van daardie hof was daar byvoorbeeld vier verjaringsake – en dit na dertig jaar van die wet. Ongelukkig verjaar wette nie. Maar De Wet het ook 'n hand in 'n uitspraak oor verjaring gehad, naamlik die gemelde *Rand Bank*-saak, waarin hy die rol van moderator van regter Baker (met wie Lategan R saamgestem het) se uitspraak vervul het (sien die addendum: 1982 3 SA 1091; Curious – volgens mededeling adv Maisels QC – 1983 *SALJ* 327). Toevallig was De Wet se Boswell, advokaat JJ Gauntlett, die suksesvolle advokaat. Ten spyte van al die deskundige bystand het die *Rand Bank*-uitspraak regsonsekerheid geskep en loop sy spook nog steeds. Tot dusver het die HHA nóg die spook begrawe nóg lewe daarin geblaas.

Vir party dien hierdie uitspraak as gesag daarvoor dat 'n borgkontrak sy eie verjaringstermyn het, dat verjaring teen die borg begin loop sodra die hoofskuld opeisbaar word en dat dit aanhou loop ongeag die lotgeval van die hoofskuld (*Bank of the Orange Free State v Cloete* 1985 2 SA 859 (OK)). In *Absa Bank Bpk v De Villiers* 1998 3 SA 920 (O) het regter Van Coppenhagen byvoorbeeld in 'n enkele sinsnede (924D–E) die uitspraak se juistheid onderskryf. Daarenteen het regter Mthiyane in heelwat meer woorde geweier om die uitspraak te volg (*Nedcor Bank Ltd v Sutherland* 1998 4 SA 32 (N)). Hoewel die HHA by meerdere geleenthede 'n beslegting van die probleem vermy het, is dit goed argumenteerbaar dat die uitslag van sowel *Kilroe-Daley v Barclays National Bank Ltd* 1984 4 SA 617 (A) 623 as *Leipsig v Bankorp Ltd* 1994 2 SA 128 (A) nie met *Rand Bank* versoenbaar is nie. Wat ietwat verstommend van regter Van Coppenhagen se lakoniese navolging is, is die feit dat daar heelwat oor die (on)juistheid van die uitspraak geskryf is (bv 26 *LAWSA* par 217; Kritzinger "Prescription of suretyship for a judgment debt" 1983 *SALJ* 35; Forsyth "Suretyship and prescription: a new direction" 1984 *SALJ* 237) en dat dit nie altyd gevolg is nie (*Jordan and Co Ltd v Bulsara* 1992 4 SA 457 (OK)). Veral Mostert "Verjaring by 'n borgskuld" 1981 *TSAR* 163 het 'n sinvolle bydrae gelewer. Terloops, die appèl teen *Absa Bank* is deur die HHA afgewys maar op 'n ander grondslag (2000 1 SA 481(HHA)).

Die feite in *Rand Bank* was heel eenvoudig. D het homself as borg en mede-hoofskuldenaar vir L, die hoofskuldenaar, teenoor die bank verbind. Die bank het vonnis teen L verkry maar eers vier jaar later aksie teen D ingestel. L beroep hom op verjaring van sy aanspreeklikheid as borg na die verloop van drie jaar vanaf die datum waarop die hoofskuld opeisbaar geword het – iewers voor uitreiking van dagvaarding. Daarenteen is die bank se saak dat die hoofskuld, vanweë die vonnis, eers na 30 jaar verjaar en dat D dus nie bevry kon word voor daardie datum nie. Soos regter Baker (420H–421A) opgemerk het,

> "[t]he question for determination here is this: If there is a judgment against the principal debtor but not against the surety, and the latter is sued only after three years have elapsed since judgment was given against the principal debtor, has the claim against the surety become prescribed by that time or not?"

Eintlik is die antwoord op die vraag afhanklik van 'n uitleg van elke besondere borgonderneming (*Bulsara v Jordan and Co Ltd (Conshu Ltd)* 1996 1 SA 805 (A) 811A–E), maar die bepalings van die borgakte kom nie in die uitspraak voor nie, vermoedelik omdat die saak aan die hand van sogenaamde algemene beginsels besleg is. Normaalweg – gewoonlik uitdruklik – duur die onderneming om die hoofskuld te betaal "so long as that debt exists in law and has in fact not been paid by the debtor". (*Cronin v Meerholz* 1930 TPD 403 406–407; vgl *Kilroe Daley loc cit.*)

Regter Baker het anders geoordeel, ten eerste (421E–F) omdat

> "it rather goes against the grain (mine, anyway) to have a rule of law which says that a surety who originally agreed to be liable for a friend's debt for three years from the day on which that debt fell due should, without any warning at all, suddenly find himself liable for 30 years"

en tweedens (424A–B) met 'n beroep op *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 1 SA 463 (A) omdat

> "although the surety binds himself as co-principal debtor, that does not render him liable to the creditor in any capacity other than that of a surety who has renounced the benefits ordinarily available to a surety against the creditor. He does not become a party to the contract between the creditor and the principal debtor (from this one might argue that he therefore does not become bound by a novation, by order of Court, of the debt between the main parties)".

Die eerste punt kom later in hierdie bydrae ter sprake. Op die tweede het regter Baker uitgebrei toe hy *Cronin* in detail gekritiseer het. Meer besonderlik was hy (op 447H) beswaard oor die uitgangspunt in *Cronin* dat "a contract of suretyship was not an independent contract but one accessory to the principal agreement". Hierdie kritiek is op 'n misverstand gebaseer en verloor uit die oog dat twee beginsels ter sprake is. Die eerste is dat die borgkontrak 'n aparte onderneming daarstel met die gevolg dat die borg nie 'n party by die hoofskuld word nie. Soos die feite in *Neon* illustreer, kan die skuldeiser nie die borg (wat ook 'n mede-hoofskuldenaar is) vir die hoofskuld aanspreeklik hou nie. Die borgverpligting hoef ook nie met die hoofverpligting ooreen te stem nie, kan (afhangende van die terme) voor die hoofverpligting verval en kan altyd minder, nooit meer, as die hoofskuld behels nie.

Die tweede beginsel is dat die borgkontrak aksessoor tot die hoofskuld is (*Bulsara v Jordan and Co Ltd (Conshu Ltd)* 810A–D). Dit beteken dat die borgkontrak nie 'n onafhanklike bestaan kan voer nie en daarom is sy noodlot afhanklik van die noodlot van die hoofskuld.

Ongelukkig het regter Baker verder verstrik geraak in probleme van stuiting en uitstel van verjaring terwyl slegs artikel 15 van die Verjaringswet enigsins ter sake kon wees. Dit bepaal dat verjaring gestuit word deur die betekening van 'n prosesstuk

op 'n skuldenaar. As sodanig was dit egter nie van toepassing nie omdat daar nie 'n prosesstuk aan die besondere skuldenaar (die borg) beteken is wat verjaring kon stuit nie.

Die gevolge van die *Rand Bank*-beginsels dat die borgkontrak sy eie verjaringstermyn het en dat verjaring teen die borg begin loop sodra die hoofskuld opeisbaar word en aanhou loop ongeag die lot van die hoofskuld, is nie deur De Wet of regter Baker behoorlik onder die loep geneem nie. Dit is dus gepas om na die anomalieë te verwys en om te bepaal of regter Baker se aangehaalde motivering, gebaseer op billikheid, enigsins steek hou.

Regter Baker het bevind dat 'n borg wat nie van die voordeel van uitskudding afstand gedoen het nie in 'n besondere nadelige posisie is omdat sy skuld eers opeisbaar word nadat die hoofskuldenaar uitgeskud is (449H–450B; vgl De Wet en Van Wyk *Kontraktereg en handelsreg* (5e uitg) 399). In die gegewe geval sou die borg dus verlief moes neem met die feit dat die skuldeiser dertig jaar tyd gehad het om sy vonnis uit te win want eers daarna begin verjaring teen hom te loop. Daarenteen, as die borg afstand van die voordeel van uitskudding gedoen het, sou sy skuld verjaar het op 'n tydstip wat uit die aard van die saak nie later as drie jaar na datum van die vonnis kan wees nie. Uit 'n verjaringsoogpunt bewys 'n skuldeiser aan homself dus geen guns nie as hy verg dat die borg van die voordeel van uitskudding afstand doen. Of die vermoë van die skuldeiser om oor die begin van die loop van verjaring te beskik enige rol in hierdie omstandighede te spele het, is 'n ander vraag (vgl *Santam Ltd v Ethwar* 1999 2 SA 244 (HHA)). Wat beide regter Baker en De Wet egter uit die oog verloor het, is die beginsel dat 'n assessore kontrak gelyktydig met die hoofskuld uitgewis word. As uitwinning eers na aan die einde van die verjaringstermyn sou geskied, sou dit beteken dat die borgverpligting bly voortbestaan ten spyte daarvan dat die hoofskuld uitgewis is.

Dit is onder hierdie stelsel dan ook nie moontlik om iemand sinvol as borg en mede-hoofskuldenaar te verbind vir 'n skuld wat 'n verjaringstermyn van langer as drie jaar het nie. Die borg van 'n verbandskuld sal van sy borgverpligting bevry word na drie jaar nadat die verbandskuld opeisbaar geword het terwyl die verbandgewer se skuld eers 27 jaar later verjaar. Dieselfde sinneloosheid geld in die geval van wisselborge en die ander gevalle gedek deur artikel 11 (a), (b) en (c).

Om hierdie resultaat te bereik, moes regter Baker vir Voet 46 1 36 verkeerd bewys. Wat Voet gesê het, is volgens Gane se vertaling:

> "If however a demand has indeed been made upon the principal debtor, but on the surety never, not even in a whole thirty years, the surety would nevertheless not be able to defend himself with prescription. This is because it has been held that, when the obligation has been made permanent as against the debtor himself by a demand made upon the debtor, it is likewise made permanent also as against sureties and remaining accessories; and that, if the defendant makes default, the surety is also held liable.
>
> If in sooth the making of a demand on one of two joint debtors interrupts prescription in respect of the other also, when each of them was bound as a principal debtor, far more must we say that an obligation against a surety is prolonged by a demand which was made on the principal debtor. It is more in accord with nature for an accessory to go with its principal, than for one principal thing to be assessed on another."

Dit het regter Baker bereik na 'n ywerige gedelf in die gemene reg tot die bewondering van vele (oa Forsyth "Suretyship" in Zimmermann en Visser (reds) *Southern Cross* (1996) 428 ev), min wat die moed aan die dag sal lê om die juistheid daarvan na te gaan. Dis egter nie nodig om tot die debat toe te tree nie. Waarop die argument kortliks neerkom, is dat Keiser Justinianus in *Codex* 8 0 5 'n ondeurdagte stukkie

wetgewing daargestel het (421F–G 427A–B 447A–F) en dat Voet 46 1 36 die Romeinse reg misverstaan het (444C ev) en tot Romeins-Hollandse reg verhef het. Al word veronderstel dat sowel Justinianus as Voet flaters begaan het, is dit in die hedendaagse konteks irrelevant. Die Suid-Afrikaanse reg is nie wat die Romeinse of Romeins-Hollandse reg moes gewees het nie, maar wat laasgenoemde was en, indien geresipieer, in daardie mate. Per slot van sake, soos Voet ten besluite gesê het, is die beginsel soos deur hom geformuleer in pas met die aksessore aard van borgskap, iets wat regter Baker bevraagteken het.

Uit die oogpunt van die openbare belang kan die vraag gestel word of dit in die belang van borge in die algemeen is om gedagvaar te moet word alvorens dit nodig is om die hoofskuldenaar aan te spreek. Mens sou dink dat borge liefs sou wou dat die skuldeiser – selfs al is afstand gedoen van die voorreg van uitskudding – eers die hoofskuldenaar uitskud. Enige ander benadering verswaar die borg se posisie wesenlik. Die feite in *Absa* en *Leipsig* illustreer die punt. Die hoofskuldenaar word gesekwestreer of sterf. Die skuldeiser moet binne drie jaar nadat die hoofskuld opeisbaar geword het, teen die borg stappe doen (klaarblyklik vir die volle borgskuld) en mag nie wag vir die afhandeling van die boedel sodat hy die borg net vir daardie gedeelte wat nie deur die dividend gedek word, aanspreek nie. Dit is ook interessant om te let op van die ander gevalle van uitstel van verjaring teen die hoofskuldenaar wat deur artikel 13 geskep is. So is daar die geval waar die skuldeiser en skuldenaar met mekaar getroud is. Wat die *Rand Bank*-benadering verg, is dat die borg binne drie jaar vandat die skuld opeisbaar geword het, gedagvaar moet word – wat weer aanleiding daartoe sal gee dat die borg die eis sal verhaal van die skuldenaar-eggenoot. Sodoende word nie alleen die vrede tussen egliede versteur nie maar die hele oogmerk van die bepaling ongedaan gemaak. Dieselfde geld vir die gevalle gedek deur artikel 13(1)(c) en (d). Of neem die geval van uitstel omdat die skuld die onderwerp van 'n arbitrasie-geskil is: die borg moet gedagvaar word in verrigtinge wat, afhangende van die uitslag van die arbitrasie, abortief kan wees. 'n Mens kan net wonder hoekom De Wet nie met hierdie gevalle gehandel het toe hy sy benadering wou regverdig nie. Hy het slegs verwys na die geval waar die skuldenaar in die buiteland is en die borg nie (De Wet en Van Wyk 138 vn 48).

Dit is gevaarlik om die rol van borgstelling in ons ekonomie te negeer. Sedert die erkenning en uitbreiding van regspersone met beperkte aanspreeklikheid, het die noodsaak vir borgstelling dramaties toegeneem. Selde is die borg 'n vriend (soos deur Baker R veronderstel) of 'n weduwee sonder olie in haar kruik wat vir die skulde van vreemdelinge borg staan. Normaalweg is dit die alleen-belanghebbendes in die regspersoon met beperkte aanspreeklikheid. Dit is altyd noodsaaklik vir kredietverlening. Sonder 'n sinvolle stelsel van persoonlike sekerheidstelling sal kredietverlening soos dit tans bekend is, wesenlik ingekort word.

Ten besluite is die vraag of die antwoord nie te vinde is in die feit dat die 1969-wet nie artikel 6(2) van die Verjaringswet 18 van 1943 in die een of ander vorm herverorden het nie. Dit het naamlik bepaal dat stuiting teen die hoofskuldenaar geag word stuiting te wees ook teen die borg. Stuiting is, soos aangedui, slegs een aspek van die probleem. Miskien belangriker in die regsverkeer is uitstel van verjaring. Hoe dit ook al sy, regter Baker het bevind dat die weglating van 'n soortgelyke bepaling slegs beteken dat die gemenereg geld (442B–443H). Adjunk-regterpresident Flemming het in *Commissioner of Customs and Excise v Standard General Insurance Company Ltd* (WPA saak 95/14533) anders geoordeel. In appèl het die punt in die HHA weer eens nie ter sprake gekom nie. (Die uitspraak is nog nie gerapporteer nie.)

Die *Rand Bank*-uitspraak illustreer weer die ou beginsel van "hard cases make bad law" en bevestig dat regters versigtig moet wees om algemene reëls te formuleer wat op billikheid van die besondere geval eerder as op algemene billikheid gebaseer is. Miskien illustreer dit ook die rede vir die beginsel dat mens die wetsopsteller se bedoeling in die wet moet soek en nie in die los praatjies van wetsopstellers nie. Ten besluite toon dit dat regsbehoeftes verskil indien gesien in die skaduwee van 'n eikeboom in teenstelling met die skerp lig op die mark.

Klaarblyklik het die stof om *Rand Bank* nog nie gaan lê nie en is die laaste woord nog nie daaroor uitgespreek nie. Die tyd het aangebreek dat iemand die hand aan die ploeg moet slaan en sonder om te veel agtertoe te kyk, probeer om 'n sinvolle verjaringswet op te stel.

STYRIAN

ISSUES ARISING FROM A CHALLENGE TO THE CONSTITUTIONALITY OF THE CUSTOMARY LAW OF INTESTATE SUCCESSION

Mthembu v Letsela [2000] 3 All SA 21 (A); 2000 3 SA 867 (SCA)

1 Introduction

Now that cases on customary law are being brought before the High Court and the Supreme Court of Appeal with greater frequency than before, and will presumably also be brought before the Constitutional Court, it is appropriate to discuss the way in which such cases are being dealt with. Remembering that, for the most part, customary law cases were previously dealt with in different courts, one can sympathise with counsel and courts faced with problems arising in a system of law with which they are much less familiar than they are with South African common law. It may well be that drawing attention to the need for deeper study will assist the courts in the handling of cases on customary law in future.

2 *Mthembu v Letsela*

The decision of the Supreme Court of Appeal in *Mthembu v Letsela* [2000] 3 All SA 21 (A); 2000 3 SA 867 (SCA) is of great importance on a number of issues. It merits close attention, *inter alia*, not only on the constitutionality of the customary law of intestate succession, but also on the essential requirements of a customary law marriage because the appellant (applicant in the court *a quo* before which the case came twice: 1997 2 SA 936 (T) and 1998 2 SA 675 (T)), based her case on the proposition "that she was married to the deceased under customary law" (1997 2 SA 939 (T) 939B–C). If she was, and if the customary law rules of intestate succession applied to the devolution of the deceased's estate, her daughter Tembi (the deceased's only child: 1998 2 SA 675 (T) 678H–I) was not heir to the deceased's estate because in customary law an estate devolves on a male heir. The appellant accordingly applied in the court *a quo* for an order declaring, *inter alia* (1997 2 SA 936 (T) 939F–H):

> "1.1 that the rule of African customary law which generally excludes African women from intestate succession ('the customary law rule') is inconsistent with the Constitution and consequently invalid;
>
> 1.2 that s 23 of the Black Administration Act 38 of 1927 ('the Act') and s 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks made under s 23(10) of the Act by Government Notice R200 of 6 February 1987 ('the regulations') are invalid insofar as they demand the application of the customary law rule;
>
> 1.3 that the administration and distribution of the estate of the late Tebalo Watson Letsela ('the deceased') is governed by the common law of intestate succession; and
>
> 1.4 that Tembi Mthembu is the deceased's only intestate heir".

The court in the first case (1997 2 SA 936 (T)) postponed the application *sine die* and referred the matter for hearing of oral evidence on the questions whether there had been a customary law marriage (a customary union in the older terminology) or a putative marriage (947D–E). (On the case in the court *a quo* see my note "Inheritance in customary law under the Interim Constitution and under the present Constitution" 1998 *SALJ* 262; Maithufi "The constitutionality of the rule of primogeniture in customary law of intestate succession" 1998 *THRHR* 142; Van Heerden "Die intestate erfopvolgingsreg van 'n swart vrou in 'n gebruiklike huwelik" 1988 *THRHR* 522; Bohler "Equality courts: introducing the possibility of listening to different voices in South Africa?" 2000 *THRHR* 288; Els "Customary law and equality: *Mthembu v Letsela and Another* 1998 2 SA 675 (T)" 1998 *Responsa Meridiana* 88.)

In view of the importance in the case of the existence or non-existence of the customary law marriage between the appellant and the deceased, which in turn was decisive for the legitimacy or illegitimacy of their daughter Tembi, the crucial nature of the circumstances, and the length of time during which the two lived together as man and wife (see below), it is remarkable that the opportunity to lead further evidence (see below) was not taken. As it is, there is no certainty about the period during which the appellant and the deceased lived together. In one paragraph it is said that they had lived together in the house at 822 Ditopi Street Vosloorus Boksburg (the main asset in the deceased's estate: 1997 2 SA 936 (T) 938) "since 1990" (938A); in the next paragraph one is given the impression that it was since 7 April 1988 when Tembi was born (938B–C) and it can be inferred to have been at least since the couple decided to raise a family, which dates back to 1987. It is recorded that 99-year leasehold tenure of the house was granted in 1989 (938C–D) but that does not necessarily indicate the date when the couple took up residence there, since 99-year leasehold was commonly given about that time to those who had occupied houses on the previous less secure tenure.

The deceased was murdered on 13 August 1993 (938A–B). During the time the couple lived together, a *lobola* contract was entered into. The date of the contract is not given, but will have been on or before 14 June 1992 (1998 2 SA 675 (T) 678G). (On the point that, strictly speaking, the word "*lobola*" refers to the contract rather than to the cattle transferred, though it is often used of the latter, see Clark (ed) *Family law service* par G81.) (References to legal literature, whether books, articles or notes are to be read as references also to the authorities cited therein.) An amount of R2 000 was agreed upon and R900 was paid as a first instalment, the balance to be paid in October 1993: (1997 2 SA 936 (T) 939A–B and note that in the Supreme Court of Appeal in par [18] Mpati AJA said that "part of the bride wealth was paid"). Before that date the deceased was murdered and the balance was not paid (1998 2 SA 675 (T) 678H). According to the applicant's answering affidavit

the deceased's family and her brother signed a document evidencing the *lobola* contract (1997 2 SA 936 (T) 938I–J–939A–B). This does not seem to have been contested by the respondents.

It is to be noted that nowhere in the reports of any of the three cases is it said that no evidence at all was led. The Supreme Court of Appeal judgment (par [2]) and the judgment in the first case (937J–938G) clearly imply that the facts there stated were either given in evidence or must be accepted because they were uncontested.

Both parties claimed that further evidence was available. In an affidavit the applicant claimed to have detailed evidence and a number of witnesses concerning the entry into the customary law marriage (938J). The first respondent, contesting this, claimed to have other evidence (940D–E). Le Roux J said (946E):

> "It is . . . essential to establish first what the marital state was between applicant and the deceased, *inter alia*, by reason of the provision found in reg 2(d) of the regulations [for the administration and distribution of the estates of deceased Blacks in *GN* R 200 of 6 February 1987] which provides as follows:
>
> 'When any deceased black is survived by any partner
>
> (i) with whom he had contracted a marriage which, in terms of ss (6) of s 22 of the Act, had not produced the legal consequences of a marriage in community of property; or
>
> (ii) with whom he had entered into a customary union; or
>
> (iii) who was at the time of his death living with him as his putative spouse; or by any issue of himself and any such partners, and the circumstances are such as in the opinion of the Minister to render the application of black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said black had been a European.'"

Later on the same page the learned judge continued:

> "This would in my view be an appropriate case to be placed before the Minister where she can show that her position and that of her child as urban dwellers is adversely affected by this rule of succession under customary law, for example because the heir fails to maintain her, or because the leasehold property does not fall within the scope of s 23 (2) and she is threatened with ejectment from her erstwhile common marital home by the application of the rule. *In order*, however, *to bring herself within the ambit of this* rule it is essential to establish the jurisdictional requirement, viz that she was married by customary law or at least was living with him as his putative spouse (which is also denied by first respondent) (946I–947A emphasis added)."

Accordingly the learned judge made the following order (947 E):

> "The matter is referred for the hearing of oral evidence on the following preliminary questions: (a) whether the applicant had entered into a valid customary union with the deceased during the latter's lifetime; or (b) whether a putative marriage under customary law existed between the applicant and the deceased."

Le Roux J clearly considered, with respect correctly, that, *at the stage of the enquiry at the time*, if application was to be made to the Minister further enquiry into the available facts should be made. The word "essential" should be read with this in mind. The learned judge does not appear to have meant that it was not possible to come to a decision on the facts before the court *if they were the only facts*. Hence, again with respect, Mynhardt J in the second case does not appear to have been correct when he said (1998 2 SA 675 (T) 679F–G):

> "Le Roux J could not determine on the papers as they stood, whether or not the applicant and the deceased had entered into a customary union and whether or not a putative marriage under customary law had existed between the applicant and the deceased."

The reason why additional available evidence was not put before the court appears to be that counsel felt it irrelevant to the purpose for which the action was brought. (Note that "[b]oth the applicant and the first respondent decided not to adduce any evidence" in the second case (per Mynhardt J 679G–H). Both must have been advised by their counsel on such a decision.) The purpose clearly was to put forward a constitutional challenge (1997 2 SA 936 (T) 939D–940J; 1998 2 SA 675 (T) 679D–E, 680F–H, 681E–F, 684B–687C). Whatever the purpose, counsels' decision had an important effect on the outcome of the case. Mynhardt J moved straight from the fact that no further evidence was led to the conclusion that

> "[t]he application must accordingly be determined on the basis that the applicant and the deceased were not married to each other and that Tembi was born out of wedlock" (679H; see also 686E–F).

With respect, this conclusion does not follow automatically from the fact that no further evidence was led. As pointed out in the previous paragraph the fact that the court in the first case, knowing that there was further evidence available, regarded further enquiry into it as essential if the Minister was to be approached does not mean that no decision concerning the marriage could be arrived at if there were no facts additional to those put before the court at the first hearing.

In the judgment of the Supreme Court of Appeal (par [7]), Mpati AJA said:

> "When the case came before Mynhardt J [1998 2 SA 675 (T)] however, no evidence was led and counsel were *ad idem* that the matter 'stands to be determined on the facts that are common cause'. Counsel for the appellant (before Mynhardt J) went further and said that 'because no evidence has been tendered from either side the [appellant] accepts that the matter is to be decided on the basis that there was indeed no such marriage between the parties'. The matter was accordingly decided on the basis that Tembi is the deceased's illegitimate child."

I have been unable to find in the report of the judgment of Mynhardt J the words quoted by Mpati AJA so it is assumed that they were statements made during argument. Mynhardt J may have felt that he was not called upon to enquire further into this aspect of the case, but was this so? Is a conclusion of law, as distinct from a statement concerning a fact or facts, binding upon a court if it is made common cause by counsel or conceded by counsel for the party against whose interest it is? The answer appears to be: "No. It is not binding on the court" (see section 3 of this note below).

As no additional evidence was led in the second case, what were the facts before all three courts? As far as one can judge from the reports of all three cases the evidence relevant to the existence or non-existence of a customary law marriage was that (1) the parties lived together for a number of years and were living together when the deceased was murdered; and (2) during this period a *lobola* contract was entered into (see the third and fourth paragraphs of this section of this note above).

The first respondent, the father of the deceased, claimed (1) that the deceased had no intention of marrying the applicant (1997 2 SA 936 (T) 940D–E), and (2) that the bride, "was never formally married and delivered" (940F). Once both parties declined to avail themselves of the opportunity to lead further evidence, could the question of the customary marriage or the absence thereof be solved? Mynhardt J and the Supreme Court of Appeal felt that it could and that there was no marriage. In the Supreme Court of Appeal concerning a submission that Tembi was the deceased's legitimate daughter Mpati AJA said (par [17] (emphasis in original)):

> "[T]here must . . . be a marriage (customary union) and not merely payment of bride wealth or part of it for the child to be 'transferred' into its father's family. The position with regard to an illegitimate child is that he or she is legitimized by subsequent payment of dowry or bride wealth *and* marriage of the parents: Warner *A Digest of South African Native Civil Case Law* 1894–1957 60 par 720 [Warner] and the cases there cited; Bekker [*Seymour's Customary law in Southern Africa* (1989)] 232 [Seymour]. The position is the same in Sotho custom: Bekker op cit 233."

The learned Judge of Appeal continued:

> *"In casu*, it is common cause that no customary union existed between the appellant and the deceased when Tembi was born. It is also common cause that no customary union was entered into subsequent to her birth. It follows that although part of the bride wealth was paid, without a customary union between her parents, Tembi was not legitimized. Mynhardt J was accordingly correct in holding that Tembi is illegitimate" (par [18]).

With respect, only two cases are referred to in the paragraph in Warner cited by the learned Judge of Appeal in par [17]: *Mkwangwana v Mbengana* (1928) 6 NAC 24 and *Mdibaniso v Msolo* 1940 NAC (C&O) 75. In *Mkwangwana*'s case Welsh P stated:

> "The fact that the Plaintiff and Mafenteni [presumably the parents of the children] lived together as man and wife for a period of 15 years during which several children were born and that no claim whatever for damages was made by the father of the latter are important factors supporting the Plaintiff's contention [*sc* that the children were legitimated by the subsequent payment of *ikhazi*: see the headnote and note that it is nowhere said in the report that the wife was subsequently delivered].
>
> The Magistrate after careful consideration of the evidence placed before him has found in favour of the marriage and this court, in all the circumstances, is not prepared to say he has erred in his conclusions."

With respect, the only difference between the facts of this case in so far as disclosed in the report, and *Mthembu*'s is the length of the period during which the parents of the child or children lived together as man and wife. The reference by the court to the judgment of the Pondo assessors that if "a man seduces a girl, and has a child by her, if the father of the girl accepts the dowry and a marriage takes place a child is legitimized" is a typical statement of the general position where the father and mother of the child were not living together as man and wife when the seduction took place.

The citation in *Mkwangwana*'s case of *Kolopene v Ngukumani* (1916) 3 NAC 122 is not altogether clear. On the one hand it is stated in *Kolopene*'s case by Moffat CM that the father "retained the girl in his possession" which would indicate that she was not living with the father of her child as his wife. If so, the facts in *Mthembu*'s case are distinguishable from those in *Mkwangwana*'s case. On the other hand, Moffat CM stated that the assessors said that "payment of dowry subsequent to the birth of a child legitimatises the child" which is strongly for the appellant in *Mthembu*'s case. It is the general statement of the assessors in *Mkwangwane*'s case on which Warner *loc cit* bases his paragraph. He does not deal with the facts of *Mkwangwane*'s case and the decision therein is not authority for the proposition in his par 720.

In the second case cited by Warner, the mother had three children before payment of dowry by the defendant (appellant). The plaintiff (respondent) alleged that the father of the children was one N. However, he failed to establish his claim and the court accepted the evidence of the respondent that he was the father of the children (76). Nowhere in the judgment is there any reference to "delivery" of the mother to the father's home after payment of dowry although there is another statement by

assessors of Pondo customs similar to that in *Mkwangwane*'s case. The comment made above on that case applies here as well. It follows that reference to the reports of the two cases cited by Warner *loc cit* which the Supreme Court of Appeal took as adequately summarised by him shows that the cases are authority for a proposition directly opposed to the one for which they were cited.

The cases cited in Warner being so problematical, one needs to ask: what do the leading cases on the subject say? One of the major questions in relation to *Mthembu*'s case for which no explanation is given in the reports of either of the cases in the court *a quo* or of the Supreme Court of Appeal is: why was there no reference to the leading cases on the subject?

In parentheses, references to the leading cases are not difficult to find: they are referred to in *Family Law Service* par G22–G28. From the point of view of those unfamiliar with the subject, one of the benefits of the abbreviated form of writing in *Family Law Service* is that the leading cases are not lost in the multiplicity of references in the longer books. It can be deduced from the three *Mthembu* cases that neither counsel nor the courts read the section in *Family Law Service* on "Customary family law".

The leading cases on the problem in *Mthembu*'s case (whenever, as in that case, the codes of Zulu law are not in issue) are *Memani v Makaba* (1950) 1 NAC (S) 178; *Ngcongolo v Parkies* 1953 NAC 103 (S); and *Mbanga v Sikolake* 1939 NAC (C&O) 31. In *Memani*'s case Sleigh P said:

> "Now two of the essentials of a customary union are the consent of the father of the girl and the handing over of the bride. *Both essentials may be inferred from the conduct of the father*, for instance, where the girl is *twalaed* and the *father accepts cattle in payment of dowry and leaves the girl at the man's kraal*. In such a case consent by the father is presumed and *no formal handing over of the bride is necessary*" (180 emphasis added).

So also in *Ngcongolo v Parkies* Sleigh P said:

> "It has been frequently stated that the essentials of a native customary union are (a) the consent of the contracting parties, (b) the delivering and acceptance of *lobola*, and (c) the handing over of the bride to her husband. *The performance of these acts is often attended by much ceremony but the omission of any ceremony whatsoever has no effect on the validity of the union* . . . In regard to (c) there may be either an actual handing over by taking the bride to the bridegroom's kraal and leaving her there or *a symbolical handing over by accepting the ikhazi and leaving her with him after she had been twalaed*" (104–105 emphasis added).

In its standard form (for other forms see Bennett *A sourcebook of African customary law for Southern Africa* (1991) 189–195; (*Sourcebook*); Olivier *et al Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 17–18 (Olivier) *twala* (alternative spelling *thwala*; infinitive *ukutwala* or *ukuthwala*) is a step taken in some, not all, customary law marriages without the prior consent of the prospective bride's father or guardian (*Family Law Service* par G26 fn 3; Koyana *Customary law in a changing society* (1980) 1–2 (Koyana); Bennett *Sourcebook loc cit*; Seymour 98–99; Olivier *loc cit*). It is often said that *twala* is similar in some respects to elopement or abduction. If the father or guardian of the prospective bride subsequently consents, expressly or impliedly, and a *lobola* contract is entered into a customary law marriage comes into being (*ibid*). It is important to remember that *twala*, when it happens, may take place *before* the *lobola* contract is entered into.

If, after *twala*, a *lobola* contract is entered into or in modern times if the man and woman live together and her father is content, on negotiation of a *lobola* contract and payment of an instalment, to allow her to remain (see the statement by

McLoughlin P, dissenting, but not on this point, in *Mbanga v Sikolake* (34) concerning "the modern tendency to omit customary practices in connection with marriage ceremonies, especially in the practice of ukutwala") the woman is not physically taken back to her father and then brought back to her husband (see the quotation above from *Memani*'s case 180).

Thus Bennett (195) draws attention to the fact that the enquiry in *twala* cases nowadays concerns the attitude of the woman's guardian, saying:

> "If he did not object to his ward's relationship (which can be deduced from his acceptance of bridewealth or non-suit for seduction damages), a marriage will be presumed, irrespective of where the matrimonial home happened to be or how the 'spouses' came to be living there."

The principle is not confined to *twala* cases. The same learned author, commenting in general, says:

> "Acceptance of earnest cattle, acceptance or promise of bridewealth, failing to object to the spouses' cohabitation, and demanding bridewealth have all been construed as consent to a customary marriage" (179).

It will be remembered that the first respondent in *Mthembu*'s case claimed that the deceased "had no intention of marrying the applicant" (1997 2 SA 936 (T) 940D–E). It is on this aspect that *Mbanga v Sikolake* is the leading case. Owen M, delivering the majority judgment, said:

> "No express words or formula are observed among natives to indicate the *bridegroom's consent. The consent is invariably indicated by conduct.* Here the action of Plaintiff in paying dowry, 'twalaing' the girl and having her taken to his kraal is clearly capable of no other construction than that of tacit consent" (31).

It should also be noted that the consent of the *parents of the bridegroom* is not necessary: (*Ngcongolo*'s case 105; *Mabena v Letsoalo* 1998 2 SA 1068 (T)).

With respect, I suggest that if counsel and/or the courts had referred to the report of *Mkwangwana*'s case (as distinct from the "digest" in Warner) and to the leading cases (mentioned above) the appellant and the deceased would have been declared to have been married in customary law, and Tembi to have been legitimated when the *lobola* contract was entered into, an instalment paid, and her mother left with the father; and the plaintiff (appellant) would have had the plain, straightforward, challenge to the constitutionality of the customary law of intestate succession that she apparently desired. A possible reason why this was not the outcome is the likelihood of the absence from the bar and court libraries of the relevant reports. (This is referred to in section 4 of this note below.) As it was, the Supreme Court of Appeal dismissed the appeal (par [50]) because in its view Tembi was illegitimate and the court found no compelling reason for "developing" the rule on illegitimate children in terms of section 35(3) of the interim Constitution (pars [31]–[40]).

Problems arising from the decision of more general import than those referred to above are dealt with in the following sections.

3 Is a court bound to accept a proposition of law which counsel made common cause?

Whether or not the parents of a child were married, with the result that a child is legitimate or illegitimate as the case may be, or a child already born is legitimated, is a conclusion of law formed as a result of the application of legal rules about the essentials of a marriage being, or not being, present. As I mentioned in my "Role of courts in developing customary law" (1999 *Obiter* 41 48), litigants come to court

to find out what the court says the law is, not what counsel for one or both of the parties say it is, and are entitled to a correct exposition of it as it in fact is. (Provisions of *law* which are common cause or are conceded by counsel should be distinguished from *facts* which are common cause or conceded.)

There is an old maxim, *curia novit ius*. Recently the Hon Mr Justice Edwin Cameron "A 'single judiciary'? Some comments" 2000 *SALJ* 141 said that "we [judicial officers, both judges and magistrates] must know the law to be applied in the matter before us, or be willing to learn it very quickly".

I suggest that provisions of law which are common cause or are conceded by counsel are not binding on the court. It follows that despite what is said in *Mthembu's* case in the Supreme Court of Appeal (par [18], quoted in section 2 of this note above) that court was at liberty to determine for itself whether or not Tembi had been legitimated by her parents' entry into a customary law marriage after her birth and before the death of the deceased. If, by means of its own research, the court had discovered the leading cases, it could have applied the law found in them (see the cases in section 4 4 of this note below) or it could have referred the matter to counsel for further argument, written or oral (Hahlo and Kahn *The South African legal system and its background* (1968) 321, cited with approval by the Hon Mr Justice PM Nienaber "Regters en juriste" 2000 *TSAR* 190 203 fn 51).

4 Authorities

The nature, and use of, authorities on customary law need to be mentioned. If counsel and the courts refrain from making full use of the authorities the administration of justice in cases in which customary law is applicable, and the development of the system of law, will suffer.

4 1 Binding authorities

It may be recalled (see my *The customary law of immovable property and of succession* (1990) 13–19 (*Customary law*)) that in customary law, as in the case of other systems of law, the binding authorities are legislation, precedent, and custom, the last-mentioned being more prominent than in many other systems of law. Questions relating to the proof of custom and related issues are discussed in my note "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?" 2000 *THRHR* 661. The doctrine of *stare decisis* applies (*ibid* and *Customary law* 16), including the distinction between precedents which are absolutely binding and those which are conditionally so. (On this terminology see Kerr "Stare decisis in magistrates' courts and in Supreme Court" 1990 107 *SALJ* 551; and Oelschig, Midgley and Kerr "Stare decisis in Provincial and Local Divisions" 1985 *SALJ* 370.)

4 2 Persuasive authority

In cases on customary law, textbooks (including Maclean's *Compendium* on which see *Customary law* 13) and other legal literature such as contributions to journals are approached in much the same way as the corresponding sources in South African common law. The weight to be attached to the papers collected by Maclean and to the evidence before the commissions (as to the identity of the more important ones see *Customary law* 200–201) varies with the standing of the original authors in the case of Maclean and of witnesses in the case of the commission reports (*Customary law* 13–14). Works of anthropologists may be, and have been, referred to as well (eg in *Sibasa v Ratsialingwa and Hartman NO* 1947 4 SA 369 (T) 386).

4 3 Reports of cases on customary law

As I have said above in section 2, finding *references* to leading cases on customary law in current literature is easy. In most courts finding *the report* of the case referred to may not be so easy. In 1994 I did a survey of the libraries of all the then divisions of the Supreme Court and published the results in a note on "Judicial notice of foreign law and of customary law" 1994 *SALJ* 577 (see esp 581–585). Unless there have been changes since 1994 only the library of the Eastern Cape Division of the High Court has a complete set; the libraries of the Supreme Court of Appeal and of the Transvaal Provincial Division before which *Mthembu*'s case came have only incomplete sets. Hence I repeat my plea (*ibid*) that the reports of the Native Appeal Court and its successors and the *Report and Proceedings, with Appendices, of the Government Commission on Native Law and Customs, 1883 (Cape)* (G4 of 1883) and the *Report of the South African Native Affairs Commission 1903–905, with Minutes of Evidence and Appendices* be reprinted. The reprint should be in sufficient quantity to allow all courts, including magistrates' courts, to have full sets and to allow such counsel as want them to purchase them.

4 4 Whose responsibility is it to research a question of law?

Innumerable cases in virtually all systems of law show the value of thorough study by counsel and one often finds statements where the court is content to say: "Counsel for the . . . referred the court to . . . and submitted that . . . I agree" or words to that effect. Counsel's duty to the client to exercise care and skill in the preparation and presentation of the case of course involves a duty to research the law on the subject. There is also a duty on counsel to bring to the court's attention the authorities relative to the case counsel is presenting, especially when the other side is not represented (*Ex parte Hay Management Consultants (Pty) Ltd* 2000 3 SA 501 (W) 505I–507F esp 507A–B).

The more interesting question which needs to be raised is whether or not it is the court's duty, using the word "duty" in a general sense, to make its own study of the authorities. With respect, I suggest that there is such a duty and that it is fulfilled more often than the judgments in reported cases disclose, probably because in many cases the law as expounded in the court's reasons is the result of a combination of the research by counsel and by the court. In some cases, however, the court refers to research which was primarily its own (eg *Williams' Estate v Molenschoot and Schep (Pty) Ltd* 1939 CPD 360 363–368 (Davis J); *Priday v Thos Cook & Son (SA) Ltd* 1952 4 SA 761 (C) 763F–764H (Van Winsen J); *Wastie v Security Motors (Pty) Ltd* 1972 2 SA 129 (C) 131H (Van Zijl J); *Seetal v Pravitha NO* 1983 3 SA 827 (D) 834F–860D (Didcott J); *Rand Building Contractors (Pty) Ltd v Homes for South Africa (Pty) Ltd* 1999 4 SA 77 (W) 81C–D 82C–83E (Satchwell J); *Ex parte Hay Management Consultants (Pty) Ltd* 508B–C (Wunsh J)). What is said in section 3 of this note above is also relevant here.

5 The mechanism of change

One of the trends discernible in recent cases is the repeated observation by courts that they are not the best vehicle for the introduction of sweeping changes in customary law. Thus the Supreme Court of Appeal in *Mthembu*'s case said per Mpati AJA:

> "In my opinion, the present is not a case where the recognition and respecting of previously acquired rights would be so grossly unjust and abhorrent, in the light of the present constitutional order, that they cannot be countenanced; nor is this an appropriate case, on the facts, to entertain an invitation to develop the rule. In any event *we*

would be ill-equipped to develop the rule for lack of relevant information. Any development of the rule would be better left to the legislature after a process of full investigation and consultation, such as is currently being undertaken by the Law Commission" (par [40] emphasis added).

(See also the reference in par [47] to the decision in *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 318H. See further Mynhardt J in the court *a quo* 686I–687C where Kentridge J's judgment in *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 881C is referred to.) The fact that cases can be decided differently in different courts is an added reason why the courts should not be regarded as the primary agent of change when much of a whole system of law is in question. If a full bench court in one division holds one view and a full bench court in another holds a different view the rules on *stare decisis* require a single judge court in a divisional court and a magistrate's court within the area of jurisdiction of that division to follow its own full bench decision. One could therefore have differing rules on the order of intestate succession in different divisions until the Supreme Court of Appeal, or, if the case goes to the Constitutional Court, that court, decides the issue.

Projects undertaken by the South African Law Commission such as those referred to by the Supreme Court of Appeal (in par [40] quoted above) normally lead to legislation so the question may be raised whether or not a code embodying the whole of the law should be enacted. As I have suggested many times some changes are advisable. The example of the Recognition of Customary Marriages Act 12 of 1998 comes to mind, even though it is open to a number of criticisms (see *Family Law Service* par G 59–81). Other statutes will no doubt be enacted in future, but, in my opinion, for the reasons given in my article "The reception and codification of systems of law in Southern Africa" 1958 (2) *JAL* 82 89–100, there should not be a code embodying the whole of the law.

6 The choice before the courts

In two articles, "Customary Law, Fundamental rights, and the Constitution" 1994 *SALJ* 720 and "The Bill of Rights in the New Constitution and Customary Law" 1997 *SALJ* 346 and in a case note entitled "Inheritance in Customary Law under the Interim Constitution and under the present Constitution"1998 *SALJ* 262, I drew attention to the problems caused by the process under which, after the 1993 Constitution in its then form had been passed by parliament, further negotiations took place in an endeavour to gather support for it in the then forthcoming election and it was amended before it came into effect. One of the amendments referred to customary law (in the Constitution the titles "customary law" and "indigenous law" are synonymous (see the 1994 article 722) which, *if the negotiations were conducted in good faith* (see esp 725–728 735 of the 1994 article and 265–268 of the 1998 case note), could only mean customary law as it then was, subject as it always has been, to the normal process of change; but not subject to the immediate elimination of, on an estimate, 85 per cent on the grounds that the 85 per cent was in conflict with the Constitution. If "customary law" meant only 15 per cent of it and if this was not disclosed, the negotiations must have been in bad faith and the Constitution was fundamentally flawed before it took effect. The complete silence on the point since 1994 means that it must be concluded that there was no such disclosure. Hence it becomes a simple, straightforward question: were the negotiations conducted in good faith or in bad faith? My answer, given in the 1994 article (728–729 735), is that the negotiations were conducted in good faith. The point needs to be re-iterated because in the second *Mthembu* case in the court *a quo* Mynhardt J said that there

"is no merit" in this submission (1998 2 SA 675 (T) 685C; the court did not mention the 1997 article although it was published before the decision was given). There is a very important difference between negotiations in good faith and those in bad faith and important consequences flow from the answer one gives to the simple straightforward question referred to above. One of the consequences is this: Is there any point in consulting those subject to, or concerned with, customary law before passing new legislative provisions? The Supreme Court of Appeal in its 40th paragraph in *Mthembu*'s case favours "a process of full investigation and consultation, such as is currently being undertaken by the Law Commission" (per Mpati AJA) and I have suggested a procedure comparable to that taken by the 1883 and 1903 commissions (see the 1997 article 353). The Law Commission regularly publishes Issue Papers and/or Discussion Papers which invite comments from all those interested and considers the replies before making its final recommendations. It also publishes the names of those who responded to the Issue or Discussion Paper which, on customary law matters, are few in number. Hence the only difference of importance between my proposal and that of the Supreme Court of Appeal is in the greater number of people whose views would be taken into account if a commission on the 1883 and 1903 model were to be appointed. The approval by the Supreme Court of Appeal of "a process of full investigation and consultation" (quoted above) means that the views of Mynhardt J in the second case in the court *a quo* (685F–H) where he again describes a submission on similar grounds as having "no merit" are not to be followed.

The choice before the courts, the views put forward in the two articles and the case note referred to at the beginning of the previous paragraph, and the need for consultation with those subject to customary law may be illustrated by referring to the South African Law Commission's Discussion Paper 93 Project 90 *Customary law: Succession* dated August 2000. (Discussion Papers do not represent the final views of the Law Commission so I will refer to "the project team" as the presumed authors.) Section 2 of the draft bill annexed to the Discussion Paper reads:

> "(1) Notwithstanding any law to the contrary, a person's estate must upon that person's death devolve in accordance with that person's will or, failing a valid testamentary disposition, either wholly or in part, according to the law of intestate succession prescribed by the Intestate Succession Act, 1987 (Act No 81 of 1987).
>
> (2) The Intestate Succession Act, (Act No 81 of 1987), applies with the changes required by the context to the intestate estate of a person who, before this Act comes into force, entered [sc into] a valid customary marriage which subsisted at the time of that person's death.
>
> (4) This Act does not apply to issues concerning succession to the office of a traditional leader."

Mthembu's case having been decided on the question of illegitimacy, the Supreme Court of Appeal has still to choose how the contradiction in the Constitution mentioned in the articles and case note referred to above can be reconciled, and, if they cannot be reconciled, whether (1) all customary law rules in conflict with the Constitution ceased to be valid (see s 2 of the Constitution) when the Constitution took effect; OR (2) customary law rules continue, subject, as they always were, to change by the normal processes, including legislation and precedent. If (1), estimating, 85 per cent of customary law as it was before the date on which the interim Constitution took effect (the position is the same under the present Constitution) has already become invalid. If (2), customary law continues to exist until changed by the normal processes, including isolated incremental changes. There appear to be two possible justifications for (2); either (a) customary law does not unfairly discriminate

against those subject to it where there are balances in the system as a whole (this is the view in the first *Mthembu* case above); or (b) much of customary law is "continued" (1994 *SALJ* 720 729 735) or "exempt" from the sanction of invalidity until changed by the ordinary processes of law (this is the view in the articles and case note referred to above (1997 *SALJ* 346 354 355)).

A court does not have a choice between following or not following the Constitution. It does have a choice as to which of two conflicting propositions, both of which are within the Constitution, are to be followed. In this choice the value of recognising the good faith of the negotiators should weigh with the court to persuade it to recognise the validity of customary law, that is, to adopt 2(b) above. Support for the position in 2(b) above is to be found in the recommended draft bill in the South African Law Commission's Discussion Paper (above 70). The project team recommends in section 2(4) of the draft bill, quoted above, that the Act does not apply to "issues concerning succession to the office of a traditional leader". "Traditional leader" is defined in section 1 as "any person who in terms of customary law or any other law holds a position in a traditional ruling hierarchy". Hence a considerable number of persons in hereditary offices are involved; but those persons would, on an estimate, amount to fewer than one per cent of persons subject to customary law. I agree with the project team (Discussion Paper 93 42–43) that succession to offices which are held by one person only should not fall within the Intestate Succession Act (see 1994 *SALJ* 720 725–726). What is clear, though, is that if the draft bill were to be passed as it now is, customary law rules on intestate succession would continue to apply to succession to office until changed by a separate Act. The inevitable conclusion is that in the project team's view customary law continues to be valid until changed by the ordinary processes of law which is the point of view in the two articles and case note referred to above. Because those rules provide, except in very few tribes, for the succession of males through males and there is no counter-balancing provision such as the maintenance rules were held to be in the first *Mthembu* case, the rules must be considered to be directly opposed to the gender equality provisions of the Constitution. Whether or not they should continue to exist as they are or should be changed, and, if changed, to what new rule, is a question that needs full discussion with those subject to customary law. On this the Supreme Court of Appeal and I agree but we differ about the extent of consultation that should be undertaken (see paragraph 1 of this section of this note above).

Concerning the extent of consultation, should the rules of succession to office be changed with no more consultation than the issuing of a Discussion Paper which those subject to the office-bearers would need to obtain, presumably by purchase, and then comment on in writing? I suggest a much fuller consultation (*ibid*). However, to undertake any investigation, whether by the Law Commission or by a special commission, would be a waste of money and a pointless exercise if customary law, even if extensively amended, is not to be recognised as a continuing system despite a conflict with one or other of the principles of the Bill of Rights until such time as it is changed by normal methods. The reason is that if any departure from the Bill of Rights would result in invalidity the result of the exercise would be struck down by the courts if there is no exemption from the sanction of invalidity. If that were to be so the only avenue left would be either (1) to devise a new system altogether (this would of course not be customary law – it would be a deduction from the provisions of the Bill of Rights) or (2) to bring all customary law problems within the South African common law which is what the project team's draft bill does for those who are not traditional leaders. If the draft bill is passed by parliament as it is at present the customary law of intestate succession will cease to exist

except in regard to traditional leaders and the proposed provision relating to traditional leaders will be invalid and open to being struck down. Parliament may wonder why it is being asked to take such a step without full consultation with those subject to customary law by means of a special commission. (This is not to question the ability of the members of the project team but by themselves they cannot take the place of all those subject to customary law.)

If the word "will" in section 2(1) of the draft bill quoted above means a South African common law last will and testament, that raises problems about the continuation of customary law rules on dispositions affecting the ownership of property after the deceased's death (as to which see my *Customary law* 109–118). However, since this is a note on *Mthembu v Letsela* the question falls outside its scope.

AJ KERR
Rhodes University

THE CAPE PROVINCIAL DIVISION OF THE HIGH COURT MAKES A DETERMINATION UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (1980)

K v K 1999 4 SA 691 (C)

1 Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (1980) became law in South Africa on 1 October 1997 with the promulgation of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. In *K v K* both parties relied upon aspects of the Hague Convention. The Cape Provincial Division of the High Court had to determine whether a wrongful removal of a child from one state to another before the Convention came into operation in both states would fall within the ambit of the Convention. In argument reference was made to section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996, which requires the court to have regard to the best interests of the child in making any determination affecting a child.

2 The relevant facts

The applicant and respondent in this case were, respectively, the father and mother of Z, the minor boy-child of their marriage. After a particularly acrimonious divorce, granted in June 1996, custody of the minor child was awarded to his mother, the respondent. The applicant was granted liberal visitation rights in respect of the child. These were detailed in the divorce order.

Prior to the granting of the divorce order the respondent suspended the applicant's visitation rights in contempt of a temporary custody order issued in December 1994. This she did on the basis of suspicions that the applicant had sexually molested Z,

an accusation which the applicant vehemently denied. The respondent removed the child from South Carolina to North Carolina in May 1996, ostensibly to give her an opportunity to verify her suspicions, while preventing the South Carolina court from awarding the applicant unsupervised visitation rights. The applicant brought an urgent application to the York County Court regarding his visitation rights. The respondent, who was at that time in North Carolina, failed to appear before the court, and instead furnished the court with documents which, she alleged, substantiated her allegations of abuse. The fact that the respondent failed to appear before the court or to apply for a protection order was regarded in a serious light by the court, which also disapproved of the respondent's immoral lifestyle. The court indicated that, had the respondent truly been concerned for the safety of the child, she should have followed the legal procedures available. It emphasised that the respondent could not unilaterally change a court order. The respondent was therefore found to be in contempt of court. The court order granted to the applicant expressly required the respondent to give the applicant at least 60 days written notice before removing the minor child from York County, South Carolina. The respondent's attorney sent her a letter, addressed to her South Carolina address, explaining the provisions of the order. The legal representative also explained the contents of the contempt order to the respondent's father, with whom both he and the respondent were in communication.

As the respondent had left South Carolina before the order was granted, she did not comply with the terms of the order. Despite this, the fine that was imposed in terms of the order was paid timeously. On 24 June 1996, after the divorce was granted, the applicant again sought relief from the York County Family Court. The court appears to have imputed from the fact that the fine for contempt was paid, that the respondent had knowledge of the contents of the previous order. The court expressed concern for the welfare of the child and ordered that if the child were found he should immediately be taken into protective custody and handed over to the applicant or a member of the applicant's family. The court ordered that the respondent should be apprehended if found anywhere in South Carolina. The York County Family Court awarded the applicant temporary custody of Z pending a further order. The order was subsequently amended to authorise the arrest of the respondent outside South Carolina. A further order of the same court confirmed the temporary custody award in favour of the applicant.

In August 1998 a warrant for the respondent's arrest was issued for her "unlawful flight to avoid prosecution", which warrant was still in force at the date when the matter was brought before the Cape Provincial Division.

The applicant alleged that he had made ongoing attempts to locate the respondent and his son, working together with American law enforcement agencies, and in 1998 approached the United States Department of State for assistance under the Hague Convention.

After her departure from South Carolina, the respondent stayed in North Carolina for a short period, whereafter she travelled to Europe, staying in Belgium for some time before relocating to Cape Town. In August 1998 she appointed a clinical psychologist to assess the child and to make the necessary intervention.

The applicant became aware that the respondent and the child had moved to Cape Town in November 1998, but learned of their physical address and telephone number only in January 1999. Proceedings were immediately initiated.

In December 1998 the applicant applied to the Cape Provincial Division for an urgent *ex parte* order for the return of Z to South Carolina and into his care. A *rule*

nisi was issued calling upon the respondent to appear and show cause why an order in the following terms should not be granted:

> "The respondent is ordered to immediately return the child to South Carolina;
>
> The applicant or his appointee be authorised to remove the child from the Republic and to return him to the state of South Carolina;
>
> The respondent be required to surrender to the Sheriff all passports, identity documents, social security documents, birth certificates and driver's licence for herself and the minor child;
>
> The respondent is required to report on a daily basis to a local police station, together with the child;
>
> The respondent not be permitted to leave the jurisdiction of the Cape Provincial division without leave of the court; and
>
> The respondent is ordered to pay the costs of the application."

The respondent gave notice of her intention to defend the matter. Both parties based their case, in part, upon the provisions of the Hague Convention. Van Heerden AJ requested that legal representatives for each party prepare argument regarding whether or not the removal of the child from South Carolina to North Carolina fell within the purview of the Convention, since the removal took place prior to both states becoming parties to the Convention. Article 35 of the Convention states that it is not retroactive in effect unless so agreed to by the states between themselves. Article 36 allows the states to agree between themselves to derogate from the provisions of the Convention as they appear. Thus certain states have been able to make the principles of the Convention retrospectively applicable to them.

Van Heerden AJ remained convinced that in South Africa the Convention is applicable only from the date of commencement of the legislation and that there is no indication that South Africa and the United States of America made the legislation retroactive between them.

Unquestionably there had been a breach of the applicant's custody rights within the meaning of the Convention. The removal was thus *prima facie* wrongful for purposes of the Convention. The removal, however, took place at the end of June 1996, more than a full year before the Convention came into operation between South Africa and the United States of America. Thus this is clearly a child abduction case to which the Convention is not directly applicable. The court therefore had a duty to exercise its discretion as the upper guardian of all minor children. In such cases the best interests of the child are paramount, a view substantiated both by section 28(2) of the Constitution of the Republic of South Africa and article 3(1) of the United Nations Convention on the Rights of the Child (1989) ratified by South Africa on 16 June 1995.

It was argued for the applicant that in applying the best interests principle the court should have reference to the principles underlying the Convention, which clearly regards abduction as harmful to the child.

Section 39(2) of the Constitution requires the court to have regard to international law and gives the court a discretion to consider foreign law when interpreting the Bill of Rights. This the court did in determining the relationship between the Hague Convention and the best interests or welfare test in non-convention cases, the Convention being not directly applicable. The Convention is not contrary to the welfare principle, but is premised upon the belief that the best interests of the child are best served by his or her being returned to the place of habitual residence for the custody determination to be made there.

Van Heerden AJ held (706 F–G) that it remained for the court to decide whether or not it was in Z's best interests to be returned to South Carolina for the custody determination to be made or if his best interests required that he remain where he was and the present court determine the custody matter. The court found that the Hague Convention principles were applicable only in so far as they indicated what was normally in the best interests of the child (707F–G read with 708C–D).

3 The court's findings

Van Heerden AJ took note of the various orders issued by the York County Family Court and the fact that the respondent had acted in wilful contempt of these orders. He felt, however, that the court could not be unduly influenced by this, especially when cognisance was taken of the fact that the respondent acted *bona fide* in the manner she believed to be in the best interests of the child (708H–J).

The judge then referred to the checklist set out in *McCall v McCall* 1994 3 SA 201 (C) for determining what was in the best interests of the child. The applicant had made a number of serious allegations regarding the respondent's suitability to be granted custody or unsupervised access to the child. These allegations included that he had a drug problem as well as a number of convictions for a variety of crimes, both drug-related and other. The most serious allegation was, of course, the allegation regarding sexual abuse, an allegation supported by the clinical psychologist. The court stressed, however, that the report had been compiled on the basis of sessions conducted with the child and information supplied by the respondent. At no time had the psychologist interviewed the applicant (710E–H). The allegations of sexual abuse were strongly contested by the applicant (711A) and remained uncorroborated (710I–J).

All the allegations of abuse related to incidents that had ostensibly taken place in South Carolina. Both parties had lived most of their lives in the United States of America and both of their families were in the United States, as was most of the evidence pertaining to the allegations regarding the applicant (708A–C). The court therefore found the York County Family Court to be the court best suited to determine the merits of the custody case.

The court found:

> "Applying the best interests of Z as the paramount consideration, I am satisfied that Z's best interests require that his future should be adjudicated upon in the South Carolina Court, rather than 'that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here', if indeed this would be possible at all" (708D).

Van Heerden AJ indicated that in his view the York County Family Court was the *forum conveniens* and that that court would apply the welfare principle as paramount in making its custody determination.

He did, however, feel compelled to require certain undertakings to ensure Z's safety pending the resumption of its role by the South Carolina court (712G). In requiring that the parties make certain undertakings he referred, *inter alia*, to the practice in the United States courts of issuing "safe-harbor orders" to protect the child until a final determination is made (712 E–F). Van Heerden AJ decided that undertakings by both parents were required if a return order were to be made.

The applicant was required to undertake that, pending the determination of the York County Family Court of South Carolina:

(1) he would not attempt to enforce the temporary custody orders issued by the York County Family Court nor seek to remove Z from respondent's day-to-day care save for the access permitted in terms of this order;

(2) he would not institute or support proceedings of whatsoever nature against the respondent or any member of her family for any matter arising out of respondent's removal of Z from the state and later the country;

(3) he would not proceed against respondent on the basis of the existing contempt orders and would take all possible steps to ensure the withdrawal of criminal charges against her in this respect;

(4) the exercise of his access rights would be supervised by a third party at all times and would take place at locations stipulated by the Department of Social Services, South Carolina;

(5) he would provide separate accommodation for respondent and Z in South Carolina. The details of the accommodation were spelt out in the court order;

(6) he would pay maintenance for Z in accordance with the court order and also carry the costs of Z's education;

(7) he would bear the cost of a roadworthy vehicle for the respondent for a period of two months or until the court made its determination, whichever period was the longer;

(8) he would bear all medical costs reasonably incurred by respondent in respect of Z in the USA, including the costs of continued therapy for Z should the Department of Social Services regard such therapy as necessary;

(9) he would pay the prescribed monthly health insurance premiums in respect of Z, as set out in the divorce decree of 1996;

(10) he would co-operate fully with the Department of Social Services of South Carolina and any other professionals who conducted an assessment to determine custody, access and care arrangements in Z's best interests;

(11) he would take all steps necessary to make this order an order of the York County Family Court.

The respondent, in turn, was required to undertake:

(1) that she would not, pending the return date contained in the order, remove the child from Cape Town and would keep the applicant's attorneys advised of her whereabouts;

(2) that she would return with the child, on the return tickets provided, to York County South Carolina and immediately upon arrival there, to hand to the applicant's legal representative all passports, travel documents and birth certificates.

The court also found that justice would be served by making no order for costs (715G).

4 The court order

The court ordered the respondent to return to York County, South Carolina, subject to the filing of affidavits giving the required undertakings and proof that the South African order had been made an order of the York County Family Court and that steps had been taken to ensure that it was enforceable in the United States.

The Sheriff was ordered to release to the applicant's attorneys all travel and other documents being held by him to be handed to the respondent immediately before her departure. These documents were then to be handed by respondent to applicant's

legal representatives immediately upon arrival in the United States. The parties were required to bear their own costs.

5 Conclusion

One of the vexing questions relating to the implementation of the Hague Convention's objectives has been how to achieve these objectives in non-convention cases. *K v K* is such a case. In the judgment under discussion the court clearly set out guidelines as regards the weight to be accorded to Convention principles in the determination of non-Convention cases. The court espoused the view that the Convention was drafted on the basis that it is generally in the best interests of a child who has been abducted to be returned to his or her place of habitual residence immediately before the abduction. In taking this stance the court thus viewed the best interests of children in general as the test to be applied in relation to the Convention. The Convention is concerned with protecting children in general and not any specific individual. This is an important development in the law regarding international parental abduction.

By adopting the view that the application of the Convention principles is generally in the best interests of children, the court in *K v* K effectively reconciled the Convention's requirement for the summary return of abducted children with the requirements of the Constitution of the Republic of South Africa as regards the paramountcy of the best interests principle in cases dealing with children.

CMA NICHOLSON
University of Pretoria

RASSISME AS FAKTOR BY STRAFOPLEGGING

S v Salzwedel 2000 1 SA 786 (HHA)

1 Inleiding

S en drie medebeskuldigdes is in die verhoorhof daaraan skuldig bevind dat hulle in Maart 1994 ene Mcoseleli Christia Benta (die oorledene) vermoor het asook dat hulle ten tyde van dieselfde gebeurtenis die motor van ene Tommy Orie onregmatig en kwaadwillig beskadig het. Regter Jones het die beskuldigde op die moordklagte tot tien jaar gevangenisstraf elk gevonnis, maar die hele vonnis is vir vyf jaar op sekere voorwaardes opgeskort, wat ingesluit het dat hulle hulle aan drie jaar korrektiewe toesig onderwerp. Die korrektiewe toesig is self onderworpe gestel aan voorwaardes: Eerstens is hulle vir drie jaar in huisarres geplaas, behalwe vir doeleindes van gesondheid en indiensneming asook vir doeleindes van sosiale, kulturele, ontspannings- en opvoedingsaktiwiteite soos deur die Kommissaris van Korrektiewe Dienste bepaal. Tweedens is hulle opdrag gegee om by sekere gespesifiseerde instellings gemeenskapsdiens vir 'n tydperk van 16 uur per maand gedurende die volle tydperk van drie jaar te verrig. Die beskuldigdes is daarbenewens, in ooreenstemming

met artikel 297(1)(b) gelees met artikel (1)(a)(i)(aa) van die Strafproseswet 51 van 1977, beveel om elkeen 'n bedrag van R3 000, in maandelikse paaiemente van R50, in 'n voogdyfonds tot voordeel van die oorledene se kinders in te betaal. Die beskuldigdes is op die klagte van saakbeskadiging elk gevonnis tot 12 maande gevangenisstraf opgeskort vir vyf jaar op voorwaarde dat hulle nie gedurende daardie tydperk aan saakbeskadiging skuldig bevind word en tot gevangenisstraf sonder die keuse van 'n boete gevonnis word nie. Die beskuldigdes is ook beveel om elkeen R150 aan Tommy Orie te betaal. Die feite wat hiertoe aanleiding gegee het, was soos volg: Oorledene en drie ander persone, almal swart mans, was onderweg in 'n Cortina motor, wat in die regmatige besit van Tommy Orie was, in die hoofsaaklik wit woongebied Cambridge in Oos-Londen toe die battery daarvan onklaar geraak en die ligte afgegaan het. Orie, die bestuurder, het van die hoofpad afgetrek. Een van die insittendes het besluit om huis toe te loop maar die ander, omdat hulle vandalisme gevrees het, het besluit om agter te bly. Die beskuldigdes, asook ander wit jeugdiges, was lede van die AWB en het bewapen, asook gemasker, sekere wit woonbuurte gepatrolleer en swart persone sonder meer aangeval. Hoewel hulle opleiding in die hantering van vuurwapens en knuppels ondergaan het, het hulle nie opdrag van die AWB ontvang om swartes aan te rand nie. Hulle het toe hulle op die Cortina afgekom het en uit die nommerplaat afgelei het dat dit heel waarskynlik aan 'n swart persoon behoort het, begin om die motor te beskadig. Toe hulle later terugkeer, het hulle opgemerk dat die Cortina nog daar staan en vir die eerste keer opgemerk dat daar swart insittendes was. Laasgenoemde het hulle uit die voete probeer maak. Twee van hulle het weggekom maar die oorledene, wat klein van liggaamsbou was, kon nie. Hy was 'n baie tingerige persoon met 'n boggelrug, slegs 1,5 meter lank en het swak ontwikkelde longe gehad. Hy het gestruikel, geval en terwyl hy weerloos op die grond gelê het, is hy op 'n brutale wyse doodgeslaan. Die verhoorhof het beslis dat al die beskuldigdes met 'n gemeenskaplike doel opgetree het en hulle op grond van *dolus eventualis* aan moord skuldig bevind. Die Hoogste Hof van Appèl (vervolgens: appèlhof) is uiteindelik gekonfronteer met die vraag of die straf wat opgelê is, van pas is. Die beslissing van die appèlhof in dié verband word vervolgens onder die loep geneem.

2 Wanneer kan die Appèlhof die diskresie van die verhoorhof by strafoplegging ter syde stel?

Die beskuldigdes het aangevoer dat nie met die diskresie-uitoefening van die verhoorhof ingemeng mag word bloot omdat die appèlhof die diskresie anders sou uitgeoefen het nie. Hoofregter Mahomed, wat die eenparige uitspraak van 'n paneel van vyf regters lewer, stem hiermee saam, maar wys daarop dat dit nie 'n onaantasbare reël daarstel nie (790). Hy wys in dié verband op die beslissing van die Appèlhof in *S v Anderson* 1964 3 SA 494 (A) 495 waar die volgende kwalifikasie gestel is:

> "The Court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence."

Volgens hoofregter Mahomed kan 'n hof van appèl met 'n vonnis inmeng indien dit verontrustend onvanpas buite verhouding tot die erns van die misdaad is, of onderlê is deur wanopvattings wat daarop dui dat die verhoorhof nie sy diskresie redelik uitgeoefen het nie (790 met beroep op *S v Pillay* 1977 4 SA 531 (A) 535; *S v Mothibe* 1977 3 SA 823 (A) 830; en *S v Narker* 1975 1 SA 583 (A) 588). In *S v*

Zinn 1969 2 SA 537 (A) 540 het die appèlhof beslis dat 'n oorbeklemtoning van die misdaadeffek en 'n onderwaardering van die persoon van die beskuldigde 'n wanopvatting daarstel wat opheffing van die opgelegde straf tot gevolg kan hê. Teen dié agtergrond merk hoofregter Mahomed op dat "[t]his must be equally true when there is an over-emphasis of the personal circumstances of the accused and an underestimation of the gravity of the offence" (790). In die onderhawige saak blyk volgens die regter 'n opvallende dispariteit tussen die straf wat die verhoorhof opgelê het en die straf wat die appèlhof, sittende as verhoorhof, sou opgelê het:

> "My main difficulty with the approach of the trial Judge is that he over-emphasised the personal circumstances of the respondents without balancing these considerations properly against the very serious nature of the crime committed, the many very aggravating circumstances which accompanied its commission, its actual and potentially serious consequences for others, and the interests and legitimate expectations of the South African community at a very crucial time in its transition from a manifestly and sadly racist past to a constitutional democracy premised on a committment to a constitutionally protected and expressly articulated culture of human rights" (790–791).

3 Rasgemotiveerde misdade en bepaling van die strafmaat

Volgens hoofregter Mahomed is die verhoorhof grootliks beïnvloed deur 'n verslag van 'n forensiese kriminoloog, doktor Irma Labuschagne. Sy het in die lig van die persoonlike omstandighede van die beskuldigdes aanbeveel dat hulle uit die gevangenis gehou behoort te word. Met verwysing na *S v Lister* 1993 2 SACR 228 (A) 232 wys hoofregter Mahomed daarop dat "[t]o focus on the well-being of the accused at the expense of the other aims of sentencing, such as the interests of the community, is to distort the process and to produce, in all likelihood, a warped sentence". Doktor Labuschagne het aangevoer dat die beskuldigdes deur 'n bykans onweerstaanbare kultuur van rassisme in hulle ouerhuise beïnvloed is. Hierdie siening bring 'n belangrike beginsel by strafoplegging na vore "in a country such as South Africa with its tragic history of racial intolerance and fear, which . . . the . . . Constitution repudiate[s] with eloquence and vigour" (791. Sien a 7–10, 15 en 19 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996). Met verwysing na voorafgaande regspraak (*S v Van Wyk* 1992 1 SACR 147 (NmS); *S v Acheson* 1991 2 SA 805 (NmHC) 813; *Ngcoob v Salimba CC* 1999 2 SA 1057 (HHA) 1068) merk hoofregter Mahomed op dat

> "[t]he commission of serious offences perpetrated under the influence of racism subverts the fundamental premises of an ethos of human rights which must now 'permeate the process of judicial interpretation and judicial discretion' including the sentencing policy in the punishment of criminal offences" (792).

Hierdie siensw yse is nie nuut nie. Artikel 211(1) van die Duitse Strafwetboek stel moord met lewenslange gevangenisstraf strafbaar. In artikel 211(2) word moord omskryf as die doding van 'n ander uit moordlus, ter geslagsbevrediging, uit hebsug of 'n ander lae beweegrede, op 'n boosaardige of grusame wyse of met algemeen gevaarlike middele of om 'n ander misdaad te verdoesel (sien tav die sistematisering van dodingsmisdade in Duitsland Labuschagne "Dodingsmisdade, sosio-morele stigmatisering en die menseregtelike grense van misdaadsistematisering" 1995 *Obiter* 34 38–42). Die Duitse hooggeregshof (*Bundesgerichtshof*; *BGH*) het beslis dat die doding van 'n ander om suiwer rassistiese oorwegings 'n lae beweegrede daarstel wat (opsetlike) doodslag, dit wil sê skending van artikel 212 van hulle Strafwetboek, tot die ernstiger misdaad "moord" omskep (BGH, Urt v 7/9/1993, NStZ 1994, 124; Labuschagne "Rassisme, die konstitusionele gelykheidsbeginsel en straftoemeting" 1994 *Obiter* 147).

In sy uitspraak in die onderhawige saak wys hoofregter Mahomed daarop dat sowel die verhoorhof as doktor Labuschagne te veel beïnvloed is deur die relatiewe jeugdigheid van die beskuldigdes asook die rassistiese omgewing waaraan hulle blootgestel is. Die beskuldigdes het die gebied gepatrolleer om misdaadpleging te voorkom, maar het sonder meer van die standpunt uitgegaan dat dié misdade deur swart persone gepleeg word. Volgens hulle wete het nóg die oorledenes nóg sy maats enigiets verkeerds gedoen. Hulle was bloot die slagoffers van 'n onklaar motor:

> "The deceased met his death simply because he was black. The attack by the respondents manifested a disgraceful exhibition of an extremely brutal kind of racism. Not the slightest degree of mercy was shown. A pathetically frail hunchback was chased and bludgeoned to death by three powerful blows with a baton. It constituted a menacing combination of pitiless cruelty and force. Even as he lay prostrate and helpless he was terrorised and kicked in a shameless exhibition of brutality and sadism" (793).

Hoewel dié spesifieke moord nie beplan is nie, is die eskapades om swart mense te terroriseer, te intimideer en aan te rand wel beplan. Die beskuldigdes het hulle vir dié doel bewapen met 'n vuurwapen, 'n panga, 'n swaar metaalpyp, 'n swaar knuppel, 'n mes en 'n bylsteel. Hulle moes ook daarvan bewus gewees het dat hulle hulle aan swaar strawwe onderworpe sou stel indien hulle gevang sou word. Daarom het hulle hulle probeer vermom met balaklawamusse en het vals nommerplate aangebring aan die motor waarmee hulle gery het. Die dood van die oorledene was gevolglik nie toevallig nie, maar die gevolg van 'n roekelose en gevaarlike plan (793). Die beskuldigdes het eers teen die einde van die verhoor berou getoon, toe hulle bewus geword het van die ernstige rigting waarin die saak beweeg het. Trouens, toe hulle in 'n koerant oor die insident gelees het, was hulle reaksie bloot om te lag oor onakkuraathede daarin opgeneem en het hulle vals alibis uitgewerk (794).

Hoofregter Mahomed spreek vervolgens die opmerking van doktor Labuschagne aan dat direkte gevangenisstraf geen ander doel as vergelding sou dien nie. Hy wys eerstens daarop dat nie net die belange van die beskuldigdes nie maar ook dié van die gemeenskap by strafoplegging verdiskonteer moet word en vervolg:

> "It cannot properly be said that a substantial term of imprisonment, in the circumstances of this case, 'would serve no purpose other than retribution'. It would also give expression to the legitimate feelings of outrage which must have been experienced by reasonable men and women in the community when the circumstances of the offence were disclosed and appreciated. A lengthy term of imprisonment sanctioned by the Court would also serve another important purpose. It would be a strong message to the country that the courts will not tolerate the commission of serious crimes in this country perpetrated in consequence of racist and intolerant values inconsistent with the ethos to which our Constitution commits our nation and that courts will deal severely with offenders guilty of such conduct. As the highest Court of the country in such matters, the Supreme Court of Appeal must project this message clearly and vigorously" (794).

In sy klassieke werk *The nature of prejudice* (1954) 230 wys Allport daarop dat rassevooroordeel dikwels in vyf fases ontwikkel, naamlik antilokusie, vermyding, diskriminasie, fisieke aanval en uitwissing. Wat duidelik behoort te blyk, is dat rassisme uiteindelik geweldstoevoeging tot gevolg kan hê. Wat hier gesê word, geld vir alle vorme van pluriegerigte diskriminasie (sien verder hieroor, ook wat terminologie betref, Labuschagne "Menseregtelike en strafregtelike bekamping van groepsidentiteitmatige krenking en geweld" 1996 *De Jure* 23 35ev; "Misdaadkonkurrensie van grafskending en pluriekrenking" 1998 *THRHR* 684). Dat rasgemotiveerde misdade in 'n ernstige lig beskou moet word, staan bo twyfel. Die straf

wat dié appèlhof oplê, is die volgende: (1) Die beskuldigdes word gevonnis tot 12 jaar gevangenisstraf elk; (2) twee jaar van dié gevangenisstraf word opgeskort op voorwaarde dat elke beskuldigde R3 000 in maandelikse paaiemente van R50 tot voordeel van die minderjarige kinders van die oorledene in 'n fonds inbetaal; en (3) elke beskuldigde moet 'n bedrag van R150 aan Tommy Orie betaal.

'n Vraag wat by die deurlees van dié beslissing by 'n mens opkom, is: Is dit reg om kinders op 'n sekere wyse deur die ouers en ander opvoeders en selfs die staat te indoktrineer en hulle dan vir gevolge wat daaruit voortvloei te straf? (Sien Labuschagne "Strafregtelike aanspreeklikheid vir 'n handeling verrig op 'n menseregstrydige bevel: Kan ons iets van die Duitse Bundesgerichtshof leer?" 1994 *SALJ* 428.) Aangesien misdade dikwels teen die agtergrond van 'n sekere (geïndoktrineerde) waardesisteem gepleeg word, sou hierdie vraag nie beantwoord kon word sonder om die problematiek rondom die bestaansreg van die strafreg aan te spreek nie (sien hieroor Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 1992 *TRW* 27 en "Evolusielyne in die regsantropologie" 1996 *SA Tydskrif vir Etnologie* 40). Daarom word dit daar gelaat. Nieteenstaande die feit dat vergelding 'n primitiewe konsep is, moet aanvaar word dat dit hedendaags nog wêreldwyd 'n substansiële rol by straftoemeting speel. Die verhoorhof het heel waarskynlik te min gewig daaraan toegeken, maar die appèlhof het myns insiens weer te veel gewig daaraan toegeken. Ongelukkig bevat die hofverslag te min relevante inligting, soos byvoorbeeld: hoe oud was die beskuldigdes ten tyde van misdaadpleging en het hulle drank of verdowingsmiddels gebruik?

4 Konklusie

Rassisme, en misdade wat daaruit voortvloei, is 'n euwel wat uitgeroei moet word. Dat dit ook by straftoemeting 'n rol behoort te speel, is duidelik. Dit mag egter nooit rasionele grense oorsteek nie. Rassisme kan ook bestaan ten aansien van lede van jou eie ras (sien Labuschagne "Ras en rassisme: strafregtelike manifestasies" 1982 *THRHR* 41 43; Labuschagne en Kruger "Egoseksuele en egorateistering in arbeidsverband: 'n Rigtinggewende beslissing van die hoogste Amerikaanse hof" 2000 *De Jure* 110). Die vraagstuk van rassisme, spesifiek in regsverband, is meer gekompliseerd as wat dikwels voorgehou word, veral aangesien dit nie deurgaans op die rasionele vlak manifesteer nie (sien bv Lawrence "The id, the ego, and equal protection: reckoning with unconscious racism" 1987 *Stanford LR* 317; Labuschagne "Die doodstraf: 'n penologiese evaluasie" 1989 *SAS* 164 178). Vir onbevooroordeelde en rasionele regspraak sou dit groot probleme in 'n plurale en verdeelde gemeenskap kon skep. Gesien die (huidige) tradisie en status van ons regsprekende gesag behoort die Suid-Afrikaanse regspleging hierdie probleme te kan hanteer. Dat dit egter moeilik sal gaan, is seker.

JMT LABUSCHAGNE
Universiteit van Pretoria

DON'T PROCRASTINATE: ADJUDICATE, LEGISLATE OR DEBATE

S v Manamela 2000 1 SACR 414 (CC)

1 Facts and judgment

The Constitution of 1996 changed the position regarding the role of Parliament, as the democratically elected organ of state whose function is to create legislation, *vis-à-vis* the role of the courts. In the past, courts did not "read in" words into

legislation. This discussion focuses on the judgment of the Constitutional Court in *S v Manamela* and its consequences for South African jurisprudence.

This case dealt with section 37(1) of the General Law Amendment Act 62 of 1955 which creates the statutory offence of being found in possession of stolen goods :

> "Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods . . . without having reasonable cause, proof of which shall be on such first-mentioned person, for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he receives them or that such person has been duly authorised by the owner thereof to deal with or dispose of them, shall be guilty of an offence and liable on conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory."

The facts of the case were the following: The two accused were arrested while carrying boxes of hair products and a sports bag in the streets of Johannesburg, which property had been stolen from a parked vehicle. The evidence adduced at the trial was not such that it established, beyond a reasonable doubt, that the accuseds' belief in the status of S (the person from whom they had obtained the goods) as the owner was unreasonable; on the other hand, the accused had not established on a balance of probability that the belief was reasonable. In the trial court the accused were acquitted of theft, but found guilty of contravening section 37(1).

On appeal the high court set aside the convictions and sentences on two grounds: first of all, on a procedural exception and a finding that the appellants had not enjoyed a "just and fair trial". The appellants had not been represented in the regional court and had not been duly warned by the magistrate of the operation of section 37(1). Secondly, it was held that the reverse *onus* provision was inconsistent with the Constitution, and as it was decisive in the finding by the magistrate, the conviction could not be sustained. The court held that although it is empowered to make an order concerning the constitutional validity of an Act of Parliament, *it does not have the power to rewrite legislation.* The court declared the reverse *onus* provision in section 37 to be inconsistent with the Constitution, and accordingly invalid. In terms of section 8(1)(a) of the Constitutional Court Complementary Act 13 of 1995, read with rule 15(1) of the rules of the Constitutional Court, the court's order was referred direct to the Constitutional Court for confirmation.

The Constitutional Court unanimously found that section 37(1) infringed both the constitutional right to silence and the presumption of innocence, and also unanimously found that the limitation on the right to silence was justified. The court was divided over the question whether the limitation on the presumption of innocence could also be justified. The majority of justices, however, concurred with the judgment written jointly by justices Madala, Sachs and Yacoob, who held that the provision was too sweeping and extended its net to a wide range of people, many of whom are poor, unskilled and illiterate.

In a series of cases decided under the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993), the Constitutional Court had held that reverse onus provisions were inconsistent with that Constitution, *that they could not ordinarily be read down* to be evidential presumptions, and that they had accordingly to be declared invalid and of no force and effect (see *S v Zuma* 1995 2 SA 642 (CC); *S v Bhulwana*; *S v Gwadiso* 1996 1 SA 388 (CC), 1995 BCLR 1579 (CC); *S v Mbatha* 1996 2 SA 464 (CC); *S v Julies* 1996 4 SA 313 (CC); 1996 BCLR 899 (CC); *Scagell v Attorney-General, Western Cape* 1997 2 SA 368 (CC), 1996 BCLR 1446 (CC); *S v Ntsele* 1997 2 SACR 740 (CC), 1997 BCLR 1543 (CC); *S v Mello* 1998 3 SA 712 (CC), 1998 BCLR 908 (CC).

Contrary to the above, it was held in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 BCLR 39 (CC) that *courts do have the power to read words into a statute* to remedy the unconstitutionality of a provision under the 1996 Constitution. For the first time in South African legal history, the court exercised this power in *S v Manamela*. The court found that the striking down of the reverse onus in section 37, without more, would leave a vacuum in the present legislative structure. The majority declared the phrase "proof of which shall be on such first-mentioned person" to be inconsistent with the Constitution and thus invalid and introduced the following requirement:

> "2. Section 37(1) should be read so as to have as a last sentence: 'In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause.'"

2 Discussion

The courts in South Africa have constantly to evaluate their role in our new constitutional democracy. (See *Du Plessis v De Klerk* 1996 BCLR 658 (CC) per Sachs J par 178 and *Mthembu v Letsela* 1998 2 SA 675 (T).) Previously, courts could only modify the meaning of a text if it did not give effect to the aim and purpose of legislation. In *Manamela* (par 54) the court for the first time took the authority from the 1996 Constitution, in particular section 172(1), to change the wording of legislation. In this case, the court "dealt" with the difficulty of the legislation by reading in certain words. The court acknowledged that

> "Parliament could remedy the situation, but that takes time, and in the interim the gap would remain. To read in the words necessary to establish an evidential presumption is less invasive of the legislative purpose of section 37 than simply striking down the presumption, and goes as far as is permissible in the context of section 37 to account for their possession" (par 58).

This approach is different from that followed in previous cases such as *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC), where the court was not willing to change the wording of an Act and referred the matter to Parliament to remedy the defect. The court failed to open up dialogue with Parliament and possibly risked failing to perform its main function in a democracy, which is the protection of citizens' rights. In *Manamela*, the court recognised this responsibility and stated that "continuing uncertainty . . . may well prejudice the general administration of justice as well as the interests of the accused persons affected" (par 12).

In *Manamela*, the court noted the principles applicable to "reading in" as a remedy for unconstitutionality, as set out in the *Gay and Lesbian Equality* judgment where Ackermann J held that "the court's obligation to provide appropriate relief must be read together with section 172(1)(b) which requires the Court to make an order which is *just and equitable*". He went on to hold that

> "depending on the circumstances, reading in could be an appropriate form of relief and that 'the real question is whether, in the circumstances of the present matter, reading in would be just and equitable and an appropriate remedy'. . . [T]he court [also] need[s] to ensure that the provision which results from severance or reading words into a statue is *consistent with the Constitution and its fundamental values*, and that the result achieved would *interfere with the laws adopted by the legislature as little as possible* . . . It should also be borne in mind that whether the remedy a court grants is one striking down, wholly or in part; or reading into or extending the text, *its choice is not final*. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits" (pars 55–56).

The court added that

> "reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision in conformity with the Constitution, and doing so *carefully*, *sensitively* and in a manner that interferes with the legislative scheme as little as possible and only to the extent that it is *essential*. There is no single formula" (par 57).

The ambit and scope of the power of judicial review is the subject of considerable controversy and to an extent this debate turns upon competing concepts of democracy. For some the Constitution was intended to protect certain freedoms against majoritarian intervention, while others view the Constitution as protecting the freedom of individuals only when the majority so wills (Van *Wyk et al Rights and constitutionalism – The new South African legal order* (1994) 5 6). Thus democracy is often seen as either the courts deferring to the legislature or the courts usurping the function of the legislature. We suggest that this choice is not the only understanding of the interaction between the courts and the legislature available to us. (See the discussion by Sachs J in *Du Plessis v De Klerk* 1996 BCLR 658 (CC) par 190.) Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the courts and the competent legislative body as dialogue (Hogg and Bushell "The Charter dialogue between courts and legislatures" 1997 *Osgoode Hall LJ* 79).

The concept of the dialogue between the courts and Parliament rests on the notion that as a constitutional democracy South Africa does not simply operate in accordance with the will of the majority represented by Parliament. If this were the position, we would simply be resorting to parliamentary democracy once again. We suggest that true democracy is constituted by access to both political entitlement (representation in Parliament) and to legal entitlement (via the courts). Much of what is valuable to a vibrant democracy is the dialogue between the courts and Parliament in the open democratic community. ("Democracy understood by the narrative communitarian is not narrowly defined in terms of periodic elections or any other restricted trope of political liberalism but is enshrined in the reality of our shared public lives as conversationalists in a political community." See Ward "Literature and the legal imagination" 1998 *N Ireland LQ* 167 176.) That is not to say that the courts must have the last word. As Hogg points out, true dialogue between the courts and the judiciary can be realised only if a judicial decision is open to change by the ordinary legislative process (Hogg and Bushell 80).

Such a dialogue has many potential advantages. Among the most important of these is that the voices of the marginalised may be heard. An examination of the different versions of law may also expose varying jural postulates that underlie the law. Furthermore, the dialogue will provide a source of different views and wisdoms on which the Constitutional Court or Parliament can draw when considering any such matter. (See Govender "Horizontality revisited in the light of *Du Plessis v De Klerk* and clause 8 of the Republic of South Africa Constitution Bill 1996" 1996 *HRCLJ* 20 23.)

In *S v Mhlungu* 1995 BCLR 793 (CC) par 129 the court stated that the balancing of

> "competing provisions will always take the form of a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, parliament, and, indirectly, with the public at large".

S v Manamela is therefore of the utmost importance to South African jurisprudence. In this groundbreaking judgment the court exercised the powers granted by the 1996 Constitution, as confirmed in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*. The first step was taken towards open dialogue between the court and Parliament, and thus towards the true meaning of a "democracy".

Manamela has taken the next step forward by indicating what the attitude of the courts should be when reviewing legislation, how the courts see themselves in the new South African constitutional democracy, and how the courts view their function in relation to Parliament in general. The court was willing to enter the debate, not only by adjudicating, but also by reading into legislation. One thing the court was not prepared to do, was to procrastinate. It is hoped that in the future the courts will follow the lead taken in *Manamela*.

DAVID TAYLOR
HERMI WILDENBOER
University of South Africa

Die prys vir die beste Afrikaanse bydrae is toegeken aan professor JMT Labuschagne vir sy artikel "Die spanningsveld tussen regsekerheid en geregtigheidsekerheid: 'n Regsantropologiese evaluasie van die evolusie van die stare decisis-reël".

BRIEWE

As a law librarian, I was most interested to read Mervyn Dendy's editorial comment entitled "How to find the law?" in the 2000 *THRHR* recently (534). I was astounded at the glaring absence of mention of the role the law librarian plays in finding law. Librarians share the frustrations that he outlines; indeed, it is because of this situation that librarians are a unique and necessary tool in research. I agree with Dendy when he writes, "practitioners cannot possibly hope to read and absorb this vast body of material". One of our *raisons d'être* is to provide practitioners with selected material necessary for their work. Law librarians are expected to acquire, scan and research material for that which is pertinent to their principals thus relinquishing them from time-consuming work. It should be considered whether it is possibly irresponsible to expect clients to pay for the costs of a lawyer to do work that could/should otherwise be done by a professional librarian.

Like you, we struggle with inaccurate indexing or omissions in legal texts (both electronic and hard copy). In the past, members of the Organisation of South African Law Libraries (OSALL) have lobbied the publishers concerned on inaccuracies and errors found in their texts. We are more than happy to take on this task on behalf of our principals and to collaborate with the legal fraternity to ensure that the quality of legal publications is improved.

I noticed that Dendy mentioned electronic information *en passant*. Without access to electronic resources, one is severely restricted both in the management of one's time and the array of necessary information. Electronic access to information is often cheaper and more readily available, and, in some cases, material is only available in this format. Many electronic monitoring services exist which assist in keeping one up to date on a regular basis. There is, however, the danger of information overload. Librarians are equipped to evaluate these services and how they work. We are the key to the sifting and dissemination of information, and are well placed to assist in the pursuit of accuracy in legal publishing.

LUCY GRAHAM
(alias the invisible law librarian)
OSALL

REDAKSIONELE KOMMENTAAR

Die Grondwet van die Republiek van Suid-Afrika, 1996 word allerweë voorgehou as 'n toonbeeld van 'n grondwet vir 'n nuwe eeu – 'n grondwet waarin nie net besorgdheid oor die weerloses en die haweloses in die staat uitgespreek word nie – maar waardeur ook daadwerklike erkenning aan die regte van diesulkes wat hulleself op die marge van die samelewing bevind, verleen word via 'n erkenning van sosio-ekonomiese regte. Maar die erkenning van sodanige regte is één storie; 'n geheel ander storie is die realisering en implementering daarvan.

Blaai 'n mens byvoorbeeld deur die hofverslae van die afgelope paar jaar (sinds 1994) is dit opvallend dat hofgedinge rondom hierdie regte skaars is en dít ongeag die uitdruklike erkenning van sosio-ekonomiese regte in die Handves van Regte. En dit nieteenstaande die feit dat vir die oorgrote meerderheid van Suid-Afrikaners die sosio-ekonomiese regte van die uiterste belang is. Hierdie regte sluit onder meer in: die reg op geskikte (lees "basiese") behuising/huisvesting/skuiling (a 26), gesondheidsorg, genoegsame voedsel en water, maatskaplike sekerheid en bystand (a 27) en selfs 'n skoon omgewing (a 24). Kortom, dit is die ware bestaansregte wat onontbeerlik is vir oorlewing.

Om hierdie rede staan die beslissing van die Konstitusionele Hof in *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (KH) uit as een van die bakens van hoop vir die gemarginaliseerdes van die Suid-Afrikaanse samelewing. *Grootboom* verteenwoordig verder die verwerkliking van een van die kardinale eise wat die Grondwet aan die regbank stel: om juis as die beskermer van die Grondwet 'n meer aktivistiese rol te speel as wat ooit toelaatbaar was in die ou bedeling gekenmerk deur die oppermagtigheid van die parlement. Dié eis word wel deeglik onderstreep deur die opdrag aan die regbank om die waardes wat 'n oop en demokratiese samelewing gegrond op menslike waardigheid, gelykheid en vryheid ten grondslag lê, te bevorder (a 39(1)). Sosio-ekonomiese regte – juis omdat hulle so "basies" gerig is op menslike behoeftes – is die regte wat by uitnemendheid spreek tot die verantwoordelikheidsin (en gewete) van die regbank.

In *Grootboom* is die Konstitusionele Hof gekonfronteer met die harde werklikheid vir duisende Suid-Afrikaners, uiterste armoede wat onder meer manifesteer in haglike woontoestande. (Om van "haglike woontoestande" in 'n plakkerskamp te praat is in elk geval heel misplaas – daar is gewoonlik nie eens sprake van 'n "woning" nie.) Die hof het by monde van Regter Yacoob Irene Grootboom en haar gemeenskap van haweloses se verknorsing pittig saamgevat:

> "The group of people with whom we are concerned in these proceedings lived in appalling conditions, decided to move out and illegally occupied someone else's land. They were evicted and left homeless. The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing. They are the people whose constitutional rights have to be determined in this case" (1175I/J–1176A, [par 3]).

In 'n eenparige uitspraak het die hof die groep gelyk gegee dat hulle inderdaad geregtig is op basiese huisvesting. Die hof beslis dus dat die staat moes optree om die verpligting wat deur artikel 26 opgelê is, na te kom. Maar dit is juis in die opdrag tot optrede aan die staat waardeur die problematiek rondom sosio-ekonomiese regte blootgelê word. Die realisering van sosio-ekonomiese regte,

waarvan die reg op toegang tot geskikte behuising een is, verg naamlik aktiewe optrede deur die staat. Daar word met ander woorde 'n positiewe verpligting op die staat geplaas om op te tree. Dit is hierdie verpligting tot optrede wat vir die bekladders van sosio-ekonomiese regte 'n steen des aanstoots is. Die beswaar word dan geopper dat 'n onverkose "elite" aan 'n demokraties verkose regering voorskryf hoe sy beleid daar moet uitsien, hoe die staatsbestel moet funksioneer en hoe (skaars) publieke hulpbronne aangewend moet word. Inderdaad, so word argumenteer, verteenwoordig hierdie optrede inbreuk op die skeiding van magteleerstuk. Wat egter geriefshalwe vergeet word, is dat die Suid-Afrikaanse samelewing steeds deur ongelykhede gekenmerk word en dat wat basiese behoeftes betref staatsingryping noodsaaklik is. Wat ook vergeet word, is dat staatsingryping uitdruklik gekwalifiseer word deurdat die staat slegs verplig word om "redelike wetgewende en ander maatreëls te tref om binne sy beskikbare middele hierdie reg[te] in toenemende mate te verwesenlik" (a 26(2)). En dit is in elk geval ook die weg wat deur die Konstitusionele Hof ingeslaan is in *Grootboom*. Daar was geen sprake daarvan dat die hof ewe skielik sy eie behuisingsbeleid aan die staat opgelê het nie. Die kern van die uitspraak was dat in enige behuisingsbeleid geïmplementeer deur die staat die behoeftes van diegene wat hoegenaamd geen skuiling het nie, óók in berekening gebring moet word.

'n Kwarteeu gelede, in 1976, skryf Mahbub ul Haq (ul Haq (1934–1998) sal onthou word as die ontwerper van die *Human Development Index* (*HDI*), die maatstaf gebaseer op indikators van lewensverwagting, opvoeding en *per capita*-inkomste waardeur die stand van menslike ontwikkeling in 'n bepaalde staat bepaal word) dat die onvergeeflikste sonde wat enige ontwikkelingsbeplanner kan begaan is om begogel te word deur hoë groeisyfers van die bruto nasionale produk en om dan die ware doelstelling van ontwikkeling te vergeet. En, vervolg hy, dikwels behels ekonomiese groei min sosiale geregtigheid en is die teendeel eintlik waar – groei word begelei deur stygende werkloosheid, verslegtende maatskaplike dienste en toenemende absolute en relatiewe armoede (*The poverty curtain: choices for the third world* 25). Die beslissing in *Grootboom* besweer hierdie sonde wat ul Haq aan beplanners toedig. Méér nog, met *Grootboom* word die staat daaraan herinner watter soort burgerlike samelewing deur die Grondwet in die vooruitsig gestel word – 'n samelewing gebed in menslike waardigheid. Maar *Grootboom* dien ook as 'n tydige waarskuwing vir almal – in die verydeling van verwagtings lê die potensiaal vir die kelder van die Grondwet en die demokrasie waarvoor só baie só intens gestry het. Die President van die Konstitusionele Hof, regter Arthur Chaskalson, verwoord die gevaarligte soos volg en waarsku "the people" van Suid-Afrika:

> "The constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another. We are capable of realising this vision but in danger of not doing so . . . Millions of people are still without houses, education and jobs and there can be little dignity in living under such conditions . . . Dignity, equality and freedom will be achieved only when the socio-economic conditions are transformed to make this possible . . . What is lacking is the energy, the commitment and the sense of community that were harnessed in the struggle for freedom." (Bram Fischergedenklesing aangebied by die Johannesburgse stadskouburg, 2000-5-18: sien *The Sunday Independent* 2000-5-21 1–2 en *Business Day* 2000-5-23 14.)

MARGARET BEUKES

Are the Canadian Charter and Charter jurisprudence suitable sources of reference for human rights and particularly criminal procedure and evidence rights in South Africa? (part 1)*

Wium de Villiers
BIuris LLB LLD
Senior Lecturer in Mercantile Law, University of Pretoria

OPSOMMING

Is die Kanadese "Charter" asook "Charter"-regsleer gepaste verwysingsbronne vir menseregte en spesifiek die strafproses- asook bewysreg in Suid-Afrika?

My ondersoek bevestig dat die Kanadese "Charter" asook "Charter"-regsleer wel gepaste verwysingsbronne vir hierdie doeleindes is. Hierdie gevolgtrekking word gerugsteun deur my bespreking van die historiese konteks van menseregte in Kanada asook die beginsels van regsvergelyking. Anders as in die Suid-Afrikaanse reg was daar 'n inkrementele wegbeweging van parlementêre soewereiniteit, wat van die Britse ryk geërf is. Hierdie geleidelike proses het oor meer as 'n eeu plaasgevind eerder as oornag. Onder Kanadese reg is tentatiewe beskerming eers aan sekere regte toegestaan en uiteindelik het formeel beskermde regte die lig gesien. Van besondere belang is die verklarende rol wat die Kanadese howe vervul het na die aanname van die "Charter".

1 INTRODUCTION

This series of articles examines the question whether it was wise to have borrowed from Canadian law when the South African Bill of Rights was drafted, and whether Charter jurisprudence can be relied on with confidence. An historical overview is given of the development of Canadian society up to the present constitutional dispensation. In particular the factors, influences and process that resulted in the recognition of protected fundamental rights are highlighted. My investigations confirm that, in one's quest to assess human rights and especially criminal procedure and evidence rights under South African law, it is of great practical and theoretical value to have regard to the equivalent rights under the Canadian Charter of Rights and Freedoms.[1] This view is substantiated by my discussion on the historical context of human rights in Canada and the principles of comparative law.

---

* This article is based on the author's doctoral thesis *Problematic aspects of the right to bail under South African law: A comparison with Canadian law and proposals for reform* (UP 2000).

1 Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11, hereafter the "Canadian Charter" or "Charter".

In this article the development of Canadian society up to the adoption of the Canadian Bill of Rights is discussed. The second one deals with the period from 1960 up to the present. In coming to a conclusion the principles of comparative law are taken into account.

2 BACKGROUND

Soon after the advent of the fundamental rights era in South Africa, the Constitutional Court committed itself to a method of interpretation which is value-based.[2] Inherent in this approach is an understanding that an assessment of a constitution must not be made in a vacuum, but in the historical context of the developments in a country.[3]

In accordance with the approach followed by the Constitutional Court in interpreting the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993), the final Constitution the Constitution of the Republic of South Africa, Act 108 of 1996) requires that the Bill of Rights be interpreted to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[4] However, these values are not self-evident. In the interpretation of the Constitution, recourse may be had to foreign law.[5] Canada is an excellent example of a society in which the values that underlie that society are based on openness, democracy, human dignity, equality and freedom. Yet the use of foreign precedent requires "careful management" in the light of the differences in the criminal justice system and society that may present themselves.[6] One must be

---

2 See *S v Makwanyane* 1995 3 SA 391 (CC) para 262 per Mahomed DP concurring and para 303 per Mokgoro J concurring; *S v Zuma* 1995 2 SA 642 (CC) para 15 per Kentridge AJ. The Constitutional Court was quick to recognise the similarity between value-based and the "purposive" interpretation applied under Canadian law with the dictum by Dickson J in *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (SCC) 395–396 becoming a primary referent for purposive interpretation. However, other approaches to constitutional interpretation have been formulated by legal scholars. One approach seeks the meaning of the Constitution in the intention of its drafters. This approach seems to be fundamentally flawed. While the text remains important, the meaning of the Constitution cannot be found by simply decoding the written text. However, the written document remains the starting point for interpretation and to that extent exercises its limiting, containing and ultimately disciplinary function upon interpretation. It is submitted that value-based interpretation is the soundest in principle and practice and lends coherence in procedure. See Kentridge and Spitz "Interpretation" in Chaskalson *et al Constitutional law of South Africa* (1996).

3 See *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) para 26 per Langa DP; *Shabalala v The Attorney-General of the Transvaal* 1996 1 SA 725 (CC) para 26 per Mahomed DP. Consideration of the political context of a constitutional provision is therefore essential for a court to make the value judgments required. When interpreting South Africa's Constitution proper weight must be given to the fact that it is not a foreign or international instrument that needs to be construed. The lack of local judicial precedents upholding human rights means that international and foreign law will at least for the time being provide important guidance. In addition s 39(1) of the Final Constitution (hereafter also referred to as FC) prescribes that international law must be considered and foreign law may be considered. This does not mean that constitutional rights should be pared down by reading restrictions into them to bring them in line with the common law. What is defensible from the past will be kept, but that which is not in line with a "democratic, universalistic, caring and aspirationally egalitarian ethos" must be rejected. See *S v Makwanyane* 1995 3 SA 391 (CC) para 262.

4 S 39 FC.

5 See s 39(1)(c) FC.

6 See *Sanderson v Attorney-General, Eastern Cape* 1997 12 BCLR 1675 (CC) para 26.

careful not to import doctrines associated with foreign constitutions into an inappropriate South African setting.[7] The two societies under discussion are very different and there are some differences in the respective criminal justice systems. One cannot therefore simply take over the principles of Canadian law outside these contexts. Any comparative legal study might therefore be inherently limited as one might not be able adequately to appreciate all these differences when the comparison is made.[8]

Nevertheless, the Canadian Charter was an important source of reference when the fundamental rights provisions in our Constitution were drafted.[9] The general limitation clause in the interim Constitution was based largely on the Canadian model.[10] This determined the structure of fundamental rights analysis and is therefore an important influence. Many attach so much importance to the role of the Canadian Charter in the drafting of our Bill of Rights that they consider the South African Bill of Rights to be largely based on the Canadian Charter.[11] In addition, legal practitioners, the courts and other legal scholars have, since the introduction of the fundamental rights provisions, treated Canadian Charter jurisprudence as perhaps the most authoritative guidance from abroad when dealing with fundamental rights issues.[12]

---

7 See the *dictum* by Cloete J in *Shabalala v The Attorney-General of the Transvaal* 1994 6 BCLR 85 (T) 119 quoting Froneman J in *Qozoleni v Minister of Law and Order* 1994 3 SA 625 (E) 633F–G.

8 The high court has warned of the danger of relying on foreign law outside these contexts. In *Nortje v Attorney-General, Cape* 1995 1 SACR 446 (C) 450a–i Marais J elaborated on the difficulties in assessing foreign law owing to the difference in the criminal justice systems and sociological factors prevailing between South Africa and the foreign country. In *Berg v Prokureur-Generaal, Gauteng* 1995 11 BCLR 1441 (T) 1445G–H the court per Eloff JP refused to take foreign case law into consideration without having full information about the criminal justice systems and constitutions of those countries.

9 See Steytler *Constitutional criminal procedure* (1998) 7, *S v Nortje* 1996 2 SACR 308 (C) 319b–c, *S v Agnew* 1996 2 SACR 535 (C) 542d and *S v Lavhengwa* 1996 2 SACR 453 (W) 494f.

10 It also has a German flavour. See Du Plessis and Corder *Understanding South Africa's transitional Bill of Rights* (1994) 47.

11 See eg *S v Shongwe* 1998 9 BCLR 1170 (T) 1186I and *Key v Attorney-General, Cape of Good Hope Provincial Division* 1996 6 BCLR 788 (CC) fn 6. In *Key* the Constitutional Court per Kriegler J held that the resemblance of the Canadian Charter to the Bill of Rights in the Interim Constitution does not require discussion. However, Du Plessis and Corder 46 indicate that in constructing the fundamental rights, the technical committee dealing with fundamental rights for the transitional Constitution, also took into account the bills previously drafted by the negotiating parties. The SA Law Commission also submitted an annotated version of its unpublished third (draft) Bill of Rights as a discussion document. Other "less official" drafts such as the Charter for Social Justice were also examined. Du Plessis and Corder 46 further indicate that the committee also looked at other sources from abroad. Long-standing international human rights documents such as the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), and the European Convention on Human Rights (1950) were examined. In the second instance Bills of Rights of other countries were looked at, eg the German Basic Law (1949), the Canadian Charter (1982) and the chapter on Fundamental Rights and Freedoms in the Constitution of the Republic of Namibia (1990).

12 It seems reasonable to surmise that Canadian Charter jurisprudence has been the most consistently quoted foreign guidance by legal academics, practitioners and South African courts dealing with fundamental rights issues. In many instances Canadian Charter authority is the sole foreign authority quoted. See eg the chapter on "Arrested, detained and accused persons"

continued on next page

The approach to interpretation adopted by the South African Constitutional Court finds an antecedent in that of the Canadian Supreme Court. The Supreme Court of Canada has similarly held that the rights and freedoms guaranteed by the Charter must be ascertained by an analysis of the purpose of such guarantee.[13] This may be ascertained by reference to the character and the larger objects of the Charter itself, the language used to articulate the specific right or freedom, the historical origin of the concepts enshrined, and where applicable, the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.

When sections of the Canadian Charter are in issue, for example the right to life, liberty and security of the person,[14] the Canadian courts try to determine the thinking behind these provisions and the purpose these rights are intended to serve in the larger society. Understanding the "purpose" of any given constitutional provision requires a thoughtful study of history, political and constitutional theory, and the circumstances of the case in the context of current affairs in society. The study of Canadian history is therefore important, if not essential, if contemporary political and constitutional issues in Canada are to be understood. If you want to know where you are going it helps to know where you have been. The Canadian Charter did not suddenly arrive in Canada on 17 April 1982.[15] It was the product of a complex history and political forces that must be kept in mind by those who wish to understand its meaning. However, this is obviously not an exact science, and conclusions are frequently not unanimously accepted.

3 THE HISTORICAL CONTEXT

The periods of importance to the development of the Constitution, including human rights, in Canadian history are the following:[16]

3 1 Pre-colonial times

Aboriginal people were living in the area now known as Canada under an aboriginal government when the settlers came in 1497. They were organised in societies and lived as they had done for centuries.[17]

---

in De Waal, Currie and Erasmus *The Bill of Rights handbook* (1998), the decisions of the Constitutional Court in *Key v Attorney-General, Cape of Good Hope Provincial Division* 1996 6 BCLR 788 (CC) and *Ferreira v Levin NO; Vryenhoek v Powell NO (No 2)* 1996 4 BCLR 441 (CC) and the supreme court in *S v Strauss* 1995 5 BCLR 623 (O). Steytler 7 confirms the view that Canadian Charter jurisprudence has been the most influential foreign source used in the South African courts in this regard.

13 *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321. This judgment has been quoted with approval by the Constitutional Court on several occasions. See eg *S v Zuma* 1995 2 SA 642 (CC) para 15 per Kentridge AJ and *S v Makwanyane* 1995 3 SA 391 (CC) para 9 per Chaskalson P.

14 S 7.

15 By way of the Constitution Act 1982.

16 See Funston and Meehan *Canada's constitutional law in a nutshell* (1994) 12 ff; Hogg *Constitutional law of Canada* (student edition) (1992) 27 ff; Scott *Essays on the Constitution. Aspects of Canadian law and politics* (1977) 3 ff; Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte *Canadian constitutional law* (1997) 5 ff; Whyte, Lederman and Bur *Canadian constitutional law. Cases, notes and materials* (1992) 2–2 ff, for constitutional histories of Canada.

17 See *Calder v British Columbia* (Attorney-General) [1973] SCR 313 328 (Can) per Judson J.

3 2 Colonial settlement and governance

3 2 1 A summarised history

Between 1497 and 1535 Europeans explored and settled in the Atlantic Provinces, the Eastern Arctic and St Lawrence Valley and what is now the eastern United States of America. From 1535 to 1663, outposts of European nations settled in New France[18] and in the valley of the St Lawrence River.[19] The period from 1663 to 1702 saw the emergence of colonial governments as a Royal government emerged in New France. The Hudson Bay Company was founded and England's commercial interests emerged. Alliances were forged with the aboriginal peoples.[20]

After this and up to 1763, the French and the British empires struggled with their aboriginal allies on the military and the commercial front for control of North America. In the years that followed, dissatisfaction grew among the parties and the British North American Policy came into being under the Royal Proclamation of 1763. A change in British policy took place by way of the Quebec Act of 1774. An independent United States of America emerged with the Declaration of Independence adopted on 4 July 1776. The first attempt to form a Canadian union was made with the Constitutional Act of 1791.

The attempts by the English and the French settlers in Canada during the period from 1791 to 1860 to reconcile their differences saw the emergence of responsible government in the provinces and colonies that would eventually form the Federation of Canada. The American civil war between 1861 and 1867 and the economic advantages of a common market, which brought with it increased wealth to undertake large public projects, provided the impetus for the Canadian union.[21]

3 2 2 Early colonial influences

The organisation of the political and legal systems of Canada in accordance with a constitution is a relatively recent development. Today Canadian society is governed by elected representatives operating in democratically sanctioned institutions. In the early years the colonies were, by contrast, governed by the prerogative of the Crown.[22] The laws were made and enforced in the name of the monarch and even where provision was made for the election of assemblies, the governor was not bound to follow their advice.

Many of the rights that Canadians now possess can be traced to the legal system Canada inherited from Great Britain.[23] In terms of section 11(f) of the Canadian Charter, for example, trial must be by jury. This procedure existed in at least

---

18 The territory now comprising Ontario and Quebec was part of the colony of New France. In 1763 after the British victory over France on the Plains of Abraham the whole of New France was ceded to Great Britain by way of the Treaty of Paris. See Hogg (1992) 33.

19 See Funston and Meehan 13. It seems that the first Europeans were of French origin. The British traders only came to Hudson Bay in the 17th century. See Scott 14. The chief source of immigrants was England and France. Most European emigrants left their homelands for greater economic opportunity. This urge was frequently reinforced by a yearning for religious freedom or a determination to flee from political oppression.

20 The aboriginal population was Indian and Eskimo (Inuit). See Scott 14.

21 See Hogg (1992) 36.

22 Read "The early provincial constitutions" 1948 *Can Bar R* 621. See also Mewett and Manning *On criminal law* (1994) 3.

23 Although Quebec did not inherit the common law with regard to civil matters, it did with regard to public law.

rudimentary form from as early as the Norman Conquest.[24] Many other fundamental rights and liberties evolved from epochal manifestos like the Magna Carta,[25] the English Bill of Rights, the Habeas Corpus Acts, and the Act of Settlement[26] to the gradual case-by-case decision-making of the common-law courts.[27] There seems to be wide agreement that the British common law was retained for criminal matters, where many rights disputes arise.[28] Despite ambiguity in the wording of the Quebec Act, British law was inherited by Quebec with respect to Crown law, constitutional law, and probably public law in general.[29] Quebec's civil law also contained many provisions protective of civil liberties.[30]

There is a vast and important body of inherited and judicially developed protections of civil liberties in Canadian law. It may be said that there are significant differences between the law of Quebec and the law of the common law provinces, but judicially developed protections of fundamental rights prevail throughout Canada.[31]

However, the significance of this inheritance should not be overstated. According to Scott, one fundamental principle that was inherited from the United Kingdom was parliamentary supremacy.[32] This meant that whatever the elected legislators decided to enact no matter how inconsistent it was with traditional liberties, it is the law of the land until legislatively repealed, and must be enforced by the courts.[33] Even guarantees as sacrosanct as those contained in the Magna Carta have been abrogated by statute in Canada.[34]

3 3 The formation of the Canadian federation

A series of colonial conferences held between 1864 and 1867 in Charlotte Town, Quebec City and London, led to the creation of a confederation and the self-governing

---

24 See Walker *The Oxford companion to law* (1980) 1238.

25 This was the first time in English history that there had been a written organic instrument exacted from a sovereign ruler which purported to lay down binding rules of law that the ruler himself may not violate. By signing the Magna Carta at Runnymede in 1215, King John was forced to agree to abide by "the law of the land" in his dealings with his subjects. Also see Gora *Due process of law* (1978) 1 ff.

26 See Pound *The development of constitutional guarantees of liberty* (1957) 61–63.

27 This inheritance should not be regarded as a body of static principles; the Canadian courts have both refined and added substantially to the principles since 1867.

28 See eg MacIntosh *Fundamentals of the criminal justice system* (1995) 1 and Gibson *The law of the Charter: General principles* (1986) 2.

29 See Cote "Reception of English law" 1977 *Alta LR* 29 41–42.

30 Scott "The Bill of Rights and Quebec law" 1959 *Can Bar R* 135.

31 Gibson (1986) 3.

32 (1977) 212. However, the various parliaments were not sovereign in all respects. They had to stay within the scheme of federalism. See Hogg (1992) 303. The principle of parliamentary sovereignty (or so-called Westminster constitutional system) was also received from Britain into South African law in 1910 when the British Parliament passed the South Africa Act, 1909. In 1994 the interim Constitution replaced this system with a system of constitutional supremacy. In the final Constitution the supremacy of the constitution is reflected primarily in s 2 which states that the Constitution is the supreme law of the land. See Burns *Administrative law under the 1996 Constitution* (1999) 4 8 and Basson *South Africa's Interim Constitution* (1994) 16 59.

33 Gibson (1986) 4.

34 See Thomas "Vox temporum" 1969 *Can Bar J* 234. Lord Chancellor Gerald Gardner stated in 1969 that 27 of the articles had already been repealed.

Dominion of Canada.[35] It did not create an independent country and the federating provinces were all British colonies. However, the provinces did achieve a large measure of self-government.[36]

The delegates' instructions at the conferences were to work out the plans for a new union.[37] From these conferences a set of 72 resolutions was eventually adopted at the Quebec City conference. It turned out that some of the provinces were not convinced of the idea of a union and the Quebec City Agreement proved difficult to implement. The plan was nearly abandoned. A slightly revised agreement was finally adopted by Upper and Lower Canada, Nova Scotia and New Brunswick in London on 4 December 1866.[38]

Paragraph 2 of the revised agreement proposed a general government charged with matters of common interest to the whole country and local governments for each of Upper and Lower Canada, and for the provinces of Nova Scotia and New Brunswick, charged with the control of local matters in their respective sections. It was seen to be the system of government best suited under existing circumstances to protect the diverse interests of the various provinces and secure efficiency, harmony and permanence in the working of the Union.[39]

The resolutions contained in paragraph 2 acted as the drafting instructions for the preparation of the British North America Act of 1867. The Act was passed by the British Parliament and came into force on 1 July 1867.[40]

3 4 The Constitution Act 1867[41]

The preamble to the Act indicated without further explanation that the new dominion would have "a Constitution similar in principle to that of the United Kingdom". The Constitution Act of 1867[42] therefore built on traditions and existing colonial constitutions.[43] However, even though the preamble articulated a desire for "a Constitution similar in principle to that of the United Kingdom" it also indicated the wish of the founding colonies "to be federally united into one dominion".

Federation as a form of government is very different from the unitary structure of the United Kingdom Constitution and it implies the need for judicial review of legislative action in order to ensure the legislature's compliance with its constitutional obligations.[44]

---

35 By way of the British North America Act, 1867. S 3 created "one Dominion under the name of Canada". The confederation scheme was settled at the conferences mentioned. See Hogg (1992) 36 104.

36 Hogg (1992) 45.

37 According to Funston and Meehan 10 the blueprint for Canada did not stem directly from the demands of the people but rather from the aspirations of colonial government leaders.

38 The agreement comprised 69 numbered paragraphs. See Funston and Meehan 10.

39 Provision was also made for the admission into the Confederation on equitable terms of New Foundland, Prince Edward Island, the North West Territory, and British Columbia.

40 Funston and Meehan 10.

41 (UK) 30 and 31 Vict c 3 (now RSC 1985 App ii).

42 The British North America Act, 1867 was renamed the Constitution Act, 1867 in 1982.

43 Funston and Meehan 11.

44 Strayer *The Canadian Constitution and the courts: The function and scope of judicial review* (1988) 1–2.

Morton does not regard the resolutions contained in paragraph 2[45] as purporting to enshrine an ideal or claiming to advance a principle.[46] The purpose was therefore not to achieve sought-after privileges and liberties, but to preserve an inheritance of freedom long enjoyed and a tradition of life valued beyond any promise of profit or of demagoguery. Confederation was to preserve by union the constitutional heritage of Canadians from the Magna Carta of the barons to the responsible government of Baldwin and Lafontaine and, no less, the French and Catholic culture of St Louis and Laval.[47]

The formula in the Constitution Act of 1867 thus provided for a division of powers. The main role of the original Constitution was to facilitate and supervise the distribution of lawmaking and governmental powers between the provinces and the federal authorities.[48] The people of a particular province or territory decided what happened in that area unless it directly affected another province or territory or the people in it. This being a democratic system, the occupants of all the provinces or territories together elected a federal government to attend to matters that generally affected the whole country and its occupants. The structure has for the most part stayed unchanged.

But the original Constitution also had to enforce a few constitutional provisions concerning fundamental rights.[49] From the "Confederation debate" of the legislator of the united Canadas in 1865 it is clear that it was the intention of the "Fathers of the Confederation" to remove certain constitutional rights from the reach of the elected lawmakers.[50]

There was still a long way to go, but the Constitution Act of 1867 at least advanced the legal protection of fundamental rights and freedoms in two ways:

---

45 See para 3 3.

46 Morton *The Kingdom of Canada: A general history from earliest times* (1969) 320.

47 The motivating factors behind the 1867 Act were described by George Brown as:

- the civil war . . . in the neighbouring republic;
- the possibility of war between Great Britain and the United States;
- the threatened repeal of the Reciprocity Treaty;
- the threatened abolition of the American bonding system for goods in transit to and from these provinces;
- the unsettled position of the Hudson Bay Company; and
- the changed feeling of England as to the relation of great colonies to the parent state.

See Funston and Meehan 12. George Brown was still alive in 1867 and played a significant role in Canada's formation. He indicates that these factors brought earnest attention to the gravity of the situation, and united all in one vigorous effort to deal with the emergency. *Idem* 11.

48 See Hogg (1992) 36–37; Scott vii 37 ff; Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 5.

49 Gibson (1986) 6.

50 See the *Parliamentary debates on the subject of the confederation of the British North American Provinces* (1865) as cited by Gibson (1986) 7. But not all the parties were in favour of the constitutional protection of rights. One JS McDonald argued that entrenching rights was not democratic. He stated that it was not his wish to interfere with the rights and privileges of minorities or any other denomination. However, he pointed to the experience in Canada that denial of the right of the majority to legislate on any given matter always led to grave consequences. He voiced his astonishment at the idea that the judgment of the majority was not to be trusted, adding that in all countries the majority controlled affairs and the minority had to acquiesce in this. However, the amendment proposed by McDonald was defeated by a very large margin. (*Parliamentary debates* 1025 1026.)

- it established the legitimacy of constitutionally entrenched, judicially enforceable rights in Canada; and
- it accorded such protection to a handful of rights that were regarded at the time as particularly important.[51]

Only a few rights were entrenched, however,[52] and the attitudes of lawyers and judges trained in the British tradition of legislative supremacy were not yet receptive to the idea of entrenchment.[53]

As Whyte observes, "laws and constitutions are not so much extracted from ideal forms, but chosen to accommodate interests".[54] This is particularly true as far as the 1867 Constitution is concerned. The 1867 Constitution is the result of the management of relationships. These relationships had been developing for 200 years and shaped the events leading up to 1867.[55] These relationships included:

- the early relationships between French and British settlers and aboriginal peoples in North America;
- the relationships among Britain, France, aboriginal peoples and American colonists resulting from their respective commercial and military policies in North America;
- the relationship between British colonies and those that were to become the United States of America and those that were to become Canada;
- the relationship of Canadian and American colonies to the imperial government in London, England; and
- the relationships between Francophones and Anglophones[56] and between Catholics and Protestants.

From time to time there have been some impressive proposals for major constitutional amendments, but the basic structure remained largely intact. However, in 1982 the citizens of Canada were reminded by the Canadian Charter[57] that they, too, have rights.

3 5 The period after 1867 to the 1950s

Between 1868 and 1912 the Canadian federation extended east, west and north with the acquisition of territories, settlements and the admission or creation of new provinces. The end of Canada's status as a "colony"[58] was formally recognised by the British Statute of Westminster in 1931,[59] and Canada became an independent

---

51 Viscount Haldane pointed this out to counsel during the argument of *Toronto Electric Commissioners v Snider* [1925] AC 396 (PC). Also see Brown *The Judicial Committee and the British North America Act: An analysis of the interpretative scheme for the distribution of legislative powers* (1967) 34.

52 See Scott 213.

53 Gibson (1986) 8.

54 (1993) vol 2:10.

55 Funston and Meehan 9.

56 It seems that these terms refer to the French and Anglo-Saxon "founding peoples". See Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 604.

57 Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982 c 11.

58 The term "colony" does not seem completely appropriate for Canada which had already achieved a substantial degree of self-government. See Hogg (1992) 45.

59 The Statute provided that no new British law would apply to Canada unless enacted at the request of and with the consent of Canada. See Hogg (1992) 48; Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 6; Whyte, Lederman and Bur 3–13.

state within the British Commonwealth. In the period from 1931 to 1949 Canada experienced the great depression, the emergence of fiscal federalism and World War II. In 1949 Newfoundland and Labrador joined the federation.

The relationships that were central to the dynamics of evolving Canadian nationhood after 1867 may be briefly stated as follows:

- a new relationship among former colonial governments (that is, provinces) and a new national government in Ottawa;
- the relationship between Canadian citizens and their two levels (federal, provincial) of government (the Canadian federation was unique, being based on the supremacy of Parliament within defined spheres of power, unlike the American model, which was based on sovereignty of the people, who delegated power to the state and federal governments to exercise subject to a system of checks and balances that governed the exercise of authority);
- the relationship between French-speaking and English-speaking residents of the new country;
- the relationships between the regions and their different economic, social, cultural and linguistic circumstances;
- the relationship between Canada and other nations, particularly the United States of America and the United Kingdom; and
- the relationship between the emerging Canadian society and the aboriginal peoples.

However, the 75 years from 1867 until approximately 1950 saw little improvement in the legal protection of civil liberties. The fundamental rights and freedoms of Canadians were frequently disregarded.[60] In Canada, as in South Africa, there are many indications that treatment was based on race. Chinese and Japanese immigrants were subjected to intolerable discrimination from the start of oriental immigration to Canada in the 1850s.[61] In 1914 the Supreme Court of Canada held that as long as treatment was based on race rather than on alien or naturalised status, it was constitutionally permissible.[62] During World War II a curfew was at first imposed on Japanese-Canadians. Later they were evacuated, interned and frequently forced to work in labour camps. Their property was also confiscated.[63] Scott reminds us of the deportation of Japanese-Canadians after World War II.[64]

There was similar intolerance in the matter of religion. This is exemplified by the persecution of Jehovah's Witnesses by the government of Quebec.[65] Another distressing example of the fragility of rights can be seen in the British Columbia Law Society's refusal to grant practising privileges to an otherwise qualified lawyer who acknowledged a belief in democratic Marxism. The courts approved this refusal and it does seem that unpopular minorities could not rely on the protection from actions

60 Scott 209.

61 Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 560.

62 *Quong Wing v The King* (1914) 18 DLR 121 129 (SCC). On 1914-05-19 leave to appeal to the PC was refused. The failure of the courts to provide effective safeguards against discrimination in the provision of public services appears from Tarnopolsky's book, *Discrimination and the law* (1982) 1–25 as cited by Gibson (1986) 5.

63 Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 569.

64 190.

65 193.

of an inflamed majority, even in the hands of professed champions of liberty like O'Halloran J, who presided in the case at hand.[66] The disregard for human rights can also be seen from the fact that in Quebec women did not have the right to vote until 1941.[67]

The history of Canada's courts shows a failure to recognise the native peoples' rights and the excessive deference with which Canadian courts have customarily treated political matters. This is illustrated by the refusal of the Supreme Court of Canada in 1943 to order a provincial government to obey its own statute requiring that an election had to be held in a vacant consistency.[68] In 1946 a Royal Commission on Espionage sat which was widely condemned for its curtailment of the civil rights of individuals who were being investigated.[69]

3 6 The 1950s – judicial activism

3 6 1 General

The period from 1950 saw the strengthening of the provincial governments and can be referred to as the modern era, with Canada searching for prosperity and unity. Many atrocities were committed against certain groups and classes of people during World War II and this abuse of the power of government led to a growing awareness of the need for the protection of human rights.[70] The universal recognition of human rights set the stage for a deeper commitment to guarantees of human rights in Canada.[71]

In 1949, another badge of colonial status was removed when the Judicial Committee of the British Privy Council was replaced by the Supreme Court of Canada as Canada's court of last resort.[72] A new type of activism developed among the judges of the Supreme Court and some landmark rulings on civil liberties were made during the 1950s.[73] In *Smith & Rhuland Ltd v The Queen ex re Andrews*,[74] for example, it was found to be unlawful for the Nova Scotia Labour Board to refuse to certify a trade union because one of its officers was a communist.

3 6 2 "Criminal law" and "implied liberties" as approach

An unusual Supreme Court ruling of the 1930s formed the prototype of and inspiration for the libertarian judicial activism of the 1950s.[75] In 1935 the Social Credit government of Alberta came to power and passed legislation designed to create a social credit monetary system within the province. Because this legislation

---

66 *Martin v Law Society of British Columbia* (1950) 3 DLR 173 (BCCA) 178–186.
67 Scott 320.
68 *Temple v Bulmer* (1943) 3 DLR 649 (SCC).
69 Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 589. The presiding judges were Taschereau and Kellock. Commission counsel were Fauteux, a future judge of the Supreme Court and Williams, president of the Canadian Bar Association and soon to be appointed Chief Justice of the Manitoba Court of Queen's Bench. See also Gibson (1986) 5.
70 Eg the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950) and the International Covenant on Civil and Political Rights (1966).
71 See Black-Branch *Rights and realities* (1997) 4 ff.
72 Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 6.
73 *Boucher v R* (1951) 2 DLR 369 (SCC); *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689 (SCC); *Noble and Wolf v Alley* (1951) 1 DLR 321 (SCC).
74 (1953) 3 DLR 690 (SCC).
75 *Reference re Alberta Legislation* [1938], SCR 100, (1938) 2 DLR 81 (SCC).

and the government's theories were subjected to heavy ridicule, an accompanying Act popularly known as the Press Act was passed to regulate criticism. The entire package of legislation was referred to the Supreme Court of Canada for a ruling on its constitutionality. The Supreme Court and later the Judicial Committee of the Privy Council[76] found the package of legislation to be unconstitutional because it invaded the federal spheres of money and banking. It was therefore not within the power of a province to regulate these spheres.

However, half of the panel of six judges in the Supreme Court offered two additional reasons for the striking down of the Press Act. They held that the curtailment of freedom of expression in the public interest is a question of "criminal law". This fell under the exclusive jurisdiction of the Parliament of Canada under the Constitution Act 1867[77] and meant that repressive provincial legislation was invalidated on the ground that it constituted "criminal law".[78] The distribution of powers approach became the basis of many of the rulings in the 1950s.[79]

The court, stating the second additional reason for striking down the Press Act, propounded a novel idea subsequently labelled the "implied bill of rights". The "implied bill of rights" had its roots in the preamble to the Constitution Act, which describes the Canadian Constitution as "similar in principle to that of the United Kingdom". The Preamble was not seen as having legal force on its own, but was used as an aid to the interpretation of operative provisions.[80] The three judges held that section 17 of the Constitution Act called for the existence of a "Parliament of Canada". When interpreted in light of the British experience, this meant a legislative body working under the influence of public opinion and public discussion. Thus the Constitution by implication prohibited any abolition of public debate.

The "implied bill of rights" approach, although adopted and approved by the judiciary, and extra-judicially by a number of prominent authorities, was never invoked in a conclusive manner.[81]

3 6 3 Criticism of approaches

However, criticism may be levelled at both the "criminal law" and the "implied liberties" approach.

The "criminal law" method, which became the basis for many of the libertarian decisions of the 1950s, entangled issues of freedom with issues of federalism. Decisions that should have been based on whether they were desirable from a libertarian point of view were instead based on whether the federal or provincial of government was the more appropriate to regulate a particular activity. Since "criminal law" was the constitutional responsibility of the Parliament of Canada, this process also tended to amplify federal power, which some proponents of balanced federalism found disturbing.[82] This approach also offered no relief against repressive laws at federal level.

---

76 *Attorney-General for Alberta v Attorney-General for Canada* [1939] AC 117 (PC).
77 S 91(27).
78 Only the federal government could therefore enact criminal law.
79 See eg *Henry Birks and Sons (Montreal) Ltd v Montreal and Attorney-General of Quebec* (1955) 5 DLR 321 (SCC); *Switzman v Elbling and Attorney-General of Quebec* (1957) 7 DLR (2d) 337 (SCC).
80 Gibson (1986) 10.
81 *Switzman v Elbling and Attorney-General of Quebec* (1957) 7 DLR (2d) 337 (SCC).
82 Weiler "The Supreme Court and the law of Canadian federalism" (1973) 23 *U Toronto LJ* 307 as cited by Gibson (1986) 10.

The "implied bill of rights" theory addressed the issues of principle and avoided the difficulties just mentioned. It applied both federally and provincially.[83] This also meant that the federal provincial division of powers was not under threat, but it involved a degree of judicial activism that some thought excessive.[84] According to Gibson this also required an uncommon level of creative imagination on the part of the courts.[85]

3 7 Adoption of Bill of Rights – 1960

3 7 1 General

The idealism of the 1950s was echoed in the Canadian Bill of Rights of 1960.[86] This Act was the most notable civil liberties development of the 1960s and recognised Canada's commitment to human rights under federal legislation.[87] The Bill was essentially the result of the work of Prime Minister John G Diefenbaker, who had campaigned for protected rights from as early as 1945 when he became a member of Parliament.[88]

The Bill was introduced into Parliament on September 1958 and the Canadian Bill of Rights was enacted in a revised form in August 1960. However, the enthusiasm for protected rights had by then cooled down, and the Canadian Bill of Rights was not constitutionally entrenched. It applied only to matters within the federal sphere of jurisdiction and was an ordinary statute of the Parliament of Canada.[89] It could therefore be amended by the normal legislative process. The reach of the Bill was also weakened by the fact that other Acts of Parliament could potentially ignore the primacy provision of the Bill;[90] in addition, there were questions with regard to protection of newly acquired rights under the Bill.[91]

Gibson gives two explanations for this limited scope:[92]

- Canadian politicians were still years away from agreeing on a formula for amending the Constitution (in a way that such an important innovation could be achieved in a manner befitting an independent nation).

---

83 See *Switzman v Elbling and Attorney-General of Quebec* (1957) 7 DLR (2d) 337 (SCC) 368 where Abbott J commented on its applicability to federal laws.

84 Gibson (1986) 10.

85 11.

86 Canadian Bill of Rights, SC 1960, c 44. See Tarnopolsky *The Canadian Bill of Rights* (1975) 12–14 for a legislative history.

87 Black-Branch 9.

88 See *Hansard* (1945) 2455. See also Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 589. In 1938 the Manitoba legislature passed an almost unanimous resolution to this effect (*Winnipeg Tribune* 1938-02-05). The resolution was introduced by a prominent independent MLA, Lewis St George Stubbs. In 1945 Co-operative Commonwealth representative Alistair Stuart and John Diefenbaker of the Conservatives motioned similar resolutions in the Federal House of Commons. During 1950 a special senate committee on human rights and fundamental freedoms approved a constitutionally entrenched guarantee of rights. The special senate committee acknowledged that such a step would have to await agreement on the deadlock question of an all-Canadian formula for constitutional amendments. See Gibson (1986) 30. However, Black-Branch 8 indicates that Alistair Stuart was the first to motion a Bill of Rights in the Federal House of Commons in 1945. The author contends that John Diefenbaker stressed the need for a federal Bill of Rights to protect Canadians only in 1946.

89 Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 591.

90 See s 2 of the Canadian Bill of Rights, 1960.

91 It became known as the "frozen concepts" interpretation. See para 3 7 4. See Black-Branch 10.

92 (1986) 12.

- There was intense disagreement among influential Canadian politicians about the desirability of giving constitutional status to additional categories of rights.

Even though its scope was limited, the Canadian Bill of Rights contained a fuller declaration of fundamental rights and freedoms in legislative form than ever before.

3 7 2 Impact of the Bill of Rights on non-legislative matters

The Canadian Bill of Rights had a minimal impact on the Canadian legal system.[93] It was infrequently used as a basis for ensuring that police, courts or administrators observed elementary forms of fairness, such as

- the right to telephone a lawyer, before complying with a police request for a breath sample;[94] or
- the opportunity of a convicted person to make representations to the court before sentence was passed.[95] Successful applications usually involved some independent basis for the asserted right and the Bill was used as a mere makeweight or interpretative aid.[96]

3 7 3 Impact of Bill of Rights on legislation

3 7 3 1 General

It happened even more rarely that legislation was invalidated because of inconsistency with the Bill. However, this little-used remedy was on occasion implemented by the Supreme Court,[97] but judgments were difficult to reconcile and much uncertainty remained. The origin of the uncertainty was twofold:

- The legal status or effect of the Bill was uncertain.
- Its content was uncertain.[98]

As to the status or effect of the Bill with regards to other legislation, the Bill itself stated in section 5(2) that it applied only to federal legislation enacted before or after it came into operation. However, lawyers asked how a statute lacking constitutional status could be given supremacy over other legislation in a constitutional system that respects the principle of parliamentary supremacy. The principle of parliamentary supremacy, even in the restricted form in which it applied in Canada, dictated that the Bill, unlike the Charter, had to yield to new legislation of different intent.[99] The Supreme Court of Canada none the less made it clear that this did not prevent federal statutes and regulations being subject to the Bill's requirements in appropriate circumstances. However, a distinction must be made between laws passed before the Bill came into force, and those enacted subsequently. These two categories are now discussed in greater detail.

---

93 Tarnopolsky "The Supreme Court and the Canadian Bill of Rights" 1975 *Can Bar R* 649.

94 *Brownridge v The Queen* (1972) 28 DLR (3d) 1 (SCC).

95 *Lowry and Lepper v The Queen* (1972) 26 DLR (3d) 224 (SCC).

96 Gibson (1986) 14.

97 See *R v Drybones* (1969) 9 DLR (3d) 473 (SCC). In *Re Singh and Minister of Employment and Emigration and 6 other appeals* (1985), 17 DLR (4th) 422, [1985] 1 SCR 177 (SCC); Beetz J held that for the purposes of the seven cases at bar, part of s 71(1) of the Immigration Act, 1976 was inoperative.

98 Gibson (1986) 14 is of the opinion that much of the confusion resulted from a failure to distinguish clearly between these two matters.

99 Gibson (1986) 14–15.

3 7 3 2 Pre-Bill legislation

Legislation may be affected by a statute like the Bill of Rights in two different ways. In the first instance the Bill may act as an "Interpretation Statute" when the language of a legislative enactment is ambiguous. It is therefore an interpretative aid directing the courts to adopt a more libertarian construction. It could go even further in that it could invalidate pre-Bill legislation where no interpretation can be found that is compatible with the Bill. The concept of parliamentary supremacy demands this for new legislation because it amends or repeals inconsistent previous laws by implication.[100] It is widely accepted that in so far as the Canadian Bill of Rights contradicted pre-Bill federal statutes and regulations, it repealed or amended those laws.

However, there was difference of opinion among legal scholars as regards the meaning of the Bill itself. The argument of some, that it was not intended to do more than provide a guide to interpretation, was based on the wording of the principal operative provision: "Every law of Canada shall . . . be so construed and applied as not to abrogate, abridge or infringe . . . any of the rights and freedoms herein recognised and declared."[101]

According to these scholars "construed and applied" meant that the Bill was intended purely to facilitate interpretation. The courts should therefore attempt to find interpretations compatible with the Bill and should stop short of declaring incompatible legislation to be inoperative. This was said to be the only purpose of the Bill of Rights, and it was contended that laws which abrogate rights and freedoms unequivocally, cannot be affected by the Bill.[102]

However, the legal and political context within which the Bill was created has to be kept in mind. At the time the Canadian common law principles of interpretation already had two presumptions that would achieve virtually everything that could be accomplished legally by a libertarian interpretation statute:

- Legislation must be interpreted for the benefit of the subject. Penal laws must therefore be construed narrowly.
- If there is an ambiguity, the interpretation that is more consistent with the liberties of the subject must be followed.[103]

---

100 The concomitant principle is that subsequent general legislation should not be construed to derogate from previous specific legislation. This is a guide to determine whether the subsequent law is really inconsistent with the earlier one. The legislature's manifest intentions as to the script of the new law is of equal or greater importance.

101 S 2.

102 The "interpretation" theory. In *R v Gonzales* (1962) 32 DLR (2d) 290 292 this viewpoint was expressed by the British Columbia Court of Appeal. The view was further approved by Cartwright CJC in a dissenting judgment in *R v Drybones* (1969) 9 DLR (3d) 473 476–477 (SCC). However, the same passage was rejected by the Chief Justice in *Robertson and Rosetanni v The Queen* (1963) 41 DLR (2d) 485 489 (SCC) which contributed to the confusion.

103 Interpretation Act, RSC 1970 c 1–23 s 11. From statements by the architects of the Bill it was clear that they intended more than purely to provide a fresh articulation of the well-established presumptions mentioned. Fulton J in his testimony before the House of Commons Special Committee that examined the proposed bill in 1960, said: "In my view you cannot enshrine a Bill of Rights which would be any more sacrosanct by constitutional amendment than by the legislative methods proposed. If there is a violation by a legislative body the courts will not enforce or give effect to the violation." Fulton J added that if Parliament wished to continue the impugned law it could be "sanctioned anew" by means of a statutory declaration under s 2 of the Bill that the law would operate "notwithstanding the Bill". In removing any doubt about the government's intention in this matter he added that "we are creating, or are declaring substantive law". Gibson (1986) 16.

This matter was finally resolved by the Supreme Court of Canada in *R v Drybones*.[104] In this matter the court held a pre-Bill provision to be inoperative "because it conflicted with the right of individuals under Section 1 of the Bill to 'equality before the law', without discrimination by reason of race". The majority judgment was delivered by Richie J who rejected the "interpretation" theory.[105]

3 7 3 3 Post-Bill legislation

When we turn to the effect of the Canadian Bill of Rights on federal statutes passed after its enactment, there are different legal considerations to take into account. The Bill may always be used to interpret future legislation, because that is precisely what interpretation Acts do. The question is whether the future statute can be rendered inoperative if there is no interpretation by which it can be reconciled with the Bill. If one applies the same principle of legislative supremacy that supports the implied repeal or amendment by the Bill of inconsistent pre-existing laws, it might seem to suggest that incompatible post-1960 statutes operate as implied repeals or amendments of the Bill.[106] However, there are two legal arguments upon which the Bill of Rights can be accorded primacy over inconsistent subsequent legislation. The first of these countervailing principles is the "manner and form" theory and the other is the principle that requires legislation dealing with fundamental rights to be repealed expressly rather than by implication.

The manner and form theory is based on the notion of rule of law.[107] The rule of law theory entails that even though Parliament has the power to change the law, it must abide by the existing law until it has been changed. Parliament is subject to the rule of law and if the Parliament of Canada, for example, enacted a provision that future statutes of a certain type would require two-thirds majorities in the Commons and Senate, and that amendments to that requirement must be made in the same manner, this new method will be binding until altered by the new method itself.[108] This obligation then forms the constraint on legislative supremacy.[109]

The Canadian Bill of Rights thus established a "manner and form" by which the rights and freedoms it declares may be abrogated or infringed upon by future legislation, namely the "notwithstanding" clause in section 2. If a future law is therefore intended to abrogate a protection contained in the Bill, it has to follow the procedure

---

104 (1969) 9 DLR (3d) 473 (SCC).

105 A Native Indian was charged with being "unlawfully intoxicated on a reserve" contrary to a provision of the Federal Indian Act. This provision applied only to Indians and was significantly more stringent than any applicable to non-Indian citizens.

106 Gibson (1986) 17.

107 The rule of law principle that the constraints of the law are applicable to all Canadians, high or low, private or governmental was a well established principle in Canadian jurisprudence before the Canadian Bill of Rights was enacted. See *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689 706–707 (SCC). See also *Reference re Language Rights under the Manitoba Act, 1870* (1985) 19 DLR (4th) 1 (SCC).

108 Gibson (1986) 18 indicates that there is considerable judicial and academic support for the view that where such a manner and form is lawfully established for the exercise of legislative powers, it must be observed.

109 Tarnopolsky 110–112. Although Acts of Parliament could not be tested under South African law before the Interim Constitution, the supreme court had so-called procedural testing rights in terms of which the court could investigate whether constitutionally prescribed procedures had been followed when an Act of Parliament was passed. See *Harris v Minister of the Interior* 1952 2 SA 428 (A) and *Collins v Minister of the Interior* 1957 1 SA 552 (A).

set out in the Bill itself. The future statute will have to declare expressly that the law in question "shall operate notwithstanding the Canadian Bill of Rights".[110] Gibson is of the opinion that although it is not explicitly stated that amendments to the procedure require the same method, it is implied.[111]

It is clear that the Canadian Bill of Rights is not susceptible to implied repeal and is "fundamental" enough to have prospective and retrospective effect.[112]

In *Curr v The Queen*[113] the Supreme Court of Canada acknowledged the prospective reach of the Bill. In this and other decisions of the Supreme Court of Canada, it is not indicated whether this is the result of the "manner and form" doctrine or the principle invoked in the *Craton* case.

Laskin J, on behalf of the court, suggested that the court's power to declare a statute inoperative should, in the case of the Bill of Rights, be exercised more cautiously and on the basis of more compelling evidence of incompatibility, than in the case of a constitutional guarantee.[114]

The court seemed to indicate that post-1960 federal statutes that are not compatible with the Bill can be "sterilised" but it requires a higher level of persuasion as to incompatibility than would be required in the case of a constitutionally infringed guarantee. However, it is clear from this judgment that federal legislation that cannot be construed in a manner compatible with the Canadian Bill of Rights, and does not contain a "notwithstanding clause" opting out of the Bill, is to be declared inoperative, whether it was enacted before or after the Bill came into force. As is mentioned above, the Supreme Court of Canada has been relatively forthcoming as to the general effect of the Canadian Bill of Rights. It is therefore disappointing to note that it has not been so bold in determining the content of the rights and freedoms it protects.

3 7 4 Contents of Bill: Frozen rights?

Section 1 of the Bill recognises and declares the rights and freedoms that "have existed and shall continue to exist". It does not "enact" the various rights and freedoms but merely "recognises and declares".[115] This invites the conclusion that the Bill merely reiterates the pre-1960 legal *status quo*. However, the "frozen rights" theory has been the source of much confusion and has been accepted by the Supreme Court in some cases and rejected in others.

---

110 A similar conclusion was reached in *Winnipeg School Division 1 v Craton* (1985) 6 WWR 166 (SCC). However, Gibson (1986) 19 argues that neither the doctrinal basis of this ruling nor the full extent of its operation is clear. According to him it may simply be treated as a special principle of statutory interpretation or it may be viewed as a judicially created "manner and form" requiring an express statutory "opt out" before legislation concerning fundamental rights can be restricted by subsequent amendment. He also finds the scope not altogether clear. It may be limited to a narrow range of statutes or may apply to any of the rights or freedoms listed in the Universal Declaration of Human Rights (1948).

111 19.

112 The Quebec Superior Court reached a similar conclusion with respect to the Quebec Charter of Human Rights and Freedoms in *Ford v Attorney-General of Quebec* (1984) 18 DLR (4th) 711 (QUE SC).

113 (1972), 26 DLR (3d) 603 (SCC); see also *Re Singh v Minister of Employment and Emigration and 6 Other Appeals* (1985) 17 DLR (4th) 422 (SCC).

114 *Curr v The Queen* 613–614.

115 The Charter is different in that it has no enacting clause itself. The Constitution Act, 1982 says "enacted" and "shall come into force", and particular rights are expressed in the present tense.

The confusion can only be swept away by recognising that there are two different "frozen rights" theories, one which the Supreme Court has denounced, and one which it appears to have accepted.[116] Both these theories are based on section 1 of the Bill.

In terms of the one "frozen rights" theory no pre-Bill restriction on rights should be regarded as affected by the Bill, because Parliament, by declaring that the protected rights "have existed" in the past, could not have regarded any existing restrictions as inconsistent with such rights.[117] In the *Drybones* case Ritchie J held that the rights protected by the Bill are not to be held "circumscribed by the laws of Canada as they existed on August 19, 1960".[118] It does seem that this sounded the last knell for the extreme "frozen rights" notion.

However, what the Supreme Court of Canada seems to have accepted in two judgments after the *Drybones* case, namely *R v Burnshine*[119] and *R v Miller and Cockriell*,[120] was the view that the Canadian Bill of Rights applies only to rights of the same general type as existed prior to the Bill's enactment.

The Bill of Rights is still in force.[121] It does seem that the Bill's capacity for the protection of rights and freedoms is considerable. Although most of its protections have been supplanted by the stronger provisions of the Charter, it embodies a few rights not expressly duplicated in the Charter.[122] What has been decided on the status and scope of the Bill is also useful by way of analogy to the interpretation and

---

116 Gibson (1986) 21.

117 It seems that this is the gist of the remarks made by Richie J in *Robertson and Rosetanni v The Queen* (1963), 41 DLR (2d) 485 (SCC). However, this approach was rejected by Richie J, again on behalf of the majority, in the *Drybones* case.

118 482–483 DLR.

119 (1974) 44 DLR (3d) 584 (SCC). The court per Martland J 590–592 made some general remarks about the rights protected by the Canadian Bill of Rights. S 1 of the Bill was said to declare that six defined human rights and freedoms "have existed" and that they should "continue to exist". All of them had existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and, further, by s 2, to protect them from infringement by any federal statute. The court found that, in 1960, when the Bill of Rights was enacted, the concept of "equality before the law" did not and could not include the right of each individual to insist that no statute could be enacted which did not have application to everyone and in all areas of Canada. Such a right would have involved a substantial impairment of the sovereignty of Parliament in the exercise of its legislative powers under s 91 of the British North America Act, 1867, and could only have been created by constitutional amendment or by statute. The wording of the Bill of Rights did not do this, because the express wording declared and continued existing rights and freedoms. It was those existing rights and freedoms which were not to be infringed by any federal statute. S 2 did not create new rights. Its purpose was to prevent infringement of existing rights.

120 (1976) 70 DLR (3d) 324 (SCC). Richie J 329 based his decision in part on the "frozen rights" notion. He subscribed to the analysis of the meaning and effect of s 1 and 2 of the Bill of Rights to be found in the reasons for judgment of Martland J, speaking for the majority of the same Court in *R v Burnshine*. However, Laskin CJ in the same case took direct issue with the "frozen rights" theory. See also Gibson (1986) 25 for an analysis of the meaning and effect of ss 1 and 2 of the Bill of Rights.

121 See *Re Singh v Minister of Employment and Emigration and 6 Other Appeals* (1985) 17 DLR (4th) 422 (SCC).

122 Tarnopolsky and Beaudoin *Canadian Charter of Rights and Freedoms* (1982) 1.

application of similar bills and charters of rights that have been adopted by some of the provinces.[123]

Having said this, the Bill has produced few tangible results, and because of the restrictive interpretations the courts gave to the particular rights and freedoms, the Canadian citizens' rights have only been minimally advanced since the Bill's introduction. Tarnopolsky said the following about the first 15 years of the Supreme Court of Canada's application of the Bill: "My answer to the question . . . how civil libertarian was the Supreme Court in interpreting the Canadian Bill of Rights? Must be: with few exceptions, hardly at all."[124]

The interpretation of provincial bills and charters has proved even more disappointing.[125] Although it may still have theoretical potential, it seems that the experiment with a statutory bill of rights largely failed with the Bill of Rights of 1960.[126]

(To be continued)

Some scholars have suggested a distinction between what they describe as constitutions of "principle" and constitutions of "compromise", though in some senses, every constitution is a constitution both of principle and of compromise . . . The possibility of distinguishing between "compromise" and "principle" may be chimerical and involves many of the contingencies and indeterminacies that trouble constitutional interpretation more generally.

Vicki C Jackson "Principle and compromise in constitutional adjudication: The eleventh Amendment and state sovereign immunity" 2000 Notre Dame LR 953 995–996.

---

123 Eg the Saskatchewan Bill of Rights, SS 1947 c 35 (Now the Saskatchewan Human Rights Code SS 1979 c S- 24.1); Charter of Human Rights and Freedoms SQ 1975, c 6; Alberta Bill of Rights, RSA, 1980 c A – 16.

124 Tarnopolsky 1975 *Can Bar R* 649 671.

125 See eg *Re Martin and Department of Social Services* (1980) 108 DLR (3d) 765 (Sask CA); *Reference re Legislative Assembly and Executive Council Act* (1981) 128 DLR (3d) 561 (Sask CA).

126 It is possible that the failure can be attributed to the peculiar manner in which the Bill was drafted. Narrower constructions were invited by terms like "recognised and declare", "have existed", and "construed and applied". It is clear that the Bill of Rights was too restrictively worded to have any effective long-term guarantee of rights. However, it does seem that the major proportion of the blame must be directed towards the judiciary. The judges were not sure that the politicians and voters they represented wanted them to be more active in the enforcement of individual rights. This resulted in non-action.

The legitimacy of legal orders (2): Towards a disruptive concept of legitimacy*

Henk Botha
BLC LLB LLM LLD
Professor of Constitutional Law, University of South Africa

OPSOMMING

Die legitimiteit van regsordes (2): Onderweg na 'n kritiese opvatting van legitimiteit
In hierdie artikel word verskillende betekenisse van legitimiteit onder die loep geneem. Die doel hiermee is nie om die korrekte definisie van legitimiteit te identifiseer nie, maar eerder om die spanning tussen die normatiewe, juridiese en sosiologiese aspekte van die legitimiteitsbegrip bloot te lê. Ek argumenteer dat legitimiteit nóg tot morele regverdigbaarheid nóg tot sosiale aanvaarding nóg tot formele regsgeldigheid verskraal behoort te word. Legitimiteit is 'n veeldimensionele begrip. 'n Kritiese bewussyn van die kontradiksies en dissonansies tussen die verskillende dimensies van legitimiteit kan ons in staat stel om sosiale verhoudinge op 'n deurlopende grondslag aan 'n transformerende kritiek bloot te stel.

1 INTRODUCTION

Modern law, according to Jürgen Habermas, is characterised by an internal tension between facts and norms, or between social reality and claims of reason. On the one hand, legal rules are connected with the authorisation to coerce; they have a social existence to the extent that they are actually enforced and followed. On the other hand, laws are not simply commands backed up by force, but embody a claim to legitimacy.[1] Sociologists are concerned with law's social existence or facticity, while moral philosophers focus on its normative content. Both these perspectives are useful, but limited: the sociology of law, because it insists on an observer's perspective, is insensitive to law's symbolic dimension, while the philosophical discourse of justice does not sufficiently appreciate the extent to which social facticity confronts constitutional ideals. For Habermas the critical challenge is to develop a dual perspective that would allow us to "take the legal system seriously by internally reconstructing its normative content", and at the same time, to "describe it externally as a component of social reality".[2]

---

* This series of articles is partly based on my doctoral thesis entitled *The legitimacy of law and the politics of legitimacy: beyond a constitutional culture of justification* (UP 1998). I am grateful to the CSD for financial assistance. However, opinions expressed in these articles are my own and should not necessarily be attributed to the CSD. Many of the ideas expressed here have been shaped and refined in discussion with Danie Goosen, Wessel le Roux, André van der Walt, Johan van der Walt and Karin van Marle. I should also like to thank Margaret Beukes, Christo Botha and Gretchen Carpenter who read through the manuscript and provided helpful and incisive comments and suggestions.

1 See Habermas *Between facts and norms* (1996) ch 1.

2 *Idem* 43.

The tension between normativity and facticity, or between moral-normative and empirical conceptions of legitimacy, also manifests itself in a second tension, namely that between justification and validity,[3] or legitimacy and legality. This issue reaches far beyond the old natural law/legal positivism debate with which it has traditionally been identified, and raises vital questions about the formalistic premises of liberal legalism, and the very possibility of legal reasoning.

It is against this background that I examine different conceptions of legitimacy in this article. My aim is not, however, to arrive at a single, coherent definition of legitimacy which would mediate between, and do full justice to, the normative, social and juridical aspects of law. It is rather to develop an understanding of legitimacy which would enable us, on the one hand, to test our social reality against our normative aspirations and ideals, and on the other hand, to confront our legal ideals with the conflict and struggle in which they are enmeshed, and the violence which is authorised in their name.

2 LEGITIMACY: A NORMATIVE OR EMPIRICAL CONCEPT?

2 1 Introduction: Rousseau versus Weber

Max Weber's treatment of legitimacy provided the groundwork for a considerable literature on the topic, and remains influential. The concept of legitimate domination is central to Weber's sociology. Weber defined domination as "the probability that a command . . . will be obeyed by a given group of persons".[4] He identified two broad categories of domination: domination by virtue of a constellation of interests (eg market domination); and domination by virtue of authority, or *legitimate domination*. Weber wrote the following about the concept of legitimacy:

> "Action, especially social action which involves a social relationship, may be guided by the belief in the existence of a legitimate order. The probability that action will actually be so governed will be called the *validity* (*Geltung*) of the order in question.
>
> Thus the validity of an order means more than the mere existence of a uniformity of social action determined by custom or self-interest . . . [A]n order [will only] be called *valid* if the orientation toward [determinable] *maxims* occurs, among other reasons, also because it is in some appreciable way regarded by the actor as in some way obligatory or exemplary for him. Naturally, in concrete cases, the orientation of action to an order involves a wide variety of motives. But the circumstance that, along with the other sources of conformity, the order is also held by at least part of the actors to define a model or to be binding, naturally increases the probability that action will in fact conform to it, often to a very considerable degree."[5]

Here three points are worth making. For Weber, legitimacy denotes a state of widespread belief: the belief that an order is obligatory or exemplary. Secondly, such belief is a reason for action. It is distinct from custom or self-interest; and may therefore account for behaviour that cannot be explained solely through the factors of custom or self-interest. And finally, legitimacy is associated with greater conformity than custom or self-interest.

It is illuminating to compare the above quotation with one from Rousseau. Whereas Weber laid the groundwork for the study of legitimacy as an empirical

---

3 Habermas uses the term "validity" as synonymous with "normativity". However, I use "validity" in the restrictive, legal-positivist sense as that which is in conformity with law. See 3 1 below.

4 Weber *Economy and society* (1978) 53.

5 *Idem* 31.

concept (legitimacy as a belief), Rousseau is regarded as "the paradigmatic thinker of legitimacy in its *normative* level of power".[6] Rousseau wrote:

> "Man was born free, and he is everywhere in chains . . . How did this transformation come about? I do not know. How can it be made legitimate? That question I believe I can answer."[7]

Society is characterised by inequality; it is ruled not by law but by force. The question for Rousseau is whether law is possible; "whether a discourse of legitimacy can be maintained which is not reducible to one of power".[8] The question of how these chains can be made legitimate is a normative one; it is not reducible to the question whether people believe them to be legitimate.[9] Rousseau turned to social contract theory to answer this question: the loss of natural freedom is legitimate in so far as man gains civil and moral freedom in return. One's chains are legitimate if they are laws which one has prescribed for oneself. Through these laws, one comes to identify one's true interest not with particular interest, but with the common interest.

In Weber's hands, legitimacy is a matter of people's convictions; it is a report about people's *subjective* beliefs. Rousseau, by contrast, is concerned with the normative question of how the loss of natural freedom can be made legitimate. He is not interested in whether people believe that it is right and proper to assume their "chains"; rather, he is interested in positing *objective* criteria for the legitimacy of power. Consequently, it is legitimate in terms of his notion of the general will to force people to be free!

Rousseau (1712–1778) and Weber (1864–1920) are "as different in spirit as they are distant in time".[10] By the time Rousseau wrote, God had already retreated from the world; and social norms could be legitimated only by reference to human convention. Even though Rousseau was pessimistic about the prospects for realising a truly legitimate order, he was confident about the prospects for conceptualising one. Weber was less confident; he believed that there was no demonstrable answer to the question of "how to combine vast power with perfect right". He therefore rephrased the question as how to secure *belief* in the legitimacy of the modern state. According to Wolin, Weber's writings must be seen in the context of a legitimation crisis within social science. Modern science achieved ascendancy over other forms of theoretical knowledge, such as philosophy, theology and history, and discredited their reality-principles (reason, revelation and experience). As a result, "social science became the natural successor of political theory". However, science soon "appeared to be power without right"; by its own admission, it could not even validate the legitimacy of its own authority.[11] Instead of trying to establish an

---

6 Merquior *Rousseau and Weber* (1980) 9.

7 Rousseau *Social contract* (1968) 49.

8 Bernasconi "Rousseau and the supplement to the social contract" 1990 *Cardozo LR* 1539 1542.

9 Rousseau *Emile* (1911) bk I wrote that "[d]omination is itself servile when it depends on opinion; for it depends on the prejudices of those whom you govern by prejudice. In order to make them behave according to your wishes, you have to behave according to their wishes". According to Winch "Man and society in Hobbes and Rousseau" in Cranston and Peters (eds) *Hobbes and Rousseau* (1972) 242, Rousseau's "point is that such a posture is incompatible with a genuinely independent and critical point of view in that it smothers any possible consideration of what is really the best way to live under consideration of what one can get away with in a world full of watchful eyes".

10 Merquior *Rousseau and Weber* 1.

11 Wolin "Legitimation, method, and the politics of theory" in Connolly (ed) *Legitimacy and the state* (1984) 63 66–67.

objective basis for legitimacy in the bureaucratic state, Weber sought to "establish a veneer of legitimacy in a world haunted by its own nihilistic tendencies".[12]

2 2 Objectivist and subjectivist theories of legitimacy

It is possible to distinguish between normative and empirical, and between objectivist and subjectivist approaches to the study of legitimacy. The *objectivist*[13] *approach* posits "criteria which are external to the mere floating *conviction* of the majority". It refuses to confer the title of legitimacy merely on the strength of the shifting beliefs of the general public; and attempts "to remove the analysis of legitimacy from the flux of opinion".[14] However, the objectivist approach is beset by serious difficulties. It must either ground the legitimacy of the legal order in its accurate representation of some external source of moral truth (for instance, the notion of natural rights), or set out the procedural conditions for attaining a rational consensus.[15] The first option rests upon a theory of knowledge that is no longer plausible. Habermas writes that a normativist concept of legitimacy "is untenable because of the metaphysical context in which it is embedded".[16] However, he also rejects a Rawlsian approach which seeks to define the procedural conditions necessary to a rational consensus,[17] as such an approach cannot provide the basis for analysing legitimacy in given historical societies.[18] In short, the insensitivity of the

---

12 Connolly "Introduction: legitimacy and modernity" in Connolly (ed) *Legitimacy* 1 9.

13 "Objectivism" is often used to designate the metaphysical distinction between subject and object, and the view that knowledge should be an accurate reflection or representation of an objective reality. However, Bernstein *Beyond objectivism and relativism* (1983) 10 shows that this is but one instance of objectivism. Even though Kant questioned this kind of metaphysical realism, he was no less an objectivist and foundationalist, as he also insisted upon "the need for an ahistorical permanent matrix or categorial scheme for grounding knowledge". Bernstein 8 defines "objectivism" as "the basic conviction that there is or must be some permanent, ahistorical matrix or framework to which we can ultimately appeal in determining the nature of rationality, knowledge, truth, reality, goodness, or rightness".

14 Merquior *Rousseau and Weber* 5. Singer "The player and the cards: nihilism and legal theory" (1984) 94 *Yale LJ* 1 26 writes that the project of objectivity in legal theory "assumes that it is possible to ground the legal system on a rational foundation. This assumption means that the first principles from which we derive the legal rules should have some kind of inherent validity independent of our individual beliefs".

15 Singer 1984 *Yale LJ* 25–39.

16 Habermas *Communication and the evolution of society* (1979) 204.

17 Rawls *A theory of justice* (1971) 516–517 writes that the principles of justice, which he believes would be chosen in the original position, are objective. "They are the principles that we would want everyone (including ourselves) to follow were we to take up together the appropriate general point of view. The original position defines this perspective, and its conditions also embody those of objectivity: its stipulations express the restrictions on arguments that force us to consider the choice of principles unencumbered by the singularities of the circumstances in which we find ourselves. The veil of ignorance prevents us from shaping our moral view to accord with our particular attachments and interests. We do not look at the social order from our situation but take up a point of view that everyone can adopt on an equal footing. In this sense we look at our society and our place in it objectively: we share a common standpoint along with others and we do not make our judgments from a personal slant."

18 "Every general theory of justification remains peculiarly abstract in relation to the historical forms of legitimate domination. If one brings standards of discursive justification to bear on traditional societies, one behaves in an historically *unjust* manner. Is there an alternative to this historical injustice of general theories, on the one hand, and the standardlessness of mere historical understanding, on the other?": Habermas *Communication* 205.

objectivist approach to the historical and cultural context in which values are held, remains its greatest liability.

Weber's equation of legitimacy with a belief in legitimacy has become widely accepted among social scientists, and has inspired an extensive literature based upon an empiricist, *subjectivist approach*. Thus Friedrich writes that the question of legitimacy is the "question of fact whether a given rulership is believed to be based on good title by most men subject to it".[19] Lipset defines the legitimacy of a political system as its capacity "to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society".[20] And Merelman calls legitimacy "a quality attributed to a regime by a population. That quality is the *outcome* of the government's capacity to engender legitimacy".[21]

These definitions have been criticised for a variety of reasons. In the first place, the reduction of legitimacy to a belief in legitimacy is said to strip legitimacy of any normative content. According to Schaar, these definitions all dissolve legitimacy into subjective belief or opinion. He shows how the current scientific usage differs from the traditional and lexical definitions of legitimacy.

> "The older definitions all revolve around the element of law or right, and rest the force of a claim . . . upon foundations external to and independent of the mere assertion or opinion of the claimant . . . Thus, a claim to political power is legitimate only when the claimant can invoke some source of authority beyond or above himself."[22]

The new definitions, by contrast, turn legitimacy into something merely descriptive and thus relieve us of the responsibility of judgment.[23] Secondly, the subjectivist approach is premised upon a view of legitimacy as something flowing from leaders to followers; and thus misconstrues the relation between the rulers and the governed. By reducing the political community to the product of manipulation by politicians, the community is seen as incapable of generating a law of its own; of establishing an alternative set (or sets) of legitimating (or delegitimating) principles.[24] Moreover, it underestimates the symbolic and normative force of actions (such as voting in an election or plebiscite) in the conferment of legitimacy upon a political order.[25]

Thirdly, the equation of legitimacy with the belief in legitimacy leaves little room for a critical assessment of possible discrepancies between rules and the values underpinning them. Beetham argues, for instance, that the British electoral system may be losing its legitimacy, not because of a shift in the people's beliefs, but rather because the rules have increasingly delivered results that are not in accordance with the beliefs or values underpinning representation.[26]

Fourthly, the Weberian conception of legitimacy banishes the problem of legitimacy to the "private recesses of people's minds"; it can be assessed by asking

---

19 Friedrich *Man and his government* (1963) 234.

20 Lipset "Social conflict, legitimacy, and democracy" in Connolly (ed) *Legitimacy* 88.

21 Merelman "Learning and legitimacy" 1966 *Am Pol Science R* 548.

22 Schaar "Legitimacy in the modern state" in Connolly (ed) *Legitimacy* 104 108.

23 Grafstein "The failure of Weber's concept of legitimacy" 1981 *J of Politics* 456 456 writes: "In Weber's hands . . . legitimacy no longer represents an evaluation of a regime; indeed it no longer refers to the regime itself." And Beetham *The legitimation of power* (1991) 13 argues that the social scientist, when describing a power relationship as legitimate, "is making a *judgement*, not delivering a *report* about people's belief in legitimacy".

24 See Schaar "Legitimacy" 109–110.

25 See Beetham *Legitimation* 12.

26 *Idem* 11–12.

people whether they believe in it. By contrast, Beetham argues that the questions of the validity and justifiability of the rules governing the exercise of power in terms of the values current in a given society, may be answered from evidence in the public domain.[27]

In the fifth place, the subjectivist approach reduces legitimacy to the stability of a regime, or a function of the political system's capacity to maintain itself.[28] Thus legitimacy is equated with the consequences it is said to produce; it is too readily inferred from the fact of obedience. The subjectivist approach seems to start from a presumption in favour of legitimacy – it is assumed "that allegiance to the order is intact unless there is overt, widespread, and well-articulated opposition to it".[29] Thus obedience arising from fear of punishment, or habit, or considerations of self-interest may easily be mistaken for legitimacy.[30] Little attention is paid to evidence of struggle and conflict – unless these occur on such a scale that they present a direct threat to the stability of the system.

Finally, only the beliefs of the subjects of a particular regime are usually considered relevant to its legitimacy. Thus the importance of the international political system, and of the opinions of other nations in conferring legitimacy upon a regime, is neglected.[31]

3 LEGAL JUSTIFICATION

3 1 Validity and justification

The notion of legitimacy refers to two other terms, namely validity and justification. Legal validity refers to the actions undertaken by lawyers to show why law is valid. Justification has a different role in the process of legitimation, and refers to the question whether law may be justified from an axiological point of view. Law is justified when it realises a certain acceptable value. From a lawyer's point of view, the problem of legitimacy is most often conceived as one of validity. Although the validity of law may be grounded in a variety of reasons, such as its being promulgated by a competent law-making agency in accordance with established procedures, or that its observance is secured by coercion, all these reasons may be reduced to a single belief, which is typical of the legalist: "law has binding force simply because it is law".[32] Law, in other words, is regarded as self-legitimating.

The conflation of legitimacy with legality or formal validity is most often associated with legal positivism. According to Kelsen, the principle of legitimacy means that the "validity (of a given system of norms) is determined only by the order to which they belong", and that "[t]hey remain valid as long as they have not been

---

27 *Idem* 13. See also Merquior *Rousseau and Weber* 6.

28 Beetham *Legitimation* 34 writes that "[m]any political scientists confuse legitimacy with regime-stability, or define it as simply a by-product of effective system-functioning".

29 Connolly "The dilemma of legitimacy" in Connolly (ed) *Legitimacy* 222 224. Beetham *Legitimation* 10 writes that the social scientist "is someone who must always be taken by surprise when people stop treating power as legitimate and take to the streets in protest".

30 People may obey the law, eg out of fear of punishment, or as a matter of tradition, or out of apathy, or considerations of self-interest, or the conviction that the law is worthy of compliance. Held *Political theory and the modern state* (1989) 101–102 argues that only the last-mentioned reason constitutes legitimacy.

31 Stillman 1974 *Polity* 35.

32 Skapska and Stelmach 1989 *Rechtstheorie* 249.

invalidated in the way in which the legal order itself determines".[33] Morality (or any other form of extra-legal justification) therefore never enters the picture. HLA Hart also excludes morality from his concept of law. "To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system."[34] He writes that to refuse to confer the title of "law" or "validity" on a morally iniquitous law which has been properly enacted and satisfies all the criteria for legal validity, would be to confuse the issue. It would be more appropriate to say: "This is law, but it is too iniquitous to be applied or obeyed."[35]

The positivist separation between law and morality is often criticised for the manner in which it reduces a normative question to a factual one. The positivist's claim to value neutrality is said to hide a preference for certain values, such as public order and authority.[36] It is pointed out that, in the years preceding the advent of Nazism, the German doctrine of the *Rechtsstaat* was "gradually and irreparably altered" by the positivist attitudes of German lawyers, which made the route to dictatorship so much easier.[37] The crude positivistic stance of many South African judges also gave rise to accusations of executive-mindedness in cases where there was a conflict between the power of the state and the rights of the individual.[38] In short, positivism is said to conflate legitimacy with legality, reduce the question of legality to a mere formal one, and thus legitimate the rule of the tyrant.

But the opposite is also true: a rigid distinction between legality and legitimacy may encourage rulers to justify unlawful government action in terms of a political legitimacy that supersedes legality. For instance, d'Entrèves refers to President De

---

33 Kelsen *General theory of law and state* (1961) 117. Cf also Ladenson "In defence of a Hobbesian conception of law" in Raz *Authority* 32, who argues that the right to rule is no more than an authorisation to use coercion.

34 Hart *The concept of law* (1961) 100. He distinguishes between primary rules and secondary rules. Regulation of behaviour is by means of primary rules. However, primary rules of obligation can only be identified with the help of a secondary rule of recognition.

35 *Idem* 203.

36 Tocqueville wrote in the 1830s that lawyers on the European Continent "are attached to public order beyond every other consideration; and the best security of public order is authority . . . [I]f they prize freedom much, they generally value legality still more; they are less afraid of tyranny than of arbitrary power; and, provided the legislature undertakes of itself to deprive men of their independence, they are not dissatisfied". Tocqueville *Democracy in America* I (1951) 275. According to Corder and Davis "Law and social practice: an introduction" Corder (ed) *Essays on law and social practice in South Africa* (1988) 1 2, the formalistic approach of South African lawyers (the "scientific" method associated with the elaboration of Roman-Dutch law) is "in itself an expression of certain social values viz a desire for system, order, and classification".

37 d'Entrèves 1963 *Rev of Metaphysics* 697. Gustav Radbruch was particularly well-known for his attack on the positivist creed of the German legal profession, and his view that there may be laws that are so patently unjust that they should be denied legal force. See Van Niekerk "The warning voice from Heidelberg – the life and thought of Gustav Radbruch" 1973 *SALJ* 234. Lon Fuller "Positivism and fidelity to law – a reply to Professor Hart" 1958 *Harv LR* 630 659 writes: "The German lawyer was therefore peculiarly prepared to accept as *law* anything that called itself by that name, was printed at government expense, and seemed to come *von oben herab* . . . I cannot see either absurdity or perversity in the suggestion that the attitudes prevailing in the German legal profession were helpful to the Nazis. Hitler did not come to power by a violent revolution. He was Chancellor before he became the Leader. The exploitation of legal forms started cautiously and became bolder as power was consolidated. The first attacks on the established order were on ramparts which, if they were manned by anyone, were manned by lawyers and judges. These ramparts fell almost without a struggle."

38 See eg Dugard "The judicial process, positivism and civil liberty" 1971 *SALJ* 181.

Gaulle's claims that "*for twenty years* he had been *the incarnation of national legitimacy*" and that "legitimacy does not depend on legality, and legality is not necessarily a proof of legitimacy".[39]

Most legal positivists would deny equating legitimacy with validity. According to Hart, "the certification of something as legally valid is not conclusive of the question of obedience".[40] Legal rules or decisions may still be criticised on extra-legal grounds, even though such criticism has no bearing on the question of validity. In this view, it is natural law theory which may insulate law from moral criticism, by equating law with morality.[41] It is, however, doubtful whether the question of validity can be judged in isolation. As David Dyzenhaus points out, words such as "validity" have "meaning only within the skein of social discourse that surrounds them".[42] Moreover, within Western culture the certification of something as "legal" or "valid" carries with it a certain tone of approval; for instance, Max Weber maintains that the belief in legality is the most important source of legitimacy in modern societies.[43] It would therefore seem as if both the natural law and legal positivist traditions have contributed to the mystification of legal authority: natural law, by grounding legal authority in metaphysics or transcendental philosophy; and legal positivism, by treating law as a closed logical system which is self-legitimating.

3 2 Legal reasoning as a distinct form of justification

Legal justification is presumed to be distinct from other forms of justification, such as moral discourse or ideology; "to furnish *legal* justification for a decision is to show that the decision is according to law".[44] It implies the existence of some standard which constrains the judge, and which is external both to the facts of the case and the subjective preferences or ideology of the judge. Thus, it presupposes the availability of a juridical method, by which general principles are brought to bear on particular cases, in a manner that yields determinate results. The belief in such a juridical method may be described as "legal formalism". Roberto Unger describes *formalism* as

---

39 d'Entrèves 1963 *Rev of Metaphysics* 688. Cf also Carl Schmitt's critique of parliamentary legality, and his defence of the principle of plebiscitary democracy in *Legalität und Legitimität* (1932).

40 Hart *Concept of law* 206.

41 According to Hart "Positivism and the separation of law and morals" 1958 *Harv LR* 593 598, the analytical separation of law and morals will help us to steer between two dangers viz "the danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism." See also Kroeze "Re-evaluating legal positivism – or positivism and fundamental rights: a comedy of errors" 1993 *SAPR/PL* 230, who criticises the "positivism-bashing" in South African legal academe, and suggests that "the mistake we made was not in trying to separate law and morality, but in uncritically accepting (explicitly or implicitly) the morality contained in apartheid legislation" (237). Falk and Shuman also note that a positivist predisposition on the part of Italian judges helped them to resist pressure from the Fascist government, and constrained reactionary judges who would use a widened discretion to the detriment of liberty (quoted by d'Entrèves 1963 *Rev of Metaphysics* 696).

42 Dyzenhaus "Positivism and validity" 1983 *SALJ* 454 464.

43 See the discussion in Botha "The legitimacy of legal orders (1): Introducing the problem" 2001 *THRHR* 171 para 6 1.

44 Michelman "Justification (and justifiability) of law in a contradictory world" in Pennock and Chapman (eds) *Justification in law, ethics, and politics* (Nomos XXVIII) (1986) 71 72.

> "a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary . . . The formalism I have in mind characteristically invokes impersonal purposes, policies, and principles as an indispensable component of legal reasoning . . . You might add a second distinctive formalist thesis: that only through such a restrained, relatively apolitical method of analysis is legal doctrine possible".[45]

Legal formalism believes, in other words, in the existence of a "method of legal justification" that distinguishes legal reasoning from moral, ideological, and other "open-ended disputes". Such a method consists in the application of "impersonal purposes, policies and principles", as opposed to the partial, subjective perspectives that characterise moral and ideological discourse. The law represents a relatively closed system: it must remain distinct from the open-ended spheres of morality, politics and interpretation, or forego its claims to objectivity, neutrality and determinacy.

And yet law can never be wholly severed from these spheres. According to Unger, "formalism presupposes at least a qualified objectivism". He describes legal *objectivism* as

> "the belief that the authoritative legal materials – the system of statutes, cases, and accepted legal ideas – embody and sustain a defensible scheme of human association. They display, though always imperfectly, an intelligible moral order".[46]

Such a moral order, importantly, is embodied in the law; it is not extrinsic to it. It is not an open-ended morality, but one that has been subsumed into the legal form. Stanley Fish characterises the relationship between law and morality as follows:

> "Morality is something to which the law wishes to be related, but not too closely; a legal system whose conclusions clashed with our moral intuitions at every point so that the categories *legally valid* and *morally right* never (or almost never) coincided would immediately be suspect; but a legal system whose judgments perfectly meshed with our moral intuitions would be thereby rendered superfluous."[47]

Joseph Singer's explication of law's claims to determinacy and objectivity throws more light on the relation between legal validity and moral justification. Theories of *legal validity* must show that legal rules and principles are *determinate*, that is, that they determine outcomes in specific cases; that the judge is not free to choose among a wide range of equally plausible outcomes. Singer shows that determinacy is both desirable and threatening. It is necessary to the ideology of the rule of law, as it restrains arbitrary judicial power. At the same time, it is threatening: a completely determinate set of rules would also be arbitrary, as it "would require judges to apply legal rules mechanically even in unforeseen circumstances where the policy underlying the rule might not apply".[48] Therefore, a legal system must incorporate not only rigid rules, but also flexible standards. It must accommodate not only the need for determinacy, but other competing values, such as security, freedom and equality. The result is a multiplicity of legal rules and principles, which

---

45 Unger "The Critical Legal Studies movement" 1983 *Harv LR* 561 564–565. Unger uses "formalism" here in a wider sense than usual. See also Unger *Law in modern society* (1976) 204.

46 Unger 1983 *Harv LR* 565. Even a legal positivist such as Hart *Law, liberty and morality* (1963) 51 concedes that some shared morality is essential to the continued existence of society.

47 Fish "The law wishes to have a formal existence" in Sarat and Kearns (eds) *The fate of law* (1991) 159–160.

48 Singer 1984 *Yale LJ* 12.

are often contradictory. Law's claim to determinacy therefore depends on the availability of a legal theory that can guide us in deciding when to follow which legal rules.

By contrast, *justification* is concerned with the quest to find *objective standards* by which we can judge and legitimate our legal rules and political institutions. Objectivity refers to the belief that the morality underlying law is not a matter of subjective belief, but constitutes an accurate representation of the good; that it is true. Singer says the following about the relation between the issues of determinacy and objectivity:

> "The issue of objectivity is related to, but different from, the issue of determinacy. The question of determinacy asks: Do our theories determine our rules and institutions and do those rules determine outcomes? The question of objectivity asks: Even if those theories determine results, what makes those institutions and doctrines legitimate? The issues are related because indeterminate theories leave us free to choose, and if we are free to choose, we have no assurance that our choices accord with the good. The issues are separate because determinate theories may or may not be legitimate, and legitimate rules and institutions may or may not be supported by determinate theories."[49]

3 3 Legal justification: a critique

The issue of justification in law has become deeply problematical in recent years. Justification presupposes the availability of a yardstick for the evaluation and criticism of power, which is itself not reducible to the power it is supposed to measure. As long as law and abstract reason are seen as removed from power, they may claim to provide a normative baseline for the evaluation and criticism of power, and thus to set limits to it. The traditional juxtaposition of the rule of law and the rule of men suggests that law is the antithesis of force, and is capable of setting effective limits to power. The traditional view of power and knowledge as ontologically separate entities, further suggests that power can be made subject to the critical light of reason. However, the modern and postmodern assault on reason has made any such claims problematic. Whereas reason appears as unified in Enlightenment thought, and is presumed to have a universal validity, postmodernism rejects all claims to finality, and assumes that there is a plurality of ways to understand our world. Postmodern critics of reason insist that all forms of knowledge – including moral knowledge and the law – are themselves products of power.[50] This presents a dilemma for the legal scholar:

> "How are we to evaluate laws, constitutions, judicial decisions, statutes, or legal interpretations, if we have lost faith in the Enlightenment ideal of holding acts of power to the critical light of reason?"[51]

More specifically, the notion of *legal* justification, which is so central to mainstream legal scholarship, has come under attack. The belief in legalism was dealt a severe blow by the legal realists, who first exposed the indeterminacy of legal rules.[52] The

---

49 *Idem* 26.

50 According to Foucault, power and knowledge are mutually constitutive and supportive. See Hutchinson *Dwelling on the threshold* (1988) 268–273. See also Lyotard *The postmodern condition: a report on knowledge* (1984) 8–9: "[K]nowledge and power are simply two sides of the same question: who decides what knowledge is, and who knows what needs to be decided?"

51 West "Disciplines, subjectivity, and law" in Sarat and Kearns (eds) *The fate of law* 119.

52 See eg Singer "Legal realism now" 1988 *Calif LR* 467; and Horwitz *The transformation of American law, 1870–1960* (1992) for a discussion of the critical legacy of legal realism.

realist project was resumed by scholars associated with the Critical Legal Studies movement, who have presented a radical challenge to liberal legalism's claims to determinacy, objectivity and neutrality. These claims have also been problematised in the writings of feminists, critical race theorists, poststructuralists, and neo-pragmatists.

Critical Legal Studies (CLS) scholars have taken the liberal legalist belief in formalism and objectivism to task by exposing the radical indeterminacy of the law. According to Unger, every branch of legal doctrine must rely on some background normative theory of the relevant area of social practice. For instance, constitutional law needs a theory of the democratic republic that would describe the proper relation between state and society. However, any such background theory is "unlikely to prove compatible with a broad range of received understandings. Yet such a compatibility seems to be required by a doctrinal practice that defines itself by contrast to open-ended ideology".[53] In the absence of a single coherent theory that unifies a particular branch of legal doctrine, the latter consists of a series of *ad hoc* rationalisations, which can be manipulated to justify a whole range of outcomes.[54]

Robin West calls the belief that law itself constitutes the standard against which the validity *and* morality of particular laws, decisions or doctrines should be judged, "legal authoritarianism".[55] Law is judged not by reference to norms culled from moral philosophy or social science, but in terms of the dictates of legalism. This belief, which is firmly ingrained in legal academe, shields legal scholars from the unsettling questions posed by the modern and postmodern disillusionment with reason. These questions are "oddly irrelevant" for the majority of legal scholars, who still cling to a pre-Enlightenment stance toward the moral authority of law.[56] For them, reason has never been the standard against which law should be judged. West rejects this pre-Enlightenment stance, and declares: "Authority of any sort, including legal authority, simply cannot be the basis of criticisms of power."[57]

The challenge facing legal scholarship is to move beyond a legalism that collapses justification into power. At the same time, such a discourse of justification must avoid recourse to abstract reason. West sees the rise of the interdisciplinary movement in law schools as a response to this challenge: both the law and economics movement and the law and humanities movement "have their genesis, at least in part, in attempts to provide a basis for criticism of law that is itself freed of the influence of either traditional moral philosophy or professional legalistic norms".[58] For law and economics scholars, neither law nor philosophy can provide a baseline for the moral criticism of law; economics, that is the study of individual preferences, provides the only knowable baseline of normative criticism. The law and humanities movement also rejects the claims of traditional moral philosophy and legalism, and turns to a culture's interpretive community as the basis of criticism of

---

53 Unger 1983 *Harv LR* 571.

54 According to Singer 1984 *Yale LJ* 26 such background theories "are either so vague or ambiguous as to give us no real help, or they are internally contradictory, telling us to do opposite things". Much of the CLS critique has centred around the notion of a "fundamental contradiction" which lies at the heart of legalism. See eg Kennedy "The structure of Blackstone's Commentaries" 1979 *Buffalo LR* 205.

55 West "Discipines" 123–127.

56 Cf Schlag "Missing pieces: a cognitive approach to law" 1989 *Texas LR* 1195.

57 West "Disciplines" 126.

58 *Idem* 127.

law. However, both movements have failed to live up to their critical potential, and are generally known for their celebration of legal culture and acquiescence in professional legal norms.[59] According to West, the conservative bias of these movements springs from the fact that neither preferences nor canonical texts and interpretive productivity – the guiding principles of the law and economics and law and humanities movements respectively – "can survive the postmodern critical assault on reason". Both a community's canonical texts and interpretations, and individual preferences, are products of power, including legal power.[60] Therefore the attempt to escape from the hold of legal authoritarianism fails.

3 4 Evaluation

In summary, a wide variety of theoretical approaches to the questions of validity and justification can be identified. We have seen that some of these theories try to maintain a strict separation between the notions of validity and justification, whereas others treat the distinction as more fluid, and tend to collapse the one into the other. Moreover, while some of these theories seek to justify legal rules or decisions with reference to normative systems outside the law, others appeal to norms and values intrinsic to the legal system. These differences can be explained with reference to the contradiction between law's purported autonomy and its sociality: the law wishes to have a formal existence, and thus to be separate from morality (and other social forces); and yet the law, in order to be legitimate, must embody a more or less coherent moral order. While a rigid separation of the questions of validity and justification is not tenable, the conflation of these two issues also runs into problems. We have seen that an appeal to legal norms as the basis of moral justification and critique may be criticised on the ground that it seeks to justify power with reference to legal authority; that it is, therefore, authoritarian. However, the justification and criticism of law with reference to extra-legal norms (morality, social consensus, the satisfaction of needs or preferences, canonical texts and interpretation) may be subject to the same criticism: that it seeks to evaluate and criticise power with an appeal to norms and values that are themselves the products of power.

4 DIMENSIONS OF LEGITIMACY

In accordance with the distinction between normative and empirical conceptions of legitimacy, and between the notions of validity and justification, it is possible to distinguish three distinct[61] uses or meanings of legitimacy. Legitimacy may denote the formal validity, the factual acceptance or efficacy, or the moral acceptability of the exercise of power.[62]

Legitimacy as *formal validity* refers to the fact that the only powers a government can lawfully exercise are those granted by law. The idea that legitimacy derives from rules is, of course, a fundamental tenet of the rule of law or *Rechtsstaat* principle.

---

59 Cf Unger's view 1983 *Harv LR* 574 that both the law and economics school and the rights and principles school are best understood as "efforts to recover the objectivist and formalist position".

60 West "Disciplines" 150.

61 Which is not to say that every theory of legitimacy can be neatly categorised as belonging to one of the three types. In fact, almost every social and legal theory draws upon a variety of the dimensions of legitimacy; however, most theories end up favouring one aspect over the others.

62 The terms validity, efficacy and acceptability are those of Aarnio *The rational as reasonable* (1987) 33–46.

However, the reduction of legitimacy to formal validity fails to do justice to the normative content of the *Rechtsstaat* idea, and ignores the social context in which law is embedded. It legitimates the power of the tyrant, as long as that power is granted by law; and conflates legitimacy with legality (in the narrow sense of the word).[63]

Legitimacy can also be regarded as the *moral justifiability or acceptability* of power relations. Legitimacy, in this sense, falls within the domain of moral and political philosophers. Power is regarded as legitimate "where the rules governing it are justifiable according to rationally defensible normative principles".[64] This approach, very importantly, restores morality to its rightful place in the discourse on legitimacy; it accords a vital role to the *values* underpinning legal rules. At the same time, however, it tends to lose sight of law's social situatedness; its inquiry is about principles embodying universal claims, rather than about the principles that obtain in a given society.

Legitimacy can also be equated with efficacy or the *factual acceptance* of power relations. It is used in a purely descriptive sense: the inquiry is concerned with given social contexts. This view of legitimacy loses sight of the moral dimension: taken to its extreme, one could argue that the reason for the illegitimacy of a repressive regime is the inefficiency of its propaganda machinery, or its inability to "engender and maintain the belief that the existing political institutions are the most appropriate ones for the society".[65] The sociological approach could, however, act as an important corrective of the moral-normative approach; while legitimacy has to be grounded in moral values, the latter must be stripped of their transcendent (or metaphysical) grounding, and embedded within a particular social context.

In order to avoid the reduction of legitimacy to a single dimension, some writers have argued for a *multidimensional, nonreductionist approach* to legitimacy. Legitimacy, according to Beetham, presupposes the conformation of exercises of power to established rules; the justifiability of such rules by reference to widely shared beliefs; and evidence of consent by the subordinate.[66] This definition combines elements of formal validity, moral justifiability and social acceptance.

A multidimensional concept of legitimacy underlies some of the most influential theories of constitutional adjudication. It is often said that a constitution must be interpreted to give effect to a nation's values and aspirations. However, few constitutional lawyers would maintain that a court is free to step outside the bounds of the constitutional text, in order to give effect to what it sees as the nation's values and aspirations. In other words, even though constitutional adjudication is seen as a value-orientated enterprise, a legal document (the constitutional text) remains the ultimate point of reference; and the constitutional interpreter is bound both by the content of the document[67] and by the rules governing the interpretation of the text. Moreover, the values informing constitutional interpretation are often said to be

---

63 Cf eg the apartheid government's insistence that it derived its powers from law, and could therefore not be called illegitimate.

64 Beetham *Legitimation* 5.

65 Lipset "Social conflict" 88.

66 Beetham *Legitimation* 15–25.

67 In the double sense that the values expressed by a constitutional judgment must be related to (if not found in) the constitutional text; and that a value judgment may not negate an express constitutional provision.

grounded in a particular social context, not in abstract truth or transcendental value. Value-orientated adjudication takes note of contemporary standards of justice, without reducing constitutional provisions to the opinions of a majority. In short, value-orientated constitutional adjudication combines elements of legitimacy as formal validity, moral acceptability and social acceptance, without simply reducing the legitimacy of constitutional review to any one of these dimensions.

However, this approach is not without difficulties. It must avoid both a subjectivist approach, which regards moral consensus as authoritative just because it exists, and an objectivist approach, which sees legal rules as legitimate in so far as they accurately reflect a transcendental moral order. A middle course is therefore adopted: legal principles are said to be grounded in consensus, and at the same time to signal a "moral order resting mysteriously upon more than consensus".[68] Two competing foundations for legal theory, consensus and reason, are therefore combined to ground the legitimacy of legal principles in *rational consensus*. Joseph Singer writes that the idea of a rational consensus rests upon a mixed metaphor:

> "This procedure *combines* the metaphor of accurate representation and the metaphor of a decision procedure. We are trying to generate an accurate picture of the considered judgment of the community; at the same time, we are trying to figure out what the considered view of others *would be* if everyone thought in a sufficiently rational way."[69]

Singer demonstrates that rational consensus cannot provide an objective foundation to legal reasoning as "it founders on its internal contradictions". By itself, it cannot generate determinate answers, as it is never clear whether it refers to "what people actually believe or what they should believe if they thought about it rationally".[70]

A multidimensional approach must also avoid the too narrow view of legal justification as the elaboration of mere formal validity, without equating legal reasoning with moral justification. Legal decision-makers must take heed of social values, but they must do so in the law's own terms – even when making value judgments, lawyers are (supposedly) still constrained by legal texts and the juridical method. However, this strategy also runs into problems. In the absence of a coherent theory which tells us how to choose among conflicting legal rules and principles, we have no assurance that our choices are either determinate or legitimate.

5 TOWARDS A DISRUPTIVE CONCEPT OF LEGITIMACY

Allan Hutchinson notes that the dominant metaphor in mainstream legal theory is that of building. Despite the crumbling of the belief in some objective certainty, mainstream legal scholars still cling to foundational thinking, erecting "baroque towers" on the shaky foundations of legal formalism and objectivism. Drawing upon Foucault, he proposes an alternative metaphor, that of "working the seam". This metaphor may be located in the context of either mining or sewing. On Hutchinson's reading, Foucault's interpretive activities should be seen within the context of sewing:

> "My interpretation of Foucault emphasises and focusses on him as an un-sewer rather than as a sewer, what he unmakes rather than what he makes. He does not stitch together grand theoretical costumes, but works their seams. He advocates a continual questioning that searches out the intolerable and identifies possible strategies for

68 Unger 1983 *Harv LR* 575. Of course, if Bernstein's broader view of objectivism is adopted (see fn 13 above), this approach does not escape from objectivism.

69 Singer 1984 *Yale LJ* 36.

70 *Idem* 38.

> transformation. When nudge comes to push comes to shove, as WB Yeats puts it, *things fall apart; the centre cannot hold* . . . Foucault is not suggesting that we can stand naked and dispense with the rational clothes of the historical present. What we can do, however, is to recognize the historicity of these garments and work to create and recreate new epistemological and ideological wardrobes from the protean fabric of social experience."[71]

André van der Walt takes up the same metaphor, but this time within the context of mining. Critical theory should "keep burrowing through the sediment of existing theory, to subject each facet of it to constant critical probing, to place all its weak spots and fault lines under constant pressure". The point of such critical theoretical activity is not merely to undermine existing theory, but also to explore new layers of legal meaning; critical theory, like coal mining, "can be destructive and constructive all at once".

> "This story does not present the law as a more or less mechanical process by which hidden (but nevertheless existing) legal meaning is found or discovered, but rather as a process by which it is wrested (and thus created) from the very loci of conflict, strife and power-struggle which make it necessary."[72]

Legitimacy, in my view, should not be seen as a building block in the great tower of legal theory, grounding established legal principles in moral truth or social consensus. The task of the critical legal scholar is, rather, to stalk the concept from behind;[73] to ask not what it can contribute to a coherent theory of the state (and the proper relation between the state and society), but what it reveals about the assumptions and pre-understandings shaping our theoretical constructs; to focus not on the apparent cohesiveness of legal theory, but on the faultlines, "the flaws and the frayed edges" that remind us that our conceptual resources, like the rules and institutions they seek to describe and justify, are human artefacts, and therefore open to challenge. Above all, we should be conscious of the processes by which power relations are camouflaged and concealed behind assertions (or assumptions) of legitimacy. We should assume responsibility for the world around us, rather than acquiesce in the "order of things".[74]

Instead of trying to integrate the formal-juridical, moral-normative and social aspects of law in a coherent theory of legitimacy, I shall focus on the contradictions, the dissonances, and the discrepancies between law's different dimensions. Seen thus, legitimacy is not a reassuring reminder of the validity – and morality – of our institutions and arrangements, but a constant interrogation of the present. Law's sociality should not be seen as a firm foundation for legal doctrine (in the sense of

---

71 Hutchinson *Dwelling on the threshold* 267–268.

72 Van der Walt "Marginal notes on powerful(l) legends: critical perspectives on property theory" 1995 *THRHR* 396 418.

73 See Van der Walt "The fragmentation of land rights" 1992 *SAJHR* 431 431–432.

74 We should, perhaps, remind ourselves of the historical context in which legitimacy rose to prominence in the political vocabulary of modernity. Historically, the term legitimacy responded to a crisis within the political institutions and self-representations of the West. See the discussion in Botha "The legitimacy of legal orders (1)" para 4. What Laclau and Mouffe *Hegemony and socialist strategy* (1985) 7 say about the genealogy of the concept "hegemony", applies with equal force to "legitimacy": that it appeared in the context of "a fault (in the geological sense), of a fissure that had to be filled up, of a contingency that had to be overcome"; that it represents "not the majestic unfolding of an identity but the response to a crisis". Or, in the words of Lefort *Democracy* ch 1, the concept of legitimacy responds to the separation of the spheres of law, power and knowledge, and thus to the impossibility of finding any complete and final principle of legitimacy.

a *Grundnorm* or rule of recognition, conferring legitimacy on all legal rules in accordance with it) but as a dangerous supplement: not only does it provide law with its social basis, but it also threatens to undermine law's autonomy.

Such a disruptive understanding of legitimacy commits us to the development of a more adequate normative account of law and politics than the thin normative theory of liberalism. At the same time, it also commits us to a more sociological approach: instead of merely inferring the legitimacy of a legal order from the absence of "overt, widespread, and well-articulated opposition to it",[75] we should become more alert to the rumblings of dissent and discontent, and start taking civil disobedience and popular resistance seriously. Liberal theorists always seem to be caught by surprise by eruptions of conflict, dissensus and antagonism. There are several reasons for this inability to account for conflict and dissensus: the tendency to conflate legitimacy with other grounds of obedience, such as apathy and pragmatic considerations; the relegation of competing value systems to the private sphere, and the assumption that the public sphere is characterised by a broad social consensus over legal and political values;[76] an underestimation of the extent to which any given consensus is shaped by power relations and is therefore always open to challenge; a statist approach which treats state power as irresistible; and the inadequacy of an individualist framework for understanding the collective aspects of social life.

Whereas liberal theory typically views incidents of resistance and dissent as mere aberrations, or as temporary delays on the road towards a rational society, a disruptive theory of legitimacy regards conflict and antagonism as constitutive of social life. Schnably cautions us, in this regard, to view every attempt to bracket some normative issues and to apply a given consensus with the greatest suspicion. He argues that

> "there is *never* any true consensus to follow. If we examine any particular area of *consensus* closely, we will find deep disputes as well. Indeed, it is precisely with respect to those values that seem most obviously uncontroversial that we should be most skeptical".[77]

We should, therefore, explore the tensions underlying supposedly consensual values and the power relations lurking behind appeals to consensus. In order to do this, we must focus, *inter alia*, on actual instances of struggle and conflict. The struggles of the new social movements (eg the women's movement, the environmental movement, the gay movement, and a host of movements mobilising around issues of cultural identity) and of local communities should serve to remind us of the contested nature of our most valued ideals, and of the violence and exclusion which are inherent to social life.[78]

---

75 Connolly "Dilemma of legitimacy" 224.

76 See Young "Impartiality and the civic public: some implications of feminist critiques of moral and political theory" in Benhabib and Cornell (eds) *Feminism as critique* (1987) 56.

77 Schnably "Property and pragmatism: a critique of Radin's theory of property and personhood" 1993 *Stanford LR* 347 363.

78 See eg Habermas "Struggles for recognition in constitutional states" 1993 *European J of Philosophy* 128; Mouffe *The return of the political* (1993) 7.

Die werking van die geskilbeslegtingsmeganisme in die Wêreldhandelsorganisasie as 'n oplossing vir handelsdispute

Elizabeth Snyman*
BIuris LLB LLM LLM LLD
Sentrum vir Ondernemingsreg, Universiteit van die Vrystaat

SUMMARY

The working of the dispute settlement mechanism in the World Trade Organization as a solution to trade disputes

Although the fundamental objectives of the old GATT system remain unchanged, the new WTO dispute settlement procedures contained in the "*Understanding on Rules and Procedures Governing the Settlement of Disputes*" represent a more consolidated and firmer legal framework for international trade disputes. Members of the WTO are still encouraged to resolve their disputes amicably and through diplomacy rather than confrontation, but where this is not possible the dispute settlement mechanism in the WTO provides for a streamlined procedure, with time limits, appeals and binding rulings which can only be reversed by mutual consent. The system includes a compulsory arbitration with consultations as well as a Dispute Settlement Body (DSB) that has the power to form panels to examine the matter and make findings to the DSB. The system also makes provision for an Appellate Body to hear appeals from panel cases.

1 INLEIDING

Die Wêreldhandelsorganisasie[1] (World Trade Organization), wat die GATT-stelsel vervang,[2] het op 1 Januarie 1995 tot stand gekom deur die Marrakesh Verklaring van 15 April 1994 en die Marrakesh Agreement Establishing the World Trade Organization wat die gevolg was van die sewe jaar lange Uruguay ronde van multilaterale handelsonderhandelinge.[3] Hierdie ooreenkoms word beskou as die

* Die outeur bedank graag die *Institute of Advanced Legal Studies*, Universiteit van Londen vir die gebruik van die biblioteek en fasiliteite van die Instituut en die Navorsingskomitee van die Fakulteit Regsgeleerdheid, UOVS vir finansiële ondersteuning. Menings uitgespreek is egter dié van die outeur en nie van die *Institute of Advanced Legal Studies* nie.

1 Hierna "die WTO".

2 Besskó "Going bananas over EEC preferences? A look at the banana trade war and the WTO's Understanding on the Rules and Procedures governing the Settlement of Disputes" 1996 *Case Western Reserve J of Int L* 287.

3 Hainsworth "Towards the millennium round: the rules of international trade" 1999 *Int Trade L and Regulation* 137; Schoenbaum "WTO dispute settlement: praise and suggestions for reform" 1998 *Int and Comp LQ* 647; Besskó 287; Dillon "The World Trade Organization: a new legal

vervolg op die volgende bladsy

belangrikste wêreldwye ooreenkoms sedert die Handves van die VN.[4] Ongeveer 90 persent van die wêreld se handel in goedere ressorteer onder die WTO raamwerk, terwyl handel in dienste en handelsverwante aspekte van immaterieelgoedereregte[5] ook by die WTO ingesluit is.[6]

Dit is noodsaaklik dat internasionale ooreenkomste of verdrae met inbegrip van internasionale ekonomiese organisasies nagekom en afgedwing word[7] en geskilbeslegtingsmeganismes word daargestel om te verseker dat die onderhandelde reëls nagekom word.[8] In die geval van die WTO word die implementering van die ooreenkoms van optrede ("code of conduct") van die WTO op twee wyses verseker, naamlik deur die WTO geskilbeslegtingsmeganisme ("dispute settlement mechanism") en die WTO handelsbeleidhersieningsmeganisme ("trade policy review mechanism").[9] Laasgenoemde omsluit ondersoek, beheer en kontrole, terwyl eersgenoemde die oplossing van konflik binne 'n vasgestelde tydperk ten doel het.[10] Dit word van alle lidlande vereis dat hulle hul sal onderwerp aan die stelsel van geskilbeslegting van die WTO.[11]

---

order for world trade?" 1995 *Mich J of Int L* 349; Bello en Holmer "US Trade law and Policy series No 24: Dispute resolution in the new World Trade Organization: concerns and net benefits" 1994 *Int Law* 1095–2003; Castel "The Uruguay Round and the improvements to the GATT dispute settlement rules and procedures" 1989 *ICLQ* 834–849; Blakeney "The origins of the World Trade Organization" 1995 *Int Trade LR* 49.

4 Chua "Reasonable expectations and non-violation complaints in GATT/WTO jurisprudence" 1998 *J of World Trade* 27; Petersmann *The GATT/WTO dispute settlement system: international law, international organizations and dispute settlement* (1997) 45 (hierna Petersmann (1997)); Brewer en Young "WTO disputes and developing countries" 1999 *J of World Trade* 169.

5 Sien in hierdie verband veral Trachtman "The domain of WTO dispute resolution" 1999 *Harv Int LJ* 333–337.

6 Chua 27.

7 Sien oa Petersmann "The dispute settlement system of the World Trade Organization and the evolution of the GATT dispute settlement system since 1948" 1996 *Common Market LR* 1211–1215 (hierna Petersmann (1996)); Gaffney "Due process in the World Trade Organization: the need for procedural justice in the dispute settlement system" 1999 *Am Univ Int LR* 1182; Van der Borght "The review of the WTO Understanding of Dispute Settlement: some reflections on the current debate" 1999 *Am Univ Int LR* 1224; Wang "Are trade disputes fairly settled?" 1997 *J of World Trade* 59–72. Kufuor "From the GATT to the WTO: the developing countries and the reform of the procedures for the settlement of international trade disputes" 1997 *J of World Trade* 117: "However, economic objectives can be achieved only to the extent that the international obligations are known, respected and understood not only by governments but also by private traders, producers, investors and consumers and to the extent that the obligations are consistently construed and applied over time."

8 Marceau "Rules on ethics for the new World Trade Organization dispute settlement mechanism" 1998 *J of World Trade* 57; Jackson en Croley "WTO dispute procedures, standards of review, and deference to national governments" 1996 *Am J of Int L* aangehaal in Vermulst en Komuro "Anti-dumping disputes in the GATT/WTO; navigating dire straits" 1997 *J of World Trade* 5: "Over the last fifteen years, many countries have come to recognize the crucial role that dispute settlement plays for any treaty system. This is particularly the case for a treaty system designed to address the myriad of economic questions of international relations today and to facilitate the co-operation among nations that is essential to the peaceful and welfare-enhancing role of these relations. Dispute settlement procedures assist in making rules effective, thereby adding an essential measure of predictability and effectiveness for the operation of a rule-orientated system in the otherwise relatively weak realm of international norms."

9 Sien oa Petersmann (1996) 1211–1215; Gaffney 1182; Van der Borght 1224.

10 Qureshi 1999 *Int Economic L* 287 (hierna Qureshi (1999)); Van der Borght 1224.

11 Lichtenbaum "Procedural issues in WTO dispute resolution" 1998 *Mich J of Int L* 1196.

Die stelsel van geskilbeslegting dien ook om die veiligheid en konsekwentheid van die handelstelsel te verseker. Eerstens word die regte en verpligtinge van lidlande uiteengesit in die WTO kode beskerm deurdat uitdruklik bepaal word dat die aanbevelings en beslissings van die geskilbeslegtingsmeganisme nie regte of verpligtinge kan byvoeg, beperk of wegneem waarop die lidlande in die Kode ooreengekom het nie. Tweedens fasiliteer die geskilbeslegtingsmeganismes die verklaring en interpretasie van die bepalings van die kode deur die uitleg daarvan ooreenkomstig die reëls van die internasionale reg. Derdens voorkom die geskilbeslegtingstelsel dat state eensydige besluite neem en afwyk van die bepalings van die kode deurdat lidlande eers WTO goedkeuring moet verkry in die geval waar van die bepalings van die kode afgewyk gaan word.[12] Ook word verhoed dat van die lidlande eensydig nakoming van die kode of die reëls van die Understanding on Rules and Procedures Governing the Settlement of Disputes[13] probeer afdwing.[14] Laastens bied die geskilbeslegtingstelsel van die WTO die verdere voordeel dat lidlande een stelsel van geskilbeslegting moet volg wanneer 'n geskil ontstaan ten aansien van die ooreenkomste tussen die partye. Die prosedure en proses is duidelik en seker.[15]

Aanhangsel 2 van die Agreement Establishing the World Trade Organization met die opskrif "Understanding on Rules and Procedures Governing the Settlement of Disputes" bevat volledige reëls en prosedures vir die beslegting van geskille tussen lidlande van die WTO.[16] Hoewel die WTO geskilbeslegtingsmeganisme in 'n groot mate 'n reorganisasie van die GATT- (General Agreement on Trade and Tariffs) stelsel is,[17] is dit in so 'n mate innoverend dat dit van die GATT-meganisme onderskei kan word. Die GATT-meganisme is aan bande gelê deur oponthoude; nie-aanvaarding van besluite van die geskilbeslegtingspanele; en die afwesigheid van 'n stelsel van appèl. Hierdie probleme word in die WTO-geskilbeslegtingstelsel ondervang.[18]

---

12 Qureshi (1999) 289.

13 Hierna "UDS".

14 Zonnekeyn "The Bananas dispute in the World Trade Organization: The DSU conundrum" 1999 *Int Trade LR* 85; Puente "Section 301 and the new WTO dispute understanding?" 1995 *ILSA Int and Comp L* 222; Specht "The dispute settlement systems of WTO and NAFTA – analysis and comparison" 1998 *Georgia J of Int and Comp L* 78.

15 Specht 77; Thomas "The need for due process in the WTO proceedings" 1997 *J of World Trade* 45–49; Palmeter 51–57.

16 Warhead "The New WTO dispute resolution procedure" 1995 *Int Trade L and Regulation* 114; Besskó 288; Komuro "The WTO dispute settlement mechanism – coverage and procedures of the WTO understanding" 1995 *J of Int Arbit* 81–171 (hierna Komuro (1995)).

17 Sien in hierdie verband veral Lichtenbaum 1198; Petersmann (1997) 179; Gantz "Dispute settlement under the NAFTA and the WTO: choice of forum opportunities and risks for the NAFTA parties" 1999 *Am Univ Int LR* 1049; Castel 834–849; Demaret "The metamorphoses of GATT: from the Havana Charter to the World Trade Organization 1995 *Columbia J of Transn L* 125–133; Ahn "The long road ahead: dispute settlement in the GATT/WTO" 1999 *Mich J of Int L* 413–418; Zekos "An examination of GATT/WTO arbitration procedures" 1999 *Dispute Resolution J* 72–76.

18 Qureshi (1999) 288; sien ook Specht 72–77; Stiles "The WTO regime: the victory of pragmatism" 1995 *J of Int L and Practice* 3–41; Van Bael "The GATT dispute settlement procedure under the Wolrd Trade Organization – GATT 1994 and under Chapter 19 of the North American Free Trade Agreement" 1995 *Hamline LR* 343.

2 GESKILBESLEGTING IN DIE WTO

2 1 Inleiding

Die WTO-geskilbeslegtingsinstellings funksioneer in 'n groot mate soos 'n hof vir internasionale handel.[19] Die raamwerk waarbinne geskilbeslegting in die WTO plaasvind, word in die UDS uiteengesit.[20] Die UDS het dieselfde juridiese gesag as die WTO kode, hoewel die hele stelsel van geskilbeslegting in die struktuur van die WTO verweef is.[21]

Die UDS het ten doel om 'n volledige raamwerk daar te stel vir die oplossing van internasionale handelsgeskille onder die leiding en beheer van die WTO. Die UDS maak dus voorsiening vir 'n verskeidenheid meganismes om handelsgeskille, insluitend geskille oor handel in dienste en immaterieelgoedereregte, tussen state op te los.[22] Die algemeenste hiervan is die stelsel van paneelbeslegting en die moontlike daaropvolgende appèl. Ander meganismes sluit in prosedures soos konsultasie, konsiliasie, mediasie en arbitrasie.[23] Die hoeksteen van die UDS is konsultasie en die paneelstelsel.[24] Die klem ten aansien van al hierdie meganismes of stelsels is dat daar 'n vrywillige en konsensuele ooreenkoms tussen die partye verseker moet word eerder as 'n beslissing wat op die partye afgedwing moet word. Daar is egter 'n aantal bepalings in die UDS wat ten doel het om te verseker dat die beginsel van "rule of law" nie uit die oog verloor word nie.[25] Indien die beslissings nie deur 'n party nagekom word nie kan sanksies teen so 'n party volg.[26]

2 2 Samestelling en werking van die geskilbeslegtingsraad

'n Geskilbeslegtingsraad[27] ("dispute settlement body") is opgerig om die reëls en prosedures van die UDS te administreer. Die DSB het die bevoegdheid om geskilbeslegtingspanele saam te stel; paneel- en appèlbesluite te aanvaar; die gebruik van sanksies deur lidlande te magtig; en die implementering van beslissings en aanbevelings te moniteer.[28]

2 3 Proses van geskilbeslegting in die paneel en by appèl

Die proses van geskilbeslegting in die WTO bestaan uit vier fases, naamlik konsultasie, geskilbeslegting in paneel, appèl en afdwinging.[29] Die proses is duidelik en eenvoudig en maak voorsiening vir die nakoming van die reëls van natuurlike geregtigheid.[30]

---

19 Schoenbaum 648; Komuro (1995) 81–171.
20 Qureshi (1999) 289; Qureshi *The World Trade Organization. Implementing international trade norms* (1996) 97; Jackson *The World Trade Organization Constitution and Jurisprudence* (1999 herdruk) 72.
21 Specht 79.
22 Qureshi (1999) 289; Jackson 72.
23 Qureshi (1999) 296; Gantz 1050; Zekos 72–76.
24 Qureshi (1999) 300.
25 *Idem* 296; sien ook Footer "The role of consensus in GATT/WTO decision-making" 1996/1997 *Northwest J of Int L & Business* 653–680.
26 Schoenbaum 648.
27 Hierna "DSB".
28 Qureshi (1999) 290; Besskó 288; Specht 79; Hirsch "The WTO Bananas decision: cutting through the thicket" 1998 *Leiden J of Int L* 201.
29 Wareham "The new WTO Dispute resolution procedure" 1995 *Int Trade L and Regulation* 115; Schoenbaum 647; Komuro (1995) 81–171.
30 Thomas *J of World Trade* 45–49; Palmeter *idem* 51–57; Stiles 3–41.

Die stelsel van paneelgeskilbeslegting[31] het kenmerke van sowel die akkusatoriese as die inkwisatoriese stelsel. Die paneelsittings is nie oop vir die publiek nie en die deursigtigheid van die proses word derhalwe bevraagteken. Ten aansien hiervan moet die hoogs vertroulike aard van sommige inligting wat hanteer word, in ag geneem word.[32] Die funksie van die paneel is om 'n objektiewe bevinding te maak ten aansien van die feite en die toepaslikheid van die WTO kode en of die optredes van die partye in ooreenstemming daarmee is.[33]

Die daarstelling van die appèlraad ("appellate body") is een van die unieke kenmerke van die WTO se geskilbeslegtingsmeganisme aangesien dit sedert die instelling van 'n geskilbeslegtingsmeganisme in GATT voorsiening daarvoor maak dat 'n party teen 'n paneelbevinding kan appelleer.[34]

2 3 1 Konsultasie

In geval van handelsgeskille tussen lande word die onderskeie partye (lidlande) aangemoedig om in konsultasie met mekaar te tree en om simpatiek aandag aan die voorleggings van die ander party(e) te gee. Tydens konsultasie kry al die partye derhalwe die geleentheid om mekaar se posisie of standpunt beter te verstaan.[35] Gedurende die konsultasieproses versoek een lidland dus 'n konsultasie met 'n ander lidland of -lande.[36] Die versoek moet skriftelik[37] wees maar word vertroulik[38] hanteer. Die DSB moet van alle konsultasies in kennis gestel word. Die beslegting van die geskil tydens konsultasie moet steeds in ooreenstemming wees met die WTO Kode.[39] 'n Lidland wat 'n versoek om konsultasie ontvang, moet binne tien dae daarop reageer en binne 30 dae te goeder trou aan die konsultasie deelneem.

Indien die geskil nie binne 60 dae opgelos word nie, word 'n geskilbeslegtingspaneel saamgestel.[40] Ook in die geval waar 'n lidland weier om tot

---

31 Vir 'n bespreking van 'n geskil soos besleg deur 'n paneel, sien bv Komuro "*Kodak-Fuji Film* dispute and WTO Panel Ruling" 1998 *J of World Trade* 161–217; Goldman "Bad lawyering or ulterior motive? Why the United States lost the film case before the WTO dispute settlement panel" 1999 *L and Policy in Int Business* 417–437; Ahn "Environmental disputes in the GATT/WTO: before and after US-Shrimp case" 1999 *Mich J of Int L* 819–870; Durling en Lester "Original meanings and the Film dispute: the drafting history, textual evolution, and application of the non-violation nullification or impairment remedy" 1999 *George Washington J of Int L and Economics* 211–269; Gupta "Appellate body interpretation of the WTO agreement: a critique in light of Japan – Taxes on alcoholic beverages" 1997 *Pacific Rim L & Policy J* 683–716; World Trade Organization *Annual Report* (2000) 57–69.

32 Qureshi (1999) 303.

33 UDS a 11(1); Chua 27; sien ook Stewart en Burr "The WTO panel process: an evaluation of the first three years" 1998 *The Int Lawyer* 709–735; Croley en Jackson "WTO dispute procedures, standards of review and deference to national governments" 1996 *Am J of Int L* 193–213.

34 Joergens "True appellate procedure or only two-stage process? A comparative view of the Appellate Body under the WTO dispute settlement understanding" 1999 *Law and Policy in Int Business* 193; sien ook Horlick "The consultation phase of WTO dispute resolution: a private practitioner's view" 1998 *The Int Lawyer* 685–693.

35 Qureshi (1999) 300; Van der Borght 1232; Wareham 118.

36 Schoenbaum 648; Van der Borght 1232; sien egter ook Schleyer "Power to the people: allowing private parties to raise claims before the WTO dispute resolution system" 1997 *Fordham LR* 2275–2311.

37 A 4(4) UDS.

38 A 4(6) UDS.

39 A 3(5) UDS; Qureshi (1999) 300.

40 Schoenbaum 648.

konsultasie toe te tree waar 'n klagte teen die betrokke lidland ontvang is, kan die ander party vra dat die aangeleentheid voor 'n paneel gebring word.[41] Een van die partye by die konsultasie kan versoek dat 'n geskilbeslegtingspaneel saamgestel word sodat die aangeleentheid beoordeel kan word indien dit blyk dat die geskil nie deur konsultasie opgelos kan word nie.[42] Voordat die saak voorgelê word vir beslissing deur 'n paneel, moet die party eers seker maak dat dit vrugbaar ("fruitful")[43] sal wees,[44] met ander woorde dat die party die remedie of resultaat van die paneelproses sal oorweeg. Die paneelproses vereis dus positiewe reaksie van die partye by die geskil.[45] Die UDS vereis dat die konsultasie met erns bejeën sal word en nie as bloot 'n blote formaliteit wat nagekom moet word alvorens 'n paneel saamgestel kan word nie.[46]

2 3 2 Samestelling van paneel

Nadat 'n lidland die samestelling van 'n paneel versoek het, moet dit binne 60 dae saamgestel word en die geskil moet binne nege maande, en waar appèl aangeteken word, binne 12 maande afgehandel word, behalwe waar al die partye by die geskil instem dat die proses vertraag word.[47] 'n Paneel word saamgestel tydens die DSB vergadering wat volg op die vergadering waar die versoek voorgelê is.[48] Die sekretariaat van die WTO het 'n lys van paneellede waarvan bepaalde individue deur die sekretariaat aanbeveel word om in bepaalde sake op die geskilbeslegtingspaneel te dien.[49] Partye by die geskil mag alleenlik die aanstelling van 'n paneellid teenstaan indien ernstige redes daarvoor bestaan.[50] In die praktyk word die partye egter wel toegelaat om 'n voorgestelde paneellid te verwerp, aangesien die partye se goedkeuring nodig is vir die samestelling van die paneel.[51] Die lys van paneellede word saamgestel uit goed gekwalifiseerde staatsdiens en nie-staatsdiens individue wat in 'n verteenwoordigende hoedanigheid in die WTO sisteem of die WTO sekretariaat gedien het of individue wat onderrig gee of gepubliseer het op die vakgebied van die internasionale handel.[52] Die lede van die paneel hoef egter geen regsagtergrond te hê nie. Die paneellede is meestal gewese handelsamptenare.[53] Hulle dien in hul persoonlike hoedanigheid op die paneel en verteenwoordig nie hul land of organisasie nie.[54] Die paneellede se onpartydigheid word verseker deurdat van hulle verwag word om enige relevante inligting te openbaar en ook deur hul verklarings tydens hul aanstelling.[55] Tensy anders ooreengekom, mag 'n paneellid nie op 'n paneel dien ten aansien van 'n saak waarby sy eie regering betrokke is nie.[56]

---

41 Gantz 1050.
42 A 4(7) UDS; Qureshi (1999) 300; Van der Borght 1233.
43 A 3(7) UDS.
44 Qureshi (1999) 300; Van der Borght 1233.
45 Qureshi (1999) 300.
46 A 4(1) en (2) UDS); Specht 82.
47 Gantz 1051.
48 A 6 UDS; Specht 83; Besskó 290; Wareham 118.
49 A 8(4) en (6) UDS; Qureshi (1999) 301.
50 A 8(6) UDS; Qureshi (1999) 301; Specht 83.
51 Qureshi (1999) 302; Van der Borght 1238.
52 A 8 UDS; Qureshi (1999) 301; Gantz 1051; Van der Borght 1238.
53 Qureshi (1999) 301.
54 A 8(9) UDS; Qureshi (1999) 301.
55 Qureshi (1999) 301.
56 A 8(3) UDS; Qureshi (1999) 301; Gantz 1051.

2 3 3 Jurisdiksie ("terms of reference")

Die aangeleentheid wat deur die paneel hanteer word, word bepaal deur die versoek van 'n lidland dat 'n paneel saamgestel moet word om 'n beslissing ten aansien van 'n bepaalde probleem te lewer.[57] Artikel 7.1 van die UDS bepaal dat, in die afwesigheid van 'n ander ooreenkoms tussen die partye, 'n paneel se jurisdiksie is

> "to examine, in light of the relevant provisions in (name of covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or giving the rulings provided for in that/those agreement(s)".

Aangesien die paneel se jurisdiksie beperk word tot daardie aangeleenthede wat deur 'n lidland na die DSB verwys is, is dit moontlik dat sekere eise of geskille nie deur die paneel hanteer kan word nie, omdat dit nie spesifiek in die lidland se versoek vir die samestelling van 'n paneel genoem is nie.[58] Inteendeel, artikel 6.2 gaan selfs verder en vereis uitdruklik dat 'n versoek om die samestelling van 'n paneel die bepaalde probleem of geskil duidelik sal uiteensit deur spesifieke geskilpunte duidelik aan te dui en 'n kort uiteensetting van die regsgronde van die klagte of eis te gee.[59] Nakoming van hierdie vereiste vervul ook die funksie dat die ander party by die geskil, asook derde partye wat aan die paneelsitting wil deelneem, die presiese aard van die geskil kan vasstel.[60]

2 3 4 Paneelondersoek

In die ondersoek van die aangeleentheid, volg die paneel 'n vaste werksprosedure ("working procedure") wat in 'n bylaag tot die UDS vervat is.[61] Die paneel stel eerstens 'n tydsrooster op waarna die voorleggings van die partye ontvang word, argumente aangehoor word en, indien nodig, verdere inligting aangevra word.[62]

Die paneel moet 'n objektiewe beoordeling maak ten aansien van die saak voor hom[63] en te goeder trou optree in ooreenstemming met die reëls van natuurlike geregtigheid.[64] Dit sluit die verpligting in om die bewyse te oorweeg en om tot 'n gevolgtrekking(s) te kom op grond van die bewyse of getuienis voor die paneel.[65] Die paneel mag nie doelbewus weier om enige getuienis in oorweging te neem of dit ignoreer nie. Die paneel mag ook nie wetend getuienis uit verband ruk of wanvoorstel nie.[66]

Paneelbesprekings en ondersoeke is vertroulik en die opinies van die individuele paneellede moet anoniem bly.[67] Daar word van die paneellede verwag om op 'n gereelde basis met die partye by die geskil te konsulteer en om aan hulle genoegsame geleentheid te bied om by te dra tot die daarstelling van 'n wedersyds aanvaarbare oplossing.[68] Die paneel mag ook konsulteer met enige lid wat wesenlike

---

57 Lichtenbaum 1225.
58 *Ibid.*
59 *Ibid.*
60 *Ibid.*
61 Specht 84.
62 *Ibid.* .
63 A 11 UDS; Qureshi (1999) 302.
64 Qureshi (1999) 302.
65 *Ibid.*
66 *Ibid.*
67 A 14 UDS; Qureshi (1999) 302.
68 Qureshi (1999) 303.

belange by die geskil het,[69] asook met enige persoon of organisasie wat na die mening van die paneel nodig is.[70] Die paneelbespreking en die opstelling van die verslag vind egter nie in die aanwesigheid van iemand anders as paneellede plaas nie.[71]

2 3 5 Deskundige hersieningsgroep

Die paneel mag 'n raadgewende verslag aanvaar van 'n deskundige hersieningsgroep waar daar 'n feitelike aangeleentheid van 'n wetenskaplike of tegniese aard deur een van die partye tydens die geskil na vore gebring is.[72]

2 3 6 Voorlegging van verslag

Die geskilbeslegtingspaneel moet binne ses maande vanaf die aanstelling van die paneel 'n finale verslag indien.[73] In geval van dringende sake, soos byvoorbeeld in die geval van bederfbare goedere, moet die verslag binne drie maande voorgelê word. Die voorlegging van die verslag mag nooit later as binne nege maande geskied nie.[74]

2 3 7 Tussentydse verslag

Alvorens 'n tydelike verslag deur die paneel uitgereik word, stuur die paneel die feitelike en die argumentasie gedeeltes van die verslag aan die partye by die geskil vir kommentaar.[75] Daarna reik die paneel 'n tussentydse verslag uit vir oorweging en kommentaar deur die lidlande alvorens 'n finale verslag uitgereik word.[76] Die partye by die geskil mag kommentaar lewer op die verslag en ook die paneel versoek dat spesifieke aspekte van die tussentydse verslag hersien moet word.[77] Sodoende kry die partye 'n laaste geleentheid om die aangeleentheid voor die paneel te argumenteer.[78] Indien geen party 'n verdere (derde) vergadering met die paneel versoek nie word die finale verslag aan elke lid versprei.[79]

2 3 8 Aanvaarding van die finale verslag

Die finale verslag moet binne 60 dae aan die DSB voorgelê word vir aanvaarding. Die UDS maak voorsiening vir die noodwendige aanvaarding van die verslag,[80] maar die finale verslag sal nie aanvaar word nie indien een van die partye by die geskil die DSB in kennis stel van sy/haar voorneme om te appelleer of indien daar konsensus in die DSB bestaan dat die verslag nie aanvaar word nie.[81] Die DSB beskik nie oor die bevoegdheid om die verslag se inhoud op enige wyse te verander of te wysig nie. Die DSB kan slegs die verslag in geheel aanvaar of verwerp.[82]

---

69 A 10 UDS; Specht 85.
70 Gantz 1052.
71 Specht 84.
72 Gantz 1052; sien egter ook Herman "The WTO Dispute Settlement Review Commission: an unwise extension of extrajudicial roles" 1996 *Hastings LJ* 1635–1667.
73 Qureshi (1999) 301.
74 *Idem* 302.
75 Gantz 1053.
76 A 15 UDS; Qureshi (1999) 303; Specht 85; sien ook Schaefer "National review of WTO dispute settlement reports: in the name of sovereignty or enhanced WTO rule compliance?" 1996 *St John's J of Legal Commentary* 307–350; Croley en Jackson 193–213.
77 Qureshi (1999) 303; Specht 85; Gantz 1053.
78 Specht 85; Huntington "Symposium on the North American Free Trade Agreement: Settling disputes under the North American Free Trade Agreement" 1993 *Harv Int LJ* 422.
79 A 15(2) UDS; Specht 85.
80 A 16(4) UDS; Besskó 285 290; Specht 79 86; Gantz 1049 1054.
81 Qureshi (1999) 303; Specht 79 86; Gantz 1054; Besskó 290.
82 Specht 86.

In geval van 'n hersiening is die algemene GATT/WTO gebruik dat dit as 'n *de novo* saak beskou word, behalwe waar anders bepaal is.[83]

2 3 9 Appèl

'n Party mag ten aansien van die finale verslag na die appèlraad ("appellate body")[84] appelleer. Die reg op appèl is beperk tot 'n regsvraag ten aansien van die verslag en die juridiese interpretasie van die paneel.[85] Wat as 'n regsvraag beskou kan word, bly egter 'n ope vraag.[86] Slegs 'n party by die geskil mag appèl aanteken en 'n derde party lidland het nie sodanige reg nie.[87] Die appèlraad mag wel kennis neem van verklarings van derde partye.[88]

Daar geld ook streng maatreëls ten aansien van tydsverloop tydens die appèlproses. Die appèlproses vind plaas binne 60 dae, maar mag nie langer as 90 dae duur nie.[89]

Lede van die appèlraad mag 'n eie mening as 'n persoonlike opinie by die bevinding van die appèlraad voeg in die vorm van 'n minderheidsopinie. Hierdie persoonlike opinies word egter anoniem by die verslag van die appèlraad gevoeg.[90]

Wat die appèlraad se samestelling betref, word gepoog om dit so ver moontlik verteenwoordigend van die WTO ledesamestelling te maak. Die raad word saamgestel uit sewe persone wat as gesaghebbende kenners met bewese deskundigheid

---

83 Qureshi (1999) 302.

84 Vir 'n bespreking van die benadering en hantering van bepaalde sake deur die appèlraad sien bv Ala'I "Free trade or sustainable development? An analysis of the WTO Appellate Body's shift to a more balanced approach to trade liberalization" 1999 *Am Univ Int LR* 1129–1171; Cone "The appellate body and *Harrowsmith Country Life*" 1998 *J of World Trade* 103–17; Knight "The dual nature of cultural products: an analysis of the World Trade Organization's decisions regarding Canadian periodicals" 1999 *Univ Toronto Faculty of Law R* 165–191; Matheny "In the wake of the flood: 'Like products' and cultural products after the World Trade Organization's decision in Canadian Certain Measures Concerning Periodicals" 1998 *Univ Penn LR* 245–278; Scow "The Sports Illustrated Canada controversy: Canada 'strikes out' in its bid to protect its periodical industry from US split-run periodicals" 1998 *Minn J of Global Trade* 245–285; Johnson "Canada's magazine and cultural policies: the World Trade Organization decision in Canada – Certain measures corncerning periodicals" 1998 *Canadian Int Lawyer* 21–27; Pyatt "The WTO sea turtle decision" 1999 *Ecology LQ* 815–838; Berger "Unilateral trade measures to conserve the world's living resources: an environmental breakthrough for the GATT in the WTO sea turtle case" 1999 *Columbia J of Env L* 355–411; Simmons "In search of balance: an analysis of the WTO Shrimp/Turtle Appellate Body Report" 1999 *Columbia J of Env L* 413–453; "Extraterritorial shrimps, NGOs and the WTO Appellate Body" 1999 *The Int & Comp LQ* 199–206; Appleton "GATT Article XX's chapeau: a disguised 'necessary' test?: The WTO Appellate Body's ruling in United States – Standards for Reformulated and Conventional Gasoline" 1997 *R of Eur Community and Int Env L* 131–138; Waincymer "Reformulated Gasoline under reformulated WTO dispute settlement procedures: pulling Pandora out of a chapeau?" 1996 *Mich J of Int L* 141–181; Charnovitz "WTO's Alcoholic Beverages decision" 1996 *R of European Community and Int Env L* 198–203. Vermulst, Mavroidis en Waer "The functioning of the Appellate Body after four years. Towards rule integrity" 1999 *J of World Trade* 1–50 bied 'n goeie maar bondige bespreking van 15 beslissings van die appèlraad.

85 Qureshi (1999) 303; Gantz 1054.

86 Qureshi (1999) 303.

87 A 17(4) UDS; Specht 86.

88 UDS.

89 A 17(5) UDS; Specht 86; Gantz 1054.

90 Specht 86.

in die reg, internasionale handel en die ooreenkomste beskou word en wat nie by enige regering betrokke is nie.[91] Lede word vir 'n termyn van vier jaar aangestel[92] en, anders as in geval van die paneelsamestelling, kan die partye nie kies watter lid van die appèlraad sitting op die bepaalde saak het nie.[93] Drie van die sewe lede van die appèlraad hoor die sake op rotasiebasis aan.[94] Die appèlraad hersien sake slegs ten aansien van juridiese aangeleenthede en regsvrae[95] en nie ten aansien van feitelike aangeleenthede en vrae nie.[96]

2 3 10 Aanvaarding van appèlbevinding

Die appèlraad se verslag word binne 30 dae na sirkulasie aan die lidlande sonder wysigings aanvaar tensy die DSB daarteen stem.[97]

2 3 11 Implementering en afdwinging van bevinding

Indien die paneel of die appèlraad vind dat die maatreël in geskil in ooreenstemming met 'n ooreenkoms is, sal die eis of klagte verwerp word. In geval van 'n oortreding sal die paneel of die appèlraad in hul verslag aanbeveel op welke wyse die oortredende party die afwyking kan regstel of in ooreenstemming met die betrokke ooreenkoms bring. Die verslag sal ook vermeld hoe die aanbevelings van die paneel of appèlraad geïmplementeer kan word.[98] Die betrokke partye moet die nodige stappe doen om gehoor te gee aan die bevindinge en aanbevelings van die paneel en waar van toepassing, die appèlraad.[99] Dit kan inhou dat die party byvoorbeeld nasionale wetgewing of regulasies behoort te wysig. Dit moet egter binne 'n redelike tyd gedoen word.[100]

3 SUKSESSE VAN DIE GESKILBESLEGTINGSRAAD

Die geskilbeslegtingsmeganisme van die WTO word as die hoeksteen van die organisasie beskou.[101] Hierdie geskilbeslegtingsmeganisme van die WTO was gedurende die eerste vyf jaar van die bestaan van die WTO baie suksesvol soos blyk uit die gewilligheid van lidlande om dit te gebruik.[102] Ook is die vasbeslotenheid van die lidlande om die reëls en prosedures van die UDS en ander WTO ooreenkoms na

91 A 17(3) UDS; Specht 80; Gantz 1054; Wareham 117.
92 *Ibid.*
93 A 17(1) UDS; Specht 80.
94 *Ibid.*
95 A 17(4) en (6) UDS; Specht 81.
96 Specht 81.
97 A 17(14) UDS; Specht 87; Gantz 1055; Besskó 291.
98 A 19(1) UDS; Specht 87; Gantz 1055.
99 Gantz 1055; sien ook Reif en Florestal "Revenge of the push-me, pull-you: the implementation process under the WTO dispute settlement understanding" 1998 *The Int Lawyer* 755–788.
100 Gantz 1055.
101 Lichtenbaum 1195; Van der Borght 1225; Albren "The continued need for a narrowly-tailored rule-based dispute resolution mechanism in future free trade agreements" 1996 *Suffolk Transn LR* 106; Chua 27; Hallum "WTO dispute settlement" 1998 Feb *New Zealand LJ* 73; Qureshi (1999) 287.
102 Hainsworth 138; sien ook Hudec "The new WTO dispute settlement procedure: an overview of the first three years" 1999 *Minnesota J of Global Trade* 1–53.

te kom, tydens die 1996 ministeriële vergadering in Singapoer herbevestig.[103] Die WTO direkteur-generaal Renato Ruggiero het dit duidelik gestel:

> "One success that stands out above all the rest is the strengthening of the dispute settlement mechanism. This is the heart of the WTO system. Not only has it proved credible and effective in dealing with disputes, it has helped resolve a significant number at the consultation stage. Furthermore, developing countries have become major users of the system, a sign of their confidence in it which was not so apparent under the old system."[104]

Die sukses van die WTO geskilbeslegtingsmeganismes blyk verder ook uit die gewilligheid van lidstate om gehoor te gee aan die beslissings en aanbevelings[105] van die geskilbeslegtingsraad van die WTO.[106] Die aantal sake wat na die WTO vir beslegting gebring word, is aansienlik meer as wat die geval was met die GATT van 1947. In die byna vyftig jaar van die bestaan van GATT is slegs sowat 200 geskille vir beslegting voorgelê. Daarteenoor is daar reeds teen September 1999 181 versoeke om konsultasie oor 141 verskillende onderwerpe, soos byvoorbeeld oor diskriminerende binnelandse belastings, handelsaspekte van die beskerming van immaterieelgoedereregte, sanksies en uitsluitings[107] na die WTO gebring.[108] Sowat 37 van hierdie sake is tussen die partye geskik of is nie meer in geskil nie. Daar is egter reeds 24 sake suksesvol afgehandel deur óf die geskilbeslegtingspaneel óf die appèlraad. [109] Die orige 30 sake word tans hanteer.[110]

In die afhandeling van die sake het die geskilbeslegtingspaneel of die appèlraad nie net die geskille tussen lidlande besleg nie, maar ook opheldering of duidelikheid gebring ten aansien van sommige van die WTO bepalings. Dit dra by tot sekerheid en voorspelbaarheid en kan in die toekoms aan die lidlande leiding bied met betrekking tot bepaalde optredes.[111] In 1996 het die ministeriële vergadering dit ook

---

103 Zonnekeyn "Stretching the limits of the WTO dispute settlement mechanism" 1999 *Int Trade L and Regulation* 31. Die ministeriële verklaring, aangehaal in Jackson 60, lui soos volg: "The Dispute Settlement Understanding (DSU) offers a means for the settlement of disputes among Members that is unique in international agreements. We consider its impartial and transparent operation to be of fundamental importance in ensuring the resolution of trade disputes, and in fostering the implementation and application of the WTO Agreements. The Understanding, with its predictable procedures, including the possiblility of appeal of panel decisions to an Appellate Body and provisions of implementation of recommendations, has improved Members' means of resolving their differences. We believe that the DSU has worked effectively during its first two years. We also note the role that several WTO bodies have played in helping to avoid disputes. We renew our determination to abide by the rules and procedures of the DSU and other WTO Agreements in the conduct of our trade relations and the settlements of disputes. We are confident that longer experience with the DSU, including the implementation of panel and appellate recommendations, will further enhance the effectiveness and credibility of the dispute settlement system."

104 Aangehaal in Jackson 59.

105 Schoenbaum 647 wys daarop dat tot op hede al die state waarteen beslissings deur 'n geskilbeslegtingspaneel van die WTO gegee is, hul bereidwillig verklaar het om regstellende maatreëls te tref.

106 Schoenbaum 647.

107 McFarlane "Update on WTO disputes" 1998 *New Zealand LJ* 415, "Update on WTO disputes" 1999 *New Zealand LJ* 30; Hainsworth 138.

108 Hainsworth 138; Chua 27; Steger "WTO dispute settlement: revitalization of multilateralism after the Uruguay round" 1996 *Leiden J of Int L* 331.

109 Hainsworth 138.

110 *Ibid.*

111 *Ibid.*

duidelik gestel dat die implementering van die verslae van die geskilbeslegtingspaneel en die appèlraad verder sal bydra tot die effektiwiteit en geloofwaardigheid van die geskilbeslegtingsmeganisme.[112] Daar moet egter op gelet word dat die geskilbeslegtingspaneel en die appèlraad se verslae nie as gesaghebbende interpretasies van die WTO ooreenkoms beskou moet word nie, omdat net die ministeriële konferensie en die algemene vergadering ingevolge artikel IX:2 die uitsluitlike gesag het om interpretasies en verklarings van die ooreenkoms te aanvaar. Die geskilbeslegtingspaneel of die appèlraad kan derhalwe nie reëls ontwikkel of skep nie.[113]

4 PROBLEME TEN AANSIEN VAN DIE GESKILBESLEGTINGSMEGANISME

Daar moet egter ook op sekere probleme van die geskilbeslegtingsmeganisme gewys word. Dit is naamlik die behoefte aan 'n stelsel van "non-adjudication-based" geskilbeslegting; die vraag oor die vermoë van die WTO panele en appèlraad om te beslis oor regsvrae buite die sfeer van die WTO ooreenkomste;[114] die reg van private toegang tot die geskilbeslegtingsproses;[115] en die reg van 'n lidland op regsverteenwoordiging in al die fases van die geskilbeslegtingsproses.[116] Daar is geen verwysing na laasgenoemde aspek in die UDS en die DSU het ook geen riglyne hieromtrent geformuleer nie.[117]

Ook ontbreek 'n effektiewe proses waardeur die nakoming van die verslag gemonitor en geëvalueer kan word.[118] Verder is dit problematies waar daar ook op ekonomiese en politieke behoeftes, belange en reëls gelet moet word en nie net op die juridiese beginsel of reël nie.[119] Daar is ook al kommentaar uitgespreek oor die samestelling van die paneel en die groot aantal paneellede waaruit 'n paneel vir 'n bepaalde sitting saamgestel word.[120]

'n Baie belangrike probleem wat spoedig opgelos moet word, is die posisie van die DSB as sodanig. Die DSB moet beter beskerm word, veral in die lig van die

---

112 Zonnekeyn 1999 *Int Trade L and Regulation* 31.

113 Hainsworth 138.

114 Schoenbaum 647; sien ook Swaak-Goldman "Who defines members' security interest in the WTO?" 1996 *Leiden J of Int L* 361; Kuilwijk "Castro's Cuba and the United States Helms Burton Act" 1997 *J of World Trade* 49; Love "United States extraterritorial jurisdiction: the Helms-Burton and D'Amato Acts" 1997 *ICLQ* 378.

115 Covelli "Public international law and third party participation in WTO Panel Proceedings" 1999 *J of World Trade* 125; Schoenbaum 647. Sien ook Giardina en Zampetti "Settling competition-related disputes: the arbitration alternative in the WTO framework" 1997 *J of World Trade* 5; Schleyer 2275; Killman "The access of individuals to international trade dispute settlement 1996 *J of Int Arbit* 143; Lucas "The role of private parties in the enforcement of the Uruguay Rounds Agreements 1995 *J of World Trade* 183–206; Panel discussion "Is the WTO dispute settlement mechanism responsive to the needs of the traders? Would a system of direct action by private parties yield better results?" 1998 *J of World Trade* 147–165.

116 Lichtenbaum 1203; Pearlman "Participation by private counsel in World Trade Organization dispute settlement proceedings" 1999 *L and Policy in Int Business* 399–415; Martha "Representation of parties in world trade disputes" 1997 *J of World Trade* 83–96.

117 Lichtenbaum 1203.

118 McFarlane "Update on WTO disputes" 1998 *NZ LJ* 415.

119 Hainsworth 139; sien ook Drahozal "Commercial norms, commercial codes, and international commercial arbitration" 2000 *Vanderbilt J of Transn L* 84.

120 McFarlane 1998 *NZ LJ* 415.

gebeure tydens die sogenaamde Piesang-geskil tussen die Europese Unie en die VSA. Die mees praktiese wyse om dit te bewerkstellig sou wees om die *sub judice*-beginsel van toepassing te maak op sake wat voor die geskilbeslegtingsraad gebring word. Dit kan gedoen word deur sodanige beginsel tot die UDS te voeg.[121]

5 GEVOLGTREKKING

Die WTO geskilbeslegtingsmeganisme soos vervat in die UDS is nie bloot 'n samevatting of integrasie van vorige geskilbeslegtingsmeganismes nie, maar is 'n daadwerklike stap vorentoe in die daarstelling van 'n verpligte, omvattende en geïntegreerde, maar ook effektiewer, vinniger en sekerder proses, terwyl die beginsel dat lidlande moet poog om geskille onderling langs vriendelike weë te besleg, behou word. Die WTO maak die gevolge van die geskilbeslegtingsproses bindend vir die partye en in 'n sekere mate afdwingbaar op die partye. Dit dra by tot 'n effektiewer stelsel. Ook die instelling van die appèlraad as 'n appèlliggaam van eerste instansie is 'n innoverende stap wat leemtes in die vorige stelsel van GATT ondervang en bydra tot die sukses van die WTO geskilbeslegtingsmeganisme.

Hoewel nie sonder probleme nie, bied die WTO geskilbeslegtingsmeganisme 'n stelsel wat met die samewerking van die lidlande kan bydra tot die spoedige en vreedsame oplossing van handelsgeskille.

> *Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously . . . If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.*
>
> *Dissenting judgment of Mr Justice Louis Brandeis in* Olmstead v US 277 US 438 485 (1928).

121 McFarlane "Increasing activity on the world trade front" 1999 *NZ LJ* 79; sien ook Besskó 65–287; McMahon "The EC Banana regime, the WTO rulings and the ACP. Fighting for economic survival" 1998 *J of World Trade* 101–114.

Sekere aspekte rakende geslagsdiskriminasie in Europa

Marlize van Jaarsveld
BIur LLB LLM
Lektrise, Universiteit van Suid-Afrika

SUMMARY

Certain aspects relating to sex discrimination in Europe

Sex discrimination is combated in Europe by means of directives of the European Union as well as National legislation. Two aspects pertaining to sex discrimination in Europe are of particular importance. First of all, section 119 of the Treaty of Rome 1957 stipulates that men and women should receive equal remuneration for equal work done. This provision seems obvious, but various problems exist with its application and interpretation. One of these is the question whether pension benefits are regarded as remuneration within the meaning of section 119. Apparently, in specific European countries, pension benefits are considered to be remuneration, with certain qualifications. The economic costs attached to the application of the equal pay principle should also be kept in mind. The second aspect pertaining to sex discrimination involves the application of positive action, or affirmative action as it is known in South Africa, as a measure to bring about equal treatment between men and women. In most European countries, the emphasis seems to be on positive action as a method of redeeming previous practices of unequal treatment between the sexes instead of attempting to achieve racial equality. Britain is nevertheless one of a few European countries where legislation has specifically been promulgated to address the existing inequalities between the races. The quota system is not extensively applied in Europe. The general approach seems to be that it should only be applied, with caution, on a case-by-case basis. The success of measures seeking to establish sexual equality in Europe has not yet been established. Various forms of critique have been expressed on the success and failures of the methods to address sex discrimination in the European Union. What is of importance is that there are measures in place to combat sex discrimination and that it will take time to evaluate how successful these are.

1 INLEIDING

Diskriminasie is wêreldwyd 'n omvattende probleem en word meestal deur middel van wetgewing bekamp. Europa is geen uitsondering nie. Diskriminasie in Europa neem verskillende vorme aan waarvan geslagsdiskriminasie op die voorgrond blyk te wees. Geslagsdiskriminasie word in Europa deur verskeie direktiewe, wetgewing, kommissies en regspraak aangespreek. In hierdie bespreking sal daar kortliks ondersoek ingestel word na die wyses waarop geslagsdiskriminasie in Europa bekamp word asook na enkele van die aspekte waarop die anti-diskriminasie-bepalings van toepassing is. Ten slotte sal daar kortliks op die leemtes in die anti-diskriminasiereg van Europa gewys word.

2 AGTERGROND: DIE STRUKTURELE OPSET VAN DIE EUROPESE UNIE

2 1 Algemeen

Die regsreëls bindend op die ledelande van die Europese Unie (voorheen die "Europese Ekonomiese Gemeenskap" of EEG) bestaan uit kontrakte tussen die ledelande oftewel verdrae ("treaties"), asook regulasies en direktiewe van die Europese Unie. Die Verdrag van Rome is een van die belangrikste ooreenkomste wat tussen die ledelande tot stand gekom het, want die bepalings van hierdie verdrag is in die regstelsels van al die ledelande vervat en bekragtig. Die Europese Ekonomiese Gemeenskap is deur die Verdrag van Rome tot stand gebring en die verdrag bevat die belangrike artikel 119 waarin daar aan die fundamentele beginsel van gelykheid tussen mans en vroue beslag gegee is.

2 2 Beleidsaanwysings (riglyne of direktiewe) van die Europese Unie

Direktiewe van die Europese Unie is van die algemeenste regsinstrumente in die Europese Gemeenskap. Na die afkondiging van 'n bepaalde direktief word elke lidland 'n bepaalde tydperk gegun om soortgelyke wetgewing in sy eie nasionale stelsel te inkorporeer. 'n Versuim van 'n betrokke lidland om die bepalings van die direktief te inkorporeer, kan ernstige gevolge vir so 'n lidland tot gevolg hê.[1] Verskeie internasionale organisasies en internasionale liggame het ook inisiatiewe geneem ten einde gelyke behandeling tussen mans en vroue te bevorder. Die Europese Unie het veral 'n groot rol gespeel deur verskeie direktiewe[2] gedurende 1975–1986 aan te neem.[3] Artikel 119 (vervat in die Verdrag van Rome) is uitgebrei deur die *Equal Treatment Directive 76/207* waarin aspekte rakende gelyke behandeling vir mans en vroue ten opsigte van opleiding, indiensneming en werksomstandighede behandel word. Volgens die *Hofmann v Barmer Erkasse*-beslissing[4] is die *Equal Treatment Directive* ontwerp om die bestaande ongelykhede tussen mans en vroue van die verlede uit te faseer en mag dit nie as 'n wyse van "social engineering" beskou word nie.

Drie belangrike direktiewe is later uitgereik om verdere gelyke behandeling tussen mans en vroue te bevorder en te verseker.[5] Hierdie direktiewe is ook aangevul deur verslae van verskeie kommissies en komitees[6] van die Europese Parlement wat hulle vir die bevordering van vroue-aangeleenthede beywer. Die meeste Europese lande het egter ook eie anti-diskriminasie-wetgewing aanvaar.[7]

---

1 Hogarth *European employment law: A country by country guide* (1995) 2–5.

2 Bv (i) direktief tov gelyke behandeling vir mans en vroue in 1975; (ii) direktief tov gelyke behandeling vir mans en vroue rakende aspekte soos werksgeleenthede, opleiding en bevordering in 1976 en (iii) direktiewe rakende gelyke behandeling van mans en vroue in sosiale sekuriteitskemas 1986.

3 Blanpain en Engels *European labour law* (1997) 235 van 1– 4.

4 Saak 184/83 (1984) *ECR* 3047; vgl ook Smit "Comparative perspectives of gender discrimination in the workplace" 1998 *TSAR* 494 496.

5 Direktief 75/117/EEC tov gelyke betaling; Direktief 76/207/EEC tov gelyke behandeling; en Direktief 79/7/EEC tov gelyke behandeling in sosiale sekerheid. Sien Barnard *European community employment law* (1995) 172.

6 Bv die *Vroueregtekomitee* en die *Raadgewende Komitee vir Gelyke Geleenthede vir Mans en Vroue*. Sien ook Barnard (vn 5) 172.

7 Smit (vn 4) 496.

2 3 Nasionale wetgewing

Die ledelande van die Europese Unie het nasionale wetgewing uitgevaardig om aan die bepalings van die direktiewe te voldoen. Dit is 'n basiese beginsel dat indien die wetgewing binne die betrokke land verskil, die wetgewing van die Europese Unie voorrang geniet.[8] Volgens die beslissing in *Commission of the European Community v Greece*[9] is daar sekere beginsels en vereistes wat moet geld voordat die bepalings van die Europese Gemeenskap in 'n lidland toepassing sal vind. Dit sluit onder andere in dat die plaaslike remedies effektief en vergelykbaar met die toepaslike reg moet wees.[10] Schmidt[11] het by geleentheid verklaar dat diskriminasie in Frankryk slegs op 'n kleiner skaal voorkom aangesien dit moeilik is om te bewys. Indien diskriminasie sonder grondige redes plaasvind, is dit aan sanksies onderhewig. 'n Werkgewer kan gevangenisstraf van tussen twee maande tot een jaar opgelê word terwyl boetes van tot 10,000 FF ook opgelê kan word.

In die Verenigde Koninkryk is omvattende wetgewing geïmplementeer om die probleem van diskriminasie aan te spreek. Hierdie wetgewing sluit die *Sex Discrimination Act* van 1975, die *Equal Pay Act* van 1970, soos gewysig deur die *Equal Pay (Amendment) Regulations* van 1983 en die *Race Relations Act* van 1976 in. Die *Sex Discrimination Act* en die *Equal Pay Act* verbied geslagsdiskriminasie terwyl die *Race Relations Act* diskriminasie op grond van kleur, ras, nasionaliteit en etnisiteit verbied.[12]

In Duitsland word die verbod op diskriminasie in 'n Siviele Kode[13] vervat. Positiewe maatstawwe ter bevordering van gelyke regte van mans en vroue word geïmplementeer terwyl die Duitse Grondwet[14] dit duidelik stel dat mans en vroue gelyke regte sal hê. Federale wetgewing maak voorsiening vir 'n aantal prosedures wat die indiensneming van vroue bevorder.[15] In België het titel 5 van die *Wet op Ekonomiese Reoriëntasie*[16] die direktief oor gelyke behandeling vir mans en dames geïmplementeer. Sowel direkte as indirekte diskriminasie word verbied. Twee Koninklike Dekrete ("Royal Decrees")[17] maak voorsiening vir die bevordering van gelyke geleenthede vir mans en vroue in die privaatsektor. In Nederland word alle vorme van diskriminasie verbied. Hierdie bepalings word vervat in sowel artikel 7A van die Burgerlike Wetboek (*BW*) as in die *De Wet op Gelijke Behandeling van*

---

8 Hogarth (vn 1) 4 ev.

9 Saak 68/88 (1989) *ECR* 2964.

10 Fitzpatrick "The effectiveness of equality law remedies: A European community law perspective" in Hepple en Szyszak *Discrimination: The limits of law* (1992) 67 68.

11 *Discrimination in employment: A study of six countries by the Comparative Labour Law Group* (1978) 58.

12 Smit (vn 4) 496; Hepple en Fredman "Great Britain" (1992) in Blanpain (red) *International Encylopaedia for Labour Relations and Industrial Relations* vol 5.

13 *Bürgerliches Gesetzbuch* (*BGB*).

14 Art 3 par 2.

15 Art 7A; 1637 ij lid 2 t/m 4 saamgelees met art 5 *WGB*; vgl ook Bakels *Schets van het Nederlands Arbeidsrech* (1996) 145–148.

16 Die sogenaamde "Beschäftigtenschutzgesetz". Sien Weiss "Federal Germany" (1994) in Blanpain (vn 12).

17 Titel 5 van die Wet op Ekonomiese Reoriëntasie van 1978-08-07 implementeer die direktief van 1976-02-09 tov gelyke behandeling vir mans en vroue – die *Royal Decree* van 1987-07-14 asook die *Royal Decree* van 1983-08-12.

Mannen en Vrouen.[18] Uitsonderings kom egter wel voor, byvoorbeeld in gevalle waar geslag 'n bepaalde faktor is vir die tipe beroep, asook by positiewe diskriminasie.[19]

3 DIREKTE EN INDIREKTE DISKRIMINASIE

Direkte sowel as indirekte diskriminasie word in Europa verbied. Volgens Smit[20] is direkte diskriminasie opsetlike optrede van bevooroordeeldheid terwyl indirekte diskriminasie meer subtiel van aard is. In *Jenkins v Kingsgate*[21] is verklaar dat alhoewel deeltydse werknemers minder per uur as voltydse werknemers betaal is, dit nie op indirekte diskriminasie neergekom het nie aangesien die werkgewer nie die opset gehad het om teen 'n sekere groep werknemers te diskrimineer nie. Die bedoeling van die werkgewer was dus deurslaggewend.

In twee Duitse sake, *Bilka Kaufhaus v Weber von Hartz*[22] en die *Rinner-Kühn*-saak,[23] is egter aanvaar dat waar die gevolge van 'n werkgewersbeleid diskriminerend van aard is, die bedoeling van die werkgewer nie van belang is nie. Verder is daar gemeld dat artikel 119 op sowel direkte as indirekte diskriminasie van toepassing is. In *Meade-Hill v British Council*[24] is namens die applikant beweer dat 'n sogenaamde mobiliteitsklousule op indirekte diskriminasie neergekom het aangesien dit vir 'n vroulike werknemer (in hierdie geval die applikant) moeiliker sou wees om saam met haar werkgewer te verhuis as wat dit vir 'n manlike werkgewer sou wees. Die hof het saamgestem dat aangesien, in die lig van die omstandighede, 'n groter persentasie van die vroulike werknemers sekondêre broodwinners was, dit vir hulle weens hul eggenotes se werksverpligtinge moeiliker sou wees om te verhuis.

'n Verskil in 'n toelaagpakket tussen getroude manlike en vroulike werknemers kan ook op indirekte diskriminasie neerkom.[25] In die bekende *Danfoss*-saak[26] is dit duidelik gestel dat in die geval van 'n bewering van indirekte diskriminasie, die bewyslas op die werkgewer rus om te bewys dat sy praktyk of beleid nie diskriminerend is nie. 'n Werkgewer kan altyd beweer dat sy praktyk objektief weens ekonomiese redes geregverdig kan word. Die hof sal dan vasstel of die praktyk, byvoorbeeld 'n betalingspraktyk, aan 'n werklike behoefte in die besigheid voldoen.[27] Engels[28] verklaar dat die toets in Brittanje minder streng is omdat die "werklike behoefte"-konsep vervang word deur die konsep van 'n "redelike behoefte" wat in die sakewêreld voorkom. Dit is egter moeilik vir 'n hof om 'n gepaste remedie te bepaal sodra dit vasgestel is dat indirekte diskriminasie wel plaasgevind

---

18 Art 7A; 1637 ij van die *Burgerlijk Wetboek* 1980 (*WGB*).

19 Art 7A; 1637 ij lid 2t/m 4 saamgelees met art 5 *WGB*; vgl ook Bakels (vn 15) 145–148.

20 (Vn 4). Sien die vier vrae wat deur Smit bespreek word om vas te stel of onregmatige indirekte diskriminasie plaasgevind het al dan nie.

21 Saak 98/80 (1981) *ECR* 911.

22 Saak 170/84 (1986) *ECL* 1607.

23 *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG* saak 171/88 (1989) *ECR* 493; sien ook Barnard (vn 5) 180.

24 (1996) 1 All ER 79 CCR; Barrie "Recent English cases" 1996 *De Rebus* 660.

25 *Sabbatini v European Parliament* 1972-06-07 20/71 IELL regspraak nr 5.

26 *Handels-og Kantorfunktionaerernes Forbund i Denmark v Dansk Arbeidsgiverforening (nm. Danfoss)* 1989 IRLR 532.

27 *Bilka-Kaufhaus v Weber von Hartz* (*supra*).

28 "Problems of proof in employment discrimination: The need for a clearer definition of standard in the United States and in the United Kingdom" 1993/1994 *Comparative LJ* 340 360.

het, aangesien die begrip indirekte diskriminasie nie 'n bepaalde standaardoptrede inhou nie.[29] Szyszczak[30] ondersteun die *Rinner-Kühn*-saak[31] en meld dat die belangrikste aspek by indirekte diskriminasie die gevolge van die diskriminerende optrede is.

4 INTERNASIONALE KONVENSIES RAKENDE DISKRIMINASIE

Daar word vervolgens kortliks gewys op internasionale konvensies wat diskriminasie verbied, aangesien hulle 'n groot invloed gehad het op die bekamping van diskriminasie en andersins omdat hulle 'n groot impak op die direktiewe ("wetgewing") van die Europese Unie gehad het.

Die Verenigde Nasies het gedurende 1979 'n konvensie[32] rakende verskeie antidiskriminerende aspekte tot stand gebring. Dit het aspekte soos die reg op gelyke vergoeding en reg op gelyke behandeling by werksevaluering ingesluit. Lidlande was verplig om volgens die bepalings van die konvensie maatreëls in te stel om diskriminasie teen vroue te bekamp.[33]

Die Internasionale Arbeidsorganisasie (ILO) het ook verskeie konvensies[34] tot stand gebring met die oogmerk om diskriminasie teenoor vroue te bekamp, terwyl die *Charter of Fundamental Social Rights* deur verskeie afgevaardigdes van die elf Europese lande, uitgesluit die Verenigde Koninkryk, aangeneem is. Hierdie fundamentele sosiale regte sluit onder andere geslagsgelyke behandeling[35] in.

5 ENKELE VORME VAN DISKRIMINASIE

5 1 Betalingsdiskriminasie

Die beginsel dat mans en vroue gelyke betaling vir dieselfde werk ontvang, word vervat in artikel 119 van die Ooreenkoms van Rome wat sedert 1957[36] van krag is. Dit behels onder meer dat betaling vir werk op dieselfde basis bereken word en dat betaling vir dienste gelewer op 'n tydskedule, op dieselfde wyse bereken word vir alle werk van daardie aard.[37] Artikel 119 is egter slegs van toepassing op vergoeding en nie op ander diensvoorwaardes nie.[38]

5 2 Die konsep van "ongelyke vergoeding"

Die begrip "vergoeding" het verskeie interpretasieprobleme veroorsaak. In *Defrenne v Sabena*[39] het die hof bevind dat 'n aftree-pensioenvoordeel, vasgestel binne die

---

29 Vgl Loenen "The equality clause in the South African Constitution: Some remarks from a comparative perspective" 1997 *SAJHR* 401 425 ev.
30 "Recent cases: Employment opportunity law" 1990 *ILJ* (*UK*) 114.
31 *Supra*.
32 *United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (1979).
33 Betten *International labour law: Selected issues* (1993) 266 280.
34 Dit sluit bv in: Die *Equal Renumeration Convention* in 1951 (nr 100); die *Discrimination* (*Employment and Occupation*) *Convention* in 1958 (nr 111) en die *Workers with Family Responsibilities Convention* in 1981 (nr 156).
35 Blanpain en Engels (vn 3) 411.
36 Geers en Heerma van Voss *Inleiding Europees arbeidsrecht* (1995) 86.
37 Blanpain en Engels (vn 3) 251–253; sien ook Barnard (vn 5) 172–175.
38 Watson "Equality of treatment: A viable concept ?" 1995 *ILJ* (*UK*) 33 35.
39 Saak 149/77 (1978) *ECR* 1765.

raamwerk van 'n sosiale sekerheidskema, nie vergoeding binne die betekenis van artikel 119 daarstel nie. Die definisie van gelyke vergoeding vir mans en vroue is verder deur direktief 75/117[40] uitgebrei. Hiervolgens is die gelyke vergoedingbeginsel van toepassing op werk van dieselfde aard of waarde en word die verwydering van alle betalingsdiskriminasie weens geslag beoog. Artikel 119 se bepalings sal dus van toepassing wees in situasies waar dieselfde werk of werk van dieselfde of gelyke waarde verrig word.[41] In *Murphy v Bord Telecom Eireann*[42] is 'n vroulike werknemer minder as haar manlike kollega betaal, ten spyte daarvan dat die werk wat sy verrig het van groter waarde was. Die hof het beslis dat dit op diskriminasie neerkom.

Smit[43] identifiseer 'n drievoudige toets om vas te stel of die beweerde ongelyke vergoeding geregverdig is al dan nie. Eerstens moet bepaal word of daar 'n verskil in vergoeding voorkom waar dieselfde tipe werk deur mans en vroue verrig word. Tweedens, indien daar wel 'n verskil voorkom, moet die rede daarvoor vasgestel word. Derdens moet daar bepaal word of die rede objektief regverdigbaar is. Indien die rede nie objektief geregverdig is nie, is daar *prima facie* geslagsdiskriminasie. Arnull[44] is van mening dat mans en vroue nie net dieselfde vergoeding vir dieselfde tipe werk wat verrig is, moet ontvang nie, maar ook vir werk wat van dieselfde waarde (gehalte) is.

In *Commission v United Kingdom*[45] is daar namens die Verenigde Koninkryk beweer dat die "werk-van-gelyke-waarde"-beginsel te abstrak is. Die hof het nie hierdie bewering gehandhaaf nie, met die gevolg dat wysigende wetgewing[46] in 1983 afgekondig is. Dit het verseker dat "die werk-van-gelyke-waarde"-beginsel deel van die Britse wetgewing geword het. Daar is egter tans steeds tegniese probleme ten opsigte van gelyke vergoeding vir mans en vroue in Britse wetgewing. Hierdie tegniese probleme is veral van toepassing op die werksevalueringstelsel en die definisie van gelyke vergoeding vir gelyke werk.[47] In die Britse saak *Strathclyde Regional Council v Wallace*[48] is bevind dat dit onnodig is vir 'n werkgewer om aan te toon dat 'n beleid van ongelyke betaling objektief geregverdig is. 'n Werkgewer hoef bloot te bewys dat die ongelyke betaling te wyte is aan 'n materiële faktor waarby geslag nie 'n rol speel nie.

Volgens die Nederlandse wetgewing kan 'n werkgewer vir vergoeding wat in die verlede te min was, aangespreek word. So 'n vorderingsreg verjaar egter na twee jaar vanaf die tydstip wat betaling moes geskied het.[49] Voorts bestaan daar ook 'n

---

40 OJ 1975 L 45/19 soos aangehaal deur Watson (vn 38) 34.
41 Barnard (vn 5) 177–180.
42 Saak 157/86 (1988) *ECR* 673.
43 (Vn 4) 508.
44 "Article 119 and equal pay for work of equal value" 1986 (11) *ECR* 200 202.
45 Saak 61/81 (1982) *ECR* 2601.
46 *Equal Pay (Amendment) Regulations SI* 1983 nr 1974.
47 Covington "Equal pay acts: A survey of experience under the British and the American statutes" 1988 *Vanderbilt J of Transnational L* 649 728; vgl ook art 7 t/m 10 *WGB* van die *WGB* 1980.
48 (1996) IRLR 672; sien ook die bespreking deur Ross "Justifying unequal pay"1997 *ILJ* (*UK*) 171.
49 Sien Bakels (vn 15) 150; Rood "The Netherlands" in Blanpain (red) *International encylopaedia for labour law and industrial relations* vol 9 (47); vgl ook art 7–10 van *De Wet op Gelijke Behandeling van Mannen en Vrouen* van 1980.

komitee saamgestel uit kundiges[50] wat aan 'n bepaalde hof 'n aanbeveling kan maak ten opsigte van die betalingsprobleem. Die hof kan hierdie aanbeveling aanvaar of verwerp.[51] In België[52] word daar min van hofprosedures gebruik gemaak indien nie aan die beginsel van gelyke vergoeding[53] voldoen word nie, as gevolg van redes soos 'n vrees vir afdanking, die aard van die hofprosedure en die omslagtigheid van die prosedure.

5 2 Pensioenvoordele

5 2 1 Algemeen

In artikel 119 word bepaal dat mans en vroue op gelyke vergoeding geregtig is. Die vraag het dan ontstaan of pensioen ook as vergoeding ingevolge die bepalings van artikel 119 beskou kan word. Indien artikel 119 se bepalings op alle pensioenskemas van toepassing is, sal dit beteken dat verskeie praktyke en skemas ten opsigte van pensioenskemas diskriminerend van aard is.

5 2 2 Toepassingslimiete ten opsigte van pensioenvoordele

Volgens *Defrenne v Belgium*[54] is artikel 119 nie van toepassing op sosiale sekuriteitskemas of aftreepensioene wat deur wetgewing gereël word nie. Verder moet hierdie tipe skemas op 'n algemene kategorie werknemer verpligtend wees en moet daar geen ander ooreenkoms in hierdie verband gewees het nie. Voorts is daar aanvanklik beslis dat buite-gekontrakteerde (nie-staatsgeoriënteerde) pensioenskemas buite die bepalings van artikel 119 val, aangesien so 'n skema as 'n algehele vervanging van 'n staatspensioenskema gedien het en dit nie bloot aangevul het nie.[55] In *Bilka-Kaufhaus v Weber von Hartz*[56] is egter in 1986 beslis dat 'n arbeidspensioen, bykomend tot 'n nasionale statutêre skema waaronder die voordele uitsluitlik deur 'n werkgewer gefinansier is, wel binne die bepalings van artikel 119 val. Statutêre sosiale sekerheidskemas wat eerder deur 'n sosiale beleid in plaas van 'n werksverhouding bepaal word, word egter van die bepalings van artikel 119 uitgesluit.[57] Artikel 7(1)a van 'n direktief[58] van die Europese Unie magtig 'n afwyking van die gelyke behandelingsleerstuk tussen mans en vroue. Hierdie bepaling geld in verskeie Europese lande, onder andere in Brittanje, Italië, Griekeland en Portugal.

Gedurende Mei 1990 het die Europese Hof in die bekende saak van *Barber v Guardian Royal Exchange Assurance Group*[59] die beginsels rakende pensioen uitgebrei deur te beslis dat arbeidspensioene wel vergoeding ingevolge artikel 119 behels. Scrubsall[60] verklaar dat drie belangrike gevolge uit hierdie beslissing voortvloei, naamlik:

---

50 *De Commissie op Gelijke Behandeling* (*CGB*).
51 Sien Bakels (vn 15) 151.
52 Art 47 (*bis*) van die Wet op die Beskerming van Vergoeding van 1965-04-12.
53 Blanpain en Engels *International encyclopaedia for labour law and industrial relations* vol 2 (1997) 138.
54 (1971) *ECR* 445; Tether "European developments: Sex equality and occupational pension schemes" 1995 (24) *ILJ* (*UK*) 194–195.
55 Sien *Warringham & Humphreys v Lloyds Bank Ltd* (1981) *ECR* 767.
56 Vn 22.
57 Smit (vn 4) 507; *Birds Eye Walls Ltd v Roberts* (1994) IRLR 29.
58 Direktief 79/EEC (Europese Ekonomiese Gemeenskap); Barnard (vn 5) 224.
59 Saak C–262/88 (1990) *ECR* 1–1889.
60 "Recent cases: Sex discrimination" 1990 *ILJ* (*UK*) 244 246.

(1) Gekontrakteerde pensioenskemas wat buite die statutêre vereistes funksioneer, word by artikel 119 ingesluit;

(2) 'n arbeidspensioenskema waar 'n werknemer nie tot 'n staatspensioen bygedra het nie, val binne artikel 119 mits die skema addisionele voordele vir die werknemer verskaf; en

(3) 'n uitgekontrakteerde pensioenskema wat die minimum voordele lewer soos wat deur wetgewing vereis word voordat dit uitkontrakteerbaar is, behoort nie by die bepalings van artikel 119 ingesluit te word nie.

5 3 Ander aspekte

Enige ouderdomsbeperking wat tussen mans en vroue onderskei, is indien die pensioen volgens 'n uitgekontrakteerde skema opeisbaar is, teenstrydig met die bepalings van artikel 119. Aangesien artikel 119 sowel horisontale as vertikale werking het, sal meer werknemers in staat wees om uit die bepalings van artikel 119 voordeel te trek.[61] In die *Barber*-saak[62] is daar egter ook 'n tydsbeperking op die eise geplaas. Indien die pensioenvoordele (eise) voor 17 Mei 1990 uitbetaalbaar was en die eise ingestel is, sal daar nie op artikel 119 se bepalings gesteun kan word nie, behalwe in die geval van werknemers wat reeds voor daardie datum regsgedinge ingestel het. In 'n Nederlandse saak *Fisscher v Voorhuis Hengelo BV*[63] het die Europese hof egter beslis dat dit wel moontlik sou wees om op die bepalings van artikel 119 te steun om terugwerkende toegang tot 'n arbeidspensioenskema te verkry.

Dit blyk ook dat werknemers wat lede van 'n enkelgeslagskema is, nie op artikel 119 kan steun om voordele te eis wat op 'n hoër vlak geniet sou kon word nie indien die teenoorgestelde geslag ook lede van die skema was.[64] Moore[65] spreek die hoop uit dat ekonomiese kostes wat deur die realiteit van die gelyke betalingbeginsel meegebring sal word, howe nie daarvan sal weerhou om hierdie beginsel te bevorder nie.

6 POSITIEWE AKSIE

6 1 Algemeen

Regstellende aksie, oftewel "positiewe aksie" soos dit in Europa bekend staan, word deur artikel 2(4) van die 1976 Direktiewe op Gelyke Behandeling gemagtig.[66] Positiewe aksie is gemik op metodes wat streef na gelyke geleenthede vir onder meer mans en vroue in die Europese arbeidsmark. Dit is spesifiek op gebiede gerig waar ongelykhede ten opsigte van mans en vroue bestaan. Artikel 2(4) maak uitdruklik voorsiening vir programme wat gelyke geleenthede vir mans en vroue bevorder, en is dus meer geslagsgeoriënteerd.

In sommige Europese lande, byvoorbeeld Brittanje, is daar ook spesifieke wetgewing wat positiewe aksie ten gunste van nie-blanke persone magtig. Positiewe aksie verskil van positiewe diskriminasie deurdat positiewe aksie 'n meer bestuursgerigte benadering is om ongelykhede tussen geslagte of rassegroepe te

---

61 Barnard (vn 5) 224–225.
62 (Vn 59).
63 Saak C–128/93 (1994) *ECR* 1–4583 (*ECJ*).
64 *Coloroll Pensioen Trustees Ltd v Russel* saak C–200/91 (1994) *ECR* 1–4389.
65 "Justice doesn't mean a free lunch: The application of the principle of equal pay to occupational pension schemes" 1995 *Employment LR* 159 177.
66 Raad vir Gelyke Behandeling Direktief 76/207/EEC.

identifiseer en aan te spreek. In die algemene Europese konteks is dit belangrik om te besef dat een vorm van 'n sekere beleid (bv gelyke geleenthede vir mans en vroue of vir alle nasionaliteite) nie voldoende is om gelyke verteenwoordiging in die arbeidsmark tot stand te bring nie. Sowel positiewe diskriminasie as positiewe aksie maak voorsiening vir spesifieke maatreëls. Hierdie maatreëls handel oor 'n positiewe sosiale beleid.[67]

6 2 Vorme van positiewe aksie

Die hof het in *Commission v France*[68] beklemtoon dat artikel 2(4) van 1970 ontwerp is om 'n bestaande situasie van geslagsongelykheid aan te spreek. Daar is ook beslis dat positiewe aksie verskeie vorme kan aanneem. Eerstens kan dit onder-verteenwoordiging van vroue in die arbeidsmark verbeter. Verder kan 'n sekere balans tussen gesins- en werksverantwoordelikhede met 'n beter verspreiding van hierdie verantwoordelikhede tussen die geslagte nagestreef word. Derdens kan positiewe aksie voorkeurbehandeling vir 'n sekere kategorie van persone magtig. Dit sal gewoonlik die vorm van 'n kwotastelsel aanneem.[69]

6 3 Die *Kalanke*-beslissing

In *Kalanke v Freie Hansestadt Bremen*[70] moes die Europese hof besluit oor die versoenbaarheid van *Länder*-wetgewing (van Bremen)[71] op gelyke behandeling tussen mans en vroue in die openbare diens met die inhoud van artikel 2(4). Die Bremen-statuut het 'n bepaling, wat op bevorderingsaangeleenthede van toepassing was, bevat wat bepaal het dat 'n vrou eerder as 'n man bevorder moes word indien sy oor gelyke kwalifikasies as die betrokke manlike kandidaat beskik het en indien daar reeds 'n onderverteenwoordiging van vroue in dié beroep was. Daar is namens die applikant beweer dat bovermelde bepaling teenstrydig was met die inhoud van artikel 2(4).

In die beslissing is daar 'n onderskeid getref tussen positiewe aksies van 'n kompenserende aard en spesiale aksies gemik op opleiding, familieverantwoordelikhede, en dies meer. Daar is deur die hof aanvaar dat geslagsdiskriminasie verbied word. 'n Nasionale beleid waar vroue bo mans in posisies van dieselfde aard aangestel word, sal wel diskriminasie teweeg bring. Vervolgens het die hof na die doelwitte van artikel 2(4) gekyk. Daar is bevind dat die doelwitte uitsluitlik beoog om aksies te magtig wat – alhoewel dit oënskynlik diskriminerend van aard is – feitlike ongelykhede tussen mans en vroue in 'n sekere beroep verminder. Sulke aksies sal dus ten spyte van hul diskriminerende gevolge toelaatbaar wees. Artikel 2(4) moet egter beperkend geïnterpreteer word. 'n Nasionale beleid wat absoluut en onvoorwaardelik voorkeur aan vroue verleen, sal nie die beskerming van artikel 2(4) geniet nie. Die Bremense regsbepaling het dus die bepalings van die gelykheidsdirektief geskend vir sover vroue outomaties ten koste van mans aangestel is.[72] Alhoewel positiewe diskriminasie dus regmatig is, sal 'n kwotastelsel slegs op 'n geval-tot-geval

---

67 Barnard (vn 5) 195–197; Geers en Heerman van Voss (vn 36) 121 122.
68 Saak 318/85 (1989) CMLR 663.
69 Smit (vn 4) 404 ev.
70 Saak C–450/93 *ECJ* 17/10/95.
71 *Gesetz zur Gleichstellung von Frau und Mann in öffentlichen Dienst des Landes Breme, Gesetzblatt der Freien Hansestadt Bremen* 29/11/90, T3234A soos aangehaal deur Klinck in "Case and comments" 1997 *SAJHR* 638 639.
72 *Supra*.

hantering redelik wees. Dit sal nie as 'n outomatiese reël kan geld nie. Prosedures wat beoog om die aantal vroue in sekere dele van die arbeidsmark te verhoog, is egter wel toelaatbaar. Dit sluit ook 'n buigsamer kwotastelsel in.[73]

6 4 Standpunte van skrywers

Shaw[74] is van mening dat Duitsland se ontwikkeling en toepassing van die kwotastelsel aanduidend is van vroue se oorwinning ten opsigte van gelykheid in die arbeidsmark. Schiek[75] meld dat die *Kalanke*-beslissing aandui dat daar nog groot ruimte is vir positiewe aksie in die Europese gelykheidsreg. Verder behoort uitsluitsel oor die presiese bestek van positiewe aksie en die beskikbare remedies gegee te word. Daar is ook verklaar[76] dat die *Kalanke*-saak 'n goeie voorbeeld is van 'n tradisionele regsgeoriënteerde benadering tot 'n vraagstuk soos regstellende aksie en die gelykheidsbeginsel.

Loenen[77] en Moore[78] was minder positief. Loenen meen dat die *Kalanke*-uitspraak onduidelik is en dat dit onsekerheid veroorsaak oor die toekoms van voorkeurbehandeling van vroue. Moore verwys na die onsekerheid ten opsigte van wanneer 'n nasionale regsreël binne die bepalings van artikel 2(4) sal val, aangesien dit nie duidelik is dat vroue absolute en onvoorwaardelike voordeel sal geniet in situasies waar daar 'n onderverteenwoordiging plaasgevind het nie. Die Europese hof het egter onlangs in *Marshall v Land Nordheim-Westfallen*[79] kwotastelsels ter bevordering van werksgeleenthede vir vroue goedgekeur. Verder is daar beslis dat ander vorme van positiewe aksie toelaatbaar is, ongeag of dit met die formele benadering van gelyke behandeling vereenselwigbaar is. Schiek[80] verklaar dat die hof in die *Marshall*-saak met die bekamping van indirekte diskriminasie beklemtoon het dat goeddeurdagte positiewe aksie-metodes goedgekeur word.

6 5 Posisie in Brittanje

In Brittanje word positiewe aksie deur die *Race Relations Act* van 1976 en die *Sex Discrimination Act* van 1970[81] gemagtig. Spesiale opleiding word gemagtig in beroepe waar vroue tradisioneel onderverteenwoordig was.[82] Positiewe diskriminasie in Brittanje mag die voorkeurbehandeling van persone sonder Britse kwalifikasies behels, sowel as die plasing van nie-blanke persone in werksposisies wat weens diskriminasie nie vantevore vir hul toeganklik was nie.[83] Pitt[84] is van mening dat statistiese inligting ten opsigte van onderverteenwoordiging van vroue en nie-blanke persone eerder beperk moet word wanneer oorweeg word of daar wel

---

73 Blanpain en Engels (vn 53) 245–248.
74 "Positive action for woman in Germany: The use of legally binding quota systems" in Hepple en Szyszak (vn 10) 386 ev.
75 "European developments: Positive action in community law" 1996 *ILJ* (*UK*) 239 ev.
76 Beukes en Van Marle "Affirmative action: A gender perspective" 1996 *SAYIL* 154 162.
77 "Van voor naar achter, van links naar rechts? Voorkeurbehandeling na Kalanke" (1995) 24 Nov afl 42 *Neue Juristen Blatt* 1521. Sien vir volledige kritiek van die *Kalanke*-beslissing 1523–1526.
78 "Nothing positive from the Court of Justice" 1996 *Employment LR* 156 161.
79 Saak C–409/95 (1998) IRLR 39 (*ECJ*).
80 "European developments: More positive action in community law" 1998 *ILJ* (*UK*) 155.
81 Bailey en ander *Civil Liberties: Cases and materials* (1995) 626 ev.
82 Artikel 47 en 48 van die *Sex Discrimination Act* van 1978.
83 Hepple *Race, jobs and the law in Britain* (1968) 23 28.
84 "Can reverse discrimination be justified?" in Hepple en Szyszczak (vn 10) 281–298.

'n leemte in 'n spesifieke arbeidsituasie bestaan. Volgens Sacks[85] het die tyd in Brittanje aangebreek vir meer effektiewe maatreëls om diskriminasie te bekamp en gelyke geleenthede te bevorder. Wysigings aan die Britse reg is nodig om die diepgewortelde vorme van diskriminasie meer effektief aan te spreek en daarna behoort min ruimte aan die howe gelaat te word vir interpretasie van die standaard van die bewyslas by beweerde diskriminasie.[86]

6 6 Posisie in ander Europese lande

Positiewe diskriminasie word wel in België[87] toegepas. Dit word as aksie gesien wat gelyke geleenthede vir mans en vroue bevorder deur ongelykhede wat in die verlede vroue se geleenthede beperk het, uit die weg te ruim. Blanpain is egter van mening dat dit onwaarskynlik is dat die kwotastelsel in die nabye toekoms in België toegepas sal word.[88]

In Nederland[89] word positiewe aksie as 'n uitsondering op die algemene verbod op diskriminasie gesien. Voorkeurbehandeling vir vroue is wel toelaatbaar. In Italië word positiewe aksie geïmplementeer om 'n meer gebalanseerde werksmag te skep.[90] Geen statistiese ongelykhede word vereis nie en 'n werkgewer hoef ook nie te bewys dat voorkeurbehandeling teenoor vroue gemik is om die doelwitte van die wet gestand te doen nie. 'n Wye diskresie word dus aan 'n werkgewer gegun. Dit word egter slegs as 'n tydelike maatreël geag.[91]

7 SLOTOPMERKINGS

Gedurende 1996 is 'n nuwe program ter bevordering van gelyke geleenthede vir mans en vroue in Europa in werking gestel.[92] Verskeie aspekte word in hierdie program aangespreek, onder andere die bevordering van gelykheid in die ekonomie vir mans en vroue, die bevordering van burgerskapregte vir vroue wat inwoners of burgers in die Europese Unie is, die bevordering van integrasie van alle vroue in verskeie vlakke in die arbeidsmark en die versoening van werksverpligtinge met familieverpligtinge. Szyszczak[93] verklaar dat veral positiewe aksie-programme 'n rol speel by die bevordering en implementering van die program se strategieë. Loenen[94] verwys na die Europese begrip van gelykheid in 'n werksituasie. Dit het volgens haar 'n parallel met die bevoegdheid om onderskeid tussen sekere groepe in die samelewing te tref ten einde gelykheid te bevorder. Hierdie benadering het juis ontwikkel uit die ongelykheid wat vir baie jare tussen die verskillende groepe

---

85 "Tackling discrimination positively in Britain" in Hepple en Szyszczak (vn 10) 376 379.

86 Engels "Problems of proof in employment discrimination: The need for a clearer definition in the United States and the United Kingdom" *Comparative Labour LJ* 1993/1994 vol 15 303 340, 369.

87 Blanpain in Blanpain (red) (vn 12) 70.

88 *Supra* 72.

89 Bakels (vn 15) 148; Klinck (vn 71) 649.

90 Grossman "Voluntary affirmative action plans in Italy and the United States: Differing notions of gender equality" 1993 (14) *Comparative Labour LJ* 185 223.

91 Grossman *loc cit.*

92 "Fourth medium-term action programme on equal opportunities for woman and men" (OJL 335/37). Dit het op 1996-01-01 in werking getree nadat dit deur die Europese Raad op 1995-12-22 aanvaar is.

93 "Fourth medium-term action programme on equal opportunities for woman and men (1996–2000)" 1996 *ILJ (UK)* 255.

94 1997 *SAJHR* 405 vn 12; 416.

persone in Europa geheers het. 'n Oënskynlike teenstelling word geskep, maar dit is belangrik om in gedagte te hou dat die onderskeid op 'n groep-tot-groep basis getref word. Die oplossing van hierdie oënskynlike teenstelling word gevind in die verwagting dat die klassifikasie redelik moet wees.

Geskikte remedies vir persone wat slagoffers van diskriminasie is, is volgens Watson[95] beperk aangesien sommige wetgewing slegs direkte gevolge het. Verder blyk dit dat die nuwe Pensioenwetgewing van 1994 steeds te kort skiet om diskriminasie behoorlik aan te spreek.[96] Barnard[97] is egter van mening dat die oogmerke van die "gelykheids"-direktiewe beperk is, aangesien dit eerder na die bereiking van gelyke werksituasies en geleenthede streef sodat die onderskeie partye op gelyke vlakke kan kompeteer, in plaas daarvan om die diepgewortelde oorsake van ongelykheid tussen mans en vroue aan te spreek. Szyszczak[98] opper verskeie punte van kritiek teen die Europese Unie se bekamping van diskriminasie. Dit sluit onder andere in dat daar nog geen poging aangewend is om die diskriminasiewetgewing te kodifiseer nie; dat sekere konsepte rakende diskriminasie in die Europese reg konserwatief is; en dat te min aandag geskenk word aan die rol van positiewe aksie.

Dit is egter interessant om daarop te let dat die Europese Raad gedurende 1984[99] aksies geloods het om werkloosheid en ongelyke geleenthede in die arbeidsmark aan te spreek. Hierdie inisiatiewe is versterk deur 'n raadsresolusie[100] met betrekking tot die bevordering van gelyke geleenthede sowel as die totstandkoming van 'n organisasie wat geleenthede vir vroue in die arbeidsmark moet bevorder.[101]

> *For the welfare of the state is nothing apart from the good of the citizens who compose it. It is no doubt true that a State whose citizens are compelled to go right is more efficient than one whose citizens are free to go wrong. But what then? To sacrifice freedom in the interets of efficiency, is to sacrifice what confers upon human beings their humanity. It is no doubt easy to govern a flock of sheep; but there is no credit in the governing, and, if the sheep were born as men, no virtue in the sheep.*
>
> *CEM Goad* Guide to the philosophy of morals and politics 801, *quoted in the Canadian case of* Morgentaler v The Queen 44 DLR (4th) 358.

95 "Equality of treatment: A variable concept?" 1995 *ILJ (UK)* 194 203.
96 Tether (vn 54) 194 203.
97 (1995) 245; 246.
98 "Race discrimination: The limits of market equality?" in Hepple en Szyszczak (vn 10) 128 130.
99 *Europese Raadsresolusie* van 1984-06-07; OJ 1984 C161/4.
100 1982-07-12 (OJC 186); OJ 1986 C203/2.
101 *NOW* (*New Opportunities for Women*) OJ 1990 (327/5); sien ook Barnard (vn 5) 246 vn 469; vn 470.

Equality and non-discrimination in the new South African constitutional order (1): The early cases

Gretchen Carpenter
BA (Hons) LLB
Professor of Constitutional Law, University of South Africa

OPSOMMING

Gelykheid en nie-diskriminasie in die nuwe Suid-Afrikaanse staatsbestel (1): Die vroeë uitsprake

Hierdie bydrae (die eerste in 'n reeks) handel oor die uitsprake van veral die Konstitusionele Hof oor gelykheid en nie-diskriminasie in die beginstadium van die staatsbestel wat in 1994 'n aanvang geneem het. Beginsels wat in enkele uitsprake van die hooggeregshof vasgelê is, geniet aandag as agtergrond vir die vroeë uitsprake van die Konstitusionele Hof (*Makwanyane*, *Ntuli*, *Rens*, *Brink v Kitshoff* en *Fraser*). Hoewel sekere beginsels in hierdie stadium vasgelê is waarop later sou voortgebou word, kan die vroeë stadium eintlik as 'n verkenningstadium beskryf word waarin die howe versigtig te werk gegaan het om probleme nie vooruit te loop nie. Klem is wel geplaas op die eiesoortige aard van die Suid-Afrikaanse situasie en die behoefte aan die ontwikkeling van 'n eie gelykheidsregspraak. Die belangrike uitsprake wat in die jaar 1997 gelewer is, word in die volgende artikel in die reeks behandel.

1 INTRODUCTION

It is hardly surprising, in the light of South Africa's past, that equality occupies a prominent place in the present South African Constitution,[1] as it did in the interim Constitution of 1993.[2] Not, of course, that equality is a concept that is altogether novel in South African law (although it is understandable that a perception may exist that the right to equal treatment was "invented" in 1994!): as Magid J pointed out in *Hugo v State President of South Africa*,[3] "[l]ong before we had a written constitution, the principle of non-discrimination, save by Parliament or unless Parliament had so decreed, was well-established in the Roman-Dutch law of South Africa". The trouble is that Parliament so often did so decree that the exception became the rule.

---

1 The Constitution of the Republic of South Africa, 1996 (the so-called "final Constitution", hereafter FC). (Referring to this Constitution as Act 108 of 1996 is a conceptual solecism: it was not an Act of the South African Parliament, but an enactment of the Constitutional Assembly. The two bodies were not identical either legally or *de facto*. See Van Wyk "'n Paar opmerkings en vrae oor die nuwe Grondwet" 1997 *THRHR* 377 378–379, who describes this terminological solecism as "die onooglikste administratiewe glips en onreëlmatigheid van 1996".)

2 The Constitution of the Republic of South Africa 200 of 1993 (hereafter IC).

3 1996 6 BCLR 876 (D) 881D.

1 1 The 1993 Constitution

The primacy of equality is apparent from the prominent position accorded to it throughout the Constitution: it featured in the preamble as well as the so-called afterword, in several of the Constitutional Principles (notably I, III and V), in the founding provision(s), the limitation provision (s 33)[4] and the interpretation provision (s 35).[5] In addition, the Bill of Rights contained a number of references to related concepts such as impartiality and equity,[6] and also direct references to equality.[7] Among the bodies created to promote the development of human rights in general, there was the Human Rights Commission, and the more specifically tasked Commission on Gender Equality. Finally, the rejection of unfair discrimination was reinforced by a presumption of unfairness which was operative as soon as discrimination on one of a number of grounds had been established.

The equality provision, section 8, read as follows:

> "(1) Every person shall have the right to equality before the law and to equal protection and benefit of the law.
>
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
>
> (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
>
> (b) . . .
>
> (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that section, until the contrary is established."

1 2 The 1996 Constitution

As in the case of the interim Constitution, equality is the first specific right to receive attention in the Bill of Rights (in s 9). But equality features even earlier than this: the preamble refers to a "democratic and open society in which . . . every citizen is equally protected by law" and section 1 (arguably the most important provision in the Constitution)[8] reads:

---

4 The limitation of rights entrenched in ch 3 was permissible only if the limitation was justifiable in an open and democratic society based on freedom and equality (*inter alia*).

5 Courts interpreting the Bill of Rights were required to promote the values which underlie an open and democratic society based on freedom and equality.

6 S 14(2) provided that religious observances could be conducted at state or state-aided institutions, provided this was done on an equitable basis; s 15(2) required that state-financed or state-controlled media be regulated in a manner which ensures impartiality; s 22 provided for disputes to be settled by a court of law or another independent or impartial forum; and s 28(2) required that the payment of compensation for property expropriated should be just and equitable.

7 Eg s 26(2) required that measures which could impact upon the right to engage in economic activity be justifiable in an open and democratic society based on freedom and equality; and s 32 provided that the establishment of private educational institutions was permissible, but that these could not discriminate on the ground of race.

8 Amendment of s 1 requires, not a two-thirds majority vote in the National Assembly, plus the support of six of the nine provinces in the National Council of Provinces, but a 75% vote in the National Assembly plus the support of six provinces – s 74.

"The Republic of South Africa is one sovereign state founded on the following values:

(a) Human dignity, *the achievement of equality* and the advancement of human rights and freedoms.

. . . "

Further examples are to be found in section 3(1), which provides that all citizens are *equally* entitled to the rights, privileges and benefits of citizenship, and are *equally* subject to the duties and responsibilities of citizenship; section 7(1), which "affirms the democratic values of human dignity, *equality* and freedom; section 29(3)(a), which provides that private educational institutions may not *discriminate* on the basis of race; the limitation provision (s 36), which requires any limitation of a right in the Bill of Rights to be reasonable and justifiable in an open and democratic society based on human dignity, *equality* and freedom; section 37, which provides that no derogation from the right not to be unfairly discriminated against solely on the grounds of race, colour, ethnic or social origin, sex, religion or language is lawful even in a state of emergency, while section 39(1)(a) enjoins any court, tribunal or forum interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, *equality* and freedom.

In addition, there are numerous references to related concepts such as equity, impartiality and proportionality.

Section 9 reads as follows:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, 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."

A number of preliminary comments about section 8 (IC) and section 9 (FC) may be appropriate at this stage. These will be discussed in greater depth later.

1 3 Preliminary comments

(1) While there are certain significant differences between section 8 (IC) and section 9 (FC) (such as the inclusion of pregnancy and marital status among the listed grounds of discrimination), the two provisions are sufficiently similar in substance for judgments based on the 1993 provision to remain relevant to the interpretation of the 1996 provision. There are also differences in wording between the respective limitation clauses (s 33 (IC) and s 36 (FC)) which need to be taken into account. The most important of these is perhaps the three different levels of justification contained in section 33(IC) which have been omitted from section 36 (FC).[9]

---

9 S 33 provided that, in general, the limitation of rights entrenched in the Bill of Rights had to be reasonable; but that the limitation of certain rights had also to be necessary. There was a third

continued on next page

(2) Both section 8 (IC) and section 9 (FC) deal separately with the right to equality before the law and to equal protection and benefit of the law on the one hand, and the right not to be subjected to unfair discrimination. Arguably, the right not to be discriminated against may be subsumed under the right to equality before the law. That the drafters of the Constitution chose to separate the two is not to be attributed purely to the historical factor of discrimination (although it must surely have played a part); it also signifies that the right imposes both a positive and a negative duty, and that the right to equal protection of the law goes further than a mere ban on discrimination. In fact, the right not to be unfairly discriminated against may be said to be subsumed under the right to equality before the law, but certainly not *vice versa*.

(3) Though reference is often loosely made to "the right to equality", the Constitution does not guarantee the right to equality in the sense of equality of outcome. However, there are several references to the achievement of equality in the 1996 Constitution: in particular, section 1 (FC) states that the achievement of equality is one of the values on which the South African state is founded, and section 9(2) refers to measures promoting the achievement of equality. One may therefore say that substantive equality, even in the sense of equality of outcome, is expressly mentioned as a desideratum.

(4) A vast amount of literature exists on the topic of legal equality. It is patently obvious that this body of work cannot be dealt with within the purview of a series of articles. Some analysis of constitutional equality is nevertheless inevitable. For example, when section 9(2) refers to "the achievement of equality", the first question that springs to mind is: "Equality of what?" And even, though this may seem more obvious, "equality for whom?"

(5) It is clear from the wording of section 9(2) that affirmative action measures are to be seen as supportive of the ideal of equality and not as an exception to or limitation on the right to equal treatment and non-discrimination. However, this raises a number of difficult issues which have not yet had to be addressed by the Constitutional Court.

(6) The right to equality before the law has an impact on all the other constitutionally protected rights, even when equality is not specifically mentioned in the provision in question. The interaction between rights must be borne in mind whenever rights analysis is engaged in.

2 THE EQUALITY JURISPRUDENCE OF THE HIGH COURT

There are a number of High Court judgments that are of importance in the context of the establishment of a "new" South African doctrine of equality. Two of these (both emanating from the erstwhile Ciskei) will be touched on here in order to provide a more complete picture. Judgments of courts *a quo* that were eventually decided by the Constitutional Court will be dealt with in the discussion of the Constitutional Court judgment in question.

2 1 *Chairman of the Council of State v Qokose*[10]

Here the Appellate Division of the High Court of Ciskei was faced with the question whether a statute of limitation which allowed a certain class of persons a shorter time to institute actions than other classes, violated the right to equality before the law. (The issue did not arise under the Bill of Rights in the South African Constitution,

---

category, for which limitation had to be necessary in so far as the rights related to free and fair political activity.

10 1994 2 BCLR 1 (CkAD).

but under the Republic of Ciskei Constitution Decree 45 of 1990. The principles are, however, relevant to the present discussion.)

The court *a quo*[11] had held that the statutory provision which required any civil action against the police to be instituted within six months violated the equal protection clause in the Constitution Decree. (The state and policemen had three years in which to institute claims against ordinary citizens.) In the words of Heath J:

> "The inequality is so obvious that it does not require any further analysis or interpretation. To put it differently, section 48(1) does not create equal protection. On the face of the provisions of section 48(1), they therefore clearly clash with the provisions of article 1(2) of Schedule 6 and are therefore . . . of no force and effect unless the provisions of section 48(1) constitute an authorised limitation or restriction."[12]

The appeal court did not agree. Rabie JA referred to the work of the American writer Willis,[13] quoted by Heath J:

> "The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction . . . The inhibition of the [fourteenth] amendment [to the Constitution of the US] . . . was designed to prevent any person or class from being singled out as a special subject for discriminating and hostile legislation . . . mathematical nicety and perfect equality are not required.
>
> Similarity, not identity of treatment, is enough."

Rabie JA took the view that this means that the question is not whether there is a distinction between classes of people, but whether the distinction is a reasonable one and that the ultimate test as regards statutes of limitation is whether the aggrieved party had a reasonable time within which to enforce his claim. He felt that the court *a quo* had erred in that it considered only the fact that there was a difference between the time allowed an ordinary citizen to institute a claim against the state and the time allowed the state to institute proceedings against an ordinary citizen. Neither the reasonableness of this provision, nor the state interest served by it, was considered.

2 2 *Zantsi v The Chairman of the Council of State*[14]

This judgment, like that in *Qokose*, dealt with the constitutionality of a statute of limitations. Section 71 of the Defence Act 17 of 1986 (Ciskei) provided that no civil action could be instituted against the Defence Force after a period of six months had elapsed since the cause of action arose. In terms of the transitional provisions of the interim Constitution, pre-Constitution laws which conflicted with the Constitution were invalid. The court could therefore enquire into the constitutionality of the provision.

Once again, one of the issues before the court was whether the provision offended against the right to equality before the law, since it applied to individuals and juristic persons who wished to institute an action against the Defence Force, but not *vice versa*. Heath J stated categorically that "[t]he ability to enforce a right is as important as the right itself"[15] and quoted with approval from the Canadian judgment in *Suche v Queen*[16] in which it was said: "No one would deny that the right

---

11 *Qokose v Chairman, Ciskei Council of State* 1994 2 SA 198 (Ck).
12 210F–H. See the appeal judgment 4F–G.
13 *Constitutional law* 579.
14 1994 6 BCLR 136 (Ck).
15 167H.
16 (1987) 37 DLR (4ed) 474.

of access of a litigant to the courts is a 'profoundly important interest' so far as that person is concerned."[17] The court found that there was an inequality as regards the right to enforce a claim and therefore that the right to equality before the law had been infringed.

It was argued by counsel for the respondent that the limitation period did not discriminate between subjects of the state, but established a classification between the state and the Defence Force on the one hand and private bodies or individuals on the other. Such classification, it was said, had a rational relation to the object sought to be achieved by the legislation in question. Extensive reference was made to the work of Servai on the constitutional law of India on this point.[18] This author emphasises that, in order to be legitimate, a classification must be rational, not arbitrary, and that in order to pass the test of rationality, two conditions must be met: first of all, the classification must be founded on an intelligible differentia which distinguishes those who are grouped together from others; and secondly, the differentia must have a rational relation to the object sought to be achieved by the limiting legislation. Servai acknowledges that classification necessarily implies the making of a distinction between persons within the classification and those outside it, because "the very idea of classification is that of inequality". However, "the mere fact of inequality in no manner determines the matter of constitutionality".[19]

The court found that the presence of administrative problems does not, of itself, justify the conferment of special protection on the state and therefore that the limitation in question was not constitutional.

The question whether the limitation was justified in terms of a general limitation provision, did not arise here. However, the guidelines relating to the rationality of classifications and differentiation contained in this judgment are of importance because they find an echo in later cases.

3 EQUALITY IN THE CONSTITUTIONAL COURT

3 1 The inequality inherent in the death penalty: *S v Makwanyane*[20]

In this case the Constitutional Court was required to decide whether the imposition of the death penalty for murder was reconcilable with the 1993 Constitution. Although capital punishment was more obviously in conflict with other rights protected in the Constitution (such as the right to life, dignity and the right not to be subjected to torture or cruel, inhuman or degrading punishment), several of the judges also addressed the question whether it conflicted with the equality provision.

The court did not explore the relationship between section 8(1) and section 8(2) in any great depth and did not state whether it regarded the issue as one of inequality before the law or as unfair discrimination, although the less favourable circumstances (racial, socio-economic, linguistic, etc) of many accused facing the death penalty were highlighted. The equality issues were dealt with by Chaskalson P, as well as Ackermann, Mohamed and Didcott JJ.

Under the heading of "arbitrariness and inequality"[21] Chaskalson P pointed out that the facial neutrality of a law cannot guarantee that it will not be arbitrary in

17 484.
18 *Constitutional law of India*.
19 Quoted 170D.
20 1995 6 BCLR 665 (CC).
21 Paras 43–56.

effect. The judge mentioned the following as factors that may influence the outcome of a trial: the way in which the case is investigated by the police and is presented by the prosecutor, how effectively it is defended, the attitude of the trial judge (and possibly of the judges of appeal), and, perhaps even more importantly, the race, home language and economic position of the accused. While judges do take such factors into account, the possibility of arbitrariness cannot be eliminated.

The judge referred to the American case of *Furman v Georgia*,[22] in which it was pointed out that any law that is non-discriminatory on the face of it may be applied in a way that violates the equal protection clause. Furthermore, in the words of Douglas J in the same case, statutes which confer discretion (like the provisions of the South African Criminal Procedure Act of 1977 which dealt with the imposition of the death penalty) are

> "pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments".[23]

Ackermann J expressed his full agreement with the judgment of Chaskalson P, but said that he wished to

> "place greater emphasis on the inevitably arbitrary nature of the decision involved in the imposition of the death penalty as a form of punishment in supporting the conclusion that it constitutes 'cruel', 'inhuman' and 'degrading punishment' within the meaning of section 11(2) of the Constitution . . ."[24]

(Thus both Justice Douglas in *Furman* and Ackermann J in *Makwanyane* treated the issue of arbitrariness as an integral part of the enquiry into whether capital punishment is cruel and inhuman.)

Ackermann J went on to explain:

> "In reaction to our past, the concept and values of the constitutional state, of the '*regstaat*', and the constitutional right to equality before the law are deeply foundational to the creation of the 'new order' referred to in the preamble . . . We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where State action must be such that it is capable of being analysed and justified rationally . . . Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order."[25]

Ackermann J sought support for his view, not only in the judgment in *Furman*, but also in the following *dictum* of Bhagwati J in *Ghandi v Union of India*:[26]

> "[F]rom a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; . . . Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law . . . "

The judge acknowledged (as had Chaskalson P) that it is virtually impossible to eliminate all elements of arbitrariness in the imposition of *any* punishment. The consequences of the death penalty are, however, such that it differs in both degree and substance from any other punishment. Because there are so many variables that could influence the decision whether to impose the death penalty or not, despite the presence of guidelines laid down by the Appellate Division, Ackermann J concluded that

---

22 408 US 238 (1972).
23 257, quoted by the court in para 52.
24 Para 153.
25 Para 156.
26 1978 SC 597 625 (para 163).

> "[t]he fact of the matter is that [the statutory provisions] leave such a wide latitude for differences of individual assessment, evaluation and normative judgment, that they are inescapably arbitrary to a marked degree. There must be many borderline cases where two courts, with the identical accused and identical facts, would undoubtedly come to different conclusions."[27]

Mohamed and Didcott JJ also referred to section 8(1). The latter held that the imposition of the death penalty is inherently arbitrary; because the punishment is irreversible and possible errors irremediable, the defect of arbitrariness militated against reasonableness and justifiability, the requirements laid down by section 33(1).[28]

For his part, Mohamed J stressed that even though judges will conscientiously seek to avoid any impermissibly unequal treatment of accused, the process is inherently arbitrary and therefore fatally flawed. Like Chaskalson P, he listed some of the factors that can influence the outcome of a trial: the poverty or affluence of the accused, and thus his ability to afford to retain the services of experienced and skilled counsel and expert witnesses; his resources in pursuing potential avenues of investigation, tracing and procuring witnesses and establishing facts relevant to his defence and credibility; the temperament and sometimes unarticulated but perfectly *bona fide* values of the sentencing officer and their impact on the weight to be attached to mitigating and aggravating factors;[29] the inadequacy of resources which compels the *pro deo* system to depend substantially on the services of mostly very conscientious but inexperienced and relatively junior counsel; the levels of literacy and communication skills of the different accused in effectively transmitting to counsel the nuances of fact and inference often vital to the probabilities; the level of training and linguistic facilities of busy interpreters; the environmental milieu of the accused and the difference between that and the environment of those who defend, prosecute and judge him; class, race, gender and age differences which influence *bona fide* perceptions relevant to the determination of the ultimate sentence; the energy, skill and intensity of police investigations in a particular case; and the forensic skills and experience of counsel for the prosecution.

Perhaps not too much need be said about the Constitutional Court's first brush with the equality clause. After all, there was more than enough ammunition to shoot down the death penalty without recourse needing to be had to inequality at all. The presence of inequality and arbitrariness merely confirmed what was patently obvious – that there was no interpretation of the 1993 Constitution which could support the retention of the death penalty.

However, it is clear that the court had not given much attention to the substance of section 8 in the present context: did section 277(1) of the Criminal Procedure Act violate section 8(1) only (in that it did not afford equal protection of the law to all those accused of murder)? If section 8(1) was violated, how should one approach the question of differentiation or classification? Did one need to examine the other side of the coin as well, and ask whether the provision discriminated unfairly against certain accused? On which grounds (listed or unlisted)? Directly or indirectly?

---

27 729C–D.

28 It is clear that the members of the court had not yet had to consider the relationship between the equality clause and the limitation clause. Thus the difficulties that arise from the two-stage approach to limitation of fundamental rights had not yet presented themselves. See the discussion later in this series of articles.

29 An example of this is to be found in the case of *S v Salzwedel* 2000 1 SA 786 (SCA). See Labuschagne "Rassisme as faktor by strafoplegging" 2001 *THRHR* 337.

Exactly where do the boundaries of the right to equal protection lie, and at which point does the limitation clause "kick in"?

3 2 The right to appeal: *S v Ntuli*[30]

This case was mainly concerned with the right to a fair trial. The issue of equality arose in so far as section 305 of the Criminal Procedure Act 51 of 1977 required a judge's certificate as a condition for the prosecution of an appeal in person by an imprisoned person convicted of an offence by a lower court; it was argued that such a provision differentiated impermissibly between such persons (who find themselves in prison and have no legal representative acting for them) and others who do have the privilege of legal representation and who are not in prison.

After examining the way in which this provision was applied in practice, Didcott J concluded that the scheme was unsystematic and haphazard.[31] He found it incompatible with both section 25(3)(h) (the right to a fair trial) and section 8 (the equality provision). He was careful to qualify his finding in regard to section 8 as follows:

> "There I have in mind the right to equality proclaimed by subsection (1) rather than the prohibition against unfair discrimination which subsection (2) pronounces. I find it unnecessary to look at the latter, irrespective of its rating either as an independent provision or as a corollary to the former. Nor do I need to explore the outer reaches of the 'equality before the law' guaranteed by subsection (1)."

The judge then emphasised once again that "[i]t is trite, however, that differentiation does not amount *per se* to unequal treatment in the constitutional sense".[32]

The requirements of section 33(1) did receive cursory attention in this judgment. The judge found, simply, that the limitation imposed by the impugned provision could not be rated either as reasonable or as justifiable in a society based on equality.

An interesting aspect of this judgment, as mentioned above, is that Didcott J recognised the possible significance of the relationship between section 8(1) and section 8(2), as well as the problems that could arise in regard to the scope of the right to equality before the law, but (wisely, perhaps) chose not to explore these at such an early stage of the development of our equality jurisprudence.

3 3 More about appeals: *S v Rens*[33]

The issue in this case was rather similar to that in *Ntuli*: again it was section 25(3)(h) of the Constitution that was the primary focus, but this time it was section 316 of the Criminal Procedure Act that was alleged to be unconstitutional. The question was whether the requirement of leave to appeal against a conviction or sentence by a superior court conflicted with the Constitution. It was averred that this offended against the right to a fair trial, and more particularly, the right to have one's case taken on appeal or review; further, that it was in breach of section 8 of the interim Constitution because it differentiated between the right of appeal from a judgment of a lower court and that of a superior court.

The section 8 challenge was not thoroughly canvassed, however, and was given short shrift by the court. Madala J held that equality before the law does not demand identical procedures, as long as the requirement of a fair trial is met. There was no

---

30 1996 1 BCLR 141 (CC).
31 Para 16.
32 Para 19.
33 1996 2 BCLR 155 (CC).

indication that the distinction in question resulted in unfair discrimination, whether direct or indirect, whether on the grounds listed in section 8(2) or on analogous grounds. The question whether such a challenge should have been brought under subsection (1) or subsection (2) of section 8 was never even considered.

3 4 "Systematic motifs of discrimination": *Brink v Kitshoff* [34]

This was first case in which discrimination was the primary focus. Interestingly (and perhaps ironically) the alleged discrimination was not based on race or colour: the issue before the court was the constitutionality of section 44(1) and (2) of the Insurance Act of 1943, in terms of which married women were deprived of certain benefits of life insurance policies ceded to them or made in their favour by their husbands, in the event of the husband's insolvency. The Act contained no similar provision where a life insurance policy was ceded to or effected in favour of a husband by a wife. The alleged discrimination was therefore based on two grounds: sex (a listed ground) and marital status (an unlisted ground).[35]

All the parties conceded that section 44(1) and (2) was in conflict with section 8 of the interim Constitution, in particular with section 8(2).

O'Regan J emphasised the special place occupied by equality as a recurrent theme in the South African Constitution[36] and proceeded to examine international and foreign law on the issue. As regards international law, article 7 of the Universal Declaration of Human Rights and article 26 of the International Covenant on Civil and Political Rights (ICCPR) were quoted and certain other international human rights instruments referred to. Foreign legal systems referred to were those of the United States of America, India and Canada. The judge concluded that while it is clear that the prohibition of discrimination is an important goal of both international instruments, there are significant differences in the approach to the interpretation of national constitutions, in particular. These reflect different approaches to the concepts of equality and non-discrimination, which

> "arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality".[37]

As is mentioned above, both the interim Constitution and the 1996 Constitution make a structural distinction between the right to equal protection of the law and the right not to be discriminated against. By contrast, both the Universal Declaration of Human Rights and the ICCPR mention the two elements almost in the same breath, thus focusing on the state's role in refraining from discriminating unfairly against individuals on the one hand and protecting the individual from discrimination on the other. As O'Regan J pointed out, the court was obliged to have regard to international law (in terms of s 35(1) (IC)).[38] Once confronted with a less open-and-shut case on equality and non-discrimination, the Constitutional Court was obliged to

---

34 1996 6 BCLR 752 (CC).

35 Marital status has been added to the list of specified grounds of discrimination in the 1996 Constitution.

36 Para 33.

37 Para 39.

38 S 35(1) required a court interpreting the Bill of Rights "where applicable, . . . [to] have regard to public international law applicable to the protection of the rights entrenched in this Chapter". S 39(1)(b) of the 1996 Constitution reads a little differently: "When interpreting the Bill of Rights, a court, tribunal or forum . . . – must consider international law".

refer, not only to the actual provisions of the international instruments, but also to the jurisprudence of international tribunals (such as the European Court of Human Rights) and, arguably, to judgments of foreign courts dealing with the interpretation of international human rights instruments.[39] Such judgments would therefore be categorised as sources of international human rights law rather than foreign law in this regard. Where a foreign judgment deals with both its own domestic bill of rights and international human rights instruments, the aspects of the judgment dealing with the latter would therefore technically carry more weight, since reference to foreign law is not mandatory.[40]

A very interesting aspect of the discrimination issue was touched on by O'Regan J in her discussion of the Fourteenth Amendment of the United States Constitution. She explained that it has been a central principle of the jurisprudence in that country that different levels of judicial scrutiny are reserved for different categories of legislative classification. Any classification that is based on race or colour, or "invades fundamental rights", attracts the strictest scrutiny. (The phrase "invades fundamental rights" is very wide; it is suggested that in the South African context, where fundamental rights are spelled out in the Constitution in greater detail than in the Constitution of the United States, this criterion would not be very helpful.) Classifications relating to gender or socio-economic rights are subject to an intermediate level of scrutiny in the United States.

O'Regan J then dealt with the question whether the South African Constitution permits of different levels of scrutiny when discrimination is in issue. Certainly there is no direct textual support for this, particularly as regards the enumerated grounds for discrimination. However, section 9(5) (FC) and section 8(4) (IC) contain a presumption that discrimination on any of the grounds specified in section 9(3) and section 8(2) respectively is unfair, subject to the contrary being established. This could imply that the listed grounds are viewed as more serious. In addition, the limitation provision in the 1993 Constitution (s 33) provided for different levels of justification.[41] O'Regan J pointed out that while racial discrimination was historically the most vicious and the most visible in South Africa, there are "other systematic motifs of discrimination [which] were and are inscribed on our social fabric"[42] and that the drafters of the interim Constitution had recognised that these could (and did in the past) create "patterns of group disadvantage and harm".[43] Although this was not stated in so many words, it seems clear that the judge was not prepared to submit discrimination based on sex or gender to a less stringent standard of scrutiny. Because of the differences in approach between the different jurisdictions alluded to earlier on, she made it clear that the interpretation of section 8, more even than any other provision of the Constitution, must be based on the language used *and* on our own constitutional context.[44]

---

39 See Botha "International law and the South African interim Constitution" 1994 *SA Public Law* 245 251 esp fn 37. He quotes art 38(1)(d) of the Statute of the ICJ, which states expressly that "judicial decisions" constitute a source of public international law. Also see Lillich "Sources of human rights law and the Hong Kong Bill of Rights" 1990/91 *Chinese Yearbook of Int Law and Affairs* 27, cited by Botha *loc cit*.

40 As Botha points out (252), our Southern African neighbours, Zimbabwe and Namibia, have produced a number of judgments dealing with international human rights law which are well worth the consideration of the South Africa courts.

41 See fn 9 above.

42 Para 41.

43 Para 42.

44 Para 40.

Although the question did not arise here (since the discrimination *in casu* was found to be of the "highest" rank anyway), it may nevertheless be asked whether our courts will be as critical of differentiation or classification based on the other grounds listed in section 8(2) (now s 9(2) and (3)). If one takes discrimination based on age or disability, for example: there is no denying that such discrimination, if not founded on any "intelligible differentia" that points to a rational connection with the object sought to be achieved by the legislation (according to the Indian formula), would be unfair and therefore open to constitutional challenge. However, such discrimination would probably not evoke the same moral outrage as racial discrimination. It will also be much easier to justify differentiation on these grounds (no one would question the fairness of denying drivers' licences to young children or the visually impaired) than in the case of differentiation based on race or colour. In other words, while discrimination on these grounds may undoubtedly be unfair or irrational or unconstitutional in a particular case, it is not as fundamental as racial discrimination (or discrimination based on sex or gender, for that matter).

But what about the other listed grounds? Take discrimination based on language or religion, both extremely emotive issues in South Africa. Would this be as fundamental as racial or gender discrimination? Could one argue that any measures favouring other religious faiths over the Christian faith, which enjoyed a kind of government-supported monopoly before 1994, come within the scope of affirmative action as envisaged by section 8(3) (IC) and section 9(2) (FC)? Certainly there have already been moves to promote languages other than English and Afrikaans, in order to redress the previous imbalance. "Affirmative" legislative measures dealing with language, religion, facilities for or the employment of the disabled, are conceivable; but it seems unlikely that one will see legislation setting quotas for the employment (or admission to higher education, or whatever) of persons over a certain age or persons whose sexual orientation is not that of the majority.

Thus even though the Constitution says nothing about varying levels of scrutiny, there may well be intuitive differentiation between the different kinds of classification that could lead to discrimination.

Another issue that was touched on by O'Regan J was the possibility of compound discrimination, which leaves the victim doubly disadvantaged. Perhaps the most obvious example is the position of black women in South Africa, who have suffered discrimination based on race and sex (and often language and other grounds to boot). Logically, any discrimination that has a compound or cumulative effect must be scrutinised more strictly than "linear" discrimination.

O'Regan J briefly examined the possibility that the discrimination in question could be justified in terms of section 33 (IC) and came to the conclusion that it could not. However, she did not address the question whether and in what circumstances discrimination that had been found to be unfair could nevertheless be justifiable and reasonable. This would require an analysis of a semantic nature: in the context of the Constitution,[45] what is the difference between fairness and reasonableness, and to what extent can the requirement of reasonableness postulated by the limitation clause, be used as a criterion to establish fairness, if at all?

---

45 In the administrative-law context, a distinction has traditionally been made between fairness and reasonableness. Whether this distinction ever really held water and whether it can survive under the present Constitution and in terms of the Administrative Justice Act, is a question beyond the purview of this article.

The main contribution of this judgment to the development of South African equality jurisprudence lies in the recognition that the jurisprudential and the philosophical understanding of equality may differ and that equality is indeed a contested concept; in the emphasis on compound discrimination and its impact; and in the implicit warning that, even though there is no textual support for the contention that our Constitution recognises different levels of scrutiny in discrimination cases, the possibility exists that certain forms of discrimination may attract stricter scrutiny than others in practice.

3 5 Unmarried fathers have rights too: *Fraser v Children's Court, Pretoria North*[46]

The case of Lawrie Fraser, the father of a child born out of wedlock who was given up for adoption by his mother, caused a great deal of public interest. In terms of section 18(4)(d) of the Child Care Act 74 of 1983, only the consent of the mother of such a child was necessary for the child to be adopted. The father had no right to object, be consulted or even informed. The main issue before the Constitutional Court, to which the matter was eventually brought, was the constitutionality of section 18(4)(d). The applicant averred that it violated both section 8(1) and 8(3) (IC), in other words, that it violated both the right to equality before the law and the right not to be unfairly discriminated against. The applicant alleged that he had been discriminated against on the ground of both sex (a listed ground) and marital status (an unlisted ground).

In his judgment, Mohamed DP emphasised once again:

> "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised."[47]

He continued to say that in his view section 18(4)(d) did indeed offend section 8 (IC), since it discriminated impermissibly between the rights of fathers in certain unions and those in other unions. Although this was not directly in issue in this case, the judge pinpointed the anomalies that resulted from discrimination against unions in terms of the Islamic faith and so-called "customary unions". In addition, it discriminated against certain fathers on the basis of their gender or marital status. This, too, could give rise to anomalies, as the judge pointed out. However, he warned that simply repealing the blanket rule contained in section 18(4)(d) would not solve the problem; the solution required a

> "nuanced and balanced consideration of a society in which the factual demographic picture and parental relationships are often quite different from those upon which 'first world' western societies are premised".[48]

This strongly implies that South Africa needs to develop an indigenous equality jurisprudence.

Mohamed DP then went on to examine the approach to the problem of the rights of unmarried fathers in the United States of America, Canada, The European Court of Human Rights[49] and the United Kingdom. He came to the conclusion that it may

---

46 1997 2 BCLR 153 (CC).

47 Para 20.

48 Para 29.

49 As is pointed out above, judgments of international bodies such as the ECHR should not be dealt with in the same breath as judgments of foreign courts, since they constitute international human rights law and not foreign law. The Constitutional Court has tended to blur this distinction.

be too simplistic to distinguish between married and unmarried fathers and between the fathers and mothers of children born out of wedlock. He judged that there was a strong argument against the constitutionality of section 18(4)(d), but urged that the legislature formulate an appropriate statutory measure which had regard both to the responses that have found favour in other jurisdictions and to the special circumstances of our own history and circumstances.[50] The deep disadvantage experienced by single mothers in South African society should be borne in mind, so that any legislative initiative should not exacerbate this disadvantage. For this reason, the solutions adopted by other jurisdictions should be approached with caution, since they may not be appropriate to South Africa.[51]

Certainly one cannot quibble with the court's finding. However, the judgment in *Fraser* cannot really be said to represent a further step in the development of equality theory in South Africa. Beyond a bald statement that nothing in the limitation clause justified the discrimination complained of,[52] the possible impact of section 33 was not addressed at all and the examination of the essential nature of the right to equal treatment and protection under the South African Constitution would have to wait for another day.

4 CONCLUSION

As was to be expected, hardly any of the tricky questions were answered definitively in the first stage. It is interesting that the issue of race and racial inequality did not feature at all in the early cases, and that gender and gender-related issues were prominent. The need for marital status to be recognised as a specified ground of discrimination, emerged. The judges were very careful not to run ahead of the actual problems they were required to address, acknowledging that an incremental approach would serve best. Emphasis was placed on the need for South Africa to develop its own indigenous equality jurisprudence which accorded with its own unique circumstances, despite the useful pointers which may be found in foreign and international law. (However, no systematic distinction was made between international law – more specifically, in the context of the Bill of Rights, international human rights law – which the court was obliged to consider, and foreign law, which the court could consider, but was not obliged to.) No attempt was made to determine the appropriate approach to the relationship between section 8(1) and 8(2), although there was some indication that the two provisions should be interpreted conjunctively.

The year 1997 was to prove critical. This is when the judgments which have formed the core of our equality jurisprudence were reported. These cases remain crucial even though all of them dealt with the 1993 Constitution, and will form the topic of the next article in this series.

50 Para 45.
51 Para 44.
52 Para 23.

Prenuptial *stuprum*

PhJ Thomas
Mr LLD
Professor of Law, Department of Legal History, Comparative Law and Jurisprudence, University of Pretoria

OPSOMMING

Voorhuwelikse *stuprum*

Volgens die Suid-Afrikaanse handboeke maak die reël dat 'n huwelik nietig verklaar kan word op aansoek van die man, indien laasgenoemde kan bewys dat sy vrou op die huweliksdag swanger was van 'n ander en dat hy daarvan onbewus was, nog steeds deel uit van die Suid-Afrikaanse gemenereg.

Die opname en ontwikkeling van genoemde reël in die Romeins-Hollandse reg word nagegaan. Die verhandeling *De matrimoniis* en meer in besonder, die oorname van gedeeltes daarvan in die *Aanhangzel tot het Hollandsch rechtsgeleerd woordenboek* asook die aanvaarding van Noordkerk se argument deur Van der Keessel word ondersoek. Daar word aan die hand gedoen dat die reël uitgedien en ongrondwetlik is.

1 INTRODUCTION

Roman-Dutch law became one of the foundations of the South African common law in the same manner that Roman law was adopted by the law of the province of Holland during the seventeenth and eighteenth centuries.

One of the essential works of the Roman-Dutch jurists was the *De legibus abrogatis*.[1] In this work Simon Groenewegen[2] systematically went through the *Corpus juris civilis* and discussed which texts still applied and which had been abrogated by legislation or custom in the province of Holland. No comparable work has been published in present-day South Africa,[3] with the result that the continued application of Roman-Dutch rules may be said to be a matter of speculation.

However, the introduction of the Bill of Rights in the new Constitution of the Republic of South Africa[4] necessitated a revision of South African private law on account of the express recognition of the right to equality.[5]

---

1 *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* 1649.

2 Simon à Groenewegen van der Made (1613–1652) studied law in Leyden, practised as an advocate and became secretary of the town of Delft. Roberts *A South African legal bibliography* (1942) 137; De Wet *Die ou skrywers in perspektief* (1988) 135 sq.

3 Van Warmelo's notes on parts 1–5 of Van der Keessel's *Praelectiones* (see fn 44), with special reference to contemporary South African legal literature and case law, published in vol 6 of the *Praelectiones*, have, to some extent, a similar effect.

4 Act 108 of 1996.

5 S 9.

It is therefore all the more surprising that a *prima facie* sexist rule of the Roman-Dutch law appears to have escaped abrogation. The rule in question provides that a marriage may be annulled at the request of the husband, if he can prove that his wife was pregnant on the wedding day and that this pregnancy was not his doing and that he had no knowledge of it.

This rule found its way into Roman-Dutch law during the seventeenth century and was received into the South African common law as part of the Roman-Dutch law of persons. During the nineteenth and the first half of the twentieth century, the rule was upheld by the courts on various occasions.[6]

However, the fact that the most recent post-constitutional South African textbook on the law of marriage does not find anything amiss and blithely states the old *status quo*,[7] deserves further attention.

2 ROMAN-DUTCH LAW

The introduction and assimilation of the rule into Roman-Dutch law went as follows:

The first mention of this possibility of annulment is found in consultation 100 in the first volume of Isaac van den Berg's collection of opinions, the *Nederlands advys-boek*.[8] The first edition of this work appeared in Amsterdam in 1693 and the opinion in question was given by Hendrik Brouwer on 6 April 1669.

The facts of the case were that a widower had married a spinster on 16 January 1667. On 19 May of the same year the newly-wed wife gave birth to a healthy and full-term baby daughter. The husband denied having had sexual intercourse with his wife before the wedding day. Two conflicting statements were put forward by the wife, and the husband chased mother and daughter from his house. The wife instituted an action for separation *a mensa et thoro* and for maintenance for herself and the child. The husband intended to assent to the proposed separation of table and bed, but to defend the claims for maintenance. In turn, he instituted an action asking the court to declare the child illegitimate and incapable of being his intestate heir.

Brouwer practised as an advocate and later became a judge of the court of Leyden. His treatise on the law of marriage, *De jure connubiorum*,[9] is described by Wessels in his *History of the Roman-Dutch law* as "a monument of research".[10] In this opinion Brouwer devotes eight closely printed pages to the question whether each party's claim should be adjudicated. He further provides a detailed discussion of the presumption of paternity, since both the maintenance and the intestate succession are dependent on the outcome. As to be expected, evidentiary aspects dominate, and Brouwer comes to the conclusion that the child is illegitimate and not entitled to maintenance and that the wife has provided proper cause for separation of table and bed and was thus not entitled to maintenance either. It comes as a surprise, however, when after the questions posed have been answered, Brouwer suddenly states in the

---

6 See *infra* fn 47.

7 Sinclair (assisted by Heaton) *The law of marriage* (1996) vol 1 394 sq.

8 *Nederlands advys-boek, inhoudende verscheide consultatien èn advysen van voorname regtsgeleerde in Nederland* (4 vol 1693, 1694, 1697 and 1698). De Wet 187–188; Roberts 50–51.

9 *De jure connubiorum apud Batavos recepto libri duo* (1665). De Wet 138; Roberts 63.

10 Roberts 63.

last six lines that *magni nominis juris consulti* are of the opinion that the marriage can be annulled on instigation of the unknowing husband on account of premarital fornication alone. The necessary authority, the jurists of name, are Carpzovius,[11] Forster,[12] Zepper[13] and Joachim a Beust.[14] Finally, Brouwer closes with Deuteronomy chapter 22 verse 20.[15]

Van den Berg, the editor of the *Nederlands advys-boek*, mentions that the same was decided in Amsterdam on 16 April 1669. It is, however, remarkable that Brouwer did not amend the text of the second edition of 1714 of his *De jure connubiorum* to reflect this new development.[16]

However, the rule was confirmed into Roman-Dutch law by Simon van Leeuwen and Johannes Voet. Van Leeuwen did not refer to the rule in his main work *Het Rooms-Hollands-regt*,[17] but it is found in his *Censura forensis*.[18]

In the latter work, having discussed divorce on the ground of adultery, Van Leeuwen posed the question, whether premarital fornication can be a ground for dissolution of a marriage.[19] He was of the opinion that if a man had unknowingly married a woman corrupted and pregnant by another, the marriage could be totally dissolved

---

11 Carpzovius lib 2 tit 10 defin 187 & tit 11 defin 193 jurispr & pract crimin part 2 4 63 num 54 & seqq. Benedict Carpzovius (1595–1666) was a judge, privy councillor to the Elector of Saxony and author of many legal works. The works referred to by Brouwer are the *Jurisprudentia forensis Romano-Saxonica secundum ordinem constitutionum Augusti Electoris Saxoniae in partes IV divisa*, also known as *Definitiones forenses* and his *Practica nova imperialis Saxonica rerum criminalium in partes tres divisa.* However, *Definitiones forenses pars* II *Constitutio* 10 deals with *patria potestas* and contains only 32 definitions, while *Constitutio* 11 of the same part deals with tutors and contains but 50 definitions. The reference in the *Practica nova* is *Pars* II *Quaestio* 63 *De Divortio, subquaestio* 4 *An concedendum divortium, si quis gravitam vel corruptam uxorem duxerit, quam virginem esse credebat?* fn 47–63.

12 Forster *De nuptiis* cap 8. Valentinus Gulielmus Forster (1574–1620) was professor at Wittenberg. The reference is to his *Liber singularis de nuptiis* (1617). Roberts 122.

13 Wilhelm Zepper *De legibus Mosaicis* cap 20. It is probable that Philippus Zepper *Collatio legum Mosaicarum, Forensium, & Romanorum, Canonici, item, & Saxonici juris* (Halae Saxonii 1632) was being referred to.

14 Joachim a Beust *De jure connubiorum* part 2 cap 33. The reference is to Joachim von Beust (1522–1597), the author of *Tractatus de jure connubiorum in tres partes divisus* (1586). This tract is also found in Von Beust's collection of tracts *Tractatus connubiorum praestantissimorum iuris consultorum* I–II (1606 (I) 1617 (I–II)). These tracts deal with a modified application of Canon law in the Protestant regions of Germany, in which process Von Beust's collection played an important role. Coing *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte* II (1) (1977) 574.

15 *Nederlands advys-boek* C Consultatie *in fine* (264): "En volgens de Wet Mosis, wie voor een Maagd getrout en geen Maagd bevonden werd gesteenigd werden. Deuter. 22 vers 20" (Brouwer must have meant 21).

16 In both editions Brouwer discussed in I 18 under the heading *De sponsalibus per errorem contractis* (I 18 23 sqq) whether a man who discovers that his wife is not a virgin, can have the marriage dissolved. The only instance in which he deemed this possible was where the husband discovered on the wedding day (night) that his wife was not a virgin and/or pregnant. In that event he must not touch the wife and must immediately send her away. (1665) I 18 28; (1714) I 18 30.

17 *Het Rooms Hollands-regt, waar in de Roomse wetten met het huydendaagse Nederlands regt, . . . over een gebragt werden.* The available edition was the Amsterdam edition of 1686.

18 The first edition of the *Censura forensis theoretico-practica, id est totius Juris Civilis . . . methodica collatio* dates from 1662. The available edition is the fourth edition dated 1741, which edition was updated by Gerard de Haas. However, prior to this date a reference to the *Censura forensis* fragment is found in Voet's *Commentarius ad Pandectas*. The second edition of the *CF* appeared in Leiden in 1678 and the third in Amsterdam in 1685. Roberts 184 sq.

19 *Censura forensis* I 1 15 10.

and not only from table and bed. Van Leeuwen relied on Schneidewinus,[20] Joachim a Beust,[21] and Carpzovius.[22] From *Digest* 48 5 14 (13) 10 he derived the requirement that the husband should not have condoned the matter by resuming sexual relations with the woman after he became aware of the facts. Van Leeuwen continued, however, by stating that the marriage is not actually dissolved as such, but is declared null and void, since a contract entered into as a result of *dolus*, is *ipso jure* null and void.[23] Finally, Van Leeuwen broached the case where a husband had committed premarital fornication elsewhere. He concluded, however, that this does not entitle the wife to dismiss her husband, because unchastity on the part of women is more reprehensible than that of men. He is of the opinion that greater chastity is required from women, because a woman's fault can cause major trauma to a family by the introduction of another's offspring.[24]

The above authors prepared the ground for Johannes Voet, the grand master of the Dutch *usus modernus*. In his *Commentarius ad Pandectas* 25 2 15, Voet held one of the grounds on account of which marriages may be annulled to be premarital unchastity followed by pregnancy. If a man in ignorance married a woman spoilt and pregnant by another and he did not after discovering this, condone the matter in any way, he could demand that the marriage be declared *ipso jure* void.

Because of the absence of Roman law authority, Voet seeks support in Canon law. After admitting that *Decretum Gratiani* 2 29 1 1 explicitly denies the above,[25] Voet continues, nevertheless, to look for authority within the Canon law. From the fact that in Canon law a free person who had married another's slave girl mistakenly thinking her to be free, could send her away if he could not buy her from her owner,[26] Voet reasons by analogy that the man who mistakenly married a spoilt woman could send her away as well, as if he had never consented to marry her.

Voet finds a second argument for nullity of the marriage in Roman law. The fact that Canon law derives an argument from *error in materia* to establish the nullity of a marriage,[27] emboldens Voet to do the same. He thus uses Ulpian's opinion on the case of the man who thought he was buying a virgin.[28] In fact a mature woman was

---

20 Johann Schneidevin(us) or Schneidewinus (1519–1568) was professor at Wittenberg. The work referred to is his *In quatuor institutionum imperialium Justiniani libros commentarii* (1609). Roberts 279.

21 The reference is to *De jure connubiorum* part 2 cap 34, while Brouwer's reference was to cap 33.

22 The references differ from those of Brouwer, namely *Jurisprud Forens part 4 constit 20 defin 12* and *Definit Consistorial* lib 2 tit 11 defin 193 *et seq*. Van Leeuwen referred correctly to *Jurisprudentia Forensis Pars IV Constitutio 20 Definitio 12 Dissolvitur matrimonium si uxor ab alio antea impraegnata & gravida reperiatur*. The latter reference can either be to *Definitiones forenses* (wrong see *supra* fn 11) or to *Jurisprudentia ecclesiastica seu consistorialis rerum et questionum in principis Electoris Saxonicae Senatu Ecclesiastico et Consistorio Supremo libri III* (1645), which work was not available for consultation. Roberts 74. For Brouwer's references see *supra* fn 11.

23 Which rule van Leeuwen erroneously bases on *D* 4 3 7 1.

24 He relies on *D* 48 5 6 1 and 48 5 35 (34) 1 and Wesembecius *Paratitla* on the same texts.

25 *Decretum Gratiani Pars* II *Causa* 29 *Quaestio* 1 para 5. The *quaestio* distinguished in para 2 between *error personae, error fortunae, error condicionis* and *error qualitatis. Error fortunae* and *error qualitatis* were deemed not to exclude consensus.

26 *Decretum Gratiani* II 29 2 4.

27 *Idem* 29 1 para 2.

28 *D* 19 1 11 5.

sold and the seller knowingly allowed the purchaser to persist in his mistake. It was held that the *actio empti* was available to rescind the purchase and that the woman must be returned after the price was repaid. Voet finds further support in the fact that a betrothal can be broken off if the betrothed woman should be spoilt by another. He dismisses the comparison with the man who has married a pauper in the mistaken belief that she was a woman of wealth. In such a case the man cannot have the marriage annulled, but ought to blame himself, according to Voet. However, honour and the very nature of things absolve from any blame the man who mistakenly marries a spoilt woman.

Voet concludes by referring to Deuteronomy chapter 22 verses 20 and 21 which deal with the laws concerning chastity and prescribe death by stoning as punishment for the bride whose husband found that she was not a maid.[29] He also alludes to the splendid reasoning of the Emperor Leo[30] in his *Novella* 93. This Novel deals with the question whether a man can break off his engagement, if he finds out that his fiancee is pregnant by another.[31] Voet cites both van Leeuwen[32] and Carpzovius[33] as well as his own grandfather, the theologian Gysbert Voet,[34] and, misleadingly, Brouwer's *De jure connubiorum*.[35]

Thus a new ground for annulment of a marriage had become part of the Roman-Dutch law of marriage.[36]

The next step was that this ground was considerably extended by relaxation of the pregnancy requirement. This meant that a marriage could be annulled on the grounds of pre-marital sexual relations with other parties than the intended husband. Van Zurck in his law dictionary, the *Codex Batavus*,[37] cites the case of Henrik de Jong,

29 Deuteronomy ch 22 v 21: "Then they shall bring out the damsel to the door of her father's house, and the men of the city shall stone her with stones that she shall die; because she hath wrought folly in Israel, to play the whore in her father's house: so shalt thou put evil away from among you." 22: "If a man be found lying with a woman married to a husband, then they shall both of them die, both the man that lay with the woman, and the woman: so shalt thou put away evil from Israel."

30 Leo the Wise (848–911 AD) Emperor of the Roman Empire in the East from 886–911 AD. Under his reign the *Basilica* were codified. This Greek compilation restored and updated the legislation of Justinian. Van Warmelo *Die oorsprong en betekenis van die Romeinse reg* (1978) 159; Jolowicz *Historical introduction to the study of Roman law* (1952) 514 sq 583. The novels of Leo the Wise, 113 constitutions, were included in the *Corpus iuris civilis* edition of Dionysius Gothofredus of 1583.

31 See also Van Warmelo "Die verlowing" 1954 *Butterworths SA LR* 73 93 fn 73.

32 *Censura forensis* I 1 15 10.

33 *Definitiones forenses* IV 20 12 13, which largely corresponds to Van Leeuwen's reference.

34 Gysbert Voet *Politicae Ecclesiasticae part 1 lib 3 tract 1 sect 3 cap 2 quaest 11.*

35 *De jure connubiorum* I 18 19 sqq.

36 The distinction between Roman-Dutch law as the law of the province of Holland and the law of the other provinces, is exemplified by Huber *Heedensdaegse rechts-geleertheyt soo elders, als in Frieslandt gebruikelyk* I 6 10. In this text Huber mentions the case of JA in Franeker, whose wife gave birth to a full term child 23 weeks after the marriage ceremony. The husband denied having had premarital sex. Huber advised him that he could deny paternity, but could not get rid of his wife.

37 Eduard van Zurck *Codex Batavus, waar in het algemeen kerk-, publyk, en burgerlyk recht van Holland, Zeeland, en het Ressort der Generaliteit, kortlik is begrepen.* The first edition appeared in Delft in 1711; the edition available to me was the Rotterdam edition of 1758 in which the matter under discussion was set out *sv* Houwelyk, Houwelyks-voorwaarden, Disertie Matrimonieel, Divortie, Separatie in para XXXIV fn 5. Roberts 344–345.

contra Fronica Meyer, of Vrouwtje Juriaens, in which the marriage was held to be null and void, because the bride had pretended to be a virgin, while in fact she had a child.[38] Van Zurck explains that this is in accordance with the old customs of the Germans, who did not pardon a deflowered woman.[39]

This extension clearly exemplifies the double standards applicable to this matter, which would hardly pass scrutiny based on present-day equality requirements. A surprising protest is however, voiced by an unknown author, Hermannus Noordkerk, who published a dissertation *De matrimoniis* [40] in 1733. Without doubt this publication would have remained unnoticed, were it not for the fact that the editor of the legal encyclopedia, the *Aanhangzel tot het Hollandsch rechtsgeleerd woorden-boek*[41] took over a large extract from this work, albeit with due acknowledgement.

Under the heading *Dissolutio matrimonii* the editor, notary Kramp,[42] first discussed the dissolution of matrimony by divorce on the basis of Noordkerk's tract. He then raised the question whether premarital sodomy unknown to the wife is a ground for dissolving a marriage. The exposition is literally derived from Noordkerk, with interjections from the editor. Noordkerk appears to have had strong views on sodomy and an unorthodox style of writing, which made Kramp refer to his publication as a tract. He admits that premarital sodomy is not a ground for annulment, but sets out a lengthy argument in favour of such ground. The editor supports him in this and is in favour of a wider ground, namely premarital unchastity as such. The main arguments are the absence of the required *consensus* for the marriage, but both Noordkerk and Kramp rely on natural law and surprisingly on equality between the sexes before the law.[43] Thus the rule that a husband who learns of the premarital unchastity of his wife of which he was unaware, is entitled to have the marriage annulled, is used to argue that the same should apply to a wife who discovers the premarital sodomy of her husband. Noordkerk points out the double standards applicable to the sexual mores of unmarried boys as opposed to those applying to unmarried girls. He refuses, however, to accept that the law should be more favourable to man than to woman in this instance. His advocacy of equality

---

38 Van Zurck para XXXIV fn 5. Vonnis van dezelve (ie Amsterdam) Heeren *Schepenen*, 15 Jul 1698.

39 Van Zurck refers to St John Chrysostom, Brouwer *De jure connubiorum* 2 18 19, Beza *De divortiis & repudiis* 87, Voet 48 5 4 and *Nederlands advys-boek* Consultatie 100. Theodorus Beza (1519–1605) was a French Calvinist theologian. He published *De divortiis* (1610) and *De Repudiis* (1651). However, in his *Amphitheatrum legale sue bibliotheca legalis,* Fontana also mentions Petrus de Beza, author of the *Tractatus de repudiis & divortiis* (1666).

40 *Dissertatio de matrimoniis ob turpe facimus quod peccatum sodomiticum vocant, jure solvendis* (1733), cited by Van der Keessel in his lectures on De Groot I 5 18; cf *infra* fn 44. Roberts 227.

41 Te Amsterdam 1772. Franciscus Lievens Kersteman was the editor of *Het Hollandsch rechtsgeleerd woorden-boek* first published in Amsterdam in 1768. *Het aanhangzel* was published in two volumes in 1772–1773 on instigation of the subscribers to *Het woorden-boek*, who were unhappy with their acquisition. Kersteman had already withdrawn from the project, and *Het aanhangzel* was edited by the Amsterdam notary LW Kramp. De Wet 169–170. Roberts 174–175.

42 Roberts "The mystery man of Roman-Dutch law – LW Kramp" 1932 *SALJ* 345–350 494–496.

43 Noordkerk *Aanhangzel s v Dissolutio matrimonii* 371 "Maar als wy ons na de Heilige beveelen der gezonde reede zullen schikken, zo zyn wy allen, zowel Mannen als Vrouwen aan een en dezelven Wet verbonden . . ."

between the sexes in respect of their premarital conduct is supported by Kramp, who ends the exposé with the statement that he is of the opinion that a woman's action in such a situation is founded.

Noordkerk's dissertation found its way into the lecture notes of Dionysius van der Keessel. The latter's lectures on Grotius' *Introduction*[44] provide, to a degree, the final statement of Roman-Dutch law. In his lecture on De Groot I 5 18,[45] Van der Keessel agrees with Noordkerk that premarital sodomy by the husband gives the wife who unknowingly married him, cause to have the marriage annulled, since it cannot be presumed that an honest woman would have consented to such a marriage.[46]

3 SOUTH AFRICAN LAW

The fact that the South African courts have applied Voet's ground for annulment[47] can be explained by the limited grounds for divorce and their strict application during the nineteenth century and the first half of the twentieth century. Moreover, the South African courts limited the ground to the extent that pregnancy at the time of marriage was reintroduced as a requirement.

It is, however, bizarre that South African legal authors have not queried this ground for annulment until this day.[48] One need not share Noordkerk's opinions to appreciate the argument that what is sauce for the goose is sauce for the gander. Thus just as Noordkerk's zealotry *vis-à-vis* sodomy is repulsive to the modern mind, so the mentality supporting this ground for annulment should be rejected. The analogy drawn by the protagonists of this rule between marriage and the contract of sale is degrading to women. Rebuttal of the paternity presumption, whether combined with divorce or not, is the apposite solution, one which, like so many other rational solutions, derives from Roman law.

---

44 *DG van der Keesselii Praelectiones iuris hodierni ad Hugonis Grotii Introductionem ad iurisprudentiam Hollandicam, DG van der Keessel Voorlesinge oor die Hedendaagse reg na aanleiding van de Groot se Inleiding tot de Hollandse rechtsgeleerdheyd* (ed Van Warmelo, Coertze, Gonin, Pont) 6 vols (1961–1975).

45 In which text De Groot states that in Holland a marriage can be dissolved only by death and adultery. Art 18 Ordonnantie van de Policien binnen Hollandt van 1 April 1580, *GPB* I 329 sqq.

46 Van der Keessel ad I 5 & 18: Placet mihi quoque sententia eiusdem Viri Consultissimi (ie Noordkerk) statuentis crimen hoc ante matrimonium contractum perpetratum uxori, quae ignorans tali nupserat, iustam praebere causam discedendi, cum honest mulier nullo modo praesumi quear consensisse in nuptias cum eiusmodi homine contrahendas.

47 *Horak v Horak* 1860 3 Searle 389; *Shaw v Shaw* 1905 26 NLR 392; *Kilian v Kilian* 1908 EDC 377; *Walters v Walters* 1911 TPD 42; *Fietze v Fietze* 1913 EDL 170; *Gabergas v Gabergas* 1921 EDL 279; *Reyneke v Reyneke* 1927 OPD 130; *Stander v Stander* 1929 AD 349; *Smith v Smith* 1936 CPD 125; *Erasmus v Erasmus* 1940 TPD 377; *Vereen v Vereen* 1943 GWL 50.

48 Hunt "Error in the contract of marriage" 1962 *SALJ* 423–443 1963 *SALJ* 94–126 231–262, gives a detailed historical and comparative exposition, the nature of which is descriptive rather than critical.

A critical investigation into section 53(b) of the Companies Act 61 of 1973

GJ Ebersöhn
Final-year LLB student, University of the Free State

OPSOMMING

'n Kritiese ondersoek na artikel 53(b) van die Maatskappywet 61 van 1973

Die Appèlafdeling het in *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 1 SA 710 (A) gesê dat direkteure van 'n artikel 53(b)-maatskappy net gesamentlik en afsonderlik, tesame met die maatskappy, aanspreeklik is vir die kontraktuele skulde en laste van die maatskappy. By nadere ondersoek na die agtergrond van artikel 53(b), blyk dit dat sekere professies nie hul lede toegelaat het om as 'n maatskappy te praktiseer nie. Hul enigste alternatief tot die eenmanbesigheid was om as 'n vennootskap te praktiseer. Die vennootskap het egter sekere probleme opgelewer, naamlik die beperking van 20 vennote asook probleme rondom kontinuïteit. Verteenwoordigers van die Effektebeurs het toe met die voorstel gekom dat kontinuïteit verleen moes word aan vennootskappe deur aandeelmakelaars toe te laat om as 'n maatskappy te praktiseer. So sou die aandeelmakelaars ook meer kapitaal kon bekom deur aandeelhouers wat geld in die besigheid belê, ook sou groter beskerming aan skuldeisers en kliënte verleen word. Die voorstel is in die Broome-Kommissie se verslag vervat, maar onderworpe aan die bepaling dat die direkteure gesamentlik en afsonderlik aanspreeklik sou wees, tesame met die maatskappy, vir die skulde en laste van die maatskappy. Die Van Wyk de Vries-kommissie het daarna die voorstel vervat in sy verslag oor aanbevelings aangaande die wysiging van die 1926-Maatskappywet, met die enigste verskil dat professionele lui slegs gebruik mag maak van 'n private maatskappy. Volgens hulle sou die onbeperkte maatskappy nie voldoende beskerming aan skuldeisers verleen nie.

Soos aangetoon sal word, was die oogmerk van artikel 53(b) dus om kontinuïteit te verleen aan professionele vennootskappe asook om die aanspreeklikheid van vennote te behou ter beskerming van skuldeisers en kliënte van die besigheid. Die oogmerk was dus nie om aanspreeklikheid van vennote, wat gesamentlike medeskuldenaars van die vennootskap se verpligtinge is, te verander nie. Die oogmerk was ook nie om lede van professionele lui beperkte aanspreeklik ("limited liability") op te lê nie, maar om die posisie van skuldeisers en kliënte se beskerming te versterk. Daarom is die bepaling "gesamentlik en afsonderlik, tesame met die maatskappy" in die Wet ingevoeg. Dus is die direkteure van 'n artikel 53(b)-maatskappy gesamentlik en afsonderlik aanspreeklik, tesame met die maatskappy, vir alle skulde en laste van die maatskappy.

1 INTRODUCTION

1 1 Section 53(b) of the Companies Act 61 of 1973

The memorandum of a private company may provide, in the words of the Afrikaans text of section 53(b) of the Companies Act 61 of 1973, which is the signed text, that "die direkteure en gewese direkteure gesamentlik en afsonderlik, tesame met die maatskappy, aanspreeklik is vir die skulde en laste van die maatskappy, wat gedurende hul ampstermyne aangegaan word of is". The English equivalent of the Act makes provision for the directors and past directors to "be liable jointly and

severally, together with the company, for such debts and liabilities of the company as are or were contracted during their periods of office".

The words "aangegaan" and "contracted" are not defined in the Act.

1 2 *Facts of Fundstrust (Pty) Ltd (in liquidation) v Van Deventer*[1]

Immediately prior to its winding-up, the company Fundstrust paid R80,5m to George Huysamer & Partners Incorporated (the s 53(b) company). The liquidators were of the opinion that the payment was impeachable as voidable or as an undue preference in terms of sections 29 and 30 of the Insolvency Act 24 of 1936. They therefore instituted proceedings, on behalf of Fundstrust, against both the section 53(b) company and 13 directors of the latter company (of whom the respondent was one), whom the liquidators alleged were jointly and severally liable, together with the company, for the repayment of the R80,5m in terms of section 53(b) of the Companies Act.

1 3 The legal issue

The question of law was whether the liability of directors, in terms of section 53(b), encompasses only the contractual debts of the company, or whether directors are liable for all debts and liabilities of the company, including statutory liabilities of the company with respect to voidable or improper preferences in terms of the Insolvency Act.

1 4 Findings of the court

After the court had examined the meaning of the words "aangegaan" and "contracted", as well as the reason for inserting section 6A[2] in the Companies Act 1926,[3] it held that section 53(b) must be interpreted in such a way that the directors of a section 53(b) company are liable only for the contractual debts and liabilities of the company.[4] The court observed that had Parliament intended section 53(b) to cover all debts and liabilities of the company, it would have used the word "incurred" rather than "contracted".[5]

The court remarked that it could not foresee any anomalies if the liability of directors was limited to mere contractual debts.[6] The court stated that because a contractual relationship exists between a stockbroker and his client, any damage which the latter might suffer as a result of the stockbroker's fraudulent or negligent conduct could be recovered by means of a contractual action, and the directors of a stockbroking company would be liable in terms of section 6A or its successors (including the present section 53(b)).[7]

The court observed that there are three other types of creditor:[8]

Those with claims in delict against the company

The directors will still be liable at common law as a result of their involvement in negligent conduct, and they may be liable in terms of section 424 of the Companies

---

1 1997 1 SA 710 (A).
2 S 6A was the precursor of the present s 53(b).
3 Act 46 of 1926.
4 The way in which the court came to this conclusion will be discussed in greater detail below.
5 727D–E.
6 734C.
7 734C–D.
8 734D–F.

Act 1973.[9] Their position is, however, not as favourable as that of contractual creditors.[10]

Those with enrichment claims

Those to whom the company is liable for tax and other statutory liabilities

The creditors listed in (b) and (c) will be able to hold the directors liable in terms of section 424 only.

The court stated that it was not convinced that the latter result (referring to (b) and (c)) was unintended. Hefer JA said:

> "I am by no means convinced this result was not intended. There is no indication, either in the reports of the commission of enquiry[11] or in the 1926 Act, that it was intended to relate the directors' liability to unusual events or to anything other than its ordinary financial or commercial commitments. Taking into account the type of company we are dealing with, I do not think that the liability arising from the commission of a delict would normally be considered as one of its ordinary business debts. This may also apply to statutory liabilities which do not form part of the company's regular expenses."[12] [13]

The court stated that one of the cardinal principles of company law is that a company is a separate legal entity which is capable of owning property and incurring debts for which its members and directors, as a general rule, are not personally liable.[14] The court also noted that the application of this principle requires that any doubt about the liability of directors for the debts and liabilities of the company ought to be resolved by construing the provision strictly and by giving preference to the least onerous interpretation. Onerous statutory provisions are generally construed this way.[15] The court further observed that section 6A of the Companies Act 1926 (now s 53(b)) impinged on the principle of separate identity, and imposed a liability on directors which did not previously exist. This was precisely the type of stipulation that required strict interpretation.[16] There was nothing in the Companies Act 1973 that justified a different conclusion.[17]

The result was that section 53(b) had to be interpreted in the same way as section 6A, since the substance of the two provisions is identical.[18] Hence, the directors of a section 53(b) company could be held liable only for the contractual debts and liabilities of the company.

1 5 Findings of the court *a quo*

The court *a quo* observed:

> "If section 53(b) were to be held to extend to *all* liabilities of an incorporated company and not confined to contractual obligations, it would be tantamount to imposing

---

9 This is the successor to s185*bis* of the Companies Act 1926.

10 The court ignored the fact that s 424 deals only with the instance where the company's business is carried on fraudulently or recklessly. Pure negligence will not suffice for the purpose of holding a director liable in terms of s 424.

11 The court referred here to both the Van Wyk de Vries and the Broome Commission Reports.

12 734G–H.

13 The question that suggests itself is whether liability for tax is not part of a company's normal expenses.

14 735D–E.

15 735G–H.

16 735H–I.

17 735I–J.

18 *Ibid.*

> punitive provisions on its directors, be they responsible for the liabilities or not, and where they have committed no misdemeanours. It is thus, to my mind, clear that section 53(b) was intended to be a reduced liability and to extend only to debts and liabilities incurred by contract and arising from a consensual relationship between the company and third parties."[19]

The court *a quo* also pointed out that the word "contracted" in section 53(b) has a specific meaning which indicates the positive and deliberate incurring of debts and liabilities.[20]

2 COMMENT

2 1 Interpretation of statutes

When Parliament was still sovereign, the courts used the expression "intention of the legislature". This was a subjective test.[21] Since the 1993 and 1996 Constitutions came into operation, the phrase "purpose of the Act" has been used. This is an objective test.[22] An example of the fact that the legislature now acknowledges the "purpose of the Act" and no longer the "intention of the legislature" is that all new bills end with a short summary of the purpose of the proposed Act.

The difference between these two tests is that when the court uses the subjective test (intention of the legislature), the court tends to focus excessively on the text without paying due attention to the context and background of the provision, whereas when the court uses the objective test (purpose of the Act), the court takes all relevant facts into consideration prior to ascertaining the meaning of a word or phrase in a provision.[23]

Botha is of the opinion that the Constitution of the Republic of South Africa, Act 108 of 1996 (especially section 39(2))[24] obliges courts to use the contextual method (of which the "purpose of the Act" is a species), and this entails that we have to interpret a provision in the light of its entire background.[25] De Waal is of the same opinion.[26]

---

19 As quoted by McIntosh: "Calling all directors of incorporated professional companies!" 1997 *Juta's Business Law* 112 113.

20 713B.

21 Botha *Statutory interpretation: An introduction for students* (1998) ("Botha") 27 explains the "intention of the legislature" as follows: "It is the primary rule of interpretation that if the meaning of the words is clear, it should be put into effect, and, indeed, equated with the legislature's intention."

22 In *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 4 SA 592 (SE) the court stated: "The interpretative notion of ascertaining 'the intention of the Legislature' does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature" (597F). See also Botha 34.

23 Botha 37 states that "the legislative text is studied to determine the initial meaning of the text, while keeping the presumptions in mind, and the interpreter must at the same time strive to strike a balance between the text and the context of the legislation".

24 Botha 41: "However, section 39(2) is a *peremptory* provision, which means that all courts, tribunals or forums *must* review the aim and purpose of legislation in the light of the Bill of Rights . . ."

25 Botha 48. He remarks: "Granted, the text is still read for its 'ordinary' (but only initial) meaning, but, as has been pointed out, the statute as a whole and its context play an equally important role in the interpretation process. It also has to be borne in mind that the purpose of the legislation will still qualify the meaning of the text."

26 De Waal 1997 *De Rebus* 250 observes: "Die probleem in die onderhawige geval is egter dat die woorde 'contracted' en 'aangegaan' vir meer as een betekenis vatbaar is. Die ware wetgewersbedoeling kan dus nie met behulp van slegs hierdie werkswyse bepaal word nie. Daar moet ook gekyk word na die res van die 1973-wet en veral die agtergrond van en oogmerk van die bepaling onder bespreking."

The court itself indicated that we have to work with a contextual approach, when it referred to *Jaga v Dönges*; *Bhana v Dönges*,[27] in which the court maintained that we cannot merely take notice of the language used without paying sufficient attention to the "contextual scene".[28] The court in the *Fundstrust* case even stated that it is the task of the interpreter to ascertain the meaning of the word or expression in the particular context of the statute in which it appears.[29] The court also maintained that we have to search for the "intention of the legislature" by taking into account the remainder of the Companies Act, as well as the background and the aim of the provision.[30]

It is submitted that one cannot merely read the words without taking notice of the whole context and background of the provision. The problem is that, as will be pointed out later, the court continually used the phrase "intention of the legislature", but failed to conduct a thorough investigation into the background of section 53(b).

2 2 The court approached the interpretation too subjectively

I shall now explain why, in my view, the court was too subjective when it interpreted section 53(b). The court used the textual method of interpretation instead of the contextual method. The result is that we have to start from scratch in order to ascertain the aim and purpose of section 53(b). The court stated that the draftsman probably used the expression "contracted" because it already appeared elsewhere in the Act. The court maintained that had the intention really been to include debts and liabilities of every kind, the much clearer wording of section 185*bis*(1)[31] could have been followed.[32] The court was of the opinion that a deviation from the "plain words" of the statute on the basis of anomalous results is justified only when the court is satisfied that such results were not intended.[33] Similarly, the court observed that where a statute is susceptible to more than one interpretation, the fact that a particular construction would lead to an anomaly is not necessarily a conclusive indication that it was not intended.[34] Therefore, a construction which leads to an anomaly should be rejected only if the conclusion is justified that the consequence could not have been intended.[35] It is submitted that the Appellate Division in the *Fundstrust* case followed a subjective approach when interpreting section 53(b). We have to keep in mind that the mere fact that the court throughout used the phrase "intention of the legislature" does not necessarily make the judgment open to criticism, provided that the court still followed a contextual approach, even though it did not specifically refer to the "aim and purpose of the Act". The court, however, failed to follow a contextual approach.

---

27 1950 4 SA 653 (A).
28 664H.
29 1997 1 SA 726I–727A.
30 728A–B.
31 Now s 424.
32 733D–E.
33 733G.
34 733H–I.
35 733J–734A.

3 ASCERTAINING THE "PURPOSE OF THE PROVISION"[36]

3 1 Dictionary meanings and the signed text

The Afrikaans text of section 53(b) refers to directors being "aanspreeklik . . . vir die skulde en laste van die maatskappy wat gedurende hul ampstermyne aangegaan word of is". The English text reads: "shall be liable jointly and severally, together with the company, for such debts and liabilities of the company as are or were contracted". The court stated that words used in this provision were not intended to have the same meaning wherever they were used in the Act, in that different considerations may affect the interpretation of the same words in different provisions.[37] It is submitted that this is correct.[38]

With respect to the word "contracted", the appellant relied on the dictionary meanings[39] "to acquire" or "become affected by". The appellant submitted that these meanings would include all debts. The court was, however, of a different opinion, in that normally we say "debts were incurred"; hence the court held that these meanings could not be ascribed to the word "contracted".[40]

With respect to the word "aangegaan", the court said:

> "Significantly the Afrikaans word does not appear in conjunction with 'skuld' other than a contractual debt or liability in any of the recognised dictionaries and other literary works. This comes as no surprise because, I venture to say, any Afrikaans linguist would find the word entirely inapposite in the context, for instance, of delictual liability or the liability to pay a tax."[41]

The court added the following with regard to the use of dictionaries:

> "Recourse to authoritative dictionaries is, of course, a permissible and often helpful method available to the Courts to ascertain the ordinary meaning of words . . . . But judicial interpretation cannot be undertaken . . . by 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene'. The task of the interpreter is, after all, to ascertain the meaning of a word or expression in the particular context of the statute in which it appears . . . As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispensable. Occasionally, however, it is not. The present appears to me to be such a case."[42] [43]

The word "las" is defined in *HAT*[44] as "verpligting" – this refers, it is submitted, not only to debts incurred in terms of a contract but also to the context of a delictual obligation. For example, where X has committed a delict against Y, X has a "vergoedingsplig" (verpligting) to compensate Y. The word "verpligting" may likewise apply in a statutory context. For instance, the duty to pay tax is a statutory

---

36 Botha 78 says the following about the detrmination of the aim and purpose of an Act: "[T]he courts must be able to use all the available data (internal and external aids to interpretation) at their disposal to ascertain the aim and purpose of the legislation."

37 732F–G.

38 The respondent also argued that it would be erroneous to presume that the legislator intended the same consequences for both s 424 and s 53(b), since they differ so much (722B–D).

39 Taken from the *Shorter Oxford English dictionary*.

40 727D–E.

41 727G–H.

42 726H–727B.

43 In other words, the court was of the opinion that it serves no purpose merely to ascertain dictionary meanings.

44 *Verklarende handwoordeboek van die Afrikaanse taal*.

obligation (verpligting).[45] It is also noteworthy that in the bill which introduced section 6A (the precursor of s 53(b)) the words "skulde en verpligtinge" were used.[46]

The *Concise Oxford dictionary* defines "liability" as "the state of being liable"; "what a person is liable for, esp (in *pl*) debts or pecuniary obligations". In my view, delictual, enrichment and statutory liabilities will invariably be "pecuniary obligations" of a company. It should be noted that the Appellate Division failed to determine the meaning of the word "liability".

The *Concise Oxford dictionary* states that to "contract" means to "enter formally into a business or legal arrangement" – this refers to contracted debts – or to "incur (a debt etc)". It would therefore seem that the word "contract" may be used as alternative term for "incur" in certain circumstances.[47] The *Concise Oxford dicitionary* defines "debt" as "something that is owed, esp money".[48] Of paramount importance is the fact that the court informs us that the word "contracted" was used throughout the Companies Act 1926, because the 1926 Act was based on the Transvaal Companies Act 31 of 1909, which in turn was based on the 1908 (English) Companies (Consolidation) Act.[49] Although the word "contracted" had been used in English law in the context of debts and liabilities in company legislation since 1862, the word never acquired a judicial meaning in English law.[50] Consequently, one must conclude that the word "contracted" was used merely because it had been used elsewhere in the Act, without the purpose of qualifying "debts and liabilities of the company".[51] The word "contracted" had not acquired a judicial meaning by 1968, when section 6A (the precursor of the present section 53(b)) was inserted in the 1926 Companies Act.[52]

The *HAT* explains the word "aangaan" by giving the following examples: "Reël, ooreenkom: *'n Koop, huwelik, lening aangaan*" (this refers to contracts); "Maak: *Onkoste, uitgawes aangaan*" (this clearly extends further than mere contractual debts – eg, if I cause an accident, then I have caused costs/expenses to be incurred).

It would seem, provisionally, that the English language ascribes the same meaning to the phrase "debts and liabilities contracted" as the Afrikaans language ascribes to the phrase "skulde of laste aangegaan", namely that this may have a broader meaning than contractual debts. Accordingly, we should not place too much emphasis on the word "contracted" by saying that the word "incurred" would have been used had a type of debt other than a contractual one been intended. Even if this is incorrect, we have to bear in mind that the text merely gives us the initial ("aanvanklike") meaning, and that we may deviate from it when the purpose of the

---

45 Likewise, in respect of enrichment claims: if A is under an obligation to repay me money which he has received in terms of an unlawful agreement, then A has a "verpligting" towards me in respect of repayment.

46 Van Wyk de Vries Commission Report 31 of 1972 (part 3) 18.

47 The applicant quoted the *Shorter Oxford English dictionary* where it gave, *inter alia*, the word "incur" as a synonym of the word "contract" (717C–D).

48 When I commit a delict, I owe money to the person aggrieved, and in terms of statutory liability, eg tax, I owe money to the Receiver of Revenue.

49 731H–J.

50 731J–732B 732D–E.

51 This the court itself stated: "In all probability the draughtsman [sic] retained the expression simply because it already appeared elsewhere in the 1926 Act without properly considering its possible implications" (733D–E).

52 733C–D.

Act or provision indicates otherwise, which section 53(b) does.[53] As I shall indicate below, the purpose of that provision was purely to grant continuity to professional partnerships and therefore to maintain the liability of partners. The purpose was not to limit the liability of professional businessmen to certain types of debt.

In any event, we have to bear in mind that the Afrikaans text is the signed text. This means that whenever an irreconcilable contradiction between the two texts exists, preference should be given to the signed text.[54] Should we attach too strict a meaning to the expressions "debts and liabilities contracted" and "skulde en laste aangegaan", this will no longer reflect the purpose of the provision.

3 2 Parliamentary debates during the legislative process

At present, it would seem that no Supreme Court of Appeal judgment exists which justifies the use of parliamentary debates as a means of interpretation. An argument for using this was, for instance, rejected in *More v Minister of Co-operation and Development*.[55] Parliamentary debates were, however, referred to in *Mpangele v Botha (1)*.[56] Since we are now working with a contextual approach in which we have to read the text in conjunction with the context, it is submitted that we may (and must) make use of parliamentary debates.[57]

In the report of the parliamentary debate (Second Reading Debate 1968-05-03), which dealt with the Companies Amendment Bill (introducing s 6A), the Minister said:

> "Firstly the purpose of the amendment in this Bill is to make provision for the establishment of a new type of private company in which the directors can be held personally responsible for the debts and liabilities of the company . . . On the basis of the recommendations of the Broome Commission it is being envisaged that the Stock Exchange Act be amended in order to provide that no Corporate body may become a member of the Exchange, unless it has, *inter alia*, been registered as a private company in terms of the Companies Act, and its constitution provides that its directors or former directors are jointly and separately responsible for its liabilities and debts. The Commission of Inquiry into the Companies Act received strong representations with a view to the inclusion of a provision in the Act which would make it possible for members of acknowledged professions practising in partnership to become incorporated as Companies under the Companies Act. The principal consideration for this request was the inconvenience and expense, as well as the break in continuity which followed time and again with the accession, resignation or death of a partner when, according to law, the partnership has to be disbanded and reconstituted."[58]

Furthermore, the Minister mentioned the reason why the unlimited company would be inappropriate for this purpose, namely that this type of company failed to offer the necessary protection to creditors, since the directors were liable only on winding-up.[59] The Minister added:

---

53 The appellant contended that because the "intention of the legislator" was unclear, the context of the provision namely the scope, purpose and background, must be considered (717H–I).

54 Botha 79.

55 1986 1 SA 102 (A).

56 1982 3 SA 633 (C).

57 Botha 92 agrees with this submission. In *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* 1994 3 SA 336 (A) the court held that it was permissible to interpret the provisions of legislation against the background of the development of the legislation. (Today we have to take it into consideration, and have no choice in the matter.)

58 *Hansard* 1968 columns 4668–4669.

59 *Idem* column 4670.

> "[I]t has thus become necessary to make provision in the Companies Act for the incorporation of a type of company, the directors of which will be continually responsible, both jointly and separately, for the debts and obligations of the company, but which will not have the disadvantages which are at present connected with registrations in terms of section 7 of the Act . . . whereas the Companies Act of Britain[60] also contains a similar provision in section 202. Nor will a provision of this kind clash with the fundamental concept of restricted responsibility in company law, because the restricted responsibility applies in respect of the shareholders of the company and not in respect of the directors. In any case, the directors of private companies usually accept in practice the responsibility for the debts and liabilities of the company by way of a separate contractual undertaking."[61]

We immediately observe the following:

(1) The liability of directors is not qualified in respect of a specific type of debt.

(2) It would seem that the purpose of the provision was to retain the liability of partners – this we observe from statements such as the reference to ongoing joint and several liability.[62]

(3) It is also clear that the purpose of the provision was to incorporate the partnership to ensure continuity, which was problematic for large professional partnerships.

(4) The purpose of the provision was, in addition, to offer better protection to creditors.

(5) As will be pointed out later, section 202 of the Companies Act 1948 provided for the unlimited liability of its directors. Note that the Minister stated: "also contains a similar provision in section 202". This is further confirmation that the purpose was to impose unlimited liability by way of section 6A.

(6) Of paramount importance is the Minister's statement that this specific form of liability[63] (joint and several liability) will not clash with the fundamental concept of restricted responsibility in company law, because limited liability applies in respect of the shareholders of the company, not in respect of directors. We notice, therefore, that the purpose was to impose upon directors unlimited liability; yet the Minister thought that the directors' unlimited liability would not infringe upon the principle of a company being a separate legal entity.

(7) Precisely the same was said in the Senate as in the parliamentary debate.[64]

3 3 Reports of Commissions

The court in the *Fundstrust* case stated, with reference to *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*,[65] that we may take into account, in the hermeneutic process, reports of commissions of inquiry.[66] [67]

---

60 Referring here to the Companies Act 38 of 1948.

61 *Hansard* 1968 column 4670.

62 It is trite that in partnership law, partners are jointly and severally liable for the debts and liabilities of the partnership. See Gibson and Comrie *South African mercantile and company law* 7 ed by Visser, Pretorius, Sharrock and Mischke (1997) 301.

63 Which indicates that this type of company would differ from other, existing companies.

64 Senate Reports: Second Reading Debate columns 4073–4075.

65 555 (A).

66 729H–I.

67 In the *Westinghouse* case the Appellate Division stated that the report of a legal commission of inquiry, which preceded the acceptance of an Act, may be used to ascertain the purpose of the legislation, provided that a clear connection exists between the recommendations of the report and the provisions of the Act concerned (562I–563A).

The court remarked that the key to the interpretation of section 53(b) was section 6A of the Companies Act 1926, as amended.[68] [69] The appellant argued that section 6A must be interpreted on the assumption that Parliament intended to impose a liability upon directors similar to the common-law liability of partners – in other words, they are personally liable for all debts. The court disagreed, holding that it was apparent from the report of the Van Wyk de Vries Commission that provision had to be made for the joint liability of the directors, and this was precisely the type of liability provided for in section 6A – it could not have been achieved by imposing the liability of partners upon directors. The court went on to hold that it was

> "clear that Parliament intended to impose on them an entirely new statutory liability and to provide creditors with an entirely new remedy not hitherto available to them which would enable them to hold the directors liable *singuli et in solidum* for company debts and liabilities before the company's liquidation".[70]

3 3 1 The Van Wyk de Vries Commission Report

If one carefully scrutinises the report of the Van Wyk de Vries Commission,[71] one can see that the Commission had a different view. In Chapter 6, which deals with types of company, the Commission stated:

> "We are providing for a private company with unlimited concurrent[72] liability of its directors in Chapter XVIII of this Report *inter alia* to meet the needs of stockbrokers. (This provision has been enacted by Act No 62/1968.)"[73]

It should also be mentioned that it was on the recommendation of the Broome Commission that section 6A was placed on the statute book.[74] A closer analysis of what the Commission stated shows the following: the Commission refers to section 6A and states that the provision regulates the unlimited liability of directors. Since their recommendation led to the enactment of section 6A, it is noteworthy that they used the term "unlimited" liability. It is therefore strongly evident that the Commission had liability for all types of debt and obligation in mind, not merely liability for certain types of debt.[75] In Chapter 49, the Commission states:

> "PRIVATE COMPANIES WITH UNLIMITED LIABILITY OF DIRECTORS
>
> One of the recommendations of the Broome Commission (on the Stock Exchange) was to the effect that firms of stockbrokers should be permitted to incorporate as unlimited companies under the Companies Act. As we had given an indication of our intention to recommend the abolition of unlimited companies the matter of the incorporation of firms of stockbrokers was considered anew. It appeared that the unlimited company

---

68 731C–D.

69 S 6A was inserted in 1968 by the Companies Amendment Act 62 of 1968. S 6A is in substance the same as s 53(b). S 6A read: "The directors and former directors of a private company limited by shares shall be liable jointly and severally, together with the company, for such debts and liabilities of the company as are or were contracted during their periods of office, if the memorandum of association of the company contains a provision to that effect."

70 731E–H.

71 Commission of Inquiry into the Companies Act, Main Report 1970-04-15 (Commission Report 45 of 1970). This report should be read in conjunction with the Supplementary Report of the Van Wyk de Vries Commission, Commission Report 31 of 1972, especially 46–48. These reports dealt with the Companies Bill, which was subsequently enacted as the Companies Act 1973.

72 Which we can understand as joint liability.

73 Commission Report 45 of 1970 para 23.05.

74 I shall later refer to the Broome Commission in greater detail.

75 This helps in ascertaining the purpose of the provision.

> form would in any event not be suitable because the shareholders (the former partners of a firm) would not be concurrently liable for the debts and liabilities of the company; that liability would arise only in winding up. This aspect was considered not to be in the public interest. It was then decided to recommend an amendment to Section 6 of the Act in order to provide for a private company with the concurrent joint and several liability of the directors for the debts and liabilities of the company. As this private company would be a special form of private company it was recommended that there should be an indication in the name to identify it as such . . . While evolving this special form of private company for purposes of stockbroking firms the Commission always had in mind the possibility that it might conveniently be used by organised professions for similar purposes. It seems to provide a type of company which would lend itself to the requirements of professions permitting the incorporation of its members."[76]

We may immediately note the following:

(1) The expression "unlimited liability" is used.

(2) The Commission nowhere confines the liability of directors to certain types of debt or liability.

(3) The Commission refers to concurrent liability, reminding us of a partnership, in which the partners are jointly liable for debts and liabilities of the partnership whenever certain requirements are met.

(4) The Commission refers to "a type of private company". This indicates that we are not dealing here with a normal company, and that the liability of the directors differs from that in an ordinary company.

(5) The Commission refers to professions whose members want to incorporate. We have to take into consideration that some professions were not allowed to incorporate, and that they were allowed to practise as partnerships only in order to retain the liability of partners.[77] We may consequently infer that the purpose of section 6A was to retain this type of liability in respect of all types of debt and liability.[78]

(6) The Van Wyk de Vries Commission stated that this company should not take the form of an unlimited company, since directors would be liable only on winding-up of the company. Hence, protection of the creditors played a role at all times (and it is clear that this protection will be reduced if the directors are held liable for contractual debts and liabilities only).

(7) Hence, we realise that the whole idea of incorporation was to provide continuity, not to change the legal position governing liability. The Van Wyk de Vries Commission refused to use the unlimited company for this purpose.[79]

---

76 Commission Report 45 of 1970 paras 49.14 and 49.15.

77 See Wandrag: "The distinction between private and public companies in South African company law: A historical analysis and comparative evaluation" 1997 *Centre for the Transaction of Business Law* 28 (UOVS) 74–77.

78 The appellant also raised this argument in the Appellate Division. See 714I–J 716B–E.

79 See also Commission Report 45 of 1970 para 23.04 and 23.05: "The main objection has been the absence of concurrent liability of the stockbroker-member of the unlimited company." See recommendation 3.07, where the following was observed: "A corporation enjoys perpetual succession, with the result that notwithstanding any changes in its membership it continues to retain its separate identity. The assets belong to the corporation as such, and not to the individual members, and any change in the membership does not necessitate any transfer of its assets or the entering into of new contracts." Note that nothing is said about limiting the partners' liability.

(8) Finally, it should be mentioned that the following recommendations were made (which eventually led to the enactment of s 53(b)): "I would accordingly recommend that provision should be made to enable members of professional and semi-professional bodies to obtain the benefits of incorporation, but without the benefit of limited liability";[80] "[t]he liability of members should be unlimited; that is to say, in the event of the corporation failing to discharge any liability every member would be liable, without limitation, for the liabilities of the corporation incurred during his membership";[81] and "[d]uring the life of the corporation the members would be liable for any acts or omissions of the corporation or of any of its members, as if they were partners".[82] The Commission even went so far as to recommend that "[t]he relationship between members *inter se* and between members and third parties would be governed by the law of partnership".[83]

3 3 2 The Broome Commission Report

The Stock Exchange Inquiry Commission (hereinafter referred to as the Broome Commission) was of the opinion that stockbrokers should be allowed to practise as a private company while the creditors are protected, in that they can hold both the company and the directors liable. Once more, we realise that the purpose of incorporation was to strengthen the protection of clients and creditors, not to reduce liability.

In its main report,[84] the Commission stated that the accountancy board requested that stockbrokers be allowed to incorporate their businesses (partnerships) as closed companies so that the stockbrokers' creditors and clients would have the protection of both the company's assets and their own personal guarantee.[85] [86] The Commission made the following observation:

"(a) [D]it sou kontinuiteit in makelaarsondernemings verseker, wat nie onder die bestaande Reëls en die Wet moontlik is nie, omdat geen voorsiening gemaak is vir –

(1) die voortsetting van 'n makelaarsonderneming na die dood van die enigste eienaar of die dood van die senior vennoot en gebrek aan kapitaal by die oorlewende vennote;

(2) die vestiging van die reg van 'n minderjarige kind om by bereiking van 'n geskikte ouderdom, 'n vennoot in sy oorlede vader se besigheid te word;

(b) [D]it sou die opbouing van kapitaal vergemaklik wat 'n saak van fundamentele betekenis, nie slegs vir die makelaar nie maar ook vir die beleggende publiek, in 'n effektemakelaarsbesigheid is, aangesien die regspersoon vir onbepaalde tyd kan voortgaan en die kapitaal in die besigheid sou bly. Dit sou die neiging hê om openbare vertroue in die Beurs te versterk, en lidmaatskap daarvan grootliks te versterk, deur die vergrootte sekuriteit van die sterk kapitaalposisie. Jong mans wat andersins aan 'n gebrek aan kapitaal ly, sou aangemoedig word om die Beurs 'n loopbaan te maak;

---

80 Commission Report 45 of 1970: Recommendation 3.08.
81 *Idem* 3.10.4.
82 *Idem* 3.10.5. See also recommendation 3.15.
83 Recommendation 3.1.0.6.
84 Commission Report 47 of 1965.
85 *Idem* para 339.
86 It was for this reason, ie that creditors and clients should have the protection of both the company's and the directors' assets, that the Broome and Van Wyk De Vries Commissions recommended that the directors should be liable "jointly and severally, together with the company".

(c) [B]aie sou bereik word deur die versterking van die effektemakelaarsprofessie veral deur spesialisasie moontlik te maak, as gevolg van die vergrootte aantal vennote in die firma;

(d) . . .;

(e) [D]it sou die skeiding van 'n lid se privaat bates van sy besigheidsbates, wat onder die bestaande Wet 'n probleem skep, meer doenlik maak.

Die regspersoon sou kan wees, of –

(f) 'n geslote maatskappy met beperkte aanspreeklikheid . . . of

(g) 'n geslote maatskappy met onbeperkte aanspreeklikheid . . . ."[87]

In the minority report, Dr AJ Norval[88] mentioned the following:

(1) On the London Stock Exchange, body-corporate membership of the stock exchange was allowed, such as a company registered under the Companies Act.[89] In the USA, too, companies have been allowed to become members of the Stock Exchange since 1953.[90] [91]

(2) The reasons why it was recommended that stockbrokers be allowed to practise as an incorporated company were stated as follows:

"[G]etuies waaronder die verteenwoordigers van die Johannesburgse Effektebeurs, [het] sterk aanbeveel dat 'n vorm van regspersoonlike lidmaatskap om verskillende redes ingestel moet word soos byvoorbeeld die versterking van die kredietposisie van die lid-onderneming deur 'n kombinasie van die bates van die maatskappy met die effektemakelaar se persoonlike waarborg; deur die versekering van kontinuïteit in die onderneming en versterking van die kapitaalbronne van die makelaarsonderneming waardeur openbare vertroue bevorder sal word . . . "[92]

The Commission eventually made the following recommendation:

"[Dat] daar voorsiening gemaak word –

(a) vir regspersoonlike lidmaatskap van die beurs;

(b) dat sodanige regspersoonlike lidmaatskap by wyse van geslote onbeperkte maatskappye moet wees."

When we scrutinise the reports of the Broome and Van Wyk de Vries Commissions to ascertain the provisional purpose, in the light of what is mentioned above, it would seem that the text is not a true reflection of the purpose of the provision,[93] and consequently we are permitted to deviate from the text, even in terms of the old approach towards the interpretation of statutes.

In this case, a clear connection between the recommendations of the Van Wyk de Vries Commission and section 6A (now s 53(b)) exists, to such an extent that the

---

87 Commission Report 47 of 1965 paras 340–341.

88 Norval mentioned the reasons why the Broome Commission proposed a provision similar to s 6A. The Appellate Division in the *Fundstrust* case failed to take any notice of the minority report.

89 Commission Report 47 of 1965 para 37 of the minority report.

90 *Idem* para 100 of the minority report.

91 The principle of body-corporate membership had been well established in overseas countries, esp in France, where the Paris Exchange had applied this with great success for some time. There brokers were required to have large amounts of capital, which was only possible through a form of body-corporate membership, whereby active members could obtain the capital they required from individuals outside the Exchange, with whom they were bound through a corporate body, and shared the profits from stockbroking with them. See para 280.

92 Commission Report 47 of 1965 para 279 of the minority report.

93 If we interpret "skulde en laste aangegaan" as being confined to contractual debts and liabilities.

recommendations have been incorporated practically verbatim. Hence we may take cognisance of the Commission's report in the light of what was said in the *Westinghouse* case.[94] Furthermore, since the Van Wyk de Vries Commission took its initiative from the Broome Commission, we may, in addition, take notice of the Broome Commission report, to ascertain the context of the provision.

3 4 Long title

The long title of the Companies Amendment Act 62 of 1968, which introduced section 6A, read:

> "To amend the Companies Act, 1926, in order to provide that directors and former directors of a private company limited by shares shall be liable jointly and severally, together with the company, for such debts and liabilities of such company as are or were contracted during their periods of office, if the memorandum contains a provision to that effect."

Again, it is nowhere stated that liability will be limited to certain types of liability or debt. Botha states, with regard to the question whether we are permitted to take notice of the long title: "It forms part of the statute considered by the legislature during the legislative process. The role played by the long title in helping to ascertain the purpose of the legislation, will in each case depend on the information it contains."[95] In *Bhyat v Commissioner for Immigration*[96] the court stated that it was entitled to use the long title of the Act (to ascertain the purpose of the statute).

3 5 Section headings

The heading to section 53, on its own, states its purpose: "Memorandum may contain special conditions and may provide for unlimited liability of directors." (This is further qualified by paragraph (b), which states that the directors shall be jointly and severally liable.) Consequently, viewed in context, it should read as follows:

> "The memorandum of a company may, in the case of a private company, provide that the directors and past directors shall be liable without limitation jointly and severally, together with the company, for such debts and liabilities of the company as are or were contracted during their periods of office, in which case the said directors and past directors shall be so liable."[97]

With regard to the question whether we are allowed to take cognisance of section headings to ascertain the purpose of legislation, Botha states that "[w]ithin the framework of the contextual approach all factors, including headings, should be considered to determine the purpose of the legislation".[98] In *Turffontein Estates Ltd v Mining Commissioner Johannesburg*[99] the court held that the value to be attached to section headings will depend on the circumstances of each case.

---

94 See fn 67.
95 Botha 84.
96 1932 AD 125.
97 The Afrikaans text would read: "Die akte van 'n maatskappy kan, in die geval van 'n private maatskappy, bepaal dat die direkteure en gewese direkteure onbeperk gesamentlik en afsonderlik, tesame met die maatskappy, aanspreeklik is vir die skulde en laste van die maatskappy wat gedurende hul ampstermyne aangegaan word of is, in welke geval die bedoelde direkteure en gewese direkteure aldus aanspreeklik is."
98 Botha 89.
99 1917 AD 419.

The Appellate Division in *Fundstrust* failed to take cognisance of the heading to section 53.

3 6 Marginal notes

Alongside section 1 of the Companies Amendment Act 1968 there appears the following:

> "Directors and former directors of certain private limited companies liable for certain debts and liabilities of such companies."

We have to bear in mind that marginal notes were not inserted by the draftsmen of the Act, as is the case today, but by the printers.[100] Accordingly, we cannot rely on them to ascertain the purpose of section 6A. The Van Wyk de Vries Commission stated that "[o]ften the marginal notes are not only wrong but also misleading".[101] The Commission made no mention of this marginal note when it dealt with section 6A.[102]

3 7 Surrounding circumstances – the mischief rule[103]

The mischief rule prescribes that four questions have to be answered to ascertain the purpose of legislation:

(a) What was the legal position prior to the adoption of the specific legislation? (Professionals such as stockbrokers were allowed to practise only as a partnership, not as a company.)[104]

(b) What was the defect for which the common law or existing legislation failed to provide?

(c) What solution did the legislator have in mind? (The legislator introduced section 6A into the Companies Act 1926.)

(d) What was the reason for the solution? (To provide continuity to professional partnerships, for example stockbrokers who practised as partners.)

3 8 Presumptions

3 8 1 The presumption that legislation does not aim to amend the existing law unnecessarily[105]

The existing law can be one of two alternatives: (a) company law, which introduced the principle of "limited liability" – in terms of this presumption, we shall therefore have to limit the liability of directors to (for instance) contractual debts, and not hold directors liable for all debts of the company; or (b) partnership law – the legislator wanted to incorporate the partnership and therefore retain the liability of partners; in terms of this approach, the directors (former partners) will be liable for all the debts of the company.

---

100 Devenish *Interpretation of statutes* (1992) 109.

101 Commission Report 45 of 1970 para 18.01.

102 *Idem* Recommendation 3.11.

103 See Botha 94–95. This rule originates from *Heydon*'s case (1584) 3 Co Rep 7a (76 ER 637) and was accepted in *Hleka v Johannesburg City Council* 1949 1 SA 842 (A) 852–853.

104 The court in the *Fundstrust* case also applied this rule: "[I]ts purport may best be achieved by considering what the law was immediately before the amendment" (1997 1 SA 728D–E).

105 Botha 64. The presumption means that legislation must, as far as possible, be interpreted in accordance with the existing law (legislation, common law, customary law and international law), or deviate from this as little as possible.

With regard to (a), we have to bear in mind that this is only a presumption, which cannot stand when the purpose of the legislation provides otherwise. It is submitted that the purpose of section 53(b) (previously s 6A) is to grant continuity to professions that practise in partnership, not to limit the directors' (partners') liability.

3 8 2 The presumption that "harsh, unjust or unreasonable results are not intended"[106]

Under this presumption, we find the rule that onerous provisions must, as far as possible, be interpreted in such a way that the persons to whom they apply are prejudiced as little as possible; onerous provisions must consequently always be strictly interpreted. One may argue that section 53(b) is a provision which infringes upon rights or even deprives people of rights, by saying that a director enjoys the right of exemption from liability for the debts of the company, except in instances such as those dealt with in section 424 of the Companies Act 1973. It is submitted that the presumption is rebutted by the purpose of section 6A, which was to grant continuity to (professional) partnerships – both the Commission reports and the parliamentary debates are silent about limiting or changing professional partners' liability. (See *Soja (Pty) Ltd v Tuckers Land & Development Corporation (Pty) Ltd*,[107] where the court was of the opinion that even though a strict interpretation of legislation which infringes upon basic rights is required (owing to the presumption), the purpose of the Act must still be ascertained whenever there is any doubt about the wording.)[108]

The reason why some professionals were not allowed to practise as companies was to prevent them, in the case of (for instance) professional negligence, from hiding behind the separate juristic personality of the company and stating: "I am only a director of the company; I acted on behalf of the company; if you want to sue someone, sue the company!"[109]

One of the consequences of the court's interpretation is that professional businessmen, who practise in terms of section 53(b), have advantages above those who practise in a partnership, since, in terms of partnership law, partners are jointly and severally liable for all debts and liabilities of the partnership. In terms of the court's interpretation, these directors are liable only for contractual debts of the company. They will be allowed to "hide" behind the company with respect to delictual and possible statutory liabilities. McIntosh observes that "[t]he attorneys profession, for one, never thought that incorporation offered the benefit of a limitation of liability for partnership debts".[110] [111]

As a result of the *Fundstrust* judgment, creditors are no longer entitled to hold partners in professional partnerships (now directors of incorporated companies) jointly and severally liable for all debts. It follows that creditors are deprived of particular rights they once enjoyed.

---

106 Botha 67.

107 1981 3 SA 314 (A).

108 331C–D.

109 This is a fear that existed in America prior to 1960.

110 McIntosh 1997 *Juta's Business Law* 112.

111 The appellant in *Fundstrust* argued that the "intention" was to retain the position of the creditors that would have applied if the stockbrokers had carried on with the business as a partnership consisting of ordinary partners; to decide otherwise would mean that (1) the legislator intended to amend the common law for no reason, which cannot be presumed; and (2) the privilege of incorporation would create rights without preserving obligations which were hitherto unquestionable (716I–717B).

3 9 Background

3 9 1 English law

During the parliamentary debate of 3 May 1968 the Minister referred to section 202 of the English Companies Act. Section 202 read as follows:

> "Limited company may have directors with unlimited liability
>
> In a limited company the liability of the directors or managers, or of the managing director, may, if so provided by the memorandum, be unlimited."[112]

Section 203 dealt with special resolutions altering the memorandum so as to make provision for unlimited liability.[113] Gower states, with regard to section 202: "It is not surprising that these provisions have long been a dead letter",[114] and "a similar type of association is of considerable importance in some other legal systems, eg the German Kommanditgesellschaft auf Aktien and the French société en commandite par actions".[115]

Boyle remarked:

> "Under the provisions of sections 202 and 203 of the 1948 Act, the directors or managers may take upon themselves an unlimited liability, the liability of the other members is limited, this being similar to the distinction between general and limited partners under the Limited Partnerships Act 1907. Since the protection of limited liability is the main reason for registering a limited company, it is almost unknown for resort to be had to sections 202 or 203."[116]

Sections 202 and 203 had their origin in section 4 of the 1867 (English) Companies Act 131 of 1867.[117] The Select Committee attempted to introduce the French *société en commandite* into English law. The final recommendation was that limited companies could have certain shareholders with unlimited liability. The result was that the 1867 Companies Act partly complied with this, in that it provided that limited companies could have directors with unlimited liability.[118]

Macnaghten remarked, concerning section 4:

> "Whatever the Legislature may at the time of the passing of this Act have anticipated, it is difficult to suppose that businessmen can ever have wished for, or contemplated, the formation of limited companies managed by directors with unlimited liability.

---

112 See Sweet and Maxwell *Sweet & Maxwell's Companies Act* (1980).

113 S 203 provided:

> "Special resolution making liability of directors unlimited
>
> (6) A limited company, if so authorised by its articles, may by resolution alter its memorandum so as to render unlimited the liability of its directors or managers, or of any managing director.
>
> (7) When such a special resolution is passed, its provisions are as valid as if they had been originally contained in the memorandum."

114 Gower *The principles of modern company law* (1957) 67 fn 35.

115 Gower 239. It must be pointed out that Gower erroneously stated that those forms of company were popular. They had, in truth, fallen into disuse.

116 Boyle and Birds *Company law* (1983) para 2.12.

117 S 4 provided: "Where after the commencement of this Act a company is formed as a limited company under the principal Act [the Companies Act 89 of 1862], the liability of the directors or managers of such company, or the managing director may, if so provided by the memorandum of association, be unlimited."

118 Cilliers *A critical enquiry into the origin, development and meaning of the concept "limited liability" in company law* (LLD thesis UNISA 1963) 193–195. See also Mayson *Mayson, French and Ryan on companies* 1988–1990 ed (1989) 44.

> There may possibly be cases in which directors have been, or may be, found willing to undertake such an extraordinary burden; but it may safely, it is conceived, be asserted that such cases have been, and will be, extremely rare."[119]

At present, sections 202 and 203 feature as sections 306 and 307 of the current Companies Act,[120] and the wording of the latter sections is identical to the wording of sections 202 and 203. In *Palmer's Company law* the author confirms that such clauses are not used in practice.[121] Pennington, however, informs us that the unlimited liability of directors, in terms of sections 306 and 307, is not as unlimited as would appear: the liability of directors is unlimited only in the case of winding-up of the company, and then only to contribute an amount necessary to meet the company's debts and liabilities, as well as costs and expenses of the winding-up.[122] [123]

3 9 2 German law

The *Kommanditgesellschaft* is a limited partnership, where at least one partner's (the general partner's) liability for all partnership debts is unlimited, and the other partners' (limited partners') liability is restricted.[124] "*Kommanditgesellschaft auf Aktien*" means a limited partnership through shares. Vorburg states:

> "The Kommanditgesellschaft auf Aktien (KGaA) is a corporate form which is not frequently used. It combines the partnership with the AG [aktiengesellschaft, ie public company] in so far as it consists of normal shareholders (holding share certificates) and one or more natural persons with unlimited liability, who replace the board of management and are the managing directors of the company (general partners). In short, the KGaA is a mixture of the AG and the limited partnership. Of course, the general partners may at the same time be shareholders of the company."[125]

---

119 Macnaghten *Rawlins and Macnaghten on companies* (1901) 196.

120 1985.

121 *Palmer's Company law* (1998) 8.604. He also observes that if this type of company was used, the company would generally be in a similar position to the French *société en commandite par actiones* and the German *Kommanditgesellschaft auf Aktien*. See also *Gore-Brown on companies* (1972) 2.4.

122 Pennington *Pennington's Company law* (1990) 610–611. He states: "It will be noted that the imposition of unlimited liability on directors by the memorandum does not make them directly liable to the company's creditors as statutory guarantors of its debts while it is a going concern, and the only way in which the liability can be enforced is in the liquidation of the company by the court or liquidator calling on them to make the necessary contribution. Moreover, persons who have ceased to be directors before the commencement of the liquidation are liable to contribute only if they were directors within one year before that time, and they cannot in any case be required to contribute towards debts and liabilities of the company incurred after they ceased to be directors."

123 See s 75(1) of the (English) Insolvency Act 75 of 1986, which provides: "In the winding-up of a limited company any director or manager (whether past or present) whose liability is under the Companies Act unlimited is liable, in addition to his liability (if any) to contribute as an ordinary member, to make a further contribution as if he were at the commencement of the winding-up a member of an unlimited company." Subs (2), however, qualifies subs (1): "(1) A past director or manager is not liable to make such further contribution if he has ceased to hold office for a year or more before the commencement of the winding up. (2) A past director or manager is not liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office. (3) Subject to the company's articles of association, a director or manager is not liable to make such further contribution unless the court deems it necessary to require that contribution in order to satisfy the company's debts and liabilities, and the expenses of the winding up."

124 Vorburg *Company law in Europe* (1975) 238 para 7 and 240–242 paras 14–31.

125 Vorburg 263 para 121.

It is noteworthy that the *Kommanditgesellschaft auf Aktien* is a company, not a partnership![126]

3 9 3 French law

According to French law, the *société en commandite par actiones* is regarded as a company although in substance it is a partnership (as in Germany) since there are commanditaires (partners with limited liability) who are in exactly the same position as shareholders in a société anonyme (which is a company). The shares of a *société en commandite par actiones* are just as freely transferable as the shares of a *société anonymes*. The *société en commandite par actiones* is, however, no longer used in France.[127] [128] [129]

At present there exists a type of company in French law which displays certain of the characteristics of the South African section 53(b) company, namely the *Groupements d'intérêt economique*. All the members of this company are jointly and severally liable for the debts and liabilities of the company.[130] Many of the South African professions, which allow their members to incorporate, require the members to be directors.[131] [132]

4 GENERAL COMMENT

We may also take into account that section 53(b) and its heading fail to mention the specific debts and liabilities of the company for which the directors are liable. If the purpose of the section had been to hold the directors liable for merely some of the debts and liabilities of the company, then the Act would have said so.

The court in the *Fundstrust* case remarked that one of the cardinal principles of company law is that a company is a separate legal entity, and the general rule is that the directors and members are not liable for the debts of the company.[133] It would seem that the court was oblivious to the fact that we are dealing here, not with a normal company, but (as the Van Wyk de Vries Commission put it) with a type of private company. In *Corporate law* the authors state the following:

> "During 1968 a special kind of private company with concurrent joint and several liability of the directors was introduced to make it possible for acknowledged

126 See Aretz *European company law* (1993) 90. This company is also required to register itself in the commercial register. See Vorburg 240–243. For more information about this type of company, see Wurdinger *German company law* (1975) 120–123.

127 Vorburg 185 para 39. Mayson 44 states: "In France the commandite rapidly declined in popularity when it became possible to incorporate companies with limited liability by registration – as in Britain."

128 It should always be borne in mind that in France all partnerships are legal *personae*, except the silent partnership.

129 In Italy we find an identical company to the *sociétés en commandite par actiones* and *Kommanditegesellschaft auf Aktien*, called the *societa in accomandita per azioni*. See Vorburg 323.

130 Vorburg 185 para 39.

131 See eg s 23(2) of the Attorneys Act 53 of 1979.

132 There are, however, certain important differences between the *Groupements d'intérêt economique* and the s 53(b) company. Eg, the *Groupements d'intérêt economique* has to be formed with the purpose of furthering the economic activities of its members or to further the profits from those activities. It may not have the making of profit as its purpose, and it must be formed for a specific time.

133 735D–E.

> professions practising in partnership to incorporate under the Companies Act of 1926. At present section 53(b) of the Act makes specific provision for a private company wishing to effect the joint and several liability of its directors with the company for the debts and liabilities of the company . . . The directors and the company are then liable *singuli in solidum* for such debts of the company."[134]

The court in the *Fundstrust* case remarked that Parliament had intended to place a new statutory liability on directors of this type of company, and to provide creditors with a new remedy which would enable them to hold the directors liable, *singuli et in solidum*, for the company's debts and liabilities prior to its winding-up.[135] Therefore section 53(b) statutorily infringes upon the principle of limited liability.

5 OTHER LEGISLATION

The Attorneys Act 53 of 1979 contains the following provision in section 23(1):

> "A private company may . . . conduct a practice if – such company is incorporated and registered as a private company under the Companies Act, 1973 . . . , with a share capital, and its memorandum of association provides that all present and past directors of the company shall be liable jointly and severally with the company for the debts and liabilities of the company contracted during their periods of office; . . ."[136]

The Public Accountants' and Auditors' Act 80 of 1991 provides in section 21(2)(a) for accountants and auditors engaged in private practice to form a company provided, *inter alia*, that its directors and past directors "gesamentlik en afsonderlik aanspreeklik is vir sy skulde en laste wat tydens hul ampstermyn opgeloop het".[137]

Another statute which makes use of section 53(b) is the Professional and Technical Surveyors' Act 40 of 1984. It provides in section 27A for professional surveyors to form a company in which the directors "gesamentlik met en afsonderlik van die maatskappy aanspreeklik is vir die skulde en verpligtinge van die maatskappy gedurende hulle dienstermyn aangegaan".[138]

Therefore we notice that, even though all of the abovementioned Acts have the same purpose, namely incorporation, different words are used.

6 DELICTUAL ACTIONS

The court in *Fundstrust* held that a contractual remedy confers sufficient protection where the stockbroker has acted negligently or fraudulently.[139]

One can easily think of a situation in which no contract exists between a company and an aggrieved party, for example where an auditor (a director of a s 53(b) company) is guilty of negligence, and a third party (eg a shareholder of another company) suffers loss in consequence. There is no contract between the auditor (or the auditor's company) and the shareholder, which means that the aggrieved party

---

134 Cilliers *et al Corporate law* (2000) 34.

135 731G–H.

136 The Afrikaans text is the signed text. It provides that "al die huidige en voormalige direkteure van die maatskappy gesamentlik met en afsonderlik van die maatskappy aanspreeklik is vir die skulde en verpligtinge van die maatskappy gedurende hul ampstermyne aangegaan".

137 The Afrikaans text is the signed text. The English text uses the words "debts and liabilities contracted".

138 The Afrikaans text is the signed text. The English text uses the words "debts and liabilities of the company contracted".

139 734C–D.

(the shareholder) will have no remedy against the other auditors (directors) of the section 53(b) company.[140] Had the Appellate Division held that directors of a section 53(b) company are liable for all debts and liabilities of the company, his co-auditors would also have been liable.

A further instance in which the plaintiff can avail himself of a delictual remedy only is where a section 53(b) company infringes on A's goodwill. What if the section 53(b) company divided 75 per cent of all its profits among its directors? Would it not be unfair to hold only the company liable and not its directors? Further instances are: (1) where there is wrongful interference with a contractual relationship,[141] for instance where a director of a section 53(b) company entices the employees (of A) by urging them to commit breach of contract,[142] and (2) unlawful competition.

There are, of course, instances in which both delictual and contractual actions will be available to the plaintiff.[143] [144] The plaintiff will have both actions available to sue the section 53(b) company, but according to the court in the *Fundstrust* case, the plaintiff will be allowed to sue the directors of the same company using only the contractual remedy, not the delictual one. There are instances where a delictual remedy would be more favourable to the plaintiff than the contractual remedy.[145] Differences, broadly speaking, between the two types of action are that the scope of the damages may differ,[146] different courts may have jurisdiction,[147] and the periods of prescription may differ.[148]

One can also think of instances where no contractual remedy is available but only an enrichment remedy (eg where the contract concluded with a director is, for whatever reason, illicit).

7 JUDGMENT DEBTS

Section 53(b) stipulates that the directors are liable for the debts of the company. A judgment debt can surely be classified as a debt. According to the Appellate Division in *Fundstrust*, however, the directors are liable only for the company's contractual debts.

---

140 Had the negligent auditor been a member of a partnership, the other auditors (partners) would have been jointly liable. See Boltar 1997 *Annual Survey of South African Law* 422.

141 Neethling, Potgieter and Visser *Deliktereg* (1996) ("Neethling *et al*") 301–302 define interference with a contractual relationship as arising where a third party acts in such a way as to cause a contractual party not to receive the performance to which he is entitled *ex contractu*, or in such a way as to increase the plaintiff's contractual obligations.

142 See Neethling *et al* 302–303.

143 Eg where an attorney is guilty of a breach of trust by violating the relationship of trust between himself and his client.

144 *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) should, however, always be borne in mind. There the majority of the court laid down that a court would grant a delictual remedy, in addition to a contractual remedy, only when the conduct (irrespective of breach of contract) also affected a legally recognised interest, which existed independently of the contract, in an unlawful and blameworthy manner.

145 For a general comparison between the delictual and contractual remedies, see Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (LLD thesis UNISA 1991).

146 Neethling *et al* 260 fn 69. It is trite law that consequential damages cannot be recovered by way of a contractual remedy unless the loss was reasonably foreseeable when the agreement was concluded, or unless the contract contains a term providing for such damages in the event of breach (*Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 2 SA 545 (A)).

147 See Neethling *et al* 261 fn 79.

148 *Idem* 261.

8 CONCLUSION

In my view, the directors of a section 53(b) company should be liable jointly and severally, together with the company, for all debts and liabilities of the company.[149] The question that presents itself is whether it is fair to hold the directors of a section 53(b) company liable for all debts and liabilities of the company. I suggest that it is indeed fair, because when a person becomes a director of a section 53(b) company, he knows that he can be held liable for all the debts of the company. Hence, liability on the part of the directors of a section 53(b) company will be identical to the liability of partners.

We have to remember that the purpose of section 6A was to grant continuity to professional partnerships which experienced the problem of dissolution whenever a partner died or retired. As partners, they would be jointly liable for the partnership debts and liabilities. As indicated earlier, the purpose was not to limit the liability of those partners (directors). Other people are also free to form a section 53(b) company, but then they have to realise that they forfeit the advantage of limited liability which they would have had had they formed an ordinary private company.[150]

In addition, we have to bear in mind that the court in the *Fundstrust* case maintained that Parliament intended to impose a new statutory liability on directors of this type of company, and to provide creditors with an entirely new remedy which would enable them to hold those directors liable, *singuli et in solidum*, for the company's debts and liabilities prior to its winding-up.[151] This is a new statutory remedy, in that it is novel in company law for directors to be liable jointly and severally for all debts and liabilities of the company.

The decision in *Fundstrust* leads to an anomaly: the directors will be liable for contractual debts to an incorporated stockbroker's client but not for moneys stolen from the client, or for the tax obligations of the business.[152]

Finally, liability will be limited to those directors who served, on the board of directors, at the relevant time, since section 53(b) states that the directors and past directors shall be liable for such debts and liabilities as are or were contracted during their periods of office. Accordingly, someone who became a director after a debt or liability was contracted would not be liable in terms of section 53(b).[153]

---

149 See Williams *Concise corporate law* (1994) 32: "Members of such professions therefore have the option of incorporating their practices and obtaining all the benefits of incorporation except that of limited liability of their directors."

150 S 56(2) permits any existing company to insert such a provision in its constitution. The written consent of each director is required. Therefore, whenever a director is not prepared to shoulder such responsibility, he can simply refuse to sign the special resolution that is required to change the company's constitution.

151 731G–H.

152 733E–G.

153 The court's argument was that liability for all debts and liabilities would lead to an anomaly. The court remarked: "At that stage [ie winding-up] the directors might well have changed. On Fundstrust's construction directors who were on the board when the company received the payments but had resigned before the date of the order, would not be liable; but those who had not been on the board at the time of the payments but had been appointed since, would indeed be liable despite the fact that they could not possibly have been involved in the receipt of the payments or in the transactions preceding them. It is difficult to accept that Parliament intended such a result" (735A–C). Clearly, the court failed to take cognisance of the words "during their periods of office".

AANTEKENINGE

EMIGRATION BY A CUSTODIAN PARENT AFTER DIVORCE

1 Introduction

When a court is confronted with an application by a divorced custodian parent to remove the children born of the marriage from the court's jurisdiction to a foreign country, it has the difficult task of deciding

> "between the following alternatives, namely, (a) whether to grant the [applicant] permission to remove the children to [the foreign country] thereby curtailing the [respondent's] rights of access, or (b) to withhold such permission and, in effect, oblige the [applicant] to remain in this country for the sake of the children" (*Bailey v Bailey* 1979 3 SA 128 (A) 141H, see also *Godbeer v Godbeer* 2000 3 SA 976 (W) 981D).

With emigration on the increase in South Africa, the question arises how the courts should approach this difficult task. This contribution will address this issue with reference to the different factors taken into consideration by the courts in applications like these, and the relevance and importance of each of these factors.

2 Factors considered by the courts in applications for removal of children from the court's jurisdiction

2 1 The existence or non-existence of a court order prohibiting the removal of the child from the court's jurisdiction

In the absence of a court order prohibiting the removal of children from the court's jurisdiction, the courts are reluctant to

> "interfere even in the case of a removal beyond the jurisdiction overseas, where the respondent, as here, was about to make a *bona fide* change of domicile, and was removing the children not to defeat the mother's right of access, but in their interests and by reasons of such change of domicile" (*Van Wijk v Creighton* 1925 1 PH B21 (W); also see Hahlo *The South African law of husband and wife* (1985) 400).

In *Lecler v Grossman* 1939 WLD 41 the court accepted the decision in *Van Wijk v Creighton supra* but added that there could be circumstances in which the removal of the child would be so unreasonable from the point of view of the parent entitled to access, that even though the application to remove the child may be *bona fide* and not against the interests of the child, the court might refuse it. This *dictum* was applied in *Theron v Theron* 1939 WLD 355, but the court stressed the importance of taking all the circumstances of the case into consideration (360 – also see *Rosen v Rosen* 1957 4 SA 346 (W) 348A–B).

Where no court order prohibiting removal of the child from the court's jurisdiction exists, the courts seem to regard the *bona fides* of the custodian parent as a

prerequisite for a successful application for removal of the child. This factor seems to be as important as the best interests of the child. However, in certain circumstances the rights of the parent who has access may carry more weight than the *bona fides* of the custodian parent or the best interests of the child (see also *2 4* below).

Where there is a court order prohibiting removal of the children from the jurisdiction of the court without the consent of the other party or the court (incorporating an agreement between the parties), the courts approach the matter differently (see Hahlo *The South African law of husband and wife* (1985) 400–401). Initially the courts were reluctant to set aside an existing court order, as is evident from the following passage from *Johnstone v Johnstone* 1941 NPD 279 287–288: "What [the order] did was solemnly done by the Court with the consent of the parties, and it is not to be lightly thrown aside."

It was later accepted that the court order could be varied if the applicant showed "good cause" for doing so (*Laaser v Yeatman* 1956 1 PH B2 (C)). In *Shawzin v Laufer* 1968 4 SA 657 (A) the Supreme Court of Appeal accepted that an agreement relating to custody which has been made an order of court may be varied by the court "for good cause" (662H). The court added that, from a procedural point of view, an application to vary an agreement is different from the ordinary application, since the court need not consider itself bound by the averments of the parties. The court may sometimes depart from the usual procedure and act *mero motu* in calling evidence, regardless of the wishes of the parties. "[W]hile in form there is an application for variation of the order of Court, in substance there is an investigation by the Court, acting as upper guardian" (663A). Although conceding that "good cause" is impossible to define and depends on the circumstances of each case (663B), the court stressed that the "true test" to be applied is what will be in the best interests of the children (666C 668H – also see *Bailey v Bailey supra* 135H 142A 142G; *Stock v Stock* 1981 3 SA 1280 (A) 1290F; *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) 437G–H and, in general, *Fletcher v Fletcher* 1948 1 SA 130 (A) 134 and *Fortune v Fortune* 1955 3 SA 348 (A) 354A–B).

The *dictum* in *Shawzin v Laufer supra* was later accepted by the Supreme Court of Appeal in *Bailey v Bailey supra*. With reference to *Du Preez v Du Preez* 1969 3 SA 529 (D) 532C–G, the Supreme Court of Appeal made the following comments about the burden upon an applicant to show "good cause" for the variation of a custody order:

> "[W]hen the paramountcy of the child's welfare . . . is borne in mind, it is obvious that the burden upon the applicant . . . dare not be magnified. She may be held to have shown good cause for variation of the order, even if no new facts or circumstances have arisen in the interim, provided it appears clearly to the Court that the child's interests would be better served by varying the order than by maintaining the *status quo*" (136A).

The paramount consideration of the best interests of the child, which has been applied by our courts for many years, has now been entrenched in section 28(2) of the Constitution of the Republic of South Africa 108 of 1996, which provides that a child's best interests are of paramount importance in every matter concerning the child.

It makes little sense to distinguish between cases where there is an order of court (incorporating an agreement between the parties) prohibiting the removal of a child from the court's jurisdiction and cases where no such order exists. First of all, even where there is no such court order (or where the court order incorporating a consent paper requires the consent of only the court, and not the other parent, for the child's removal), the custodian parent will first have to obtain the permission of the

non-custodian parent, unless the custodian parent has been awarded sole guardianship of the child (Guardianship Act 192 of 1993 s 1 – also see Schäfer *The law of access to children* (1993) 99). If permission is refused, the court must be approached for permission. Secondly, in both instances the court is called upon to investigate the matter as upper guardian of all minors, and the paramount consideration is the best interests of the child concerned.

2 2 The access rights of the non-custodian parent

In the past, it was accepted that a greater right to restrict the movements of the custodian parent is given to a party to whom the court has expressly given a right of reasonable access (*Etherington v Etherington* 1928 CPD 220). However, in *Lecler v Grossman supra* the court held that the fact that an order granting reasonable access has been made, does not assist the applicant. The non-custodian parent has access in any event (44). Furthermore, access is not prejudiced because the divorce order makes no mention of it. It is implied in any divorce order (*Theron v Theron supra* 359).

However, where access is further developed in the court order and certain specified access rights are granted to the non-custodian parent (eg the right to have the child for alternate weekends or school holidays), this court order is regarded as an effective ruling which must be observed until varied by consent or by the court itself (*Johnstone v Johnstone supra*, where it was held that not even the mother's remarriage to a man who lives in another city was considered a strong enough reason to limit or alter the father's "clear right" under the agreement; *Lecler v Grossman supra* 44; *Taylor v Taylor* 1952 4 SA 279 (SR) 282A–C; *Allan v Allan* 1959 3 SA 473 (SR) 476E; *Stock v Stock supra* 1290C).

The fact that the access rights of the non-custodian parent will be curtailed following the removal of the child from the court's jurisdiction, is without doubt one of the factors to be considered by a court applying the best interests of the child criterion. However, it should make no difference whether the court has expressly granted reasonable access to the non-custodian parent in the divorce order or not, or whether certain defined access rights have been specified in the divorce order or not. Reasonable access for the non-custodian parent is implied in the divorce order.

It is widely accepted that it is of importance to children to have close contact with both parents. The fact that children will be deprived of the advantage of this companionship is an important consideration in applications like these. Although in most of the reported cases the negative effect of the removal on the non-custodian parent's access rights was not regarded as conclusive, it should be kept in mind that in all these cases the non-custodian parent was in a position to travel abroad to visit his or her children (or the children were in a position to visit the non-custodian parent), so that although access was more difficult to exercise, it was not terminated completely (see eg *Argall v Argall* 1945 2 PH B57 (W); *Rosen v Rosen supra* 349D; *Shawzin v Laufer supra* 669A; *Bailey v Bailey supra* 144H; *Van Rooyen v Van Rooyen supra* 440B; *Godbeer v Godbeer supra* 982H). Generous allocation of block access (eg for a four-week period over Christmas – see *Van Rooyen v Van Rooyen supra* 441J–442A) would be advisable. The position of the non-custodian parent could be strengthened further by ordering the applicant to take all the steps that are necessary to ensure that the court's order relating to access is enforceable in the foreign country (as was done in *Van Rooyen v Van Rooyen supra* 442F).

However, it may well happen that even though the non-custodian parent is in a position to travel abroad to visit the child, the removal is not approved because of

the negative effect of depriving the child of the continuing close contact with and companionship with the non-custodian parent (see eg *Stock v Stock supra* 1296H 1297E–H). The best interests of the child criterion can, after all, not be applied in a vacuum, but depends on the particular circumstances of each case.

Where the effect of the removal would be to terminate access completely (whether owing to the non-custodian parent's financial position or the inaccessibility of the foreign country), the courts seem to be reluctant to sanction the removal (see eg *Grgin v Grgin* 1961 2 SA 84 (W) 89A).

It seems that in some cases the courts approach this issue entirely from the perspective of the non-custodian parent. Statements like the following create the impression that the rights of the parent, rather than the interests of the child, are used as the starting point:

> "I am not prepared to say that there may not be other cases where even though the removal is *bona fide* and the child's interests are not jeopardised it may yet be unreasonable to permit the removal of the child. It is possible that the Court might go beyond the mere inquiry into the *bona fides* of the custodian parent and might hold in particular circumstances that because of the hardship to the other spouse the removal from the jurisdiction was not reasonable" (*Lecler v Grossman supra* 45).

One should rather emphasise the fact that, in the particular circumstances, the best interests of the child require that the child remain in close contact with the non-custodian parent. Access is, after all, regarded as the right of the child rather than the parent (*B v S* 1995 3 SA 571 (A) 582A). It would therefore make sense to approach this issue from the perspective of the child, rather than that of the non-custodian parent. In the words of Nugent J in *Godbeer v Godbeer supra*:

> "I do not approach the issue from the perspective of the respondent, for whom it will undoubtedly, and quite naturally, be a deeply traumatic experience to be deprived of the comfort which he derives from the company of his children. I approach the matter rather from the point of view of the children, who will be deprived of the comfort of their father's ready presence" (981F).

2 3 The parental authority of the custodian parent

As early as 1904 (*Mitchell v Mitchell* 1904 TS 128 130–131) it was held that the custodian parent has the right to regulate the life of the child, to have the child with him or her as a general rule, and to direct the lines on which the child's education should proceed. This right was later held to include the right to decide to take the child abroad (*Van Wijk v Creighton supra*; *Etherington v Etherington supra* 222; *Argall v Argall supra*; *Myers v Leviton* 1949 1 SA 203 (T) 210).

To emphasise the right of the custodian parent to regulate the life of the child, is to approach the matter from the wrong perspective. The emphasis should rather be on the child's best interests. Only where it is found that it is irrelevant whether the children live in South Africa or in the foreign country, because either option would be in the interests of the children, should the right of the custodian parent to regulate the lives of the children be the conclusive factor (see eg *Godbeer v Godbeer supra* 981A–C 982D 982J). As a matter of fact, the Supreme Court of Appeal held in *Fortune v Fortune supra* that "where there is an approximately even balance of the factors relating to the minor's interests, the Judge would be *obliged* to add the other considerations to one scale or the other and so reach his conclusion" (354B; my emphasis).

2 4 The bona fides *of the custodian parent*

The importance to a child of maintaining close contact and companionship with both parents has already been stressed. For this reason, the motivation of the custodian parent is an important factor to be taken into account by the court applying the best interests of the child criterion. If the custodian parent is motivated primarily by vindictiveness and spite towards the other parent "there is every reason to suppose that she will do what she can to frustrate the father's access to his detriment and that of the children" (*Van Rooyen v Van Rooyen supra* 437J–438A).

Be that as it may, *bona fides* should not be regarded as a prerequisite for a successful application for permission to remove the children from the court's jurisdiction. Even when there is doubt about the *bona fides* of the custodian parent, the interests of the children may require that the removal be sanctioned. Additional measures may then be needed to ensure that the non-custodian parent would be allowed to exercise access freely, for example by ordering the custodian parent to take all the necessary steps to ensure that the court's order relating to access is enforceable in the foreign country (as was done in *Van Rooyen v Van Rooyen supra* 442F).

2 5 The reasons for the emigration

On a few occasions, the courts have regarded the reasons for the relocation (eg remarriage, career opportunities, etc) to be an important (or even conclusive) factor in applications like these. In *Johnstone v Johnstone supra* remarriage to a foreigner was not considered a good enough reason for varying the existing court order – the court held that the custodian parent found herself in this difficulty through her own volition as she was not obliged to remarry (288). In *Theron v Theron supra*, the court (discussing the decision of the Court of Appeal in England in *Hunt v Hunt* 28 Ch D (1885) 606, where the custodian father, a medical officer in the army, was ordered to go to India) stated that the reasonableness of the removal of the children from England in *Hunt v Hunt supra* "is clearer than the removal by the respondent of her children to Nairobi, because she was under no compulsion to leave the Union, whereas Dr Hunt was compelled to leave England" (361).

In *Myers v Leviton supra* the custodian father of a child (who, in terms of the divorce order was prohibited from removing the child from the Transvaal without the mother's permission) took the child to Durban for a holiday, where he decided to settle, keeping the child with him. The child's mother sought an order directing the father to allow the child to spend the December holidays and one short holiday per year with her, which order was granted. The custodian father's appeal against the order was dismissed. The court was of the opinion that, since the order related only to access, the cases relating to the custodian parent's right to remove the children from the court's jurisdiction were not in point (211). However, the court held in an *obiter dictum* that if a custodian parent *has to live elsewhere* (as in *Hunt v Hunt supra*), or *wishes to live elsewhere* (as in *Theron v Theron supra*) and the parent is acting in good faith and not spitefully, the court will not prevent such parent from removing the children from the court's jurisdiction (211–212).

In *Stock v Stock supra* the Supreme Court of Appeal was of the opinion that the first question to be asked is why the respondent wished to take the children abroad: "[T]he Court, as upper guardian of the minors, must examine the reasons given closely, more particularly when the custody arrangements are to be altered so soon after the divorce" (1291H).

Schäfer (*The law of access to children* (1993) 99–104) categorises the power of the custodian parent to remove the child from the court's jurisdiction under headings

relating to the reasons for the relocation ("remarriage to a foreigner", "career opportunities and other compelling reasons" and "personal desire to live in a foreign country"). However, as Schäfer correctly points out, it is extremely difficult to be dogmatic over this issue (104). The best interests of the child criterion is a relative concept that can be judged only within a particular set of circumstances. In the words of King DJP in *Van Rooyen v Van Rooyen supra*: "The Court will make an assessment on the particular facts as they concern these particular children; in other words, it will apply individual justice" (437H). It is futile to attempt to predict the outcome of a case with reference only to the reasons for the relocation.

Since the best interests of the child are paramount in applications like these, the reasons for the relocation are relevant only if they have a direct bearing on the interests of the child. Factors such as the existence of a better support system in the foreign country, better employment prospects and better financial resources, for example, will undoubtedly have a positive impact on the children, because their lives will be more stable and secure (see eg *Van Rooyen v Van Rooyen supra* 438A–439H).

2 6 The fundamental rights of the custodian parent

The Constitution of the Republic of South Africa 108 of 1996 protects every person's right to freedom of movement (s 21(1)), as well as every person's right to leave the Republic (s 21(2)). It further protects every citizen's right to enter, remain in and reside anywhere in the Republic (s 21(3)), and every citizen's right to a passport (s 21(4)). Furthermore, section 18 of the Constitution protects every person's right to freedom of association and section 10 protects every person's right to human dignity.

It could possibly be argued that an order prohibiting removal of the children by the custodian parent infringes that parent's fundamental rights to freedom of movement and association (eg if that parent wishes to go and live with a particular person in the foreign country). It could further be argued that such an order infringes the custodian parent's right to dignity. If the custodian parent is prevented by the order from going to live with his or her new spouse in the foreign country, his or her right to family life is infringed, which is considered by the courts as part of the right to dignity (*Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 1 SA 997 (C); *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC); *Patel v Minister of Home Affairs* 2000 2 SA 343 (D)).

Although the fundamental rights of the custodian parent have never been specifically considered by a court hearing an application for removal of the children from the court's jurisdiction, they are without doubt a relevant consideration in applications like these. However, section 28(2) of the Constitution, which provides that a child's best interests are of paramount importance in every matter concerning the child, has to be borne in mind. The correct approach is summarised by King DJP in *Van Rooyen v Van Rooyen supra*: "[A]ll the relevant factors, even the mother's fundamental right to freedom of movement, will be assessed in the context of [the] children's best interests" (437H).

3 Conclusion

The paramount consideration in applications by custodian parents for permission to remove their children from the court's jurisdiction is the best interests of the child. It makes no difference whether there is a court order prohibiting removal of the children from the court's jurisdiction or not. Regardless of whether or not a court

order exists, the custodian parent needs the consent of the other parent, unless sole guardianship has been awarded to the custodian parent (Guardianship Act 192 of 1993 s 1). If the non-custodian parent refuses to consent to the removal, a court order will have to be obtained. The court is then called upon to act as upper guardian of all minors, and the paramount consideration that has to be applied is the best interests of the children.

All the relevant factors will be assessed in the context of the child's best interests. It follows, therefore, that only factors that have a direct bearing on the interests of the child can be considered relevant. As it is important that a child should remain in close contact with both parents, the effect of the removal of the child on the access rights of the non-custodian parent is a relevant factor. If access will still be possible (albeit restricted) after the removal, this factor will seldom be conclusive.

The right of the custodian parent to control the child's life should be conclusive only where there is an approximately even balance in the factors relating to the child's interests.

The motivation of the custodian parent is a relevant factor if that parent is motivated by spite and vindictiveness towards the other parent, as this may have a negative impact on the non-custodian parent's access rights. However, as there are ways of protecting these rights, this factor should not be conclusive if the relocation would be in the best interests of the child.

The reasons for the relocation will be relevant only if they have a direct bearing on the interests of the child.

The custodian parent's fundamental rights to dignity, freedom of movement and freedom of association, like all the other relevant factors, must be assessed in the context of the best interests of the children.

JM KRUGER
University of South Africa

THE POTENTIAL FOR EIA PARTNERSHIPS IN SADC – A COMPARISON OF LEGISLATIVE ARRANGEMENTS IN LESOTHO AND SOUTH AFRICA*

1 Introduction

Developing countries all over the world have fragmented and uncoordinated environmental legislation *inter alia* because of colonialism (Iqbal "Recent trends in national environmental law. Paper delivered at UNEP Conference", unpublished paper presented at the UNEP Fourth Global Training Programme on Environmental Law and Policy, Nairobi Kenya 1999-11-15 to 1999-12-03 2). In South Africa

* Paper delivered at the IAIA (SA) Conference on Partnerships at Goudini 2000-10-02–04.

fragmentation was exacerbated by the so-called homeland system (Du Plessis "Integration of existing environmental legislation in the provinces" 1995 *SAJELP* 23–36). According to Iqbal (2) legislation addressing environmental problems was promulgated in the colonial era to facilitate resource allocation and exploitation, rather than to conserve or manage the exploitation of environmental resources. This legacy necessitates the need for environmental law reform. To date approximately 80 countries world-wide have accepted some or other form of environmental framework law (Iqbal 3).

South Africa has adopted the National Environmental Management Act 107 of 1998 (NEMA) and Lesotho is in the process of finalising an Environment Bill 2000. Both of these pieces of legislation can be regarded as environmental framework legislation (see also Nel and Du Plessis "Environmental framework legislation v NEMA", paper delivered at the Congress of Teachers in Law Durban 2000-07-03–07). One of the aims of environmental framework legislation is to ensure "an integrated, ecosystem-orientated legal regime that permits a holistic view of the ecosystem, of the inter-relationships and inter-actions within it, and of the linkages in environmental stresses" (Iqbal 3; Okidi "Incorporation of general principles of environmental law into national law with examples from Malawi" 1997 *Environmental Policy and Law* 332). The Lesotho bill is modern and compares well with other environmental framework legislation world-wide.

Framework legislation is an important instrument for addressing environmental problems within the regional context. Environmental degradation and pollution know no boundaries (see also Timpson "Creating a just future – the role of the judiciary and the law on sustainable development" in UNEP *Southeast Asian justices symposium The law on sustainable development* (1999) 9ff). South Africa is part of the Southern African Development Community (SADC) and in this context it is important to ensure that the legislation in the different regions corresponds. One of the objectives of framework legislation is to allow for inter-regional co-ordination and integration of fundamental principles of environmental law. Corresponding environmental framework legislation not only achieves improved co-ordination and enforcement of environmental laws but also the enhancement of intra-regional sustainable development (Barth "Address at seminar on the law of sustainable development" conducted at Pace University School of Law White Plains New York 1995-3-02, http://www.law.pace.edu/landuse/library/barth.html (date of access 2000-01-10); Nel and Du Plessis 8). Environmental framework legislation does not exclude the possibility that each country may provide for its own needs by way of sectoral-specific legislation that may differ between countries to account for differences in legal and administrative regimes.

In order to ensure proper development in the SADC region it is important that SADC countries align their legislation. Some projects are undertaken across borders or by the same developers. Before development can take place, each country's legislation has to be studied. It is also important to ensure that environmental impact assessments (EIAs) undertaken in the region are of a similar standard to ensure harmonious and sustainable regional development.

Both NEMA and the Lesotho Environment Bill provide for the investigation of environmental impacts. The provisions in NEMA are not yet in operation and use is made of the regulations issued in terms of the Environment Conservation Act 73 of 1989 (ECA). However, South Africa is in the process of redrafting its EIA regulations. The Environmental Bill 2000 includes extensive measures dealing with environmental impact assessment (EIA). The purpose of this paper is to make a

comparison between the two systems to determine whether the new South African EIA regulations can be brought in line with the Lesotho Bill.

In this note the environmental rights contained in the South African Constitution and the Lesotho Bill will be compared, after which a brief comparison of the South African and Lesotho legislation dealing with EIA will be given in order to make recommendations for consideration to be included in the new South African EIA regulations.

2 Environmental rights

Section 24 of the Constitution of the Republic of South Africa, 1996 forms the main framework within which the other legislation has to be interpreted. Section 24 provides:

"Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and

(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 degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

Lesotho does not have a similar fundamental right in their Constitution but such a right is included in the Lesotho Environment Bill, which reads as follows:

"4.(1) Every person living in Lesotho –

(a) has a right to a clean and healthy environment; and

(b) has a duty to safeguard and enhance the environment including the duty to inform the Authority of all activities and phenomena that may affect the environment significantly.

(2) Every person may, where the right referred to in subsection (1) is threatened as a result of an activity or omission which is likely to cause harm to human health or environment, bring action against the person whose activity or omission is likely to cause harm to human health or the environment.

(3) The action referred to in subsection (2) may –

(a) seek prevention or discontinuance of the activity or omission, which is likely to cause harm to human health or the environment;

(b) request that the on-going activity be subjected to an environmental audit;

(c) request that the on-going activity be subjected to an (*sic*) environmental monitoring;

(d) request that measures to protect the environment or human health be taken by the person whose activity or omission is likely to cause harm to human health or the environment.

(4) The court shall in exercising its jurisdiction, be guided by the following principles of sustainable development –

(a) the polluter pays principle;

(b) the precautionary principle;

(c) the principle of eco-system integrity;

(d) the principle of public participation in the development policies (*sic*), plans and processes for the management of the environment; and

(e) the principle of inter-generational and intra-generational equity."

In this regard, the bill differs substantially from the fundamental right in the Constitution especially as it places a duty on every person in Lesotho to protect the environment and to inform the relevant authority of activities that may harm or affect the environment. The bill also describes the actions or steps that individuals may take in this regard. In the South African Constitution any person may rely on the fundamental rights and may act on behalf of a group of persons (s 38 of the Constitution) or on behalf of the environment (s 32 of NEMA). The bill lists the principles that the court should take into account while the values contained in the Constitution (ss 1 and 7) and the principles contained in NEMA (s 2) form the basis of the interpretation of section 24.

3 Comparison between South Africa and Lesotho

The South African Constitution, read with the ECA and NEMA, forms the legal framework of environmental legislation in South Africa, while the Environment Bill 2000 will regulate environmental matters in Lesotho. Part V of the Bill regulates issues regarding environmental impact assessment, audit and monitoring.

Various aspects of the South African and Lesotho legislation dealing with EIAs will be compared.

3 1 Definition of EIA

An environmental impact assessment is defined in the Lesotho Bill as "a systematic examination of a project or activity conducted to determine whether or not that project or activity may have adverse impact on the environment" (cl 1). NEMA does not directly refer to EIAs but refers generally to investigation into the environmental impact of activities. Government Notice R1183 (*GG* 18261 of 1997-09-05) refers to environmental impact assessments but does not give a definition. The ECA refers to environmental impact reports but also does not define EIAs.

3 2 Lists of activities

In 1989 ECA was enacted in order to co-ordinate all matters concerning environmental conservation. The Act was partially repealed by NEMA. ECA's sections 21, 22 and 26 and the regulations issued in terms of the Act have been repealed, but the repeal will take effect at a date determined by the minister in the *Government Gazette*. Both ECA and NEMA contain provisions dealing with EIA that will be compared to the Lesotho Bill.

In terms of section 21 ECA the minister may by notice in the *Government Gazette* identify those activities which may in his opinion have a substantial detrimental effect on the environment. Such a list of activities was published on 5 September 1997 (GN R1182 *GG* 18261 of 1997-09-05). Regulations were also issued with regard to matters dealing with environmental impact assessment (GN R1183–1184 *GG* 18261 of 1997-09-05). The Department of Environment Affairs and Tourism (DEAT) published an *EIA Guideline Document* to help with the interpretation of the Act and regulations (Department of Environmental Affairs and Tourism *Guideline Document EIA Regulations.* Pretoria: Department of Environmental Affairs and Tourism (1998), http://www.environment.gov.za/docs/1998/eia.htm [date of access 2000-07-30]).

Section 23 NEMA deals with integrated environmental management. One of the objectives of environmental management is to

> "identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences of alternatives and options for mitigation of activities, with a view to minimising negative

impacts, maximising benefits, and promoting compliance with the principles of environmental management as set out in section 2".

The effects of activities on the environment must receive adequate attention before any action is taken and there should also be adequate and appropriate opportunity for public participation.

The minister or MEC (in concurrence with each other and, where applicable, other relevant ministers) may identify activities which or geographical areas where activities may not commence without authorisation (s 24(1)–(2) NEMA). These activities have to be specified in regulations (s 24(1)(c)).

Existing authorised and permitted activities must be compiled. Compilations of information and maps must be prepared that specify the attributes of the environment in geographical areas. There should also be an indication of the sensitivity, extent, interrelationship and significance of attributes that should be taken into account by organs of state that have to give authorisation for the undertaking of new activities (s 24(1)(d)–(e)). In terms of the Lesotho bill, the Environment Authority and District Development Co-ordinating Committees must, every five years, prepare action plans in which the principal environmental problems must be listed (cls 25–26).

The list of activities for which an EIA should be undertaken is specified in the schedule to the Lesotho bill (cl 27). Nobody may undertake a project or activity without an environmental impact licence (cl 33). The obligation to require environmental impact assessment prior to authorisation is also stated as one of the principles included in the bill (cl 3(l)). NEMA provides that one of the factors that should be taken into account with regard to sustainable development is that "negative impacts on the environment and on people's environmental rights be anticipated, prevented and where they cannot be altogether prevented, are minimised and remedied" (s 2(4)(a)(viii)).

However, the minister may amend the schedule in the bill (eventually the Act) by notice in the *Gazette*. In South Africa the list of activities is specified by way of regulation, which eliminates the trouble involved in parliamentary amendment of an Act. Lesotho has circumvented this by giving the minister the authority to amend primary legislation by way of subordinate legislation.

The listed South African activities include

- the construction or upgrading of, *inter alia*, facilities for commercial electricity generation and supply, nuclear reactors and installations, transportation routes, manufacturing, storage et cetera of hazardous waste, roads, railways, airfields, marinas, harbours, cableways, communication networks, racing tracks, canals and channels, dams, reservoirs for public supply, utilisation of ground or surface water for public water supply, public and private resorts, sewage treatment plants, industrial and military manufacturing of explosives or ammunition;
- change of land use from residential to industrial or commercial use; from light to heavy industrial use; agricultural to any other use; grazing to any other use; nature conservation or zoned open space to any other use;
- concentration of livestock for commercial production;
- intensive husbandry/importation of a plant or an animal that has been declared a weed or an invasive or alien species;
- release of any organism outside its natural area of distribution;
- genetic modification of any organism;
- reclamation of land below the high water mark of the sea and inland water (including wetlands);

- disposal of waste;
- scheduled processes in terms of the Atmospheric Pollution Prevention Act 45 of 1965.

A vast number of activities is listed in the schedule to the Lesotho bill – some are generally formulated and others more specifically. The general projects and activities include "(a) any activity out of character with its surroundings; (b) any structure of scale not in keeping with its surroundings; (c) major changes in land use". The specific activities refer to matters such as urban and rural development, transportation, dams, rivers and water resources, aerial spraying, mining, mineral extraction (quarrying and open-cast), forestry, agriculture, processing and manufacturing industries, energy and electric infrastructure, waste handling, storage et cetera, nature conservation, camp sites, racing and communication facilities. Projects or activities that may affect certain areas or features are also listed, dealing with issues such as selected development areas, protected environments, mountain catchment areas, national monuments and heritage and archaeological sites, graves and burial sites, lakes, caves, indigenous forests et cetera. An interesting activity that is listed is policy that will lead to projects that may have or is likely to have an impact on the environment.

The bill will be applicable to all projects in existence at the commencement of the Act. If a project does not comply with the provisions of the Act, the developer may be required to take remedial measures as prescribed by the relevant authority (cl 31(2)). The South African legislation is silent on this aspect and this gives rise to several interpretation problems. For example, it is uncertain whether the regulations can be applied to activities initiated before the commencement of the ECA regulations and NEMA.

All the listed activities mentioned in Government Notice R1182 are included in the Lesotho bill. However, the Lesotho list is more comprehensive and listed thematically while the South African list's point of departure is the activity. Lesotho also includes mining, forestry (which may fall under change of land use in SA), aerial spraying and changes to the social, cultural and natural protected environment (which may also be covered in the SA regulations by change in land use).

3 3 Role players

3 3 1 Responsible institutions

In South Africa the Department of Environmental Affairs and Tourism (DEAT) is the implementing authority in terms of both ECA and NEMA. However, in terms of ECA and NEMA the approval of EIAs can be given by DEAT, an MEC of a province or a local authority depending on the circumstances (ss 22 and 24 respectively; GN R1184 *GG* 18261 1997-09-05). In some instances the permission to proceed must be given by two authorities, for example in terms of the Development Facilitation Act 67 of 1995, where the tribunal also has to give authorisation for a development project. DEAT has no say in mining activities and the authorisation is given by the Department of Minerals and Energy (in terms of the Minerals Act 50 of 1991). The fact that so many institutions have the power to give authorisation is a problem in South Africa.

However, the Lesotho bill provides for the establishment of an independent Lesotho Environment Authority (cl 9). This authority is to be the principal agency for the management of the environment (cl 10(1)(a)). The authority will be assisted by a technical advisory committee consisting of eight members with experience in

the various fields of environment management (cl 20). One of their functions will be to review and advise on EIAs. The approval of EIAs and environmental impact statements (EISs) and the authorisation and identification of projects, activities, policies and programmes for which an EIA will be necessary, rest with the authority (cl 10(1)(f)–(g)). It is the author's opinion that this is a far better development than the South African fragmentation that exists at this stage.

3 3 2 Applicant

The responsibilities of the applicant and the relevant authority are specifically spelled out in the South African legislation (reg 3 GN R1183). The responsibilities of the applicant in the Lesotho legislation must be derived from the clauses dealing with the application itself.

3 3 3 Consultant

In Lesotho only consultants or experts whose names and qualifications have been approved by the Environment Authority may undertake an environmental impact study (cl 29(6)). In South Africa it is the obligation of the applicant to appoint an independent consultant with expertise in the environment and who is competent to complete the EIA (reg 3(a) and (d) GN R1183).

3 4 Public participation

In terms of South African legislation the applicant must ensure that a proper public participation process is followed during all phases of the project – from the initial plan to the environmental impact assessment. In terms of the Lesotho bill, it seems that the Environment Authority invites inputs from the public at various stages of the project, for example after receiving the project brief and again after receiving the environment impact statement (see the discussion under scoping, EIA and EIS *infra*). However, the participation of the public is invited in both the South African EIA practice and the Lesotho bill. The procedures for public participation are not described in any of the legislation.

3 5 Application

A South African applicant must make an application to the relevant provincial or local authority on the prescribed form (reg 4 GN R1183). The developer will then be informed whether he or she should advertise the application (reg 4(6)). After the application is considered, the relevant authority may request the applicant to submit a scoping report (reg 5(1)). In the case of Lesotho the project brief (scoping report) forms the application (cl 28(1)).

3 6 Scoping

In terms of regulation 5 of GN R1183 a plan of study for scoping must be submitted to the relevant authority – additional information may be requested by the authority. After the plan of study is accepted, the applicant must submit a scoping report (reg 6 GN R1183). This report must include a brief project description, a description of how the environment is to be affected, a description of environmental issues as well as alternatives identified as well as a record of public participation (reg 6(1)). Amendments may be requested (reg 6(2)). After consideration of the scoping report, it can be decided that no further investigation is needed or the applicant can be requested to submit an EIA (reg 6(3)).

In terms of the Environment Bill, a developer (who must bear its own costs – cl 29(7)) must submit a project brief stating the above-mentioned information as

well as the possible products and by-products and their environmental consequences, the number of people that are going to be employed by the project and any other information that may be required (cl 28). The applicant may also be requested to amend his or her brief or to provide additional information. The project may be approved without additional information or the relevant authority may require an EIA if it is of the opinion that the project is likely to have a significant impact on the environment. At this stage the relevant authority may invite written and oral comments from the public and may consult communities in the area where the project is to be situated. There is no requirement that there should be a public participation process during the compilation of the project brief. This differs from the South African position and is a major deficiency in the Lesotho legislation. The development of a project is the crucial phase when the public should be involved.

3 7 EIA and procedures

In terms of the South African legislation an applicant must first submit a plan of study for the environmental impact assessment (reg 7 GN R1183). This should include a description of the environmental issues that require further investigation, a description of feasible alternatives, additional information to determine the potential impacts of the proposed activity on the environment and the method to identify the impact. The proposed method of assessing the significance of these impacts must also be included (reg 7(1)). After the plan of study has been accepted, the applicant must submit an environmental impact report (EIR) (reg 8). In terms of the Lesotho legislation the Environment Authority may make guidelines with regard to a preliminary environment assessment (cl 29(8)).

NEMA provides more information in this regard. The procedures for the investigation, assessment and communication of the potential impact must ensure at least the following (s 24(7)):

- an investigation of the environment likely to be significantly affected by the proposed activity and alternatives to it;
- an investigation of the potential and cumulative impacts of the activity on the environment, socio-economic conditions and cultural heritage, its alternatives and significance and the consideration of the environmental attributes as compiled by government;
- an investigation of the mitigation measures;
- public information and participation in all phases of the investigation and assessment of impacts;
- independent review and conflict resolution;
- reporting on gaps in knowledge, adequacy of methods, underlying assumptions and uncertainties;
- arrangements for monitoring and management of impacts and the effectiveness of these measures;
- co-ordination and co-operation between state organs in the consideration of the EIA report;
- consideration of the principles in section 2 of NEMA.

Additional procedures may be prescribed by the Minister or an MEC (s 24(3)). All regulations must first be submitted in draft format to the Committee for Environmental Co-ordination (s 24(4) read with ss 7–10) who must approve the regulations. Thereafter the regulations must be published in the *Government Gazette*

for comment (s 47). As is stated above, DEAT is in the process of drafting new EIA regulations. Regardless of whether the regulations are to be issued in terms of ECA or NEMA, they will have to be published in the *Government Gazette* for comment. There is no similar procedure in the Lesotho bill.

3 8 EIS/EIR

In terms of the South African legislation an environmental impact report (EIR) must be submitted (reg 8 GN R1183). The report must contain a description of each alternative, the extent and significance and possible mitigation of each impact, a comparative assessment of alternatives and appendices including descriptions of the environment, the activity to be undertaken, public participation, media coverage and any other information included in the plan of study. NEMA does not prescribe requirements for the report, except that it will most probably be expected to address all the procedural issues as set out in section 24(7).

In Lesotho, the developer must submit an EIS 14 days after the completion of the EIA (cl 29). The EIS must describe the same issues as specified in the South African legislation, and must further include a description of the technology, method and processes to be used as well as their alternatives, reasons for selecting the proposed site, an indication of other areas that may be affected, a description of how the information was generated, identification of gaps in knowledge and uncertainties, the social, economic and cultural effects of the project on people and society and the irreversible and irretrievable commitment of resources by the developer (cl 29(5)).

The appointment and certification of consultants as set out in the draft regulations published in 1994 is not included in GN R1182 and GN R1183 (GN 171 *GG* 15529 of 1994-03-04). As is stated above, the Lesotho bill provides for the certification of consultants.

3 9 Transparency

Both the South African legislation and the Lesotho bill state that the environmental impact report or statement is a public document which is open for public inspection (reg 12 GN R1183; cl 30 bill). In both countries the public is invited to make comments. In Lesotho a public hearing may also be held (cl 30).

3 10 Consideration and record of decision

After considering the application, the relevant South African authority may issue the authorisation with or without conditions attached, or may refuse the application. The authorisation may be made subject to a period of validation (reg 9). The relevant authority must issue a record of decision (reg 10 GN R1183).

In terms of the Lesotho bill, the minister may approve the project, require the developer to redesign the project, reject the project or issue an environmental impact licence setting out the terms and conditions necessary to facilitate "sustainable development and sound environmental management" (cl 33(2)). The authority must issue a record of decision (cl 33(3)–(7)).

However, a developer may be requested to submit a new EIS after the licence has been issued if there is a substantial change or modification to the project or if the project poses an environmental threat which was reasonably unforeseen at the time of the first study (cl 34). There is no similar provision in the South African legislation. A new EIA need be done only if the changes in the project can be regarded as upgrading or a change in land use (GN R1182).

3 11 Monitoring and audit

Only the Lesotho bill provides for monitoring and auditing. The relevant authority must, in consultation with the minister, monitor all environmental elements to make an assessment of a possible change in the environment and their possible environmental impacts as well as the operation of an industry, project or activity to determine its immediate and long-term effect on the environment (cl 31).

An environmental inspector in Lesotho may at any time enter land or premises to monitor the environmental effects of the activity (cl 31(3)). There is no similar provision in ECA or NEMA, but the minister may appoint a person to investigate a matter relating to the protection of the environment (s 20).

The Lesotho bill also provides for periodic audits of activities and projects by the relevant authority that are likely to have adverse effects on the environment (cl 32). The authority may require holders of an environmental impact assessment licence, the operator or developer of a project or activity or the owner or holder of legal right in the land, to submit reports on the conformation of the project with the terms and conditions set out in the licence. The above-mentioned persons are further obliged to take all reasonable steps to mitigate undesirable effects not contemplated in the environmental impact statement.

3 12 Reasons and appeal

In terms of the Lesotho bill, aggrieved persons may, within 30 days after being informed of a record of decision, request reasons for the decision. There is no requirement in the South African legislation that reasons must be given, but section 33 of the Constitution states that reasons must be given for administrative actions and this is reiterated in the Promotion of Administrative Justice Act 3 of 2000.

Aggrieved persons in Lesotho may also appeal to the Environmental Tribunal (established in terms of cl 109). The South African legislation provides for an appeal to the minister (s 43 NEMA) or to a provincial authority (reg 11 GN R1183). Under the common law, reasons must be given for administrative actions. NEMA also provides for alternative dispute resolution mechanisms such as conciliation and arbitration (ss 18–19) which do not exclude recourse to the courts. The Lesotho bill does not refer to alternative dispute resolution mechanisms.

3 13 Transferability of EIA

In Lesotho an environmental impact assessment may be transferred to another person in respect of the same project – the relevant authority must, however, be given written notice within 30 days of the transfer (cl 35). No such provision is included in the South African legislation.

3 14 International implications

If an activity will affect the interest of more than one province or traverse international boundaries such as that between South Africa and Lesotho or will affect compliance with obligations resting on the Republic in terms of customary or conventional international law, the South African minister may make regulations stipulating the procedure to be followed (s 24(6)). The Lesotho bill does not have such a provision.

4 Differences

The differences between the South African and Lesotho legislation may be summarised as follows:

South Africa	Lesotho
Constitutional environmental right which includes a duty on the state to ensure sustainable development.	An environmental right is included in the Environmental bill placing *inter alia* a duty on all persons to ensure a sustainable environment.
No definition of EIA but can be derived from sections in NEMA dealing with this aspect.	Defines EIA.
Listed specific activities are the point of departure.	Listed activities are both general and specific and are thematically arranged.
Policy that may affect the environment is not listed as an activity.	Policy that may affect the environment is listed as an activity.
Compilation of information and maps specifying attributes of the environment must be made available.	Lists of environmental problems must be compiled every five years on a national and district level.
Several institutions are involved in the approval of EIAs namely on national, provincial and local level – fragmentation of functions.	The Lesotho Environmental Authority assisted by a technical advisory committee has to approve EIAs.
The responsibilities of the applicant are clearly spelled out.	The responsibilities of the applicant are derived from the clauses dealing with EIA issues.
The appointment of consultants with knowledge and expertise is the obligation of the applicant – there is no formal requirement.	Only consultants whose names and qualifications have been approved by the Lesotho Environmental Authority may be appointed.
Public participation is included from the initial project plan until and after the completion of the final EIA.	Public participation takes place only after a project plan and the EIS have been received. Public meetings may be called.
To involve the public is the obligation of the applicant.	To involve the public is the obligation of the Lesotho Environment Authority.
The application process is initiated on a prescribed form after which a study for scoping must be done. A final scoping report must be completed afterwards.	There is only one step in the Lesotho process, namely the handing in of a project brief, which is very similar to a scoping report in character.
An EIA plan of study must be handed in before the EIA can be done.	The minister may issue guidelines for a preliminary environmental assessment.
The procedures for an EIA are described.	No description of procedures for EIA.

continued

South Africa	Lesotho
Completion of environmental impact report. The contents are described.	Completion of an environmental impact statement. The contents are described but differ in minor aspects from the SA EIR.
There are no prescribed time periods.	Time periods are prescribed.
The fact that an applicant may be requested to submit a new EIS if the project is substantially modified is not included in South African legislation and may give rise to interpretation problems.	An applicant may be requested to submit a new EIS if the project is substantially modified.
There is no explicit provision for the monitoring and auditing of projects.	Provision is made for the monitoring and auditing of projects.
No provision that the EIA may be transferred to another applicant.	The EIA may be transferred to another applicant.
Provision is made for the minister to act in the case of transboundary projects or pollution.	No such provision.

The key differences between the South African and Lesotho legislation are the listing of policy that may affect the environment as an activity, the establishment of a single environmental authority, public participation as well as monitoring and auditing. The fact that policy is not listed as an activity in the South African legislation may be the result of the inclusion of co-operative governance in NEMA. In the discussions preceding NEMA the institution of a single independent environmental authority was discussed. It was not introduced, probably because of the financial implications.

The emphasis on public participation may be due to the history of South Africa where input from the public was totally ignored. In recent years the role of the public in policy-making and the drafting of legislation has become more important. To a large extent this was also the position in Lesotho. However, the history of the Katshe dam indicates the importance of including the public from the initial stages in the project.

5 Similarities

Both the South African and Lesotho legislation have extensive *locus standi* provisions – the South African legislation goes somewhat further than that of Lesotho in that an applicant may act on behalf of a group of persons. Extensive lists of activities for which an EIA is necessary are listed – in the South African legislation in regulations and in the Lesotho bill as an annexure. In both countries no person may undertake a listed activity without the necessary authorisation – non-compliance is an

offence. The investigation of the impact of activities on the environment is regarded as a principle in the legislation of both countries. Although public participation is a prominent feature in both countries, the procedures governing this are not described. In both countries a scoping process must be followed by an EIA process. After the scoping process, the authorities may decide to approve the project without an EIA. In both countries the applicant may be asked to amend his or her EIA and scoping reports. In both countries the EIA can be approved after which a record of decision must be issued. The authorisation may be subjected to conditions. In both countries the EIR/EIS is regarded as a public document open for public inspection. Provision is made for appeal and the giving of reasons.

6 Conclusion

There are similarities and differences between the South African and Lesotho EIA legislation. When considering the differences, it is important to take into account that administrative systems of countries usually differ. South Africa is also a much larger country than Lesotho, where decentralisation may not be seen as of the same importance as in South Africa.

While South Africa is in the process of revising its EIA legislation, it would do well to take note of the legislation in Lesotho, and *vice versa*. There is still time for the two countries to align their legislation as far as possible to avoid conflict in the case of transboundary projects or pollution and to provide developers with cross-boundary projects with more or less the same standards and application procedures. South Africa and Lesotho are in need of development and streamlined procedures can speed up development in the region. A similar standard may also help to ensure sustainable development.

Both the Lesotho and South African legislatures can learn from each other and both countries should take note of what is happening on their doorstep. It is possible to align the South African and Lesotho EIA legislation. Lesotho's idea, for example, of a one-stop institution for the approval of EIAs and an environmental tribunal may be considered for South Africa as well as clearer specification of its listed activities. On the other hand, it must be taken into account that South Africa is a more extensive country than Lesotho which may not make this feasible. The provisions for monitoring and auditing in the Lesotho legislation should also be considered for South Africa. Lesotho, on the other hand, could give consideration to the South African public participation requirements as well as its alternative dispute resolution mechanisms. It could also make provision for transboundary problems. Both countries should consider prescribing procedures for the public participation process. However, in both countries it is a question whether the introduction of such legislation is practicable and financially viable: before ambitious legislation is introduced, all the practical problems should be considered to ensure that the legislation does not become paper law. However, this should not prevent the alignment of legislation in the SADC region or be used as an excuse for failure to achieve this.

WILLEMIEN DU PLESSIS
Potchefstroom University for Christian Higher Education

THE TENANT AND ACTS OF GOD: *REMISSIO MERCEDIS* IN SOUTH AFRICAN LAW

1 Introduction

South African law recognises a general principle of contract whereby any agreement constitutes a contract when the essential requirements for the specific species of contract have been met (Zimmermann and Visser *Southern Cross: civil and common law in South Africa* (1996) 239 ff). In the contract of letting and hiring of immovable property, the landlord undertakes to permit the tenant temporary use and enjoyment of the property in return for an agreed sum of rent (Kerr *The law of sale and lease* (1984) 163; Nagel *et al Commercial law* (2000) 150; Cooper *Landlord and tenant* (1994) 200 and Lotz "Lease" 14 *LAWSA* 147 153). The contract of lease confers various continuous rights and duties on both parties. The nature and extent of these rights are largely governed by the agreement itself, unless otherwise regulated by statute. The landlord's primary obligation in terms of the contract of lease is to permit the tenant undisturbed use and enjoyment of the object of lease for the term of the contract, while the tenant's main obligation is to pay the amount of rent due. Where the landlord fails to honour one or more of his obligations, breach of contract occurs and the tenant becomes entitled to various remedies, such as cancellation of the agreement together with a claim for damages. Where the landlord's failure to honour his contractual agreements does not affect the essence of the agreement, however, termination will generally not be allowed and the tenant will have to avail himself of lesser remedies such as remission of rent. (See Piek and Kleyn "'n Huurder se aanspraak op vermindering van huurgeld terwyl hy in besit van die huursaak is" 1983 *THRHR* 367–382.)

2 Remission of rent

2 1 Definitions

Remission of rent as a contractual remedy has been extensively circumscribed in case law. In *Rubidge v Hadley* 1848 Menz 174 177 the court compared British and South African law concerning remission of rent and came to the following conclusion:

> "By the laws of England, losses for non-use of this kind fall on the tenant, by the law of Scotland they fall on the landlord, and also by Roman-Dutch law, where such losses are occasioned by reason of extraordinary seasons of unfruitfulness, war, fire and acts of God."

In *Commercial Bank v De Pass, Spence and Co* 1870 NLR 10 11 the court stated:

> "Unforeseen accidents such, among others, as war, fire, inundation, or the giving way of dykes and dams, unusual want of fruitfulness, or anything of the kind which deprives the tenant of immediate use, discharges him from payment of full rent. In such cases the rent is diminished or reduced, according to the extent of the injury and the period of non-use, at the discretion of the judge."

In *Zweigenhaft v Rolfes, Nebel & Co* 1903 TH 242 246 Smith J described the remedy in the following terms:

> "A remission may be claimed where the enjoyment of the property for the purposes for which it was let, is hindered or prevented by some vis maior happening without default, actual or constructive, of either party."

And most recently in *Thompson v Scholtz* 1999 1 SA 232 (SCA):

> "*Remissio mercedis* is a remedy of some antiquity. Where a tenant is deprived of or disturbed in the use or enjoyment of the leased property to which he is entitled in terms of the lease, either whole or in part, he can in appropriate circumstances be relieved of the obligation to pay rental, either full or in part; the court may abate the rental due by him *pro rata* to his own reduced enjoyment of the merx."

2 2 Vis maior et casus fortuitus

The common elements in these citations are unforeseen or uncontrollable events, which have a direct and substantially diminishing influence on the tenant's rights of use and enjoyment of the leased property. Although the terms *vis maior* and *casus fortuitus* are well entrenched in South African law, the content and boundaries of these terms have never been clearly defined. In *Greenberg v Meds Veterinary Laboratories (Pty) Ltd* 1977 2 SA 277 (T) 280B–C the court merely referred to *Bayley v Harwood* 1954 3 SA 498 (A) 502 for an authoritative definition of *vis maior* and *casus fortuitus*. Closer inspection reveals that the *Bayley* case quoted a variety of common-law authors on the subject, without establishing an authoritative definition of these concepts. (However, see recently *Gassner NO v Minister of Law and Order* 1995 1 SA 323 (C) 329–330.) Various cases in South African law have, however, confirmed that *casus fortuitus* should be regarded as a species of *vis maior*. (See eg *New Heriot Gold Mining Co v Union Government* 1916 AD 415 433.) "There seems to be no distinction that is relevant for the present purposes between *casus fortuitus* and *vis maior*" (see *Bayley* 505F).

Academic contributors, on the other hand, have made significant progress in defining these concepts. Wille defines *vis maior/vis divina* as some power, force or agency, which cannot be resisted or controlled by any ordinary person (*Landlord and tenant* 220). Cooper echoes Wille's definition by emphasising the elements of resistance and control (*Landlord* 200). Kerr avoids a definition *in toto* and merely remarks that a *numerus clausus* examples of *vis maior* is an unattainable dream (*Sale* 223). The essential requirements for a phenomenon to be classified as either *vis maior* or *casus fortuitus* relate to the unforeseen or uncontrollable nature of the event. (Various concrete examples of *vis maior* have been recognised in South African law. For earlier case law on this topic see Cooper *Landlord* 200. See recently Kerr *Sale* 223 and *Gassner supra*; *Anderson Shipping (Pty) Ltd v Polyius (Pty) Ltd* 1995 3 SA 241 (A); *Van Zyl v Van Biljon* 1978 2 SA 372 (O); *Hare's Bricksfield Ltd v Cape Town City Council* 1985 1 SA 769 (O) and *South African Railways and Harbours v Interland Marketing (Pty) Ltd* 1983 1 SA 1110 (A).) For a natural phenomenon to be regarded as *vis maior*, it has to be of a magnitude which could not have been reasonably foreseen or guarded against. The norms of experience within the locality will also operate as an important consideration.

2 3 Uti frui praestare

Remission of rent has generally been linked to the landlord's obligation to permit the tenant use and enjoyment of the leased property for the term of the lease. In Roman law, this duty was described as *uti frui praestare* (lit to deliver use and enjoyment). Although various Roman law texts discuss the landlord's contractual duty to permit use and enjoyment, the boundaries of the term remain elusive (see eg *D* 19 2 15 2; *D* 19 2 15 4–7; *D* 19 2 25 6; *D* 19 2 33; *CJ* 4 65 8; *CJ* 4 65 18–19).

The controversy surrounding a demarcation of this term has continued into South African law. On the one hand it is proposed that the landlord's contractual obligation to permit use and enjoyment extends only to direct, actual use of the property. On the other hand it has also been argued that indirect financial benefits accruing from the leased property should be included in this term. Hawthorne, in a comprehensive survey of Roman-Dutch authors on this topic, has furthermore indicated that the Roman terminology *uti frui praestare*, was supplanted in Roman-Dutch law by a similar concept, namely *commodus usus* (Hawthorne "The tenant's right to *commodus usus*" 1989 *THRHR* 124–130). The latter term was used in a narrower sense than its Roman law counterpart, but it was not limited to direct actual use of the leased property.

Varied terminology has been used in South African law to define the landlord's contractual obligation to permit use and enjoyment (Piek and Kleyn *Huurder* 369). The boundaries of this duty have escaped definition in South African law (see eg *Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd* 1991 1 SA 796 (W) and *Cape Town Municipality v Table Mountain Aerial Cableway Co Ltd* 1996 1 SA 909 (C)) but some progress was made in *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk* 1987 2 SA 932 (A), where the applicant leased certain premises from the respondent. The main road leading to the premises was diverted as a result of the respondent's mining activities. The diverting of the main road cost the applicant nearly all of its customers, thus resulting in severe financial loss. In this decision Botha JA chose to give an extensive interpretation to the landlord's contractual duty to permit use and enjoyment by allowing a claim for pure financial loss suffered by the tenant as a result of the landlord's actions:

> "Die voorbeeld moet dus gesien word as 'n geval waar die verhuurder inbreuk maak op die huurder se *commodus usus* sonder dat sy optrede 'n daadwerklike of 'n regstreekse fisiese uitwerking op die huurperseel het" (954C).

2 4 Effect

Diminution of the tenant's use and enjoyment on account of unforeseen or uncontrollable events may occur in four ways. These are: the destruction of the object of lease; eviction of the tenant; justifiable abandonment by the tenant and frustration of the intended purpose for which the object was let (Cooper *Landlord* 200). Partial destruction of the object of lease will enable the tenant to claim remission of rent in proportion to his diminished use and enjoyment (see eg *Daly v Chisholm* 1916 CPD 562). Total destruction, on the other hand, will result in termination of the agreement and a claim for damages. The tenant will furthermore be entitled to remission of rent where his physical occupation of the property has been disturbed by premature eviction from it (see *Partridge v Adams* 1904 TS 472 476). A justifiable fear of *vis maior* or *casus fortuitus* will also enable the tenant to claim remission of rent. (See the extensive list of occurrences cited in Wille *Landlord and tenant* 219.) Where the tenant's fear is clearly unfounded, however, abandonment of the property will constitute wrongful termination of the lease. Where the use for which the property had been let was frustrated on account of some unforeseen or uncontrollable event, remission of rent will also be allowed. The onus rests on the tenant to prove the existence of unforeseen or uncontrollable events which have substantially diminished the tenant's use and enjoyment of the leased property (see the *New Heriot* case 438). The diminution must be the direct and immediate result of the above-mentioned occurrences and not merely indirectly connected with them. Remission of rent cannot be claimed where the effect of *vis maior* is indirect; where the loss or diminution may be attributed to the tenant's

fault; where the tenant accepted the risk of accidental destruction or where the risk had already passed to the tenant at the time of destruction. (See eg *Enter Centre Enterprises (Pty) Ltd v Brogneri* 1972 SA 117 (C) 123–124.)

2 5 Continued occupation

In *Arnold v Viljoen* 1954 3 SA 322 (O) the court created a precedent by holding that a tenant had to quit the premises before being able to institute a claim for remission of rent on account of *vis maior* or *casus fortuitus*. The tenant in this case leased a building from a landlord with the aim to use it as a hotel. The inspection authorities refused a licence because certain requirements had not been complied with. The tenant therefore cited substantial diminution of beneficial occupation and demanded remission of rent. In a surprising decision, Van Winsen J decided that the tenant was still obligated to pay the full rent instalment since he had continued to occupy the building (330A–F). According to the judge, the concept of beneficial occupation applied only to claims of damage against the landlord. This decision was followed in a number of cases, but it has endured severe criticism, especially from academics. The main criticism put forward by Piek and Kleyn relates to the content of the term "beneficial use and occupation" (*Huurder* 367–382). After a comprehensive analysis of various decisions in which this divergent view was followed, the authors justifiably conclude that the majority of cases following this view quoted either the *Arnold* case or *Sapro v Schlinkman* 1948 2 SA 637 (A) as authority. These cases furthermore showed that the divergent view offered by *Arnold* had no real foundation in law. In *Steynberg v Kruger* 1981 3 SA 473 (O) 478 Steyn J departed from the *Arnold* case and stated that the tenant will be entitled to remission whether he elects to quit the premises or not. The more acceptable view is to be found in *Ntshiqa v Andreas Supermarket (Pty) Ltd* 1997 1 SA 184 (TkSC) where it was held that it is not obligatory for a tenant to give up possession of the premises before he may claim a remission in rent. (See Nagel *et al Commercial law* (2000) 230–231.)

2 6 Calculation

In leases of agricultural property, a distinction is made between single crop and mixed farming activities. Where a tenant conducts mixed farming on the leased property and only one of a variety of crops is substantially diminished owing to the occurrence of unforeseen or uncontrollable events, a claim for remission of rent will generally not be allowed. The gross profit resulting from the entire use of the property must be taken into account in assessing the amount of remission and the substantial diminution of a single crop will therefore not result in a successful claim for remission of rent. In all other forms of lease, the amount of remission is left to the discretion of the court: "The amount of remission is thus calculated without reference to any claim for damages, but with reference to what is fair in all circumstances" (*Fleming v Johnson & Richardson* 1903 TS 319 325; Wille *Landlord and tenant* 229).

In instances where the total rent instalment has been prepaid, the tenant will be entitled to a claim based on unjustified enrichment, specifically the *condictio causa data causa non secuta* (Kerr *Sale* 224). However, such a claim will be denied if the tenant had knowledge of impending circumstances which could detrimentally affect the harvest (*Schoen v Cutting* 1904 TH 87).

2 7 Legislation

In both the former Cape and Orange Free State provinces, a claim for remission owing to unforeseen or uncontrollable circumstances was expressly excluded by

legislation, while the common-law position as stated in this contribution remained in force in the former Natal and Transvaal. The General Law Amendment Act 8 of 1897 (Cape) stated in section 7 that remission of rent on account of "inundation, tempest, or such like unavoidable misfortune" would not be allowed (Tennant *Statutes of the Cape of Good Hope: 1652 – 1895* (1895) 1601). The wording of this section was severely criticised and attempts were even made to prove that the legislature attempted to alter the common law (Anon "Some controverted points of law" 1911 *SALJ* 165 166). However, in later decisions the courts interpreted the above-mentioned phrase extensively to include a variety of misfortunes. (See Wille *Landlord and tenant* 221.) Section 7 was adopted by the Free State in 1902 with the addition of "war or insurrection" to remove any uncertainty concerning its application (Ord 5 of 1902 s 5). However, between 1977 and 1979 the provisions barring the application of remission of rent in the Cape and Free State were repealed (Pre-Union Statute Law Revision Act 43 of 1977 as well as s 1(1) of the Pre-Union Statute Law Revision Act 24 of 1979). This subsequently led to an interesting situation whereby the common-law position as set out in this section must be presumed to be in force and applicable to the whole of South Africa.

3 Conclusion: But why?

The reader should by now have pondered the relevance of this dusty piece of common law and its applicability to the South African situation at the dawn of the twenty-first century. Once it is understood that a large part of the South African economy is made up of subsistence farmers, who rely on bountiful harvests for their livelihood and survival, the importance of this remedy becomes apparent. By resurrecting this remedy in *Thompson v Scholtz*, the Supreme Court of Appeal has again opened the door to the ever-increasing number of subsistence farmers to claim remission of rent on account of unforeseen or uncontrollable occurrences. The repeal of prohibiting legislation now enables a tenant of agricultural land anywhere in South Africa to employ this remedy where unforeseen or uncontrollable occurrences have caused extensive crop failure. In a country such as South Africa where agriculture remains an important part of the economy, remission of rent could be fruitfully applied to compensate tenants who have lost their livelihood as a result of severe flooding or other acts of God. The remedy could also serve as a useful form of insurance for subsistence farmers who are generally unable to provide proper insurance against unusual weather conditions and the consequent loss of their harvest.

PJ DU PLESSIS
University of South Africa

The natural law of man is the dictate of reason pointing out what things are in their very nature honourable or dishonourable, with an obligation to observe the same imposed by God. As man . . . is a reasonable being, he is further led on to religion and to rational intercourse with his fellow man, the foundation of which is doing unto others as we would that they should do unto us, and keeping one's word . . .

Hugo de Groot Inleyding tot de Hollandsche rechts-geleerdheyt (trans Maasdorp) 1 2 5–6.

VONNISSE

DIE TOETS VIR DELIKTUELE NALATIGHEID ONDER DIE SOEKLIG
Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000 1 SA 827 (SCA); Mkhatswa v Minister of Defence 2000 1 SA 1004 (SCA)

1 Inleiding

Die toets vir deliktuele nalatigheid het in hierdie twee gewysdes onder die loep gekom. Ander kwessies wat sydelingse aandag geniet het, is die plek van nalatigheid in die hiërargie van die delikselemente, asook die verhouding tussen nalatigheid enersyds en onregmatigheid en juridiese kousaliteit andersyds. Die afgelope 34 jaar is die volgende formulering van die toets vir nalatigheid deur appèlregter Holmes in *Kruger v Coetzee* 1966 2 SA 428 (A) 430 as gesaghebbend beskou:

> "For the purposes of liability *culpa* arises if –
>
> (a) a *diligens paterfamilias* in the position of the defendant –
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant failed to take such steps.
>
> This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case. No hard and fast rules can be laid down."

In *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1077 aanvaar appèlregter Olivier egter Boberg (*The law of delict Vol 1 Aquilian liability* (1993) 390) se herformulering van hierdie toets, wat soos volg lui:

> "For the purposes of liability *culpa* arises if –
>
> (a) a *diligens paterfamilias* in the position of the defendant –
>
> (i) would have foreseen harm of the general kind that actually occurred;
>
> (ii) would have foreseen the general kind of causal sequence by which that harm occurred;
>
> (iii) would take reasonable steps to guard against it; and
>
> (b) the defendant failed to take those steps."

Hiermee is in metaforiese sin die *dramatis personae* geïdentifiseer wat in *Sea Harvest* en *Mkhatswa* die hoofrolle sou speel.

2 *Sea Harvest*

Die feite was kortliks die volgende. 'n Onlangs voltooide koelpakhuis, tesame met al die voorrade in die koelkamers, is deur 'n brand vernietig wat ontstaan het toe 'n noodfakkel wat tydens nuwejaarsvierings afgevuur is, daarop geval het. Die eisers, eienaars van sommige van die voorrade in die pakhuis, stel 'n eis om skadevergoeding teen die grondeienaar en huurder van die pakhuis in op grond van laasgenoemdes se beweerde nalatigheid, welke nalatigheid daarin geleë sou wees dat die eisers versuim het om 'n sprinkel-brandbestrydingsisteem in die dak en binneruimte van die koelpakhuis te laat installeer. Daar was algemene instemming dat sodanige sisteem die brand óf sou geblus het, óf minstens onder beheer sou gehou het.

Ten aanvang skets appèlregter Scott die regsposisie ten aansien van onregmatigheid en nalatigheid in die algemeen soos volg (837F–838D):

> "In the course of the past 20 years or more this Court has repeatedly emphasised that wrongfulness is a requirement of the modern Aquilian action which is distinct from the requirement of fault and that the inquiry into the existence of the one is discrete from the inquiry into the existence of the other. Nonetheless, in many if not most delicts the issue of wrongfulness is uncontentious as the action is founded upon conduct which, if held to be culpable, would be *prima facie* wrongful. It is essentially in relation to liability for omissions and pure economic loss that the element of wrongfulness gains importance. Liability for omissions has been a source of judicial uncertainty since Roman times. The underlying difficulty arises from the notion that, while one must not cause harm to another, one is generally speaking entitled in law to mind one's own business. Since the decision in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) the Courts have employed the element of wrongfulness as a means of regulating liability in the case of omissions. If the omission which causes the damage or harm is without fault, that is the end of the matter. If there is fault, whether in the form of *dolus* or *culpa*, the question that has to be answered is whether in all the circumstances the omission can be said to have been wrongful or, as it is sometimes stated, whether there existed a legal duty to act. (The expression 'duty of care' derived from English law can be ambiguous and is less appropriate in this context . . .) To find the answer the Court is obliged to make what in effect is a value judgment based, *inter alia,* on its perceptions of the legal convictions of the community and on considerations of policy . . . It is clear that the same facts may give rise to a claim for damages both *ex delicto* and *ex contractu* so that the plaintiff may choose which to pursue. But a breach of a contractual duty is not *per se* wrongful for the purposes of Aquilian liability . . . Whether the requirement of wrongfulness has been fulfilled or not will be determined in each case by the proper application of the test referred to above."

Vervolgens word die vraag na nalatigheid ondersoek omdat dit volgens die regter "convenient" is om eers met nalatigheid en daarna onregmatigheid te handel: "In the absence of negligence the issue of wrongfulness does not arise" (838H). Na die aanhaal van die formulerings van die toets vir nalatigheid in sowel *Kruger v Coetzee supra* as *Mukheiber v Raath supra*, vervolg regter Scott (839C–G):

> "A reading of the reference cited [in *Mukheiber*] reveals, however, that the learned author's [Boberg se] formulation of the test is in the context of the so-called relative theory of negligence which he advances as being more logical and convenient than what has sometimes been called the absolute or abstract theory. Broadly speaking, the former involves a narrower test for foreseeability, relating it to the consequences which the conduct in question produces, and serves in effect to conflate the test for negligence and what has been called 'legal causation' . . . so as, it is contended, to eliminate the problems associated with remoteness. I do not read the judgment in the *Mukheiber* case to have unequivocally embraced the relative theory of negligence. Indeed, elsewhere in the judgment and when dealing with the issue of causation the Court appears to have applied the test of legal causation: which the strict application

> of the relative theory would have rendered unnecessary . . . Having said this, it should not be overlooked that in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving this issue."

Regter Scott beklemtoon voorts dat daar nie 'n universeel toepaslike formule vir nalatigheid kan wees wat vir alle gevalle geskik is nie, en vervolg (839I–840G):

> "A rigid adherence to what is in reality no more than a formula for determining negligence must inevitably open the way to injustice in unusual cases. Whether one adopts a formula which is said to reflect the abstract theory of negligence or some other formula there must always be, I think, a measure of flexibility to accommodate the 'grey area' case . . . Notwithstanding the wide nature of the inquiry postulated in para *(a)* (i) of Holmes JA's formula – and which has earned the tag of the absolute or abstract theory of negligence – this Court has both prior and subsequent to the decision in *Kruger v Coetzee* acknowledged the need for various limitations to the broadness of the inquiry where the circumstances have so demanded. For example, it has been recognised that, while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable . . . The problem is always to decide where to draw the line, particularly in those cases where the result is readily foreseeable but not the cause. This is more likely to arise in situations where, for example, one is dealing with a *genus* of potential danger which is extensive, such as fire, or where it is common cause there is another person whose wrongdoing is more obvious than that of the chosen defendant. It is here that a degree of flexibility is called for. Just where the inquiry as to culpability ends and the inquiry as to remoteness (or legal causation) begins – both of which may involve the question of foreseeability – must therefore to some extent depend on the circumstances . . . In many cases the facts will be such as to render the distinction clear, but not always. Too rigid an approach in borderline cases could result in attributing culpability to conduct which has sometimes been called negligence 'in the air' . . . Inevitably the answer will only emerge from a close consideration of the facts of each case and ultimately will have to be determined by judicial judgment."

Volgens die regter was die algemene moontlikheid van 'n brand in die koelpakhuis ongetwyfeld redelikerwys voorsienbaar (840H) (die abstrakte of absolute benadering), maar hy verwerp hierdie benadering ten gunste van die relatiewe of konkrete benadering deur te vra of 'n redelike persoon in die posisie van die verweerders die wyse waarop die skade ingetree het, sou voorsien het, dit wil sê die gevaar dat vuur wat van 'n eksterne bron op die dak van die gebou ontstaan het, die gebou aan die brand kon steek (841F). Na 'n ondersoek van die feite beantwoord appèlregter Scott hierdie vraag ontkennend en bevind dat die verweerders nie nalatig was nie (843A–C).

In 'n afsonderlike uitspraak volg appèlregter Streicher 'n ander benadering. Hy bevind naamlik aan die hand van die abstrakte benadering (*Kruger v Coetzee supra*) dat die verweerders wel nalatig was omdat brandskade redelikerwys voorsienbaar was en die redelike persoon stappe sou gedoen het om die skade te voorkom deur die installering van 'n sprinkelstelsel (846D–E). Desnieteenstaande bevind hy dat die verweerders nie aanspreeklik is nie omdat juridiese kousaliteit ooreenkomstig die soepele benadering ontbreek het aangesien nóg die wyse waarop die brandskade ingetree het, redelikerwys voorsienbaar was, nóg het oorwegings van billikheid, redelikheid en regverdigheid geverg dat die skade aan die verweerders toegereken moet word (847D–G).

3 *Mkhatswa*

Die eiser het in 'n plakkerskamp 'n paar kilometer van 'n militêre basis gewoon. 'n Groep soldate van die basis het 'n nabygeleë sjebeen besoek en kortpad deur 'n

plakkerskamp geneem waar 'n geveg met inwoners van die kamp ontstaan het. Een van die soldate het daarop na die basis teruggekeer, besit geneem van 'n militêre vragmotor en 'n aantal gewere en met 'n groep medesoldate 'n weerwraakaanval op die plakkerskamp geloods. In hierdie proses is die eiser met 'n geweerkolf aangerand as gevolg waarvan hy sy regteroog verloor het. Die eiser stel 'n eis teen die verweerder in op grond van die beweerde nalatige versuim van die bevelstruktuur om behoorlike beheer oor soldate in die basis uit te oefen, asook die nalatige versuim van sekere wagte om die uitvaart van bedoelde soldate, en bygevolg die eiser se aanranding, te voorkom.

As vertrekpunt by die ondersoek na aanspreeklikheid weens 'n late, moet volgens appèlregter Smalberger die vraag na nalatigheid eerste, voor onregmatigheid en regsoorsaaklikheid, afgehandel word (1111D–H):

> "Liability for the alleged wrongful omissions is predicated on the principles laid down in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A). However, before those in command of Apex base (and the defendant vicariously) can be held responsible for any wrongful commission, it must be established that they were negligent in failing to guard against and prevent reasonably foreseeable harm to the plaintiff. The question of negligence (ie the failure to comply with the standard of conduct of a reasonable person) is the logical starting point to any enquiry into the defendant's liability, for without proof of negligence the plaintiff cannot succeed in his action and considerations of wrongfulness and remoteness (legal causation) will not arise.
>
> Subject to the qualification to be mentioned later, in determining the issue of negligence I shall apply, as urged upon us by counsel for the plaintiff, the well-known and widely approved test for negligence enunciated by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E–F rather than any later adaptation thereof (see *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) at 1977E–F) which (and I say this despite the fact that I was a party thereto) might give rise to some uncertainty as to what was sought to be conveyed – see in this regard the judgment in the matter of *Sea Harvest* [*supra*] . . ."

Met verwysing na die toets vir nalatigheid in *Kruger v Coetzee supra* en appèlregter Scott se bespreking in *Sea Harvest* van die tempering van die wye aard van die toets in ander appèlhofbeslissings, kom regter Smalberger tot die slotsom (1112G–H) dat

> "whether or not conduct constitutes negligence ultimately depends upon a realistic and sensible judicial approach to all the relevant facts and circumstances that bear on the matter at hand. What also needs to be emphasised is that what is required to satisfy any test for negligence is foresight of the *reasonable* possibility of harm. Foresight of a mere possibility of harm will not suffice".

Die hof se uiteindelike gevolgtrekking is dat nalatigheid by sowel die bevelstruktuur as die wagte ontbreek het omdat, wat die bevelstruktuur betref, die gebeure, soos dit wel plaasgevind het, en die nadeel wat die eiser ervaar het, nie as 'n redelike moontlikheid deur 'n redelike persoon in hul posisie voorsienbaar was nie; en wat die wagte betref, hulle nie onredelik opgetree het deur die soldate uit die basis te laat nie.

4 Kommentaar

Alhoewel ons terdeë van die veeleisende taak van regters bewus is – soos appèlregter Nienaber ("Regters en juriste" 2000 *TSAR* 195) dit stel, is "die regter heelpad onder druk – druk van die massa van werk en druk van kollegas" – en dat regters juis daarom ook kan fouteer, beteken dit nie dat grondige, "ingeligte, gebalanseerde" (*idem* 198) en selfs skerp kritiek teen uitsprake moet uitbly nie, veral nie waar die hoogste hof van appèl sonder enige verduideliking hoegenaamd

gevestigde reg negeer, of appèlregters van een uitspraak tot 'n volgende van standpunt verander, en sodoende 'n klimaat vir regsonsekerheid skep nie.

1 Ten eerste is dit onverstaanbaar dat die hoogste hof van appèl in sowel *Sea Harvest* (837I–838A 838H) as *Mkhatswa* (1111E–F) onomwonde van mening is dat (in die geval van aanspreeklikheid weens 'n late) die vraag na nalatigheid vóór die vraag na onregmatigheid aandag moet geniet – onregmatigheid kom met ander woorde eers ter sprake indien nalatigheid reeds vasstaan (vgl ook *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1077). Hierdie werkswyse is onaanvaarbaar. Daar kan logieserwys net van skuld – in die sin dat 'n persoon vir sy *onregmatige* optrede verwyt word – sprake wees waar 'n persoon onregmatig gehandel het; iemand se optrede is tog nie regtens verwytbaar waar hy regmatig gehandel het nie (sien Neethling, Potgieter en Visser *Law of delict* (1999) 119; Van der Walt en Midgley *Delict: Principles and cases* (1997) 54; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 111). Boberg *Delict* 268 stel dit soos volg:

> "Fault may . . . be described as that element of a delict which induces the law to *impute a man's wrongful conduct to him* in the sense of holding him legally responsible for it . . ." (ons kursivering).

Hierdie korrekte standpunt word tot so onlangs as ses jaar gelede ook nog deur die appèlhof op ondubbelsinnige wyse ten aansien van aanspreeklikheid weens 'n late onderskryf, en, verbasend genoeg, kort na die beslissings in die *Sea Harvest*- en *Mkhatswa*-saak, weer eens deur dieselfde hof bevestig. In *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 364 verklaar appèlregter Olivier naamlik (sien ook Neethling en Potgieter "Deliktuele aanspreeklikheid weens bevrugting as gevolg van 'n nalatige wanvoorstelling: die funksies van onregmatigheid, nalatigheid en juridiese kousaliteit onder die loep" 2000 *THRHR* 164–165):

> " '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."

In *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) 1055 verwoord appèlregter Marais dieselfde gedagte met verwysing na die pas aangehaalde *dictum* in *Administrateur, Transvaal* soos volg:

> "Any attempt to decide whether a particular omission will potentially ground liability by merely measuring it against the standard of conduct to be expected of a reasonable person will fail for a number of reasons. First, that test is sequentially inappropriate. It is, of course, the classic test for the existence of blameworthiness *(culpa)* in the law of delict. *But the existence of culpa only becomes relevant sequentially after the situation has been identified as one in which the law of delict requires action*" (ons kursivering).

Hy laat hierop in 'n voetnoot volg:

> "It would of course be permissible, in an appropriate case, where it seems clear that, on any view of the scope of such legal duty to act as could conceivably be imposed in the first phase, the defendant has not behaved in a blameworthy fashion according to the traditional test for *culpa*, to omit the first phase, *to assume against the defendant that he was not free in law to refrain from any action*, but to acquit him of liability because of the absence of any *culpa* (ons kursivering)."

Dit is jammer dat die hoogste hof van appèl in *Sea Harvest* en *Mkhatswa*, sonder enige verduideliking hoegenaamd, 'n gevestigde grondbeginsel van die deliktereg so radikaal omverwerp. Hierdeur vermag die hof dan tog die "juridies onmoontlike" omdat selfs 'n volkome regmatige handeling as nalatig bestempel sou kon word. 'n

Mens kan maar net vertrou dat die korrekte benadering in *Administrateur, Transvaal supra* en *Bakkerud supra* in die toekoms sal seëvier.

2 In die lig van die voorgaande sou die korrekte benadering in beide onderhawige beslissings gewees het om eers vir onregmatigheid te toets (of minstens te veronderstel dat daar wel 'n regsplig op die verweerder(s) gerus het om positief op te tree: sien *Bakkerud supra* 1055) en daarna, indien nodig, vir nalatigheid. Die korrekte benadering tot die onregmatigheidsvraag by aanspreeklikheid weens 'n late word wel deur appèlregter Scott in *Sea Harvest* uiteengesit (sien 837F–838D, hierbo aangehaal). Hiervolgens kan 'n late net onregmatig wees as daar in die besondere omstandighede 'n regsplig op die dader gerus het om positief op te tree om die intrede van skade te verhoed, en hy nagelaat het om die regsplig na te kom (sien ook *Bakkerud* 1054–1056). Of sodanige regsplig bestaan, word beantwoord aan die hand van die regsopvattinge van die gemeenskap. By hierdie beoordeling moet alle faktore wat volgens die *boni mores* op die regsplig kan dui, oorweeg word (sien bv *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597; *Administrateur, Transvaal supra* 358 363–364).

In *Sea Harvest* dui veral twee faktore in die algemeen op die bestaan van 'n regsplig aan die kant van die verweerders om die eisers se skade deur brand te voorkom het, te wete beheer oor 'n potensieel gevaarlike voorwerp ('n koelpakhuis wat aan die brand kon raak en skade aan huurders se voorrade in koelkamers kon veroorsaak) en die bestaan van 'n besondere (kontraktuele) verhouding tussen die partye (sien in die algemeen Neethling, Potgieter en Visser *Delict* 62–65 67–68). Hierdie twee faktore was op sigself egter nie noodwendig voldoende om *in casu* 'n regsplig te laat ontstaan het om voorkomende maatreëls te neem nie. Die feite van die besondere geval, tesame met al die toepaslike omstandighede, moet die deurslag gee of daar redelikerwys van die verweerder verwag kon word om op te tree (sien *Administrateur, Transvaal supra* 361), dit wil sê om stappe te doen om die intrede van brandskade te voorkom (*Sea Harvest* 833–836). Die kernvraag in *Sea Harvest* was of daar 'n regsplig op die verweerders gerus het om 'n sprinkelsisteem in die gebou te laat installeer om brandskade te voorkom. Onses insiens was dit nie die geval nie, en wel om die volgende redes: Die verweerders het van deskundige raadgewende ingenieurs gebruik gemaak om die koelpakhuis te ontwerp; die bouplanne is deur die hawe-ingenieur goedgekeur; die gebou is uiteindelik as 'n "lae-risiko"-koelpakhuis geklassifiseer waarvoor 'n sprinkelsisteem nie vereis word nie (nieteenstaande die feit dat die hoof van die stadsraad se brandweerafdeling dit aanvanklik as 'n "moderate risk storage" beskou het waarvoor 'n sprinkelsisteem wel vereis word); geen koelpakhuis in Suid-Afrika, met die moontlike uitsondering van een of twee, is met 'n sprinkelsisteem toegerus nie; koelpakhuise het in die algemeen 'n goeie reputasie wat brand betref; die afvuur van fakkels in die hawegebied is regtens verbode; en geen fakkel het nog ooit 'n brand in die hawe- en omliggende gebied veroorsaak nie. Die verweerders het gevolglik nie onregmatig opgetree nie; anders gestel, hulle optrede was in die lig van die omstandighede van die geval redelik en nie *contra bonos mores* nie. So gesien, was dit dus onnodig om die moontlike nalatigheid van die verweerders hoegenaamd te oorweeg.

In *Mkhatswa* daarenteen was daar na ons mening wel 'n regsplig op die bevelstruktuur om die ingetrede nadeel te voorkom. Weens die besondere verhouding tussen bevelvoerder en ondergeskikte in weermagverband, asook uit hoofde van die besondere amp van persone in so 'n bevelstruktuur (sien Neethling, Potgieter en Visser *Delict* 67–68), het daar 'n plig op die bevelstruktuur gerus om dissipline te handhaaf, onder andere deur duidelike riglyne in hierdie verband – ook oor verlof

– voor te skryf. Dit behoef geen betoog nie dat die bevelstruktuur *in casu* hierdie plig verbreek het (sien *Mkhatswa* 1110–1111), en bygevolg onregmatig gehandel het. Wat die wagte betref, het onregmatigheid egter ontbreek omdat hulle nie geweet het dat die betrokke soldate die kamp ongemagtig verlaat het nie (vgl Neethling, Potgieter en Visser *Delict* 45 60 vn 119 63 vn 126 oor die rol wat die *wete* of *kennis* van die dader by die onregmatigheidsvraag by 'n late speel), hetsy omdat die betrokke soldate die kamp nie deur die bewaakte hek verlaat het nie, hetsy omdat die wagte nie spesifieke opdrag gehad het om die deurgang van die soldate te verhinder nie (1114). Gevolglik het 'n regsplig om voorkomend op te tree by hulle ontbreek en word hulle gedrag tereg deur die hof as redelik bestempel (1114H). Slegs wat die onregmatige versuim van die bevelstruktuur betref, was dit dus nodig om nalatigheid te ondersoek. Hier verdien die hof se gevolgtrekking instemming dat die redelike moontlikheid van nadeel nie voorsienbaar was nie en dat nalatigheid bygevolg ontbreek het.

Vervolgens kom die toets vir nalatigheid asook die verhouding tussen nalatigheid en juridiese kousaliteit aan die orde. Daar bestaan in hoofsaak twee uiteenlopende sieninge oor die aard van die nalatigheidstoets (sien Neethling, Potgieter en Visser *Delict* 137–139). Enersyds is daar die abstrakte (of absolute) benadering waarvolgens daar gevra word of benadeling van andere in die algemeen redelik voorsienbaar was (bv *Botes v Van Deventer* 1966 3 SA 182 (A); *Herschel v Mrupe* 1954 3 SA 464 (A) 474; *Groenewald v Groenewald* 1998 2 SA 1106 (SCA) 1112). Die vraag of 'n dader vir 'n spesifieke gevolg aanspreeklik is, word beantwoord met verwysing na juridiese kousaliteit (sien hieroor in die algemeen Neethling, Potgieter en Visser *Delict* 181 ev). Andersyds is daar die konkrete (of relatiewe) benadering waarvolgens 'n dader se handeling net as nalatig beskou kan word indien die spesifieke nadelige gevolg redelikerwys voorsienbaar was (sien *Ablort-Morgan v Whyte Bank Farms (Pty) Ltd* 1988 3 SA 531 (OK) 536; vgl Boberg *Delict* 276–277). Die streng toepassing van hierdie benadering maak volgens aanhangers daarvan (vgl *idem* 381) 'n ondersoek na juridiese kousaliteit onnodig.

Die toepassing van hierdie twee benaderings het 'n interessante verloop gehad vanaf *Kruger v Coetzee supra*, deur *Mukheiber v Raath supra* en die *Sea Harvest*-saak, tot by voltooiing van die kringloop in *Mkhatswa*. Dit blyk uit die regspraak dat *Kruger v Coetzee* (sien Holmes AR se formulering hierbo) as voorbeeld van die abstrakte benadering beskou word (sien *Sea Harvest* 840A 845E–I; *Mkhatswa* 1121C–D). Hierdie wye benadering is in *Mukheiber v Raath supra* getemper deur 'n onomwonde onderskrywing van die relatiewe benadering soos geformuleer deur Boberg *Delict* 390 (sien aanhaling hierbo), wat streng gesproke juridiese kousaliteit in die ban doen maar tog nie deur appèlregter Olivier ten volle deurgevoer is nie omdat hy steeds aanspreeklikheid deur middel van juridiese kousaliteitsmaatstawwe beperk (sien Neethling en Potgieter 2000 *THRHR* 167–168; *Sea Harvest* 839E–F, hierbo aangehaal).

In *Sea Harvest* (*ibid*) sluit appèlregter Scott by hierdie vertolking van die uitspraak in *Mukheiber* aan aangesien hy beklemtoon dat die uitspraak steeds ruimte laat vir die toepassing van juridiese kousaliteit. Nietemin is die wye abstrakte benadering van *Kruger v Coetzee supra* volgens die regter in latere appèlhof-uitsprake meer konkreet begrens, soos deur die beginsel dat die presiese wyse waarop die skade ingetree het, nie voorsienbaar hoef te gewees het nie, maar wel die algemene aard daarvan (*Kruger v Van der Merwe* 1966 2 SA 266 (A); *Minister van Polisie en Binnelandse Sake v Van Aswegen* 1974 2 SA 101 (A) 108; *Sea Harvest* 840B). Regter Scott se siening dat daar geen universeel geldende formule vir

nalatigheid is wat vir elke geval geskik is nie, weerhou hom daarvan om vir een van vermelde twee benaderings kant te kies. Volgens hom is die ware kriterium vir nalatigheid of die gewraakte optrede in die besondere omstandighede te kort skiet aan die standaard van die redelike persoon (839F–G). Desnietemin pas hy tog *in casu* die relatiewe benadering tot nalatigheid toe (841F). Hierteenoor laat appèlregter Streicher in 'n minderheidsuitspraak in *Sea Harvest* geen twyfel oor sy voorkeur nie. Hy volg naamlik die abstrakte benadering in *Kruger v Coetzee supra* en *Groenewald supra*, en begrens aanspreeklikheid dan deur middel van die soepele benadering tot juridiese kousaliteit.

In *Mkhatswa* is appèlregter Smalberger duidelik nie gelukkig oor die onsekerheid wat die uitspraak in *Mukheiber* moontlik tot gevolg sou kon hê nie (alhoewel hy met laasgenoemde uitspraak saamgestem het). As uitgangspunt pas hy die nalatigheidstoets soos geformuleer in *Kruger v Coetzee supra* toe (1111G), maar sluit aan by die beperkings daarvan wat deur appèlregter Scott in *Sea Harvest* uitgewys is. Hy beklemtoon nietemin dat nalatigheid die voorsienbaarheid van die redelike moontlikheid van nadeel vereis (1112H).

Bostaande uiteenlopende beskouings oor die formulering en toepassing van die nalatigheidstoets deur die hoogste hof van appèl skep uiteraard 'n klimaat vir regsonsekerheid (soos Smalberger AR self uitwys: 1111H) en is daarom te betreur. Waaroor daar wel sekerheid bestaan, is dat die standaard van die redelike persoon toegepas moet word en dat die voorsienbaarheid van die redelike moontlikheid van nadeel vereis word. Na ons mening is die konkrete of relatiewe benadering te verkies en wel om die volgende oorwegings: Soos Boberg *Delict* 276–279 tereg aanvoer, kan die vraag of die redelike persoon anders as die dader in die betrokke geval sou opgetree het om benadeling te voorkom, slegs sinvol beantwoord word met verwysing na die nadelige gevolg of gevolge wat inderdaad redelikerwys voorsienbaar was (en nie net met verwysing na skade in die algemeen nie, soos deur die formulering in *Kruger v Coetzee supra* vergestalt). Alleen met inagneming van hierdie gevolg(e), kan weloorwoë besluit word welke stappe die redelike persoon sou gedoen het of welke voorsorgmaatreëls hy sou getref het (indien enige) om die gevolg(e) te voorkom (Van der Merwe en Olivier *Onregmatige daad* 143; Visser "Denkmodelle oor deliktuele aanspreeklikheid" 1977 *De Jure* 382 ev; Neethling, Potgieter en Visser *Delict* 138). Dit beteken nie dat die presiese aard en omvang van die skadelike gevolg(e), of die presiese wyse waarop die skade ingetree het, redelikerwys voorsienbaar hoef te gewees het nie. Dit is voldoende as die algemene aard van die gevolg(e) en van die wyse waarop dit ingetree het, aldus voorsienbaar was (sien bv *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 765; Boberg *Delict* 278–279). Hierdie weergawe van die konkrete benadering word ook deur appèlregter Olivier in *Mukheiber supra* (839, hierbo aangehaal) gevolg, en, ten spyte daarvan dat appèlregter Scott in *Sea Harvest* nie 'n voorkeur vir óf die abstrakte óf die konkrete benadering wou uitspreek nie, tog by implikasie deur hom aanvaar (sien 840A–B, hierbo aangehaal) en *in casu* toegepas. In *Mkhatswa* verwys appèlregter Smalberger op sy beurt ook met goedkeuring na appèlregter Scott se pas gestelde standpunt in *Sea Harvest* (terwyl hy as uitgangspunt die abstrakte benadering van *Kruger v Coetzee supra* verkies).

Daar moet egter beklemtoon word, soos ook duidelik in *Sea Harvest* (839D–F, hierbo aangehaal) en *Mkhatswa* (1111F, hierbo aangehaal) te kenne gegee is, dat aanvaarding van die konkrete of relatiewe benadering nie inhou dat juridiese kousaliteit, veral by verwyderde gevolge ("remote consequences"), nie meer 'n belangrike rol as aanspreeklikheidsbegrensingsmaatstaf te speel het nie (sien Neethling en

Potgieter 2000 *THRHR* 165–168). Trouens, hierdie twee beslissings laat geen twyfel nie dat die hoogste hof van appèl regsoorsaaklikheid tereg (steeds) as 'n onontbeerlike, selfstandige delikselement ag (sien hieroor Neethling, Potgieter en Visser *Delict* 181 ev) – 'n standpunt wat op een lyn met die posisie in ander moderne regstelsels is (sien Spier en Haazen "Comparative conclusions on causation" in Spier (red) *Unification of tort law: Causation* (2000) 127 ev). Sodoende word die onsekerheid wat die uitspraak in *Mukheiber supra* in hierdie verband kon veroorsaak het (sien Neethling en Potgieter 2000 *THRHR* 165–168), nou (hopelik finaal) opgeklaar.

J NEETHLING
JM POTGIETER
Universiteit van Suid-Afrika

UITBREIDING VAN DIE TOEPASSINGSGEBIED VAN DIE AKSIE VAN AFHANKLIKES

Santam Bpk v Henery 1999 3 SA 421 (SCA); Amod v Multilateral Motor Vehicle Accidents Fund (Commissioner for Gender Equality Intervening) 1999 4 SA 1319 (SCA)

1 Inleiding

Dit is gevestigde reg dat die afhanklikes van 'n persoon wat op onregmatige en skuldige wyse gedood is, skadevergoeding vir verlies van onderhoud met die *actio legis Aquiliae* van die dader kan verhaal (sien Neethling, Potgieter en Visser *Law of delict* (1999) 283 ev; Burchell *Principles of delict* (1993) 233 ev; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 332 ev). Die belangrikste vereiste vir die afhanklike se aksie – altans voor die beslissings in die onderhawige twee sake – was dat die oorledene, terwyl hy geleef het, 'n sogenaamde *gemeenregtelike* onderhoudsplig teenoor die afhanklike moes gehad het (sien bv *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Santam Bpk v Fondo* 1960 2 SA 467 (A)). Sodanige onderhoudsplig kon óf weens 'n wettige huwelik óf weens bloedverwantskap ontstaan (sien Neethling, Potgieter en Visser *Delict* 278). Hierdie standpunt het tot gevolg gehad dat die howe geweier het om die aksie van afhanklikes toe te staan in byvoorbeeld gevalle waar daar in die afwesigheid van 'n "wettige" huwelik (soos by die inheemsregtelike gewoonteverbintenis), net 'n kontraktuele plig tot onderhoud aan die kant van die oorlede broodwinner bestaan het (bv *Nkabinde v SA Motor and General Insurance Co Ltd* 1961 1 SA 302 (N); *Santam Bpk v Fondo supra*. Soos te begrype, is hierdie siening aan skerp kritiek onderwerp (sien Neethling, Potgieter en Visser *Delict* 284 vn 33 35; *Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 825 (ZS); *Henery* 429A–B) en kon verwag word dat dit in die lig van die waardes wat die Grondwet 106 van 1996 onderlê, deur die hoogste hof van appèl hersien sou word.

2 *Henery*

Die eerste geleentheid het hom voorgedoen in die *Henery*-saak. Hier was die geskilpunt of 'n geskeide vrou wat kragtens 'n hofbevel op onderhoud van haar vorige man geregtig is, die aksie van afhanklikes weens sy dood tot haar beskikking het, met ander woorde, 'n geval waar die gemeenregtelike vereiste van 'n wettige huwelik ontbreek het. Appèlregter Nienaber bevestig dat so 'n vrou gemeenregtelik geen aanspraak weens verlies van onderhoud het teen die dader wat vir haar man se dood verantwoordelik is nie (427I–428A; sien ook *Santam Bpk v Fondo supra* 472–473 – *obiter*). Die vraag is desnietemin na die juistheid van hierdie standpunt (429B–D)

> "wat die geskeide vrou ondanks die reg op onderhoud wat sy aan die Hofbevel ontleen 'n aksie teen die dader sou ontsê. In effek beteken die *obiter dictum* [in *Fondo supra*] dat haar eis om vergoeding, waar haar onderhoud vanweë die dood van haar gewese man in gedrang kom, regtens nie erken word nie; anders gestel, dat haar onbetwiste reg op onderhoud, anders as dié van ander afhanklikes, regtens nie teen sodanige optrede as beskermingswaardig geag word en dat die optrede van die dader dus nie teenoor haar as onregmatig beskou word nie".

Regter Nienaber besluit om die aanspraak van die vrou oor die boeg van aanspreeklikheid weens suiwer ekonomiese verlies te gooi aangesien die onderhoudsverlies wat sy ondervind, suiwer ekonomies van aard is (430C–J; sien ook Neethling, Potgieter en Visser *Delict* 294 vn 113; Boberg *The law of delict Vol 1 Aquilian liability* (1984) 103–104). In verband met die onregmatigheidsvraag in hierdie verband word met goedkeuring na die volgende *dictum* in ons boek *Deliktereg* (1996) 288–289 verwys (430E–F):

> "Die maatstaf wat by hierdie beoordeling aangewend moet word, is die algemene redelikheids- of *boni mores*-onregmatigheidskriterium. Soos bekend, vereis dié kriterium dat die hof 'a value judgement embracing all the facts and involving considerations of policy' moet uitspreek. Dit word gewoonlik beskryf as die 'policy-based aspect of the 'duty of care' concept, by means of which the scope of delictual liability is judicially controlled'. Die *boni mores*-kriterium behels basies 'n noukeurige afweging van die belange van die betrokke partye met inagneming van die gemeenskapsbelang."

Die toepassing van hierdie benadering en gedagtegang bring die regter by die slotsom dat daar geen gegronde rede bestaan om iemand in die eiseres se posisie in beginsel haar aksie te ontsê nie. Hy verklaar (430F–J):

> "[Daar is] in my gemoed weinig twyfel dat die gemeenskapsbelang verg dat 'n geskeide vrou se aanspraak op onderhoud, net soos dié van enige ander afhanklike, beskermingswaardig is. Logies, regspolities en op billikheidsgronde bestaan daar na my mening geen rede om die geval van die geskeide vrou van dié van ander afhanklikes te onderskei nie; dat die bron van die reg in die een geval gemeenregtelik en in die ander statutêr is, kom nie daarop aan nie – trouens, die statutêre verlening van die reg op onderhoud aan die geskeide vrou is op sigself die produk van langdurige regsontwikkeling gegrond op die gemeenskapsoortuiging van wat reg en billik is. Die onderhoud *post* huwelik is in 'n sin bloot die voortsetting van die man se onderhoudsplig *stante matrimonio*. Akademiese skrywers begunstig omtrent almal die verlening van so 'n aksie. En die vrees wat soms om regspolitieke redes teen die toestaan van 'n aksie om suiwer ekonomiese verlies uitgespreek word ('liability in an indeterminate amount, for an indeterminate time to an indeterminate class') geld nie hier nie."

3 *Amod*

Hierdie saak het 'n tweede geleentheid gebied om die gemeenregtelike posisie ten aansien van die aksie van afhanklikes te hersien. In *Amod* was die vraag of die afhanklike wat volgens Moslem-gebruik met die oorledene getroud was, 'n eis

weens onderhoudsverlies kon instel teen die deliksplegger (in effek die Multilaterale Motorvoertuigongelukfonds) wat vir die oorledene se dood verantwoordelik was.

Uitgaande van die standpunt dat die aksie van afhanklikes 'n soepele remedie is wat by moderne omstandighede aangepas kan word (1325C), verwerp hoofregter Mahomed die gewraakte bevinding in *Santam v Fondo supra* dat slegs 'n huwelik wat volgens die gemenereg wettig is, bedoelde aksie fundeer (1327A–D). Hy verklaar (1327E–F):

> "In my view, the correct approach is not to ask whether the customary [Muslim] 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. This is the test adopted by this Court in *Santam Bpk v Henery*."

Die hof vat die algemene beginsels in *Henery* soos volg saam (1326A–B):

> "(a) The claimant for loss of support resulting from the unlawful killing of the deceased must establish that the deceased had a duty to support the dependant.
>
> (b) It had to be a legally enforceable duty.
>
> (c) The right of the dependant to such support had to be worthy of protection by the law.
>
> (d) The preceding element had to be determined by the criterion of *boni mores*."

Toegepas op die onderhawige geval, kom die hoofregter tot die gevolgtrekking dat ingevolge die Moslem-huwelik, wat 'n kontrak daarstel, die oorledene 'n plig gehad het om sy afhanklike te onderhou, welke plig regtens afdwingbaar was (1326F–G). Die kernvraag is nou of die afhanklike se reg op onderhoud *in casu* regtens erkenning en beskerming verdien. Die regter antwoord instemmend, om die volgende redes: Die huwelik was *de facto* monogaam, is streng volgens die voorskrifte van 'n belangrike godsdiens in die openbaar voltrek en is in ooreenstemming met die etos van verdraagsaamheid, pluralisme en godsdiensvryheid van die nuwe konstitusionele bedeling. Gevolglik verg die *boni mores* dat die reg op onderhoud van 'n afhanklike in sodanige Moslem-huwelik beskerm moet word. Regter Mahomed verwoord dit soos volg (1329E–H):

> "I have no doubt that the *boni mores* of the community at the time when the cause of action arose in the present proceedings would not support a conclusion which denies a duty of support arising from a *de facto* monogamous marriage solemnly entered into in accordance with the Muslim faith any recognition in the common law for the purposes of the dependant's action; but which affords to the same duty of support arising from a similarly solemnised marriage in accordance with the Christian faith full recognition in the same common law for the same purpose; and which even affords to polygamous marriages solemnised in accordance with African customary law exactly the same protection for the same purpose (by virtue of the provisions of s 31 of the Black Laws Amendment Act 76 of 1963, which reverses the consequences of the *Fondo* judgment in respect of customary marriages). 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. The *boni mores* of the community would at that time support the approach which gave to the duty of support following on a *de facto* monogamous marriage in terms of the Islamic faith the same protection of the common law for the purposes of the dependant's action as would be accorded to a monogamous marriage solemnised in terms of the Christian faith."

Die regter wil hom nie uitlaat oor die vraag of beskerming ook sou geld in die geval waar die oorledene 'n party tot 'n poligame Moslem-huwelik was nie (1330B–D).

Ten slotte beklemtoon hoofregter Mahomed dat die uitspraak nie alle kontraktuele onderhoudsverpligtinge by die aksie van afhanklikes insluit nie, maar soos volg beperk word (1331C–D):

> "[T]he defendant must show that:
>
> (a) the deceased had a legally enforceable duty to support the dependant *and*
>
> (b) that it was a duty arising from a solemn marriage in accordance with the tenets of recognised and accepted faith *and*
>
> (c) it was a duty which deserved recognition and protection for the purposes of the dependant's action.
>
> The dependant concerned would not succeed by establishing (a) alone. The requirement in (a) is a *necessary* condition in terms of *Warneke*'s case but is not a *sufficient* condition."

Die afhanklike se eis word gevolglik toegestaan.

4 Kommentaar

Die onderhawige twee sake demonstreer dat die aksie van afhanklikes, anders as wat voorheen in die regspraak te kenne gegee is, nie beperk is tot gevalle waar daar 'n sogenaamde gemeenregtelike onderhoudsplig bestaan nie (maw gevalle waar die plig uit 'n "wettige" huwelik en bloedverwantskap spruit), maar soepel genoeg is om by veranderde omstandighede aangepas te word. Gevolglik was dit moontlik om 'n onderhoudsplig te erken wat uit sowel 'n hofbevel as 'n Moslem-huwelik voortgespruit het.

Terwyl hoofregter Mahomed (in *Amod*) se vertolking (1326A–B; hierbo aangehaal) van die beginsels wat volgens *Henery* in die huidige verband toepassing vind, in die algemeen instemming verdien, kom dit tog voor of sy uiteensetting in vier elemente die aangeleentheid onnodig kompliseer. In die eerste plek kan (a) en (b) sinvol saamgevat word deur eenvoudig te vra of die oorledene 'n regsplig (maw 'n regtens afdwingbare plig) gehad het om die afhanklike te onderhou. Indien wel, het die afhanklike 'n reg op onderhoud, as keersy van die regsplig tot onderhoud, teenoor die oorledene gehad. Vervolgens moet bepaal word of dié reg op onderhoud – afgesien van die afdwingbaarheid daarvan *inter partes* – ook beskermingswaardig teen inmenging deur buitestanders geag word. By hierdie beoordeling word die *boni mores*- (onregmatigheids-) toets toegepas (elemente (c) en (d)).

Die ondersoek na die beskermingswaardigheid van die afhanklike se reg op onderhoud teen inbreukmaking deur derdes, onderstreep die feit dat 'n mens by die aksie van afhanklikes met 'n onregmatige daad teen die afhanklike te make het, en nie – soos ten onregte deur die regspraak te kenne gegee word (sien bv *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 837–838; *Henery* 429E–I; Neethling, Potgieter en Visser *Delict* 283–284; Van der Merwe en Olivier *Onregmatige daad* 345) – met 'n delik teenoor die broodwinner nie. Alhoewel appèlregter Nienaber hom nie in *Henery* 429J–430A hieroor wou uitspreek nie, het die tyd miskien tog nou aangebreek dat die hoogste hof van appèl sy foutiewe standpunt in heroorweging neem.

Uiteraard kan 'n regsplig tot onderhoud – die korrelate reg wat ook teen derdes beskerming geniet – uit enige regserkende bron ontstaan (vgl ook *Henery* 430F–J, hierbo aangehaal). Só is erkenning al verleen aan 'n *wettige huwelik* (wat nie beperk

is tot 'n burgerlike huwelik wat ingevolge die Huwelikswet 25 van 1961 tot stand gekom het nie maar in *Amod* uitgebrei is tot enige "solemn marriage in accordance with the tenets of recognised and accepted faith"; en let ook daarop dat inheemsregtelike huwelike nou statutêr wettig is: sien die Wet op Erkenning van Gebruiklike Huwelike 120 van 1998), *bloedverwantskap* (sien Neethling, Potgieter en Visser *Delict* 285–286), 'n *hofbevel* (*Henery*) en 'n *statuut* (a 31 van die Wysigingswet op Swart Wetgewing 76 van 1963) as sodanige bronne. Die vraag is nou of 'n onderhoudsplig/reg wat bloot uit 'n *kontraktuele onderneming* spruit en nie deur een van genoemde kategorieë gerugsteun word nie, ook teen aantasting deur derdes beskermingswaardig geag moet word. Hier beweeg 'n mens op die gebied van deliktuele aanspreeklikheid weens bemoeiing met 'n kontraktuele verhouding (sien Neethling, Potgieter en Visser *Delict* 308 ev) wat weens die onstoflike aard van die belange wat hier op die spel is (ook dié in onderhoud), deurgaans as 'n vorm van suiwer ekonomiese verlies geld (vgl *Henery* 430; hierbo aangehaal). Alhoewel die nalatige bemoeiing met 'n kontraktuele verhouding in beginsel Aquiliese aanspreeklikheid fundeer, moet nietemin beklemtoon word dat nie elke feitelike inwerking op 'n kontraktuele (onderhouds)prestasie prinsipieel onregmatig is nie. Net soos by aanspreeklikheid weens suiwer ekonomiese verlies (Neethling, Potgieter en Visser *Delict* 296), moet telkens aan die hand van die *boni mores* vasgestel word of daar 'n regsplig op die dader gerus het om die afhanklike se onderhoudsverlies te vermy; anders gestel, of die afhanklike se reg op onderhoud as beskermingswaardig beskou word. Of dit die geval is, hang van die omstandighede van elke geval af. Wat onses insiens 'n belangrike rol behoort te speel, is die aard van die kontraktuele verhouding wat die onderhoudsplig/reg fundeer. Daarom het die feit dat die Moslem-huwelik nie net 'n "gewone" kontraktuele verhouding behels nie maar uit 'n "solemn marriage in accordance with the tenets of recognised and accepted faith" voortspruit, en dat die swart gewoonteregtelike verbintenis die produk van 'n inheemsregtelik erkende praktyk is, die deurslag gegee om die betrokke reg op onderhoud van die afhanklike teen aantasting deur derdes te beskerm. (Alhoewel Mahomed HR in *Amod* die vraag ooplaat of 'n afhanklike in 'n poligame Moslem-huwelik haar onderhoudsaanspraak teenoor derdes kan afdwing (1330B–C; vgl Rautenbach en Du Plessis "The extension of the dependant's action for loss of support and the recognition of Muslim marriages: The saga continues" 2000 *THRHR* 313), is ons van mening dat daar in hierdie opsig in beginsel geen verskil tussen die swart gewoonteregtelike verbintenis en die Moslem-huwelik is nie en dat so 'n eiseres wel behoort te slaag: sien oor die gewoonteregtelike verbintenis Davel *Skadevergoeding aan afhanklikes* (1987) 63 ev.)

Bemoeiing met 'n blote kontraktuele onderhoudsreg sal in die afwesigheid van besondere faktore (soos in *Amod*) waarskynlik nie gedingsvatbaar wees nie omdat dit die aanspreeklikheid van 'n dader by die aksie van afhanklikes te wyd sal laat uitkring (sien *Amod* 1331B). Gevolglik sal die uitbreiding van die aksie na ander verhoudings waaruit 'n kontraktuele onderhoudsplig kan spruit, soos selfdegeslag-"huwelike", of verloofdes ingevolge 'n saambly-ooreenkoms, of 'n pleegsorgverhouding tussen 'n vader en sy stiefkind, met omsigtigheid hanteer moet word.

J NEETHLING
JM POTGIETER
Universiteit van Suid-Afrika

DIE REGSPLIG VAN DIE STAAT OM DIE REG OP DIE FISIES-PSIGIESE INTEGRITEIT TEEN DERDES TE BESKERM: DIE KORREKTE BENADERING TOT ONREGMATIGHEID, NALATIGHEID EN FEITELIKE KOUSALITEIT

Carmichele v Minister of Safety and Security 2001 1 SA 489 (SCA); Moses v Minister of Safety and Security 2000 3 SA 106 (K)

1 Inleiding

By 'n vorige geleentheid is dieselfde tema, weliswaar beperk tot die polisie as staatsorgaan, in 'n bespreking van *Mpongwana v Minister of Safety and Security* 1999 2 SA 794 (K) aangeraak (sien Neethling "Die regsplig van die polisie om die reg op die fisies-psigiese integriteit te beskerm" 2000 *THRHR* 150). Die staatlike beskerming van persone teen aanranding deur derdes het ook reeds in verskeie hofsake aandag geniet (sien bv *Minister van Polisie v Ewels* 1975 3 SA 590 (A); *Mtati v Minister of Justice* 1958 1 SA 221 (A); *Nkumbi v Minister of Law and Order* 1991 3 SA 29 (OK); *Mpongwana v Minister of Safety and Security* 1999 2 SA 794 (K); vgl *Minister of Police v Skosana* 1977 1 SA 31 (A); *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) (vir 'n bespreking van dié sake, sien 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) 146–147; Neethling 2000 *THRHR* 153; vgl ook *Ntamo v Minister of Safety and Security* 2001 1 SA 830 (TkHC) waar die hof by implikasie aanvaar het dat daar 'n regplig op die polisie gerus het om die publiek teen A, wat hulle met 'n pistool gedreig het, te beskerm – *in casu* het die polisie egter die perke van noodweer oorskry toe hulle A doodgeskiet het). Uit hierdie sake kan afgelei word dat daar in elke besondere geval vasgestel moet word of daar 'n regsplig op die staat gerus het om bedoelde beskerming te verleen, en dat die volgende faktore aanwysend van sodanige regsplig kan wees (sien Neethling 2000 *THRHR* 153–154): die konstitusionele imperatief om die reg op die sekerheid van die persoon te beskerm; die algemene statutêre verpligting om misdaad te voorkom en onderdane te beskerm; die wete (kennis) of waarneming van die aanranding of dreigende aanranding; 'n kontraktuele onderneming om 'n persoon te beskerm; feitelike beheer of kontrole oor 'n (potensieel) gevaarlike toestand; die waarskynlike of moontlike omvang van die nadeel wat die eiser kon ly; welke voorsorgmaatreëls redelikerwys (en uit 'n praktiese oogpunt) geverg kon word; wat die kanse was dat die maatreëls suksesvol sou wees; en of die koste verbonde aan die neem van die maatreëls proporsioneel sou wees tot die skade wat die eiser kon ly. (Vgl verder oor die regsplig van die polisie om vermoënskade vir die eiser af te weer, *Dersley v Minister van Veiligheid en Sekuriteit* 2001 1 SA 1047 (T).) Teen hierdie agtergrond word die *Moses*- en *Carmichele*-saak nou onder oë geneem.

2 *Moses*

Die eiseres se man (A) is oornag in 'n polisiesel aangehou omdat hy dronk was en gewelddadig geraak het. Terwyl hy in die sel was, is hy so ernstig deur ander aangehoudenes (B en C) aangerand dat hy aan sy beserings beswyk het. Die eiseres

eis vervolgens skadevergoeding van die staat vir onderhoudsverlies weens haar broodwinner se dood. Sy baseer haar eis daarop dat daar 'n regsplig op die staat gerus het om haar man teen die aanranding in die sel te beskerm, welke regsplig op onregmatige en nalatige wyse verbreek is.

Regter Van Reenen laat hom soos volg oor hierdie twee delikselemente in die onderhawige verband uit (113G–114D):

> "In the context of delictual liability a clear distinction is made in our law between wrongfulness and negligence (see *Simon's Town Municipality v Dews and Another* 1993 (1) SA 191 (A) at 196F). An omission is wrongful if in the particular circumstances a legal duty to act positively exists and the party whose conduct is under consideration fails to discharge that duty. It is generally accepted that, in the absence of an established legal norm or a recognised ground of justification, wrongfulness is determined according to the criterion of reasonableness with reference to the legal convictions of the community as established by the Courts (see *Minister van Polisie v Ewels* 1975 (3) 590 (A) at 596H–597B; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 320; *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27I). The test is an objective one based on all the facts of a particular case (see *Nkumbi v Minister of Law and Order* 1991 (3) SA 29 (E) at 35E; *Minister van Polisie v Ewels (supra* at 597B)). By contrast, reasonableness in the context of negligence is determined with reference to the conduct of a *bonus paterfamilias* in the position of the person whose conduct is under consideration (see *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E–F). Accordingly, conduct in the discharge of a legal duty to avoid harm flowing from an omission does not attract liability in law in the event of such harm materialising if such conduct coincides with that of a reasonable man in the circumstances. (Compare *Minister van Polisie v Ewels (supra* at 598A); *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 112B.) As Neethling *et al Deliktereg* 3rd ed at 151 footnote 155 point out, one in such a case is strictly speaking not dealing with liability founded on an omission. Whether a failure to act positively in particular circumstances is wrongful must be judged with reference to the different interests of the parties, their relationship with one another and the social consequences of imposing liability in the kind of case in question. Factors that ought to be considered and balanced are, *inter alia*, the possible extent of the harm; the degree of risk of the harm materialising; the interests of the defendant and the community; the availability of reasonably practicable preventative measures and the chances of their being successful; and whether the cost involved in obviating it is reasonably proportional to the harm. (See *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 361H–362B, 363C.)"

Die hof kom tot die slotsom dat daar *in casu* 'n regsplig op die polisie gerus het om redelike stappe te doen om A teen aanranding in die sel te beskerm, en wel op grond van die volgende oorwegings (sien 114E–115A): Die statutêre verpligting van die polisie om redelik teenoor aangehoudenes op te tree; die grondwetlike verskansing van fundamentele regte; die feit dat 'n aangehoudene se bewegings- en besluitnemingsvryheid aan bande gelê is – wat volgens die regter "a heightened duty on the part of the defendant's employees of safeguarding a detained person's interests" meebring; die werklike risiko van fisiese konflik – met gepaardgaande ernstige aanranding en selfs doodslag – omdat A geplaas is in 'n sel wat opsygesit is vir persone wat weens oproerigheid en dronkenskap gearresteer is; die feit dat A 53 jaar oud en kleingebou was; en die feit dat die risiko van fisiese benadeling maklik en teen minimale koste verminder kon word deur geweldenaars van die res van die aangehoudenes in die sel te skei of deur gereelde inspeksies. Regter Van Reenen konkludeer (115A–C):

> "In view of the foregoing and the nature of the relationship between the defendant and persons being detained . . . the defendant's servants, in the circumstances, in my view, had a legal duty to have taken reasonable steps to protect the deceased against assaults

> by any of the persons detained in the cell with him. If I err in having come to the conclusion that the aforementioned cases have established a legal norm as regards the obligations of the police services towards persons in its care or under its custody, then I am of the opinion that a failure to have protected the deceased against assaults by his co-detainees would be considered as wrongful with reference to the prevailing legal convictions of the community at the time."

Vervolgens ondersoek die hof die vraag of die polisie in die besondere omstandighede redelik, of soos die *bonus paterfamilias*, opgetree het – dit wil sê die vraag na nalatigheid (116D):

> "Would a reasonable man in the position of the defendant's employees have foreseen that one or both of [B en C] would assault the deceased and, if so, what steps would they have taken to avoid it?"

Die hof besluit (115–117) dat die polisie nie nalatig was nie, onder andere omdat hulle elke 25 minute 'n inspeksie van die sel gedoen het; 'n relatief beperkte mannekrag tot hulle beskikking gehad het wat aan vele sake aandag moes gee; nie geweet het dat B en C gewelddadige neigings het nie; B en C nie enige tekens van aggressiwiteit getoon het toe hulle in die sel geplaas is nie; en hulle (die polisie) onbewus van die aanranding van A in die sel was. Die redelike persoon sou dus nie meer gedoen het as die polisie om die aanranding en dood van A te voorkom nie. Gevolglik is die staat nie aanspreeklik nie.

Regter Van Reenen se uitspraak verdien volle instemming en kan as 'n skoolvoorbeeld dien van hoe die vrae na onregmatigheid en nalatigheid by aanspreeklikheid weens 'n late in ons reg hanteer moet word.

3 *Carmichele*

Die eiser (A) is brutaal aangerand deur C terwyl A by haar moeder (B) gekuier het. C was vantevore skuldig bevind aan huisbraak en onsedelike aanranding op grond waarvan hy beboet en tot opgeskorte gevangenisstraf veroordeel is. Ten tyde van die aanranding was daar ook 'n klag van verkragting hangende teen hom maar hy is deur die landdros op eie verantwoordelikheid op aanbeveling van die ondersoekbeampte vrygelaat. 'n Paar dae na sy vrylating het B die polisie versoek om C hangende sy verhoor aan te hou. Die polisie het die saak met die aanklaer bespreek maar laasgenoemde het B meegedeel dat tensy C 'n verdere misdaad pleeg, niks gedoen kan word nie. Kort hierna – na 'n selfmoordpoging en 'n onderhoud met die aanklaer waaruit ernstige seksuele afwykings geblyk het – word C gearresteer en na 'n psigiatriese hospitaal vir waarneming verwys. Die verslag van die hospitaal het C nóg as 'n gevaar vir die gemeenskap bestempel, nóg aanbeveel dat hy hangende die verkragtingverhoor aangehou moet word. Hierbenewens het die prokureur-generaal, wat in besit was van die dokumentêre bewyse van die erns van die verkragting en die omvang van C se seksuele afwykings, nie die aanklaer opdrag gegee om borgtog teen te staan nie. Gevolglik word hy weer deur die landdros op eie verantwoordelikheid vrygelaat. Hierna het onder andere C en B nogmaals op verskeie geleenthede tevergeefs gepoog om die polisie en aanklaer te oorreed om C in aanhouding te plaas. Weens C se aanranding van A terwyl hy op vrye voet was, stel sy 'n eis teen die staat in op grond daarvan dat die polisie en aanklaers 'n regsplig gehad het om haar teen C te beskerm, welke plig op onregmatige en nalatige wyse verbreek is. In die hof *a quo* beslis regter Chetty dat die polisie en aanklaers nie 'n regplig teenoor die eiseres gehad het en bygevolg nie onregmatig opgetree het nie.

In die hoogste hof van appèl stel appèlregter Vivier ten aanvang die toets ter bepaling van 'n regsplig by aanspreeklikheid weens 'n late soos volg (494B–D):

> "The appropriate test for determining the wrongfulness of omissions in delictual actions for damages in our law has been settled in a number of decisions of this Court such as *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A–C; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 317C–318I; *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27G–I and *Government of the Republic of South Africa v Basdeo and Another* 1996 (1) SA 355 (A) at 367E–H. The existence of the legal duty to avoid or prevent loss is a conclusion of law depending upon a consideration of all the circumstances of each particular case and on the interplay of many factors which have to be considered. The issue, in essence, is one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the Court."

Hy vervolg (494G):

> "The question must always be whether the defendant ought reasonably and practically to have prevented harm to the plaintiff: in other words, is it reasonable to expect of the defendant to have taken positive measures to prevent the harm . . ."

Omdat die besluit om C hangende die verhoor vry te laat by die landdros berus het, was die regsplig wat die polisie en aanklaers na bewering teenoor A verskuldig was, volgens die hof (497C–D) oënskynlik beperk tot die plig van die polisie om volle inligting oor die saak aan die aanklaers te verskaf, en die plig van die aanklaers om borgtog teen te staan en die hof van alle inligting omtrent C in hierdie verband te voorsien. Regter Vivier besluit (497D–F) dat die polisie bedoelde plig nagekom het en laat hom soos volg oor die regsplig van die aanklaers uit (497G–I):

> "There is obviously no absolute duty resting on a prosecutor to oppose bail in all cases. The prosecutor has a public duty to oppose bail in appropriate cases but a breach of this duty does not necessarily constitute a legally actionable omission at the instance of any individual member of the public. Whether a legal duty is owed in that situation to any individual member of the public depends on what is reasonable, having regard to all the facts and circumstances of the particular case and the interplay of the factors mentioned by the authorities to which I have referred. It also depends on whether the claimant stands in a special relationship to the defendant such as distinguishes the claimant from any other member of the public."

In die lig van die feite (C het net een vorige veroordeling van onsedelike aanranding – sonder gepaardgaande fisiese beserings – teen hom gehad; die psigiatriese verslag het C nóg as 'n gevaar vir die gemeenskap bestempel nóg aanbeveel dat hy hangende die verkragtingverhoor aangehou moet word; die prokureur-generaal het nie die aanklaer opdrag gegee om borgtog teen te staan nie; en die prokureur-generaal se instruksie dat alle verhoorafwagtende gevangenes die reg het om vrygelaat te word tensy vrylating "contrary to the interests of justice" sou wees: sien 497I–498C; vgl 494H–495D), kom appèlregter Vivier tot die slotsom dat dit nie onredelik was van die aanklaer om C se vrylating nie teen te staan nie, en dat die aanklaer bygevolg nie 'n regsplig teenoor A gehad het om borgtog teen te staan of C se herarrestasie te bewerkstellig nie. Hierdie slotsom word volgens die hof gerugsteun deur die feit dat daar nie 'n "spesiale verhouding" tussen die aanklaers en A bestaan het nie (499A–B):

> "In the absence of evidence that the appellant was at any special distinctive risk the fact that the attack occurred at a secluded village where she was a visitor is insufficient to establish the special relationship contended for. The mere fact that complaints and requests for [C's] rearrest were made to the prosecutors is also insufficient to establish a special relationship."

Ook appèlregter Vivier se beslissing verdien instemming aangesien die polisie en aanklaers gedoen het wat redelikerwys van hulle verwag kon word. Hulle het dus nie onregmatig teenoor die eiseres opgetree nie.

4 Kommentaar

Die volgende kan in hierdie verband vermeld word:

(i) Anders as 'n aantal resente beslissings van die hoogste hof van appèl (*Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) 837–838; *Mkhatswa v Minister of Defence* 2000 1 SA 1004 (SCA) 1111; *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1077; *Goldstein v Cathkin Park Hotel* 2000 4 SA 1019 (SCA) 1024; sien ook *Standard Bank of South Africa Ltd v OK Bazaars (1929) Ltd* 2000 4 SA 382 (W) 395–398), volg die hof in *Moses* die korrekte benadering deur eers na onregmatigheid en daarna na nalatigheid te vra (sien ook *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 364; *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) 1055; *African Life Assurance Co Ltd v NBS Bank Ltd* 2001 1 SA 432 (W) 441 445; *Dersley v Minister van Veiligheid en Sekuriteit* 2001 1 SA 1047 (T) 1054–1060; vgl *Columbus Joint Venture v ABSA Bank Ltd* 2000 2 SA 483 (W) 513: "an act can only be negligent if it is also wrongful"). Nieteenstaande herhaling moet weer eens beklemtoon word dat daar logieserwys net van skuld – in die sin dat 'n persoon vir sy onregmatige optrede verwyt word – sprake kan wees waar 'n persoon onregmatig opgetree het; iemand se optrede is nie regtens verwytbaar waar hy regmatig gehandel het nie (sien Neethling en Potgieter "Die toets vir deliktuele nalatigheid onder die soeklig" 2001 *THRHR* 476).

Die korrekte benadering word ook in *Carmichele* gevolg, waarskynlik omdat die hof *a quo* bevind het dat onregmatigheid ontbreek en daar net teen hierdie bevinding geappelleer is. Appèlregter Vivier verklaar (493I):

> "In the circumstances we are not concerned with the question whether negligence was proved or the further question whether any possible negligence could ever have been causally related to the appellant's loss."

Indien die vraag na nalatigheid volgens die hoogste hof van appèl egter "the logical starting point to any enquiry into the defendant's liability" is (soos dié hof dit in *Mkhatswa supra* 111 wil hê), of as dit "convenient" is om die vraag na nalatigheid eers te ondersoek omdat "[i]n the absence of negligence the issue of wrongfulness does not arise" (*Sea Harvest supra* 838), kan met reg gevra word waarom regter Vivier nie 'n meer kritiese houding teen die benadering van die hof *a quo* in *Carmichele* inneem nie. Waarom was dit in hierdie saak nie ook die logiese aanvangspunt, of bloot gerieflik, om eers die nalatigheidskwessie uit te klaar nie? Ter wille van regsekerheid en gesonde regsontwikkeling het dit dringend noodsaaklik geword vir die hoogste hof van appèl om riglyne te verskaf oor die omstandighede waarin eers vir nalatigheid en daarna vir onregmatigheid getoets moet word (die "juridies onmoontlik[e]" of "sequentially inappropriate" benadering volgens respektiewelik *Administrateur, Transvaal supra* 364 en *Bakkerud supra* 1055), en omgekeerd. Sonder sodanige riglyne gaan praktisyns dit bra moeilik vind – indien nie onmoontlik nie – om te weet welke benadering die hof in 'n bepaalde saak gaan volg, en dit is tog nie gewens nie. Indien die volgende twee *dicta* van die hoogste hof van appèl beoog het om groter helderheid te bring, word hierdie oogmerk ongelukkig nie bereik nie. In *Mostert v Cape Town City Council* 2001 1 SA 105 (SCA) 120–121 verklaar appèlregter Schutz:

> "I have approached this case as one raising questions of negligence, whereas an unbending adherence to logic might dictate that wrongfulness is the prior enquiry, and the question of the reasonableness of expecting the council to replace the pipeline might have been dealt with under that heading. Logic is one thing, utility sometimes another. As was pointed out by Scott JA in *Sea Harvest Corporation (Pty) Ltd and*

> *Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (A) at 837H, in many if not most delicts the issue of wrongfulness is uncontentious, as the action is founded upon conduct which, if held to be culpable, would be *prima facie* wrongful. This is such a case. If the council was negligent in not preventing the 1990 burst I have no doubt that the community's sense of what the law ought to be would demand that liability be imposed upon the council (cf *Cape Town Municipality v Bakkerud* [2000 3 SA 1049 (SCA) 1055]). After all, the council leads across densely populated land a large volume of water under pressure, and then exercises exclusive control over it. Whatever its contrasted social utility, this is the equivalent of walking one's tiger across the forum."

En in *Cape Metropolitan Council v Graham* 2001 1 SA 1197 (SCA) 1203 sê appèlregter Scott die volgende:

> "The appellant admitted in its plea that it was under a legal duty to take such reasonable precautions as circumstances permitted in order to avoid or minimise injury to users of the road. In other words, it effectively acknowledged that if it were found to have negligently failed to take such precautions its conduct would have been not only negligent but also wrongful. (Compare *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA) at 837G–838C.) In my view, the admission was properly made. Given the circumstances, the existence of such a duty accords with what I would perceive to be 'the legal convictions of the community' (see *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at 1056F–G). In view of the admission, however, it is unnecessary to consider this aspect further."

Uit hierdie *dicta* blyk dat die onregmatigheidskwessie in bepaalde gevalle by aanspreeklikheid weens 'n late geen probleem verskaf nie. Dit is naamlik waar daar klaarblyklik volgens die *boni mores* 'n regsplig op die verweerder gerus het om positief op te tree ten einde die intrede van nadeel te voorkom (en hier speel die feit dat die verweerder die bestaan van die regsplig erken, uiteraard 'n rol) – met ander woorde, die hof "assume[s] against the defendant that he was not free in law to refrain from any action"(*Bakkerud supra* 1055). In hierdie gevalle is die *nalatige* verbreking van die plig wat vir die eiser nadeel veroorsaak terselfdertyd ook (*prima facie*) onregmatig. Daarom hoef net op die nalatigheidskwessie gefokus te word. Hierdie standpunt verdien instemming omdat dit met die korrekte volgorde van eers onregmatigheid en daarna nalatigheid versoenbaar is. Hier moet onthou word dat *iedere* verbreking van 'n regsplig, ongeag of dit nalatig geskied al dan nie, in elk geval in beginsel onregmatig is (sien Neethling, Potgieter en Visser *Delict* 57). So gesien, word die onregmatigheidskwessie in gevalle waar die regsplig vasstaan, as 't ware vooraf afgehandel en is dit daarom sinvol (en "convenient") om net aandag aan die vraag na nalatigheid te gee. (Terloops, hiermee word nie te kenne gegee dat nalatigheid onregmatigheid enigsins bepaal nie; selfs in die afwesigheid van nalatigheid is die verbreking van die regsplig steeds in beginsel onregmatig.) Ongelukkig verklaar hierdie benadering nie waarom die hoogste hof van appèl in sake soos *Mkhatswa supra*, *Sea Harvest supra* (sien Neethling en Potgieter *supra*) en *Goldstein supra* eers die nalatigheidsvraag ondersoek het, *voordat* die vraag of daar 'n regsplig op die verweerder gerus het, uitgeklaar is nie. Dit blyk veral uit *Goldstein supra* 1023–1025 waar appèlregter Harms sê: "Having found negligence, it is convenient to deal with wrongfulness (the breach of a legal duty) at this juncture." Afgesien hiervan, word sake verder gekompliseer deur die hoogste hof se botsende opvattings oor wat logies in hierdie verband sou wees. Enersyds word die vraag na nalatigheid as "the logical starting point to any enquiry into the defendant's liability" beskou (*Mkhatswa supra* 111). Andersyds weer kan "an unbending adherence to logic . . . dictate that wrongfulness is the prior enquiry" (*Mostert supra* 120). 'n Mens kan maar net vertrou dat die hoogste hof van appèl gou helderheid sal bring.

(ii) Die onderskeid tussen die objektiewe redelikheidsmaatstaf vir onregmatigheid en die objektiewe redelike man (persoon)-toets vir nalatigheid word duidelik in *Moses* ten aansien van aanspreeklikheid weens 'n late geïllustreer (sien hieroor Neethling, Potgieter en Visser *Law of delict* (1999) 151–154; sien ook Neethling "Nogmaals 'duty of care' – onregmatigheid en nalatigheid by aanspreeklikheid weens 'n late" 1997 *THRHR* 730–733). Die kern van die onderskeid is daarin geleë dat dit by onregmatigheid om 'n diagnostiese belange-afweging aan die hand van die regsoortuigings van die gemeenskap gaan, terwyl nalatigheid 'n prognostiese oordeel oor die redelike voorsienbaarheid en voorkombaarheid van skade verg. Die verskille tussen die twee toetse het tot gevolg dat 'n dader vir doeleindes van onregmatigheid onredelik kan optree terwyl hy vir doeleindes van nalatigheid redelik (soos 'n redelike persoon) handel. Dit is dan ook die resultaat in *Moses*. Die polisie se late om A teen aanranding te beskerm, was onredelik en bygevolg onregmatig omdat daar volgens die *boni mores* 'n regsplig op hulle gerus het om positief op te tree ten einde die aanranding te voorkom en hulle versuim het om die regsplig (volkome) na te kom. Omdat die polisie egter wel (onsuksesvol) gepoog het om die regsplig na te kom en hulle optrede met dié van die redelike persoon ooreenstem, het hulle (onredelike) onregmatige handeling nie met (onredelike) nalatige optrede gepaard gegaan nie (skade was nie redelikerwys voorkombaar nie) en is die staat tereg nie aanspreeklik nie (sien ook Neethling Potgieter en Visser *Delict* 153).

(iii) Ten slotte, ten einde feitelike kousaliteit te bepaal, pas die hof in *Moses* die sogenaamde *conditio sine qua non*- of "but for"-toets toe (117F–118E):

> "The application of the "but-for" test to the facts of the instant case entails mentally substituting the omission to have conducted a cell inspection during the above-mentioned period with lawful conduct, namely such a cell inspection. The outcome of the enquiry whether the failure to have conducted a cell inspection was a cause of the assault on the deceased will depend on whether, if the defendant's servants had acted in such a hypothetical manner, the assault would have taken place or not. If it would not have taken place the omission on the part of the defendant's servants was the cause of the assault; if it would have taken place the converse is the position."

Afgesien van die besware wat teen bedoelde "toets" by skadeveroorsaking deur positiewe optrede ingebring kan word (sien Neethling, Potgieter en Visser *Delict* 174–178), is daar ook probleme met die toepassing daarvan by 'n late. Soos regter Van Reenen tereg uitwys, moet feitelike kousaliteit hier bepaal word deur 'n bepaalde handeling in al die bestaande feite van die geval in te dink en dan 'n sinvolle voorstelling van die hipotetiese gebeure te maak (sien ook *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700). Dit is egter nie 'n ware toepassing van *conditio sine qua non* nie aangesien laasgenoemde maatstaf vereis dat 'n mens iets moet "wegdink" en nie moet "indink" nie (Neethling, Potgieter en Visser *Delict* 167 172–173). Hoe ook al, daar moet beklemtoon word dat die vraag nie is of *redelike* optrede die gewraakte gevolg sou vermy het nie (sien bv *Minister of Police v Skosana* 1977 1 SA 31 (A)), maar eenvoudig of die dader *enigiets* kon doen om die gevolg te voorkom – anders word nalatigheid met feitelike kousaliteit verwar (sien Visser en Vorster *General principles of criminal law through the cases* (1991) 137). Ook is die vraag nie, soos die regter dit wil hê, of *regmatige* optrede – dit wil sê waar die dader die regsplig volkome nagekom het – die gevolg sou voorkom het nie, want dan word onregmatigheid en feitelike kousaliteit weer verwar. Aangesien voortdurende of meer gereelde inspeksies van die sel weens 'n tekort aan mannekrag nie moontlik was nie, lyk dit nie of die polisie die gevolg sou kon vermy het nie en dat feitelike kousaliteit bygevolg ontbreek het (soos die hof inderdaad ook bevind: 118C–E).

J NEETHLING
Universiteit van Suid-Afrika

INTER-COUNTRY ADOPTIONS – THE NEED FOR SOUTH AFRICA TO ACCEDE TO THE HAGUE CONVENTION
Fitzpatrick v Minister of Social Welfare and Pensions 2000 3 SA 139 (C)

1 Introduction

Inter-country adoptions are a modern worldwide phenomenon. The practice of relocating children over large geographical areas and from one cultural environment to another is fraught with complex difficulties. The practice is also open to abuse, and can result in exploitation of children. In order to minimise the potential for exploitation of children, the seventeenth session of The Hague Conference on Private International Law unanimously approved the Convention on the Protection of Children and Co-operation in respect of Inter-Country Adoption of 29 May 1993 ("Convention on Inter-Country Adoption"). The Convention puts in place minimum standards and procedures to be applied in cases of inter-country adoption where the child and the prospective adopter are both resident in contracting states at the date on which the application for adoption is made.

In terms of section 18(4)(f) of the Child Care Act 74 of 1983, South African law does not permit non-South African citizens to adopt children of South African citizens. Likewise, South Africans who adopt a child outside South Africa have to go through lengthy procedures before the adoption will be recognised and enforced in South Africa. This practice prevents the Department of Social Welfare and the courts from acting in the best interests of the child in all cases, and is out of line with modern realities.

South Africa has ratified the United Nations Convention on the Rights of the Child (UNCRC), which requires member states to implement legislation that is directed towards the protection of the rights of the child and the elimination of all forms of exploitation of children. The Convention on Inter-Country Adoption is one of three international conventions drafted with these specific objectives in mind. South Africa should thus honour her commitment to the principles established in the UNCRC and give urgent attention to her position with regard to the Convention.

2 Facts

In *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 3 SA 139 (C) the first and second applicants were a married couple. Both partners were British nationals. The third applicant was an advocate acting as *curator ad litem* on behalf of a minor child whom the first and second applicants were seeking to adopt. The first and second applicants applied to the Department of Social Welfare for an adoption order in respect of a minor child born of parents who were South African citizens. The biological parents of the child had abandoned him at birth. Almost immediately after he was abandoned, the first and second applicants fostered him. Shortly after fostering the child, the first and second applicants decided to initiate appropriate steps to adopt him. Their application could not be considered by the Department of Social Welfare because section 18(4)(f) of the Child Care Act prohibits the adoption of a child born of a South African citizen by anyone who is not a South African citizen, who is not resident in South Africa, who has not met the requirements for

acquisition of such citizenship and who has not applied for such citizenship. The applicants had no desire to acquire South African citizenship, and were in fact planning to become residents of the United States of America shortly after the finalisation of the adoption proceedings (141B).

The first and second applicants applied to the high court for a declaration that section 18(4)(f) of the Child Care Act was invalid by reason of the fact that it was unconstitutional in terms of the Constitution of the Republic of South Africa, Act 108 of 1996. The applicants also sought an order declaring them to be the child's joint guardians and custodians. The third applicant joined the proceedings in his capacity as *curator* of the child.

The child had been abandoned by his biological parents at birth and was taken into foster care by the first and second applicants in November 1997, when he was two and a half months old. When the foster parents' application to adopt the child failed in March 1998, he was removed from the care of his foster family, with whom he had forged strong relations. He was placed with another foster family, but failed to settle. The child was restored to his former foster family one month after his removal.

There was no question in the mind of any party to the case that there were strong emotional bonds between the child and the first and second applicants. All the parties to the case, including the respondent, were unanimous in the view that his adoption by his foster parents would be in his best interests. To this end, the biological parents had consented to the adoption of the child by the couple. The third applicant went so far as to indicate that he was of the opinion that the appropriate Children's Court Commissioner should be authorised to grant an interim adoption order in favour of the first and second applicants (142C).

The respondent continued to reject the possibility of the adoption of the child by the applicants on the basis of the proscription contained in section 18(4)(f) of the Child Care Act. She indicated, however, that she would have no objection to the section being declared invalid on the ground of inconsistency with the Constitution (141I–J). The Minister took up the position that a declaration of invalidity of the section should be suspended for a sufficient period to give Parliament an opportunity to amend the section in such a way as to remedy the defect. In the interim, the Minister was prepared to support an application by the first and second applicants to be appointed as the child's guardians and custodians (142A–B). The third applicant and counsel for the first and second applicants argued that the declaration of invalidity of section 18(4)(f) should not be suspended.

The respondent was mindful of the international law in the field of inter-country adoptions, and indicated that any amendment to the Child Care Act must address the critical issue of inter-country adoptions as part of a comprehensive approach to child-care legislation, taking into account the Convention on Inter-Country Adoption as well as South Africa's obligations in terms of the UNCRC (142G–143B). The respondent was adamant that inter-country adoption should be allowed only if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin, in accordance with article 21(b) of the UNCRC (143C–D). Furthermore, she pointed out that South Africa at present lacks the necessary infrastructure to administer inter-country adoptions (143F).

It was argued for the respondent that section 172(1)(b)(ii) of the Constitution confers on the court a discretion to make a just and equitable order, which order

might include the suspension of a legislative provision in order to allow the competent authority an opportunity to take steps to amend the provision (143F–G).

Foxcroft J was of the opinion that the present case was analogous to that of *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC), 1997 2 BCLR 153 and, that as in that case, an immediate striking-down of the provision would be inappropriate in the circumstances (143G–H). One of the primary considerations taken into account by the court in arriving at this conclusion was that Parliament had decided upon a citizenship requirement for adoption, and should be given time to reformulate the provision so as to make it constitutionally acceptable. Foxcroft J stated that in his opinion two years would be an acceptable period within which to require Parliament to amend the provision. Furthermore, the international ramifications of the amendment also support the view that Parliament should be allowed to redraft the section (143H–144A). In view of this, the court made an order in the following terms:

1 Section 18(4)(f) of the Child Care Act is invalid and unconstitutional in so far as it creates an absolute prohibition against adoption of a child born of South African citizens by any person who is not a South African citizen, or a person who qualifies for South African citizenship but has failed to make application for it (144F–G).

2 Parliament is granted a period of two years from date of judgment (2000-02-15) within which to remedy the defect (144G–H).

3 First and second applicants are awarded joint custody, joint guardianship and joint control over the minor child (144H).

4 Third applicant will continue as curator and act on behalf of the child in adoption proceedings (144H–I).

No order was made as to costs (144C).

3 Comments

The Convention on Inter-Country Adoption was the product of lengthy negotiations between member states at the conference, as well as a vast number of invited non-member states and intergovernmental and non-governmental organisations. It recognises that inter-country adoption may well offer a child a family environment in circumstances where institutionalisation may be the only available alternative within the child's country of origin (art 4(a)–(*b*)). The subsidiarity principle, which requires that domestic alternatives for placement of the child be considered before the possibility of inter-country adoption, must be applied within the context of the best interests of the child. The Convention is not designed to encourage inter-country adoption. Its objective is to recognise the practice as an international phenomenon and to ensure that it is properly regulated in a manner that will safeguard the best interests of the child and respect for his or her fundamental human rights (art 1(a)).

In attempting to achieve this objective, the Convention creates a system of co-operation between states to ensure that safeguards are respected which will prevent various abuses of the inter-country adoption institution, such as the sale and abduction of children. Hence the Convention advances the objectives of the UNCRC of protecting children's rights and eliminating all forms of child exploitation.

A further aim of the Convention is to secure recognition of international adoptions under the Convention in all contracting states. While the Convention does not

require states to participate in inter-country adoptions, it sets out a procedure to be followed by contracting states where such an adoption is under consideration. The procedures are not exclusive, and contracting states are entitled to add to the Convention where they deem it appropriate. Contracting states accept the Convention as establishing minimum standards to be applied to inter-country adoptions, and retain the right to add to the provisions of the Convention in the best interests of the child.

The Convention does not resolve all controversial inter-country adoption issues, but strives to minimise abuses of the practice by engendering co-operation between states to eliminate exploitation of children, while facilitating the speedy conclusion of international placements where appropriate in the best interests of the child.

I believe that the *Fitzpatrick* case is clear evidence of the need for South Africa to consider accession to the Convention. The growing number of orphans in South Africa makes it imperative for Parliament to take immediate steps to facilitate the adoption of such children into a family environment as speedily as possible. This will require that authorities recognise the possibility that inter-country adoption may be the only option for some of these children.

CMA NICHOLSON
University of Pretoria

DIE STRAFREGTELIKE EFFEK VAN 'N VALSE VERKLARING DEUR 'N DOKTER AANGAANDE DIE DOODSOORSAAK NA AKTIEWE EUTANASIE

Hoge Raad 30 November 1999, *Tijdschrift voor Gezondheidsrecht*, 2000/200

1 Inleiding

Die feite in dié saak is kortliks soos volg: die beskuldigde, 'n uroloog werksaam in 'n hospitaal, is ten laste gelê dat hy opsetlik 'n pasiënt van sy lewe beroof het deurdat hy hom 'n totaal van 40ml kaliumchloried binne-aars, via die infuus waaraan hy gekoppel was, toegedien het as gevolg waarvan hy gesterf het. Die voorafgaande hof het beskuldigde hiervan vrygespreek. Laasgenoemde hof het beslis dat beskuldigde reageer het op die uitdruklike en ernstige verlange van die pasiënt en dat hy hom op die "verweer van aktiewe eutanasie" kon beroep. Die pasiënt het prostaatkanker van 'n gevorderde aard onder lede gehad, met die gevolg dat daar 'n pligtekonflik by beskuldigde ontstaan het en hy 'n keuse moes maak tussen eutanasering of die versaak van sy plig as dokter om die pasiënt, op sy versoek, van verdere ondraaglike en sinnelose lyding te bevry (sien in dié verband Labuschagne "Regstaatlike waardegradering van die menslike lewe en lewenskwaliteit: opmerkinge oor noodtoestand as verweer by aktiewe eutanasie" 2000 *THRHR* 133 137–138).

Die beskuldigde is ook ten laste gelê, en dit is as bewese verklaar, dat hy as geneesheer opsetlik op 'n valse wyse en in stryd met die waarheid 'n verklaring rakende die dood van die pasiënt, soos bedoel in artikel 7(1) van die Wet op de Lijkbezorging, afgelê het waarin hy as behandelende dokter verklaar het dat hy oortuig is dat die pasiënt as gevolg van 'n natuurlike oorsaak oorlede is. Hy was egter bewus daarvan dat die dood van die pasiënt nie as gevolg van die intrede van 'n natuurlike oorsaak was nie. Die beskuldigde het dit erken, maar daar is namens hom aangevoer dat die vervolger (*Openbaar Ministerie*) verhoed behoort te word om 'n vervolging in te stel op grond van die skending van die beginsels van 'n billike strafproses. In dié verband is in besonder 'n beroep gedoen op die skending van die *nemo teneturbeginsel*. Hierdie beroep is soos volg deur die voorafgaande hof verwerp:

> "De door de verdediging als zodanig aangeduide verbods- en gebodsnormen, voortvloeiend uit de Wet op de Lijkbezorging in samenhang met de daarop gebaseerde Meldingsprocedure Levensbeëindiging hebben de strekking te bevorderen dat artsen eigener beweging verslag doen van levensbeëindigend handelen; zij leggen niet een verplichting op een euthanaserende arts. Het . . . tenlastegelegde houdt niet in dat de verdachte een dergelijke verplichting heeft verzuimd, maar dat hij een valse verklaring heeft afgegeven. Het afgeven van een juiste verklaring is niet een handeling waardoor de arts zichzelf tot verdachte van een misdrijf zou bestempelen waartoe hij niet mag worden gedwongen. Het recht 'to remain silent' omvat niet het recht onwaarheid te spreken of valse verklaringen af te geven en het recht 'not to contribute to incriminating himself' omvat niet het recht alles te doen wat ertoe kan bijdragen een verdenking te vermijden of af te wenden" (par 3 2).

Beskuldigde beroep hom in finale instansie op die Hoge Raad (*HR*), die hoogste hof in Nederland. Die beslissing van die *HR* in dié saak word vervolgens teen die agtergrond van die Nederlandse reg onder die loep geneem. Daarna word enkele opmerkinge oor die Suid-Afrikaanse reg in dié verband gemaak.

2 Die Nederlandse reg

Artikel 294 van die Nederlandse Strafwetboek (*Sr*) lui:

> "Hij die opzettelijk een ander tot zelfmoord aanzet, hem daarbij behulpzaam is of hem de middelen daartoe verschaft, wordt, indien de zelfmoord volgt, gestraft met gevangenisstraf van ten hoogste drie jaren of geldboete van de vierde categorie."

Artikel 40*Sr* bepaal dat 'n (andersins) strafbare handeling waartoe die dader deur oormag (noodtoestand) gedwing is nie strafregtelike aanspreeklikheid tot gevolg het nie (Hazewinkel-Suringa en Remmelink *Inleiding tot de studie van het Nederlandse strafrecht* (1996) 296). Die *HR* het in 'n verskeidenheid beslissings oor 'n tydperk wat etlike dekades omspan die reël gevestig dat aktiewe eutanasie uitgevoer deur 'n geneesheer, na 'n innige doodsversoek deur 'n pasiënt wat aan 'n ongeneeslike siekte ly, onder die verweer van oormag of noodtoestand tuisgebring kan word. Ek het op verskeie van dié beslissings, soos dié verweer in Nederland ontvou het, in Suid-Afrikaanse tydskrifte kommentaar gelewer (sien bv "Dekriminalisasie van eutanasie" 1988 *THRHR* 167; "Aktiewe eutanasie en professionele hulpverlening by selfdoding van 'n psigiatriese pasiënt" 1995 *SALJ* 227; "Aktiewe eutanasie van 'n swaar gestremde baba: 'n Nederlandse hof herstel die *ius vitae necisque* in 'n medemenslike gewaad" 1996 *SALJ* 216; "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). In 'n beslissing van 21 Junie 1994 (NJ 1994, 656 par 10 2) word die verweer van noodtoestand, in die konteks van 'n botsing van pligte, by aktiewe eutanasie soos volg verduidelik:

> "Bepalend voor het welslagen van dit verweer is het antwoord op de vraag of onder de gegeven omstandigheden de bewezenverklaarde gedraging van de verdachte gerechtvaardigd worden geacht, omdat daarbij is gehandeld in noodtoestand, dat wil zeggen – in het algemeen gesproken – dat de pleger van het feit, staand voor de noodzaak te kiezen uit onderling strijdige verplichtingen, de zwaarstwegende is nagekomen . . . Daarbij wordt aangetekend dat in het bijzonder een arts in noodtoestand kan komen te verkeren, wanneer hij of zij gesteld wordt voor de noodzaak te kiezen tussen enerzijds de plicht tot behoud van het leven en anderzijds de plicht om als arts al het mogelijke te doen om ondraaglijk en uitzichtsloos lijden van een aan zijn zorgen toevertouwde patiënt te verlichten. Bij de beoordeling van het beroep op noodtoestand dient onderzocht te worden of de arts, in het bijzonder volgens wetenschappelijk verantwoord medisch inzicht en overeenkomstig de medische ethiek geldende normen, uit onderling strijdige plichten een keuze heeft gedaan die, objectief beschouwd en tegen de achtergrond van de bijzondere omstandigheden van het onderhavige geval, gerechtvaardig is te achten."

In die saak onder bespreking is die beskuldigde onskuldig bevind vir sover dit sy beroep op noodtoestand, binne konteks van aktiewe eutanasie, betref. Dit blyk duidelik uit die feitestel dat voldoen is aan die vereistes wat in Nederland vir strafvrye eutanasie gestel word. Die *HR*, asook die voorafgaande howe in die onderhawige saak, onderskei suiwer tussen die gebeure wat die valse verklaring oor die doodsondersoek voorafgegaan het en die waarheid van die inhoud van die verklaring, dit wil sê die toepassing van die primitiewe *versari in re illicita*-leerstuk, ook in 'n "chronologies-omgekeerde" sin, word vermy.

Artikel 228(1)*Sr* lui soos volg:

> "De geneeskundige of verloskundige die opzettelijk een valse verklaring afgeeft nopens een geboorte, een oorzaak van overlijden dan wel nopens het al of niet bestaan of bestaan hebben van ziekten, zwakheden of gebreken, wordt gestraft met gevangenisstraf van ten hoogste drie jaren of geldboete van de vierde categorie" (sien ook Noyon, Langemeijer *et al Wetboek van strafrecht* Bk 2 (1997) 661).

Die *HR* wys ten aanvang daarop dat die beskuldigde nie versuim het om die doodsoorsaak van die pasiënt aan te meld nie, maar dat hy dit valslik aangemeld het. Die moontlike relevansie van die *nemo tenetur*-beginsel val volgens die *HR* gevolglik weg. Troùens, of dit hoegenaamd by die feite van die saak relevant is, is vir my onduidelik. Deur die maak van 'n valse verklaring aangaande die doodsoorsaak van die pasiënt het beskuldigde hom aan oortreding van artikel 228(1)*Sr* skuldig gemaak. Beskuldigde se appèl word ook deur die *HR* in dié verband afgewys. Waarom beskuldigde die valse verklaring aangaande die doodsondersoek afgelê het, blyk nie duidelik nie. Sy optrede met betrekking tot die dood van die pasiënt was tog immers regmatig! Sy onnodige *ex post facto* valse verklaring stel hom nie net aan 'n strafsanksie onderworpe nie, maar ook aan professionele tugmaatreëls met verreikende gevolge.

3 Die Suid-Afrikaanse reg en konklusie

Hoewel aktiewe eutanasie nog nie in Suid-Afrika toelaatbaar is nie, maak die globale opmars van individuele outonomie, as 'n grondwaarde van 'n menseregtelike bestel, die wettiging daarvan onvermydelik (sien hieroor Labuschagne "Die strafregtelike verbod op hulpverlening by selfdoding: 'n menseregtelike en regsantropologiese evaluasie" 1998 *Obiter* 45 57–60). Die opsetlike aflê van 'n valse verklaring aangaande die oorsaak van dood van 'n pasiënt sou binne die trefkrag van verskeie misdade in Suid-Afrika val (sien bv a 15, 17 en 31 van die Wet op Registrasie van Geboortes en Sterftes 51 van 1992; Snyman *Strafreg* (1999) 347–355. Vgl Labuschagne "Dekriminalisasie van meineed" 1991 *TRW* 20–48).

In die saak onder bespreking het die *HR* die vereistes vir 'n geldige beroep op aktiewe eutanasie as noodtoestandsverweer duidelik van die suspisiewekkende maak van 'n valse verklaring met betrekking tot die oorsaak van dood deur 'n geneesheer onderskei. 'n Chronologies-omgekeerde toepassing van die *versari in re illicita*-leerstuk, wat volgens die huidige stand van ons reg sonder enige regverdigbare morele of ander waardebasis is, is net so onaanvaarbaar en verwerplik as die tradisionele manifestasie daarvan (sien Swanepoel *Die leer van* "versari in re illicita" (1945) 1 *et seq*; *S v Van der Mescht* 1962 1 SA 521 (A); *S v Bernardus* 1965 3 SA 287 (A); Burchell *South African criminal law and procedure*, vol 1 (1997) 288–289). Juis as gevolg van die groot moontlikheid vir en die effek van misbruik moet, soos in die Nederlandse reg, streng prosedures vir toelaatbare aktiewe eutanasie gestel word. Die maak van 'n vals verklaring aangaande die oorsaak van dood van 'n pasiënt behoort, as sodanig, regtens afgekeur te word. By die vraag of toelaatbare aktiewe eutanasie, asook ander vorme van eutanasie, plaasgevind het, sou die maak van sodanige verklaring in gepaste omstandighede bloot bewysregtelike waarde hê, met ander woorde die hof sou daaruit, in samehang met ander getuienis, die afleiding kan maak dat die vereistes vir toelaatbare eutanasie nie nagekom is nie.

JMT LABUSCHAGNE
Universiteit van Pretoria

RE-AFFIRMATION OF THE DOCTRINE OF IMMUNITY OF MUNICIPALITIES AGAINST LIABILITY FOR WRONGFUL OMISSIONS ASSESSED AND REJECTED
Cape Town Municipality v Bakkerud 2000 3 SA 1049 (SCA)

1 Introduction

Surely very few areas, if any, of the South African law of delict have achieved the fame (or notoriety) associated with the area of liability for wrongful omissions on the part of local authorities, mostly municipalities. Every modern South African textbook dealing with the law of delict contains a discussion of the so-called "Municipality" cases in which the development from a strict "prior conduct" regime to the most elastic "legal convictions of the community" (or *boni mores*) approach is described. (See Boberg *The law of delict vol 1 – Aquilian liability* (1984) 41–46 212 217–222 232–234 236–237 239; Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 31–42; Burchell *Principles of delict* (1993) 41–42; Van der Walt and Midgley *Delict – Principles and cases* vol 1 (1997) 71; Neethling, Potgieter and Visser *Law of delict* (1999) 58–61 70–71. Of the older works, cf Macintosh and Norman-Scoble *Negligence in delict* (1970) 143–148; McKerron *The law of delict* (1971) 71–79.)

Van der Walt and Midgley's concise description (71) of the principle of immunity of municipalities can be taken as our point of departure:

> "For many years the doctrine of previous conduct applied particularly to municipal authorities constructing roadways. In effect, municipalities were not liable for harm caused by mere omissions to repair or maintain a road. Liability arose only if a new source of danger had been introduced."

It is now familiar history that the judgment of Rumpff CJ in *Minister van Polisie v Ewels* 1975 3 SA 597 (A) dealt the final blow to the so-called "prior conduct" or "new source of danger" rule in respect of delictual liability for omissions in general. Although this case did not deal specifically with a municipality as defendant, subsequent judgments of provincial divisions of the supreme court (in particular *Van der Merwe Burger v Munisipaliteit van Warrenton* 1987 1 SA 899 (C) 907I–908B; *Rabie v Kimberley Munisipaliteit* 1991 4 SA 243 (NC) 258I–J; *Butters v Cape Town Municipality* 1993 3 SA 521 (C) 528H–J; and *Cape Town Municipality v Bakkerud* 1997 4 SA 356 (C) 369E–371C) interpreted it as being of general application, thus abrogating the stranglehold of the *omissio per commissionem* rule in the context of defendant municipalities. As Burchell (42) points out with regard to the *Van der Merwe Burger* case in particular, one can now conclude that the importance of all these judgments lies in the fact that they have shown the way to the Supreme Court of Appeal "to reassess the restrictive approach of *Halliwell* [viz *Halliwell v Johannesburg Municipal Council* 1912 AD 659, the *locus classicus* in respect of the 'prior conduct' doctrine] which is out of keeping with the spirit of *Ewels*". It is rather astonishing that the issue of a possibly different dispensation for defendant municipalities in the context of liability for omissions had to wait until the last year of the second millennium, which marks the silver jubilee of the *Ewels* judgment, for our highest court to hand down an authoritative judgment.

2 Facts

The plaintiff was an elderly woman who sustained injuries when she stepped into a pothole in a sidewalk in Sea Point, Cape Town, while walking along the pavement of the street in which she resided. The hole which caused her to stumble was about 15 centimetres in diameter and 10 centimetres deep; this dangerous state of affairs had existed for a period of at least six months prior to her mishap. The legislation in terms of which the defendant municipality had constructed the road and sidewalk in question empowered, but did not oblige, the defendant to construct, maintain and repair streets and pavements within its area of jurisdiction. The plaintiff successfully claimed damages from the defendant in the magistrate's court, without the court ordering a reduction of the amount on account of any measure of contributory fault on her part. The defendant's appeal to the full court of the Cape Provincial Division was essentially unsuccessful, as that court found that the defendant's (appellant's) failure to take steps to guard against an occurrence like the present, constituted a wrongful, negligent omission towards the plaintiff (respondent). The appeal succeeded only in the sense that the plaintiff's amount of damages was reduced by 50 per cent in terms of section 1(1)(a) of the Apportionment of Damages Act 34 of 1956.

The Cape Town Municipality obtained leave to appeal to the Supreme Court of Appeal. The importance to it, as a local authority, of the principle of law involved in imposing a legal duty to repair streets and pavements in its area of jurisdiction swayed the court *a quo* to grant the leave applied for. The scenario was that of the typical test case: the plaintiff (respondent) was not represented by counsel in the court *a quo* or even in the proceedings before the Supreme Court of Appeal and no cost order was sought against her by the defendant (appellant) (1054A–C). It is also noteworthy that no evidence was given on behalf of the municipality. Everything

hinged upon a finding as to the relevant broad principle: counsel for the appellant adopted the position that his client, the municipality, would be liable to the respondent in delict, unless the immunity conferred by the municipality cases – namely that the prior conduct rule still applies where a claim based on an omission is instituted against a municipality – was re-affirmed (1061D–E).

3 Judgment

On the facts available to him, Marais JA found for the respondent (1061B–E):

> "In the present case there is very little in the way of evidence to go on when it comes to deciding whether or not it should be held that the municipality was under a legal duty either to repair these holes or to warn the public of their existence and that its failure to do either was negligent. However, there is just enough to warrant a finding that it was. Sea Point is a densely populated suburb. The pavement abutted on residences and would have been in constant use. There were two holes in close proximity to one another and they were not shallow. There was also a pole near the holes from which a wire cable ran which was attached to the pavement in the vicinity of the holes. It had the effect of shepherding a passer-by in the direction of the holes. The pavement was relatively narrow. The holes had been there for many months . . . In the circumstances, it is unnecessary to subject to any further scrutiny the factual foundation for the existence of a legal duty and a finding that there was *culpa* in failing to fulfil it."

In dismissing the appeal, the court in effect found that the appellant's failure to guard against the respondent's injuries constituted a breach of its legal duty to take precautionary measures (which breach constituted wrongful conduct on its part), for which it could be blamed in law (the element of negligence being established).

4 Appraisal of judgment

4 1 The court's failure to refer to current academic opinion explicitly

The *ratio decidendi* of Marais JA's judgment contains a preliminary, general overview (1054D–1057G) of the issue of delictual liability of municipalities for omissions (termed a "prelude" by the judge himself – 1057H), followed by an application of principle to the omission in issue in the specific case (1057H–1061E). In respect of his exposition of the applicable principles of the law of delict in this field, it is quite startling that the judge refrained from referring in so many words to even a single modern South African textbook on delict, while specifically referring to a mere three articles in legal journals (of which only two are of South African authors – both members of the judiciary, thus not academics, *strictu sensu* – namely Amicus Curiae in 1976 *SALJ* 85 (1056 fn 9) and Corbett in 1987 *SALJ* 52 (1057D; this publication is a record of a public lecture by Corbett JA), the other being of Anglo-American origin (1055 fn 6)). He expressed his intention on this methodology as follows (1054D):

> "The legal literature on the wider topic of liability for omissions generally has burgeoned over the years and has by now reached formidable proportions. Nothing short of a doctoral dissertation can do justice to it all. What follows is a blend of my own observations and what can be gleaned from the more recent cases decided in this and other Courts in South Africa and elsewhere, and from the preponderance of legal writing in the textbooks and journals."

One can wholeheartedly agree with the judge that the literature on this topic has "reached formidable proportions". His observation on the need of a doctoral dissertation in which justice can be done to the subject is, however, rather unfortunate: he was obviously unaware that a formidable doctoral thesis in which the

present problematic field is thoroughly treated over 682 pages, was completed as far back as 1979 – four years after the *Ewels* judgment (Kemp *Delictual liability for omissions* (unpublished thesis, UPE). In Boberg's treatment of the subject, this work is, however, specifically referred to (216). It is the occurrence of this type of omission which causes sympathy for the difficult task of a judge who has to rely on the spadework of the advocates pleading before him; in this case Marais JA pointedly lamented the fact that the respondent had no legal representation (1054C). (It is indeed a pity that Marais JA missed the opportunity to consult Kemp's thesis. Kemp treats the *omissio per commissionem* doctrine in depth (214–264; see 4 3 *post*).)

Two further observations concerning the judge's treatment of academic sources can be made here: First, on the introduction of the test of the "legal convictions of the community" for wrongfulness by Rumpff CJ in the *Ewels* case, he stated that it "has not been universally acclaimed" (1056H); as authority he referred to the article by Amicus Curiae (*supra*) in a footnote (9), adding to the reference the information that this was the *nom de plume* of the distinguished Colman J, for which piece of bibliographical data he further referred to the encyclopaedic *The law of obligations – Roman foundations of the civil tradition* by Zimmermann (1046 fn 299). However, the reference is clearly erroneous: that footnote merely contains a reference to the *Ewels* judgment; the correct source for the information concerning Colman J's *nom de plume* is Hutchison's contribution in Zimmermann and Visser *Southern Cross – civil and common law in South Africa* 628 fn 233! (This work was referred to by Marais JA at 1057 fn 10.) Secondly, his reference to sources as authority for the statement that the *Ewels* test "has been welcomed by most" (*ibid*) was to the work edited by Zimmermann and Visser (625 fn 225) referred to above. Hutchison there merely states: "See the writers listed by Boberg (n 68), 266." This is indeed a quite novel way of utilising a secondary source! Why did the judge not refer to Boberg's work in the first place?

If one were to seek the judge's failure to refer to standard text books and contemporary contributions in the law journals in the English custom of avoiding references to living authors (academics), this does not explain his treatment of the products of the mind of one so eminent as the late Paul Boberg. That Marais JA was probably not following a custom such as the one just referred to, is evidenced by the fact that he did refer to two very eminent living academics, Zimmermann and Visser (by implication to a third, if Hutchison, who wrote the relevant part in this compilatory work but who is never mentioned by name, is added). Or does the fact that the works under the name of the latter authors can be described as "descriptive" and not "contentious" (as some of the other works may in some respects be typified) play a role in this regard? One can simply continue endlessly endeavouring to find an explanation for the judge's approach to contemporary academic writing. It is suggested that no clear methodology to explain the lack of reference to standard works and contributions in legal journals emerges from this judgment. (For a different judicial approach which explicitly takes cognisance of the fruits of labour of academics, there is a plethora of examples from the reported judgments: see eg *Sachs v Donges* 1950 2 SA 265 (A); *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 825 (A); *Christian League of Southern Africa v Rall* 1981 2 SA 821 (O); cf further Hahlo and Kahn *The South African legal system and its background* (1973) 324–325; Hosten, Edwards, Bosman and Church *Introduction to South African law and legal theory* (1995) 526–507; Steyn 1967 *THRHR* 101; Rabie 1983 *De Jure* 21; Nienaber 2000 *TSAR* 190.)

Returning to Marais AJ's remark concerning the existence of a large body of academic writing on this topic (1064D, quoted above), one must assume that he read and digested what was readily available (ie virtually all the South African sources). In this light his final conclusion in declining to re-affirm the doctrine of immunity of municipalities is precisely what one would have expected. Had he come to another decision, this would have run counter to the overwhelming majority of contemporary academic writings (as to textbooks alone, see Boberg 234 *in notis*; Van der Merwe and Olivier 42; Burchell 42 *in fine*; Van der Walt and Midgley 71; Neethling, Potgieter and Visser 61 *in fine*).

4 2 The "prelude" continued: the wrongfulness issue

What has critically been observed above (*4 1*) does not detract from the fact that Marais JA eloquently paraphrased the applicable legal principles as they have developed over the decades, in particular succeeding in rendering a systematic and jurisprudentially satisfying exposition.

The judge's warning against confusing the delictual elements of wrongfulness and fault (*culpa*) is to be welcomed; there seems to be a tendency, even in judgments of the Supreme Court of Appeal (see eg *Cape Metropolitan Council v Graham* 2001 1 SA 1197 (SCA), discussed by author in 2001 *De Jure* 198) to disregard the theoretical differences between these elements. In explaining the difference between a "mere" omission and a wrongful one (see for the terminology 1054G), Marais JA warned (1054H–1055A):

> "Any attempt to decide whether a particular omission will potentially ground liability by merely measuring it against the standard of conduct to be expected of a reasonable person will fail for a number of reasons. First, the test is sequentially inappropriate . . . Secondly, the application of the classic test for *culpa* to the solution of the anterior question is calculated to produce consequences which are too burdensome for society to acquiesce in shouldering them."

One can laud the judge's emphasis on the fact that "the issue of wrongfulness is logically anterior to the issue of fault" (to use the words of Boberg 271; this is indeed the present academic *communis opinio*: see eg Van der Merwe and Olivier 111; Van der Walt and Midgley 54, 125; Neethling, Potgieter and Visser 119). The mere notion of employing the reasonable man test, which is the criterion for negligence and against which Marais JA pertinently warns as a second point in the context of testing for wrongfulness, would be a strange way of arguing indeed. From a purely theoretical point of view, one wonders how this idea could even have arisen: the *diligens paterfamilias* test operates on the basis that the reasonable person is put *into the shoes of the defendant at the time of the relevant act or omission*, whereas the *boni mores* test for wrongfulness is more objective in the sense that the situation to be evaluated is viewed from a distance, *ex post facto*, which is much more of an armchair approach in the sense that one may be "wise after the event". (For the difference between the tests for wrongfulness and *culpa*, see in particular Neethling, Potgieter and Visser 151–154.) What the judge did in fact moot before rejecting it outright, was a stricter than normal test *vis-à-vis* the defendant than both the existing criteria for wrongfulness and *culpa*. Its introduction into the law of delict would have confounded the distinctions between the tests for these different delictual elements, which have evolved over decades of case law.

Scholars in the field of delict have been grappling for a very long time with the difficulty of finding a *via media* between a doctrine which denies liability for any omission on the one hand, and one which converts all moral and ethical obligations to act positively into legal duties, on the other hand. The type of approach advocated

by Monroe (*The Lex Aquilia* (1898) 38) seems to have been followed in the case law which evolved in South Africa since the handing down of the first "Municipality" judgments at the beginning of the previous century:

> "Even those who hold that an omission is actionable are not really thinking of the case of a man simply declining to bestir himself for the protection of his neighbour. The law does not compel everybody to act the part of Don Quixote."

Marais JA gave an overview of the development of South African law in this regard in paraphrased form (1055E–G): he sketched the initial piecemeal, casuistic approach, in which omissions were regarded as actionable (wrongful) only where certain circumstances existed. He mentioned the following (well-known)

> "factors [which] have come to the fore over a long period of time which may indicate the existence of a legal duty to act positively to prevent harm" [to use the words of Neethling, Potgieter and Visser 57]: "prior conduct on the defendant's part; the existence of a special relationship between plaintiff and defendant, pointing to a duty to act positively on the defendant's part; the existence of a statutory measure, creating such duty; and control by the defendant of dangerous property".

Although the judge emphasised that his list is not exhaustive, it is unfortunate that he did not mention the few other instances usually provided by the standard textbooks, as this may have gone some way towards dispelling present uncertainty in the field. Although academic opinion would on the whole seem to favour as further categories of liability for an omission the defendant's holding of a particular office and a contractual undertaking by the defendant for the safety of a third party (see Boberg 212; Van der Merwe and Olivier 47; Neethling, Potgieter and Visser 68), there seems to be some doubt about a seventh category listed by Neethling, Potgieter and Visser (69–70), namely "creation of the impression that the interests of a third party will be protected". The need to recognise such further category was rejected by Strauss AJ in *Longueira v Securitas of South Africa (Pty) Ltd* 1998 4 SA 258 (W). The present judgment does not assist in obtaining certainty on that question (although it may be regarded in most circles as purely academic).

In most eloquent terms Marais JA reflected on the existence or absence of a unifying link in the categories of actionable omissions, concluding on this point as follows (1056F):

> "It was not always easy to discern one [a unifying link]. In the end, this Court [in the *Ewels* judgment] felt driven to conclude that all that can be said is that moral and ethical obligations metamorphose into legal duties when 'the legal convictions of the community demand that the omission ought to be regarded as unlawful'. When it should be adjudged that such a demand exists cannot be the subject of any general rule; it will depend upon the facts of the particular case. It is implicit in the proposition that account must be taken of contemporary community attitudes towards particular societal obligations and duties. History has shown that such attitudes are in a constant state of flux."

No modern scholar will find fault with this concise and accurate interpretation of the effect of Rumpff CJ's judgment in the *Ewels* case (in addition to the quaint, indirect, reference to Boberg 266 via Zimmermann and Visser 628 fn 225, on which I have commented above under *4 1*, one may refer to all modern South African standard textbooks in this regard, eg Van der Merwe and Olivier 41–42; Burchell 42; Van der Walt and Midgley 71; Neethling, Potgieter and Visser 70–71: the consensus reflected in their pages is in accordance with the exposition of Marais JA quoted directly above). One can say that the court simply reaffirms the position as it has been interpreted by the provincial divisions of the supreme court and academics over the past 25 years.

Marais JA evaluated the reactions to the *Ewels* judgment (1056H–1057C) and concluded that the reservations expressed by someone as eminent as Colman J (viz Amicus Curiae 1076 *SALJ* 85; see comments above under *4 1)* to the effect that a specific court's personal, subjective perception of the strength of a particular moral or ethical duty could too easily be equated with the "legal convictions of the community" (thus giving rise to the spectre of legal uncertainty and unpredictable jurisprudence within the idiom of the "Chancellor's foot"), do not weigh up against the benefits of the formula of the "legal convictions of the community". (It is noteworthy that the court never used the expression *boni mores* as a synonym for "the legal convictions of the community", a usage which has taken firm root in the jurisprudence and which has been echoed in academic literature; see in particular sources referred to in Neethling, Potgieter and Visser 38 fn 17.) In this regard Marais JA concluded (1057B–C):

> "Courts are expected to be able to recognise the difference between a personal and possibly idiosyncratic reference as to what the community's convictions *ought* to be and the *actually prevailing* convictions of the community. Provided that Courts conscientiously bear the distinction in mind, little, if any, harm is likely to result."

In emphasising the difference between a court's evaluation of what the legal convictions of the community ought to be and what the actually prevailing convictions are, Marais JA made a very fine distinction. In the context in which he spelled out his warning, one must certainly interpret his direction as putting the prevailing legal convictions on the foreground as the criterion to be applied, and not as the court's perception of what the convictions ought to be. Should this be a correct interpretation of the judge's words, it would seem to fly in the face of an earlier observation made by him (1053J fn 3) concerning the English terminology for expressing what Rumpff CJ referred to in the *Ewels* case as "die regsoortuiging van die gemeenskap":

> "The phrase [viz 'legal convictions of the community'] is the translation in the law reports of the phrase 'regsoortuiging van die gemeenskap' used by Rumpff CJ . . . It is not a particularly happy rendering. What after all is a *legal* conviction? 'Sense of what the *law* ought to be' would, I think, convey the meaning more accurately. However, as the rendering in the law reports is commonly used, I shall fall in line and continue to use it in this judgment."

Although the emphasis here is not on the difference between reality and ideal (as in the exposition at 1057B–C), but on the question whether a conviction is of a legal nature or not, one cannot escape the logical conclusion that Marais JA here equated the contents of the concepts of "legal convictions" and "convictions about what the law ought to be". This is indeed a perplexing aspect of the judgment which may in future present difficulties when the precise meaning of the criterion of "legal convictions of the community" presents itself for scrutiny again.

Marais JA concluded his "prelude" by referring with approval to the words used by Corbett JA in a public lecture (later published in 1987 *SALJ* 52; see in particular 56) where the future chief justice explained the main impact of the *Ewels* judgment regarding the application of the criterion of "the legal convictions of the community" as lying in the Appellate Division's casting "the courts for a general policymaking role in this area of law". Marais JA added the following rider to those words (1057F):

> "In playing that general policymaking role a court should be mindful of its limitations in diagnosing accurately and prescribing effectively for the ills of society."

4 3 The position of municipalities as defendants

The gist of the appellant's argument was that the enabling legislation in terms of which municipalities embark upon road-making activities do not impose a positive

obligation upon those bodies to build or maintain pavements (1057H–1058C): since that legislation is purely directory (permissive) and not peremptory, a municipality's failure to maintain a sidewalk it had built cannot be held against it unless, of course, the municipality had created a new source of danger by its prior conduct. The high-water mark of this process of thought which underlies the doctrine of "the general immunity" of municipalities in this regard, is undoubtedly the judgment of Schreiner JA in *Moulang v Port Elizabeth Municipality* 1958 2 SA 518 (A). What the appellant was in fact seeking was a return to the *Moulang* position, which would entail a total denial of the validity of the development of rules pertaining to liability of municipalities for wrongful omissions after the *Ewels* judgment. The appellant therefore took a stance against overwhelming odds. It is of interest that the author of the only doctoral thesis dealing specifically with this issue, argues against the *communis opinio*; his view could therefore have been used in favour of the appellant (Kemp 264; see also in particular 393 *et seq*):

> "It is submitted that the criticism against the *omissio per commissionem*-doctrine (sic) is largely unfounded. The South African courts have established liability for an *omissio per commissionem* on a sound doctrinal basis."

The old adage runs that it is no use crying over spilt milk. However, in retrospect, it is to be lamented that this thesis was not referred to and the arguments contained in it thus not considered. In the light of the final judgment of Marais JA, it would be pointless to pursue any of Kemp's arguments here.

The court declined to embark upon an analysis of the municipality cases of pre-*Moulang* vintage. Instead it provided an extremely useful four-point summary of what "the cases did and did not decide" (1058D): First, they did not decide that *at common law* a municipality was absolutely immune against delictual liability for failure to repair a road or pavement (1058E). Secondly, they did not decide that the relevant *enabling legislation* conferred such immunity (1058F–I). Thirdly, they did not decide that municipalities that did in fact choose to exercise their powers of repair placed themselves in an immune position (1059A). Fourthly – and this is the only conclusion formulated positively – these cases did decide that, apart from the existence of prior conduct on the part of the municipality concerned, the law of delict did not give rise to a general legal duty to repair a street or pavement which had deteriorated into a state of disrepair (1059B–C).

Marais JA then continued to evaluate the effect of later judgments (like *Regal v African Superslate* 1963 1 SA 102 (A), *Minister of Forestry v Quathlamba* 1973 3 SA 69 (A) and *Minister van Polisie v Ewels supra*) which broadened the ambit of delictual liability for omissions, upon the municipality-cases doctrine as it had culminated in the *Moulang* case. In drawing the conclusion that, although the latter cases did not expressly overrule the municipality cases, they did undermine them substantially, the court expressed itself as follows:

> "Insofar as the municipality cases proceeded from the premise that 'our law of negligence recognises liability for omissions only exceptionally, and more particularly when there has been a previous act or commission on the part of the alleged wrong-doer' [*Moulang* case 522H], they inhibited the Courts concerned from enquiring whether . . . the legal convictions of the community demanded that a legal duty to repair (or warn) *dehors* the legislation should be recognised . . . [O]nce it has been accepted (as it has been) that the premise was indeed erroneous, the authority of the conclusions reached in the municipality cases in regard to any supposed general immunity and the scope of liability for omissions in general must necessarily be considerably diminished. In other respects, the authority of those cases remains unimpaired."

Having thus firmly reconciled himself to the rejection of the narrow prior conduct principle (the "erroneous premise"), it is important to note that Marais JA concluded that the authority of the municipality cases is still accepted "[i]n other respects": this doubtless refers to the policy considerations mentioned in a case like *Moulang*, which played a (subsidiary) role in deciding on the presence or absence of wrongfulness in evaluating a municipality's failure to repair a road or sidewalk. Schreiner JA described these considerations as follows in the *Moulang* judgment (522F–G):

> "A main factor is no doubt that of expense to municipalities. It might be practically impossible for them to make and keep all their street and pavement surfaces reasonably safe for users. Improvements and maintenance take time and money. And the law has thought it right not to discourage municipalities from doing work on their roadway surfaces, by the fear that such activity might raise a liability if holes or other unevennesses came into existence and caused accidents. And there are doubtless other factors."

The most important conclusion drawn by Marais JA after having asserted the non-existence of a general immunity for municipalities, is the following (1059–1060A):

> "I think that, having done so [rejected the notion of a general or relative immunity for municipalities] it was wrong to substitute for it what amounts to a blanket imposition upon municipalities generally of a legal duty to repair roads and pavements. In my view, it has to be recognised that in applying the test of what the legal convictions of the community demand and reaching a particular conclusion, the Courts are not laying down principles of law intended to be generally applicable. They are making value judgments *ad hoc*."

In saying this Marais JA was referring to and criticising Brand J's judgment in the court *a quo*. It is interesting to note that Fagan and Fagan 1997 *Annual Survey of SA Law* 260 *et seq* criticise Brand J on the self-same point, namely for postulating a type of "blanket" legal duty on municipalities to maintain roads and sidewalks, or to warn users of existing dangers. These authors can now rest content that their point of view has prevailed.

Marais JA substantiated his stance by a vivid example of "a minuscule and underfunded local authority with many other and more pressing claims upon its shallow purse" (1060B) which should not be held liable for failure to repair potholes in a little-used lane. He then reiterated what he said earlier (1060D):

> "There can be no principle of law that all municipalities have at all times a legal duty to repair or to warn the public whenever and whatever potholes may occur in whatever pavements or streets may be vested in them (*sic*)."

He also stated that although it is tempting to construe a general duty on the part of municipalities to act in protection of the road-using public, such a notion is not in accordance with the demands of reality (cf 1060E; see also 1060G–I).

The all-important implication for an individual plaintiff claiming delictual damages from a municipality on the ground of such defendant's failure to repair a road or pavement, is that the onus is upon the plaintiff to prove the existence of a duty to act positively on the municipality's part, as well as the breach of that duty by the defendant; furthermore, the normal onus on the plaintiff of proving negligence on the defendant municipality's part is reasserted by Marais JA (1060H–J). The importance of the court's direction regarding the onus of proof in respect of the wrongfulness issue manifests itself if one bears in mind a general notion among average road-users and even lawyers, which was formulated as follows in one of the earlier municipality cases (*Stewart v City Council of Johannesburg* 1947 4 SA 179 (W) 186): "Pedestrians are entitled to regard sidewalks as safe and to proceed accordingly unless they are plainly warned to the contrary."

This statement does not reflect the law as it has now been laid down.

5 Conclusion

This judgment aims at striking a balance between the interests of members of the public who suffer damage because of a flaw in the surface of a road or pavement in a municipal area, and the local authority under whose jurisdiction the road or pavement falls. The "magic wand" by which justice is to be attained, is the criterion of the legal convictions of the community, which determine the presence or absence of wrongfulness in the case of an omission.

One is tempted to embark upon a detailed description of the history of this *boni mores* criterion in the sphere of omissions since its emergence in landmark judgments like *Ewels*, but that would fill many pages and could be a more fitting subject for a master's dissertation or even a doctoral thesis. However, what should be emphasised is that the application of that criterion, while achieving justice between the parties, fails in the sphere of creating legal certainty. (That is the main point of criticism of a general recourse to this somewhat vague criterion, as pointed out by Amicus Curiae 1976 *SALJ* 85.)

One can further pose the question (now purely academic, of course): Even assuming that a very heavy burden rests upon a municipality in the sense of postulating a general duty to maintain and repair roads or to warn against dangers, would the indigence of a municipality not avail it when the negligence issue came to the fore, after a positive decision has been taken as to the existence of a wrongful omission? The cost and trouble involved in taking precautionary measures to avoid harm is a well-known factor in the process of establishing negligence (see eg Van der Walt and Midgley 144–149; Neethling, Potgieter and Visser 142–143; see also Marais JA's reference to this aspect 1061A).

In retrospect, one can say that the issue of delictual wrongfulness in the sphere of liability of municipalities for an omission has finally stabilised: the pendulum has swung from the side of a strong immunity for municipalities (eg *Halliwell v Johannesburg Municipal Council* 1912 AD 659; the *Moulang* case *supra*) to a high-water mark of blanket liability for omissions (in particular the judgment of Brand J in the court *a quo* in the *Bakkerud* case), finally to come to rest in the fashion described by Marais JA. It is improbable that money will be spent in the immediate future to reopen this issue in our highest court, if one bears in mind that "*Roma locuta est, causa finita est*"!

JOHAN SCOTT
University of Pretoria

A NEW MILLENNIUM, A NEW APPROACH? Janse van Rensburg v Grieve Trust CC 2000 1 SA 315 (C)

1 Introduction

In 1995 I expressed the hope that the introduction by the Constitution of the Republic of South Africa, Act 200 of 1993, of the principle of equality would have a significant effect on the development of the law of contract ("The principle of equality in the law of contract" 1995 *THRHR* 157 ("Principle of equality")). Since then, the 1993 Constitution has been superseded by the Constitution of the Republic

of South Africa, Act 108 of 1996. In terms of section 8(2) and (3), the rights contained in the Bill of Rights apply horizontally. In consequence, the courts are mandated to explore and investigate all private relationships to ascertain whether a particular constitutional right is applicable to a particular relationship (Devenish *A commentary on the South African Constitution* (1998) 45–46).

Moreover, it has been submitted that the Constitution embraces and promotes a substantive conception of equality (Kentridge "Equality" in Chaskalson *et al* (eds) *Constitutional law of South Africa* (1996) 14–55). Although fundamental rights are now positive law, their effect will be determined by interpretation. In 1995 I also expressed the hope that the approach to the interpretation of fundamental rights would be a purposive one, but added that the outcome of the interpretation by the courts will depend on views about the state, society and the individual (Principle of equality 162).

It is therefore cause for rejoicing that the right to equality has recently been applied in an area of the law of contract which was in great need of impetus. I refer to the principle of *bona fides*, a principle which, on the one hand, is referred to as underlying the law of contract (*Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 652F–G), but, on the other, is not regarded as playing a significant role in South African law (*Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 605–606 609–610). This principle has, as a result of the right to equality, eventually been recognised and used as a norm in establishing equitable principles.

2 The role of *bona fides* in the law of contract

The classical theory which underlies the South African law of contract and the principle of individual autonomy has been tempered by the principle that good faith in contractual relations requires protection. It has been accepted that the duty to contract in good faith governs the creation, consequences and performance of contracts, and has the potential to ensure equitable results. During the 1920s the Appellate Division recognised and gave effect to *bona fides* in the law of contract (eg *Neugebauer & Co Ltd v Hermann* 1923 AD 564; *Macduff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573). Already in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 295, however, Kotzé JA stated: "Equitable principles are only of force in so far as they have become authoritatively incorporated and recognised as rules of positive law." Although the judges, in particular Jansen J, occasionally recognised and used the concept of *bona fides* to create new and equitable rules and to find just solutions for problems (see eg *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 651B–652G), the minority judgment in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 611G–617H clearly shows what could have been accomplished. The majority judges in the *Bank of Lisbon* case (*per* Joubert JA) stated that no evidence could be found of the existence of a general substantive defence based on equity (605I–J).

In spite of, and also as a result of, the above approach, the courts have given expression to the requirement of good faith by indirect means, namely by interpretation of contracts, by *ex lege* and tacit terms, and by considerations of public policy (Principle of equality 169–174).

A properly developed norm of good faith should provide the justification for the implication of *ex lege* and tacit terms in contracts. Development of the content ascribed to the norm of good faith will be in the hands of the judiciary and the

legislature. The recognition of the right to equality in positive law should provide a determinant of the content of this ambiguous and underdeveloped open norm in the law of contract.

It is obvious in our case law that freedom of contract has dominated at the expense of social and economic realities. Most judges ignore the discrepancy between the formal requirements of freedom and equality and socio-economic reality, and continue to uphold the assumptions of the nineteenth century. In this respect, they share the sentiment of the courts in most countries, namely that postulates such as equality and freedom are political values, and as such must be made part of legal reality by the legislature and not by the judiciary. Thus they refuse to use their judicial function to bring about social and economic redistribution. In the past there has also been limited inclination to make any adaptations to doctrines to ensure equality, as can be seen in the decisions regarding cases of suretyship contracts since *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) (eg *Standard Bank of SA Ltd v Wilkinson* 1993 3 SA 822 (C); *Standard Bank Financial Nominees (Pty) Ltd v Bamberger* 1993 4 SA 84 (W); *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 4 SA 206 (W); Principle of equality 173 fn 128).

3 Influence of the Constitution

Good faith required development – a development which Van der Walt in 1986 ("Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontraksbedinge" 1986 *SALJ* 646 659) was doubtful would take place in the future. It is gratifying to note that the South African courts are meeting the challenge, as may be seen in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (SCA) and, more recently, in *Janse van Rensburg v Grieve Trust CC* 2000 1 SA 315 (C).

In *Janse van Rensburg* the question of the nature of a trade-in agreement provided the forum for the development of good faith as a norm governing contractual content and creating a foundation for a doctrine of substantive unconscionability which will control unfair contracts directly.

Abandoning the rule laid down by Kotzé JA in *Weinerlein v Goch Buildings Ltd* 1925 AD 295 and reconfirmed by Joubert JA in *Bank of Lisbon* 1988 3 SA 580, where it was stated that equity does not exist distinct from and opposed to the law, and that equitable principles are of force only in so far as they have become authoritatively incorporated and recognised as rules of positive law, Van Zyl J (in *Janse van Rensburg* 2000 1 SA 326) actively recognised equity as a principle of the South African law of contract.

4 Nature of a trade-in agreement

4 1 Facts

In *Janse van Rensburg* the appellant purchased a used 1990 model Opel Kadett motor car from the respondent for the amount of R38 046. Payment was to be made partially by way of a trade-in of the appellant's interest in a used car. This interest was valued as the difference between the car's trade-in value of R44 000 and the amount of R28 582 still owing by the appellant in terms of a credit agreement. The balance of the purchase price was to be paid in cash. The appellant was under the *bona fide* but mistaken belief that the traded-in car was a 1993 model whereas in reality it was a 1989 model. It was common cause that if the respondent had been aware of the car's true age, he would not have agreed to a trade-in amount of more

than R34 200. The respondent accordingly claimed reduction of the trade-in amount, being the difference between R34 200 and the original trade-in figure of R44 000 (R9 800).

4 2 Applicability of aedilitian actions to trade-in agreements

4 2 1 Introduction

The case turned on the question whether the aedilitian actions are available in a trade-in agreement where the trade-in has a latent defect, or where an innocently made but incorrect *dictum et promissum* in respect of the traded-in thing has been made. The magistrate in the court *a quo* found for the respondent that the action for a reduction in purchase price is applicable to a latent defect in a vehicle traded in as part of the purchase price (317C–D), and that the principle of *in solutum datio* was applicable (317D). The magistrate had held that he was bound by the decision in *Wastie v Security Motors (Pty) Ltd* 1972 2 SA 129 (C) despite the fact that there were contrary decisions in Natal in *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 1 SA 172 (D) and in the Orange Free State in *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 2 SA 208 (O). On appeal, it was argued for the appellant that the *Wastie* decision was distinguishable, alternatively wrong, and should not be followed (317D–E). The respondent, on the other hand, contended the opposite, alternatively that the principle of *in solutum datio* was applicable.

4 2 2 Case law

Van Zyl J thoroughly analysed the aedilitian actions as applied in Roman law, and the extended application of those actions in *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A) and *Wastie v Security Motors (Pty) Ltd.* In the latter case the same issue was in contention, namely whether the *actio quanti minoris* was available in a trade-in agreement where the vehicle traded in was defective. An extension of the aedilitian remedies depended on whether the contract was one of sale or one of exchange. After reference to Voet 18 1 22, it was decided that the contract at issue was one of sale (1972 2 SA 131F), and that in terms of the aedilitian actions the purchaser gives to the seller a similar warranty to the one given by the seller to the purchaser, namely that the merx is free of latent defects (132G–H). The decision was based on the argument that if this was not the case, then that careful balance which the law preserves between purchaser and seller would be disturbed, and the innocent seller may, because of his inability to prove the deception of the purchaser, be overreached by an unscrupulous purchaser feigning ignorance of the latent defect in the non-money portion of the price (132 *in fine*).

In *Mountbatten Investments*, however, Bristowe J criticised and rejected the extension of the application of the aedilitian remedies to trade-in contracts (1989 1 SA 180E–F). In his opinion, those actions are applicable to contracts of sale and exchange. After analysis of the transaction, he came to the conclusion that a traded-in vehicle was neither sold nor bartered (179F–G). He concluded that there is no authority that there is an implied warranty in law for the non-monetary portion of the *pretium* (180J–181A). This approach was also taken by Wright AJ in *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 2 SA 208 (O), where an innocent but false misrepresentation was made in respect of the model of a vehicle traded in on another vehicle. It was also held that there was no substance in the notion that the law preserves a careful balance between purchaser and seller, and that the proposition that an innocent seller may be overreached by an unscrupulous purchaser feigning ignorance of a latent defect was unconvincing (*Mountbatten* 1989 1 SA 181A–B).

5 Theoretical solutions

Van Zyl J in the *Janse van Rensburg* case referred to various academic contributions aimed at supporting the applicability of the aedilitian remedies to the traded-in object. Reinecke (1989 *TSAR* 442 447) is of the opinion that the purchase price in trade-in contracts is linked to a facultative performance to deliver a sum of money plus a thing. This interpretation would preclude the possibility that a trade-in contract may be construed as a contract of exchange. Flemming *Krediettransaksies* (1982) 204, De Wet and Van Wyk in *Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 314 fn 5 and Hawthorne "The nature of trade-in agreements" 1990 *THRHR* 116–121 and "Nature of a trade-in agreement" 1992 *THRHR* 143–151 are all of the opinion that a trade-in transaction is an *in solutum datio* in the sense that the creditor agrees to accept something else as part of the performance which is due. These theories facilitate the argument that the aedilitian remedies are applicable to trade-in agreements, without relinquishing the requirement that the price should be in money. Van Zyl J decided to overlook this aspect and held himself bound by the *Wastie* decision (323H), which has been heralded as being "in perfect accordance with the true spirit of good faith that has formed the basis for the contract of sale ever since the days of classical Roman law" (Stoop "*Hereditas damnosa*? Some remarks on the relevance of Roman law" 1991 *THRHR* 175 186).

Van Zyl J found no merit in the argument that a traded-in object qualifies as an *in solutum datio*. According to him, an *in solutum datio* means that performance of something other than the agreed or due debt is made to the creditor. He took the line that *in solutum datio* must relate to the whole debt originally agreed upon and not merely to a part of it (327A–B, and the references cited there). Zimmermann *The law of obligations: Roman foundations of the civilian tradition* (1990) 252, however, states that "the transaction is usually regarded as a contract of sale, the purchaser being allowed to provide a substitute for part of the purchase price". Van Zyl J, however, viewed the vehicle being traded in as part and parcel of the original debt agreed upon by the parties. It is part-performance of the agreed obligation to pay the price of the purchased vehicle. Part-performance can never be equated with substituted or alternative performance (327C–D).

6 Extension of the application of the aedilitian remedies to trade-in agreements

Van Zyl J was, however, convinced that the aedilitian actions should apply to trade-in agreements (325B). He justified this proposition by citing the requirements of the principles of justice, equity, reasonableness and good faith – all norms inherent in the law of contract (325C). Moreover, public policy demands that the relevant law be extended and adapted to meet the requirements of modern commercial practice (325C–D).

Furthermore, the extension of the aedilitian remedies to the traded-in portion of the price in contracts of purchase and sale was held to be a consequence of the flexibility of the South African legal system (325D). This flexibility had already been noted in *Blower v Van Noorden* 1909 TS 890 905, *Pearl Assurance Co v Union Government* 1934 AD 560 563, *Jajbhay v Cassim* 1939 AD 537 542, *Phame (Pty) Ltd v Paizes* 1973 3 SA 418H–419C, *S v Graham* 1975 3 SA 569 (A) 576F and *Alpha Trust (Edms) Bpk v Van der Watt* 1975 3 SA 734 (A) 749D–E, and was recently implied in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 320E–F, where it was noted that the concept of *bona fides* in its creative role forms part of our law.

Van Zyl J associated himself with the extension of the application of the aedilitian remedies to a seller in a trade-in agreement where the vehicle traded in is defective or a misrepresentation is made about it (326A). Although he rejected all the constructs used by academics, he justified such an extension as being consonant with the spirit and values contained in the Bill of Rights as set forth in Chapter 2 of the new South African Constitution (326E–F). In terms of section 8(3)(a) of the Constitution, courts are exhorted to apply or to develop the common law to the extent that legislation does not give effect to provisions of the Bill of Rights. The right to equality before the law is one of the rights entrenched in the Bill (see s 9(1), which states: "Everyone is equal before the law and has the right to equal protection and benefit of the law"). The principle of equality is reinforced when read together with section 39(1)(a), which requires a court, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

7 Conclusion

Janse van Rensburg v Grieve Trust CC is the first high court decision that acknowledges the mandate of the Constitution to develop the common law by giving effect to a fundamental right contained in the Bill of Rights, in this instance the right to equality. In a trade-in agreement, it would be unjust, inequitable and unreasonable for a seller to be liable for latent defects in, and misrepresentations relating to, the vehicle sold by him while no similar obligation attaches to the purchaser in respect of a vehicle traded in by him. A purchaser would in effect be able to deliver a defective trade-in vehicle, knowing full well that the seller will not be able to raise the aedilitian actions against him. If these actions were available only to one party but not to the other, then the law's recognition of the principle of equality would be false. It is interesting to note that Van Zyl J, after stating his belief in the principles of justice, equity, reasonableness and good faith inherent in our common law and strongly evident in our law of contract, was nevertheless forced to rely on constitutional values to reach an equitable solution.

A final question is whether Van Zyl J has by implication planted the seed for the development of a doctrine of inequality (see Principle of equality 175). On a more pessimistic note, the fact remains that, in his alacrity to reach an equitable decision on the basis of values rather than formalistic rules, the judge appears to have relinquished the ancient requirement that the price in a contract of sale must be in money.

LUANDA HAWTHORNE
University of South Africa

But constitutional law is the ultimate expression of all *areas of law, public and private. All law functions within the foundational values and parameters that the constitutional structure establishes and enforces. The creation of professional distance between the public and its law undermines the sovereignty of a democratic polity.*

James T McHugh "Making public law 'public': An analysis of the Quebec reference case and its significance for comparative constitutional analysis" 2000 ICLQ 445.

BOEKE

ACTA JURIDICA

Juta & Co, Ltd, Cape Town 1999 ix and 338 pp

This edition of *Acta Juridica* is devoted to particular aspects of environmental law. It comprises a selection of papers largely, but not exclusively, presented at a conference hosted in April 1998 by the Faculty of Law of the University of Cape Town in collaboration with the Environmental Law Centre, Macquarie University, Sydney. It incorporates the papers of a number of South African, Australian and other international academics and practitioners, and is arranged in three broad themes: environmental justice, governance and law; natural-resource conservation and utilisation; and waste, pollution, standards and liability. The collection broadly examines these three themes against the backdrop of political change in South Africa and explores the impact of the developing constitutional democracy on the promotion of "environmental justice".

In the first part, which deals with environmental justice, governance and law, a number of South African and overseas authors investigate the nature of the Constitution of the Republic of South Africa, Act 108 of 1996, particularly its founding principles and the Bill of Rights, to determine how and to what extent it encapsulates the basic tenets of environmental justice. Most authors agree that the South African constitutional democracy, which entrenches democratic values such as human dignity, equality and other fundamental rights and freedoms, provides the context within which environmental justice should be promoted and achieved. Against this backdrop, environmental justice means social justice, for example environmental reconstruction and reconciliation, environmental equality, and equity in the distribution and utilisation of resources, which should lead ultimately to the achievement of long-term growth and welfare through sustainable development. Addressing and rectifying environmental injustice is a worldwide phenomenon, and a responsibility which is shared by governments, business and industry, civil society and individuals. It is inextricably intertwined with poverty, and was brought to light as a result of the apparent schism between the wealthy "North" and developing "South" which led to far-reaching environmental and economic hardship for developing countries.

Part two examines the conservation and utilisation of natural resources. The first contribution focuses on aspects of wildlife conservation, in particular community-based management of wildlife resources in the local-government sphere and the successes that have been achieved in neighbouring countries with community participation in a balanced resource-management programme: on the one hand, the

community participates in and incurs responsibility for wildlife conservation; on the other, it takes ownership of and generates substantial financial returns for its involvement in the programme. The next paper reflects on an informative study of the conservation of marine resources and illustrates the negative effects of authoritative control by the state over the abalone industry on communities and their natural resources. Communities have viewed the "top-down" law-and-order approach to the management of natural resources as a mechanism used by the state to maintain ownership over valuable economic assets, rather than as a conservation strategy. It illustrates how the exclusion of local people in accessing resources, partly through the adoption of draconian laws and enforcement, has failed to achieve sustainable resource utilisation and suggests that decentralisation of management responsibilities, the adoption of co-management strategies and the forging of partnerships could be the only option for long-term success in natural-resource conservation. The last paper under this topic looks at water rights and property in South Africa, with a comparative view from the USA and Germany. The author examines the legacy of environmental injustice caused by the previous water and property regime, and the efforts that have been made by the Constitution and subsequent water and land statutes to achieve environmental justice. Some incisive questions are posed on the constitutionality of the new National Water Act 36 of 1998 in relation to the effective cancellation of unexercised water rights and the granting of water licences. The reorganisation of South African water law must, however, be assessed within the wider constitutional context, taking into account the transitional arrangements in the Act and the remedies available to individual users. The apparent encroachment on private (individual) rights may be regarded as reasonable and justifiable in terms of the overall state responsibility to provide access to and the beneficial and sustainable use of this finite basic resource to all people.

The last theme tackles waste, pollution, standards and liability, and focuses on particular topics in this field. The first paper identifies the complexity of environmental standards and their legitimacy. It is argued that standards can no longer be drawn from one discipline only, since a change in emphasis has occurred from environmental protection to sustainable development and its socio-economic dimensions. A holistic approach which traverses different disciplines (and not only legislation) is necessary. The transboundary movement of hazardous waste, and the environmental injustices caused by the dumping of such waste in developing countries, is the next topic of discussion. The author discusses the relevant provisions of the Basel Convention, Lomé Convention and Bamako Convention, and their impact on and implications for the regulation of hazardous waste in South Africa. It is clear that, in the light of its international obligations, South Africa is moving towards the adoption of a comprehensive waste-management regime and an integrated waste-management strategy. Waste-management schemes will have to be worked out to implement the system. The next paper deals with the asbestos crisis in South Africa. Many questions are posed regarding the constitutional obligations of the state, especially with regard to the health and safety of its people, as well as its statutory responsibilities in terms of the cleaning-up of landfill sites, abandoned mines and the rehabilitation of land polluted by asbestos mining/manufacturing. It also discusses the responsibilities and liability of mining companies in terms of old and new legislation, and examines the principle of strict liability from a comparative perspective. The last paper examines transboundary pollution and liability, and concentrates mainly on the Dutch approach to water pollution and liability as it has been developed in specific case studies concerning the rivers Rhine, Meuse and

Scheldt. The author compares the effectiveness of approaches to this problem in private law and public international law, and offers some valuable insights on the use and effectiveness of the principle of strict liability versus fault liability and, particularly, environmental covenants as agreements (contracts) negotiated between a public and a private party with the purpose of reducing environmental pollution as a long-term objective.

Although the themes covered are distinct areas of environmental law, they are integrated, and need to be approached in a holistic and co-ordinated way to form a cohesive whole which is based on the fundamental principles of environmental justice and sustainable development. The international and comparative perspectives have brought an awareness and understanding of the universal dimensions of environmental problems, and of the undeniable fact that environmental justice and sustainable development in South Africa have to be addressed within the context of a global, complex socio-economic and political milieu.

The journal is presented in its usual neat and pleasing format, with editorial and technical work competently done. A few minor editorial and typing errors have cropped up, of which the most glaring is the "odd" page 162 with its misplaced contents.

The contributors and editors have succeeded in presenting a solid and integrated overview of some of the most pressing South African and international environmental problems. As Jan Glazewski concludes in the preface, it is hoped that this issue of *Acta Juridica* will make some contribution to meeting the tremendous challenges for those concerned with environmental justice generally and in South Africa specifically.

ELMENE BRAY
University of South Africa

[T]here are two ways to claim that meaning is indeterminate: One can say that a text's meaning is infinite – or one can say that its meaning is indefinite. If the meaning of every text is infinite, then all texts mean the same thing, because all texts have every meaning. But if one says that the meaning of every text is indefinite, we mean that the contexts in which the text will take its meaning cannot be specified in advance, and therefore the text will always have an excess of meaning over that which we expect (or intend) it to have when it is let loose upon the world.

Balkin "Transcendental deconstruction, transcendental justice"
1994 Mich LR 1131 1152

EDITORIAL COMMENT

11 SEPTEMBER 2001 – HOW CAN SA LAWYERS RESPOND?

Decent people of all ethnic groups will be appalled at the attacks which occurred in the United States of America on 11 September 2001. Some 7000 innocent men and women appear to have lost their lives, in a most violent and horrendous manner, as an immediate result of the atrocities. The physical damage to property has been immense, and the pure economic loss (particularly in the form of loss of profits already sustained and yet to be suffered by businesses directly or indirectly affected) will be incalculable. The entire world, with the exception of a minority of misanthropic extremists, has been shocked, no doubt because people across the globe perceive that the events of 11 September 2001 constitute an assault not only upon America but upon the whole of civilised humanity. If steps are not taken to prevent similar incidents from occurring in the future, none of us will be able to live or travel secure in the knowledge that we are not unwittingly placing ourselves in the firing line of some unknown, murderous fanatic bearing a grudge against our government, our religion, our language or our race.

How, then, can we, as South African lawyers thousands of kilometres away from the scenes of the carnage, respond in a meaningful way to this catastrophe?

In the first place, we can show our solidarity with those in the United States who have suffered the most grievously (particularly, the families of those who died in New York, Washington and Pennsylvania) by donating money to the international relief effort that was set up in America within a week and a half after the terrorist attacks. Donations can be made by means of credit card by accessing the website www.tributetoheroes.org on the Internet, or by sending a bank draft in American dollars to the September 11 Telethon Fund, PO Box 203103, Houston, TX 77216-3103, United States of America. By giving to this cause, we assert our humanity and declare ourselves opposed to those who bring about, or who celebrate, the wanton destruction of life and property.

Secondly, those of us who have the privilege of teaching law must inculcate in our students the virtues of tolerance towards those of other religious, racial, national and language groups. Those whom we educate in law today go on to become not only the attorneys, advocates, judges, magistrates and legal advisers of tomorrow but also, in many cases, the business and political leaders of the next generation. These people are, for the most part, at a highly impressionable age when they pass through our hands, and it is during their university years that they tend to formulate the attitudes which will guide them throughout their lives in their behaviour towards those from other religious, language or cultural backgrounds. The power that our students will collectively come to wield in national and world affairs is vast. Law teachers accordingly play an important role in building the foundations of a peaceful and safe world. By teaching our students to respect those who are different from themselves, we increase the likelihood that they will become responsible adults who will build rather than destroy, and that they will influence others in their own communities to do likewise.

Thirdly, as lawyers we must do everything in our power to promote the equal treatment of people of all religious, racial, national and language groups. Most of

the atrocities and mass denials of human rights throughout history can be traced back to a belief on the part of the perpetrators that their religion, race, language or nation (as the case may be) was in some way superior to that of their victims. By ensuring that all are able to practise their religious beliefs and express their cultural and ethnic identity in a manner that is not harmful to others, we provide the best guarantee we can of a secure and peaceful world.

Finally, as human beings, we must reach out to members of ethnic groups other than our own, building friendships and allegiances across religious and ethnic divides, making common cause wherever possible, and standing united in our condemnation of those who would imperil our safety for their own narrow, sectionalist ends. The horrific events of 11 September 2001, although at the time of writing they appear to be the work of Muslim extremists, are accordingly not an occasion for a general outpouring of anti-Islamic feeling among non-Muslims, or for Muslims to vent hatred at such targets as America, the West, Israel or the Jewish people in general. Rather, those events create a unique opportunity for men and women of all religious and political views to declare their common humanity and their mutual abhorrence of the acts of fanatics and extremists on all sides (including those of their own persuasion) which threaten world peace, and endanger all of us.

MERVYN DENDY

The legitimacy of legal orders (3): Rethinking the rule of law*

Henk Botha
BLC LLM LLD
Professor, University of South Africa

OPSOMMING

Die legitimiteit van regsordes (3): Regstaatlikheid heroorweeg

Die idee van die heerskappy van die reg, wat neerslag vind in sowel die Anglo-Amerikaanse *rule of law*-idee as die kontinentale regstaatbeginsel, rus tradisioneel op twee grondslae: die algemene gelding van regsnorme en die outonomie van die reg. Beide dié grondslae is egter in gevaar gestel deur die opkoms van die administratiewe staat, wat gekenmerk word deur die verlening van wye diskresionêre bevoegdhede aan regters en administratiewe funksionarisse. Ek argumenteer in dié artikel dat die formele waarborge wat tradisioneel met die regstaat verbind word, onontbeerlik is om magsmisbruik te voorkom. Dit is egter nodig om die klassieke idee van die heerskappy van die reg te stroop van oordrewe formalisme, en in nuwe kontekste te bedink. Die Suid-Afrikaanse Grondwet bied ons die geleentheid om juis dit te doen. Die uitdaging is om sowel die magsuitoefening van politici en burokrate as die aannames van regsgeleerdes op 'n deurlopende grondslag aan 'n transformerende kritiek te onderwerp.

1 THE RULE-OF-LAW LEGITIMATION OF POWER

According to Max Weber,[1] the political systems of modern Western societies rest primarily on "legal domination". Political legitimacy, in these systems, is based upon a belief in the legality of government action. Government is believed to be bound by known legal rules, and to exercise its power solely through the medium of such rules, which have been created through legally prescribed formal procedures. In Weber's view, law is accepted in modern Western societies, simply because it provides a framework of predictable rules which make it possible for the individual to pursue his/her self-interest in a rational manner. Law's legitimacy relies on the logical clarity and internal consistency of a system of rules (formal rationality), rather than on the fact that it gives expression to religious or moral values (substantive rationality).

---

* This series of articles is partly based on my doctoral thesis entitled *The legitimacy of law and the politics of legitimacy: Beyond a constitutional culture of justification* (UP 1998). I am grateful to the CSD for financial assistance. However, opinions expressed in these articles are my own and should not necessarily be attributed to the CSD. Many of the ideas expressed here have been shaped and refined in discussion with Danie Goosen, Wessel le Roux, André van der Walt, Johan van der Walt and Karin van Marle. I should also like to thank Margaret Beukes, Christo Botha, Gretchen Carpenter, André van der Walt and Dawid van Wyk who read through the manuscript and provided helpful and incisive comments and suggestions.

1 See Weber *Economy and society* (1968) ch 3.

Weber's equation of legitimacy with (a belief in) formal legal rationality is, of course, highly controversial. Critics[2] have pointed out that a pure formally rational legal system would be impossible, that the rationality of legal rules cannot be evaluated in abstraction from substantive moral principles and specific socio-economic conditions, and that the modern emphasis on formal legal rationality itself rests upon a preference for certain substantive values over others.[3] And yet, Weber's analysis of formal legal rationality and of the dangers of deformalised law[4] has to a large extent shaped discussions of the possibility of the rule of law in the modern state.

The rule of law[5] – the idea that law is capable of restraining power – is premised on the generality and autonomy of modern Western law. In the first place, the rule of law requires government action to be based on clearly formulated, publicly declared legal rules that are of general application. Vague, amorphous or undetermined legislation gives too much latitude to judges and administrators, and thus breeds arbitrary and unpredictable government action. Allowing legislatures to issue laws that are directed against specific individuals, would be equally inconsistent with the rule of (formal and impersonal) law, as opposed to the rule of the arbitrary dictates of a legislative assembly. Only if legislation applies generally, that is, if it applies potentially to all cases and individuals, can it secure the impartiality of exercises of state authority. In short, the generality of law shields the individual from arbitrary exercises of power, renders government action calculable, and ensures the formal equality of all citizens.[6]

Secondly, the rule of law presupposes the autonomy of law.[7] Law is autonomous to the extent that it is separated from a specific set of interests, or a set of religious, moral, economic, or any other non-legal norms or beliefs. Law can set limits to

2 See eg Habermas "How is legitimacy possible on the basis of legality?" in *The Tanner lectures on human values VIII* (1988) 219 220–230; Cotterrell "Legality and political legitimacy in the sociology of Max Weber" in Sugarman (ed) *Legality, ideology and the state* (1983) 69 83–84.

3 Eg, Kennedy "Form and substance in private law adjudication" 1976 *Harvard LR* 1685 has argued that the preference for formal or substantive legal reasoning is an expression of an individualist and altruistic ethic, respectively.

4 See Weber *Economy and society* 880–900.

5 In this article, I use the term "rule of law" in a wide sense, to denote the idea that government, no less than individual citizens, is subject to the law; that it must exercise its powers in accordance with law. This definition, like Dicey's classic exposition of the rule of law (*Introduction to the study of the law of the Constitution* (1982) 110 114-115), emphasises the supremacy of the law over arbitrary power. However, it does not share Dicey's resistance to the continental notion of a distinct field of administrative law, or his insistence that the rights and liberties of the individual are the result of judicial decisions confirming the common law, and not of abstract constitutional statements. I therefore use the term "rule of law" in a general sense, to embrace different Anglo-American versions of the doctrine, as well as the continental *Rechtsstaat* concept. See Cotterrell *The sociology of law* (1984) 168. See also Blaauw "The Rechtsstaat idea compared with the rule of law as a paradigm for protecting rights" 1990 *SALJ* 76.

6 On the ideal of legal generality, see Neumann "The change in the function of law in modern society" in Scheuerman (ed) *The rule of law under siege: Selected essays of Franz L Neumann and Otto Kirchheimer* (1996) 101 106–108; Neumann "The concept of political freedom" in Scheuerman (ed) *The rule of law under siege* 195 199–203; Scheuerman *Between the norm and the exception: The Frankfurt School and the rule of law* (1994) 68–71; and Unger *Law in modern society: Toward a criticism of social theory* (1976) 53–54.

7 On the idea of autonomous law, see Nonet and Selznick *Law and society in transition* (1978) 53–72; Unger *Law in modern society* 52–53.

power only to the extent that it is separate from the interests and values of any particular social group. It must therefore be the province of institutions specialising in the interpretation and application of law (the legal profession and judiciary), the members of which are trained to speak a distinctly legal language, which is not reducible to moral, political, economic or scientific discourse.

The rule of law therefore presupposes a clear distinction between law and politics, and a separation of powers between the judiciary and the "political" branches of government. The judiciary is independent from other organs of the state, and must ensure that such organs act within the limits of the law. At the same time, however, legal institutions must not be seen to trample on the political functions of the legislature or executive.[8] The judiciary, it is said, must merely apply abstract, general legal norms to particular cases, and may not make law, or become embroiled in policy issues.

In this view, legal institutions must engage in formal legal reasoning, as opposed to moral, political or economic reasoning, and are concerned with formal, not substantive justice. Law should centre around determinate legal *rules*, rather than open-ended standards. Rules serve not only to fix the limit and scope of official authority, and thus to legitimate power, but also to narrow the apparent range of judicial discretion, and thus to maintain the integrity of the legal process. The focus on rules also enables lawyers to develop a distinct style of legal reasoning. The proliferation of rules requires technical expertise (applying canons of interpretation, resolving contradictions, filling gaps, etc) which distinguishes the "artificial reason" of the law from the "natural reason" of politicians and laymen.[9]

2 LAW IN THE WELFARE STATE

2 1 The rule of law under threat

There is a close historical affinity between the rule of law and the development of a capitalist market economy. The classical idea of the rule of law, with its insistence that law should be expressed in terms of general, formal rules (as distinguished from *ad hoc* orders or broad standards), facilitated capitalist development by breeding legal certainty and predictability, rendering government action calculable, and thus enabling citizens to pursue their interests in a rational manner.[10] It also served to legitimate the socio-economic order, by subjecting all individuals to a uniform set of formal rules. In terms of the rule of law ideology, relations of inequality were the

---

8 Nonet and Selznick *Law and society* 58 (emphasis omitted) write: "Legal institutions purchase procedural autonomy at the price of substantive subordination. The political community delegates to the jurists a limited authority to be exercised free of political intrusion, but the condition of that immunity is that they remove themselves from the formation of public policy."

9 This is, of course, a reference to the words of Sir Edward Coke, who told King James that legal matters "are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it" – quoted by Nonet and Selznick *Law and society* 62. According to Nonet and Selznick, "[a]rtificial reason is the rhetoric of legal legitimacy".

10 See Weber *Economy and society* 814 on the historical link between free-market capitalism and rational, formal law. See also Hayek *The road to serfdom* (1944) 54 (quoting Mannheim that "[r]ecent studies in the sociology of law once more confirm that the fundamental principle of formal law by which every case must be judged according to general rational precepts, which have as few exceptions as possible and are based on logical subsumptions, obtains only for the liberal competitive phase of capitalism").

result of differences in the natural capacities of individuals, which could not be blamed on a legal system which recognised the formal equality of all individuals.[11]

However, the classic ideal of the rule of law came under pressure from changes in the nature of capitalism, the introduction of new forms of regulation within the modern state, and a greater interpenetration of law and politics and of the public and private spheres. Ever since the late nineteenth century, the transition from small-scale, entrepreneurial market economies to industrial capitalism brought about a whole range of social and economic problems which necessitated greater government interference in areas previously regarded as beyond the proper reach of state action. Industrialisation and the attendant concentration of economic power gave rise to the mass exploitation of workers, women and other vulnerable groups. As these groups became more vocal in demanding social and political equality, it became increasingly difficult to present the market as a sphere in which free individuals compete on an equal footing, or to depict law as a neutral arbiter of interests. The market, it seemed, was inherently coercive,[12] while legal decisions were inevitably based on policy considerations.

The pressures of democratisation and industrialisation gave rise to more overt state intervention in economic and social life. The shift from a liberal, supposedly non-interventionist state to a welfare state[13] was necessitated both by the economic imperatives of the capitalist system, and by the need to preserve the legitimacy and stability of the liberal democratic state.[14] On the one hand, the state had to intervene in the economy to correct market failures, and thus to ensure the success of the economic system. On the other hand, it became increasingly difficult to reconcile vast economic and social inequality with the liberal idea that society consists of free and equal individuals. The state therefore came under pressure to improve the social

---

11 Trubek "Complexity and contradiction in the legal order: Balbus and the challenge of critical social thought about law" 1977 *Law and Society R* 529 540 writes that formal law "appears to be a neutral and autonomous source of normative guidance", and thus to "become autonomous from the immediate needs of the state apparatus and of individual capitalists".

12 See eg Hale "Coercion and distribution in a supposedly non-coercive state" 1923 *Political Science Q* 470.

13 I use the term "welfare state" to refer to any state which is characterised by a high degree of government intervention in social and economic life (typically, that would include government programmes designed to provide the poor, the unemployed and the old-aged with a basic level of subsistence), and the existence of extensive regulatory frameworks and administrative apparatuses designed to further social, economic and political goals. Used in this sense, South Africa is a welfare state, despite the fact that social security and welfare programmes are not nearly as extensive in South Africa as in many Western European countries. Barrie "The question is not whether the administrative state should be dismantled, but where the acceptable level of state activity lies: 1989–1998 a decade of making the administrative process efficient and fair" 1998 *TSAR* 547 547–548 lists the following features of the "administrative state" which developed in South Africa after 1920: "substantial state intervention in economic activity; state regulation of industrial activities; intervention in the housing market (Rents Act 13 of 1920); administrative regulation of welfare activities; a comprehensive regulatory system for the agricultural sector; an administrative edifice to give effect to the policy of separate development; extensive administrative machinery to preserve state security; the emergence of corporatism – the collaboration between government and private organizations for the purpose of conducting private ventures – and lastly the creation of numerous advisory committees covering almost every facet of public administration".

14 See Habermas *Legitimation crisis* (1976) 50–75 for a discussion of the contradictory demands on the modern welfare state.

position of women, children and the poor through protective measures (eg labour legislation) and welfare entitlements.[15]

The rise of the welfare state has serious implications for the rule-of-law legitimation of power. In the first place, the changing role of the state undermines the *public/private distinction* which is so central to the idea that law is capable of setting limits to power, and of carving out a space where the individual can pursue his/her ends free from political interference. The modern state becomes increasingly involved in the regulation of the "private" sphere, while large corporations assume important "public" functions. Law in the welfare state is no longer primarily concerned with the elaboration of private rights and individual duties, but turns increasingly to the promotion of the public interest.[16] The emphasis shifts from the individual property-holder or citizen, whose private life must be protected against undue state and social interference, to the interests of the underprivileged and of society at large, which must be protected against excessive respect for abstract individual rights and powers. The individual is increasingly seen as a social product, rather than a free moral agent; as someone who must "be cured or helped rather than judged".[17] Property becomes social: the focus of attention is no longer the household or the marked-off piece of land, but "the corporation, the hospital, the defence establishment, the transport or power utility whose 'property' spreads throughout the society and whose existence is dependent upon subsidies, state protection, public provision of facilities, etc".[18]

The decline of private law is matched by the introduction of new fields of law which seek to regulate an activity or an aspect of social life, rather than to adjudicate between individuals. Examples are labour law (itself a recognition that contract law, with its assumption of individuals contracting on an equal footing, cannot provide an adequate basis for the regulation of work in modern societies), the law of broadcasting and environmental law. In short, the concern with the atomic individual makes way for a concern with "a non-human abstracted ruling interest, public policy or on-going activity, of which human beings and individuals are subordinates, functionaries or carriers".[19]

Secondly, the welfare state witnesses the introduction of *new forms of regulation*, which tend to undermine the *generality* of legal norms. Not only is there a need to regulate specific trades, industries and areas of life, but laws that are directed against particular institutions (eg a particular bank or firm) become a regular feature of the modern state.[20]

---

15 Couwenberg *Constitutionele ontwikkelingsmodellen* (1984) 75–81 identifies three causes that gave rise to the birth of the welfare state: the process of democratisation, industrial development, and political-ideological influences. The process of democratisation, and the establishment of the principle of universal suffrage, exerted pressure on governments to improve the social position of the economically weak through government intervention. Industrial development created an economic surplus, and thus provided the economic conditions for the creation of the welfare state. Finally, the welfare state was made possible by an ideological compromise among social democratic, liberal, and Christian democratic forces.

16 Friedmann *Law in a changing society* (1972) ch 16 characterises the shift towards a social-welfare conception of law as a shift from private law to public law.

17 Kamenka and Tay "Beyond bourgeois individualism: the contemporary crisis in law and legal ideology" in Kamenka and Neale (eds) *Feudalism, capitalism and beyond* (1975) 130.

18 *Idem* 133. See also Reich "The new property" 1964 *Yale LJ* 733.

19 Kamenka and Tay "Beyond bourgeois individualism" 138.

20 See Cotterrell *Sociology* 176–177 for a discussion of "particularised regulation".

The generality of legal norms is further eroded by the prevalence of discretionary regulation.[21] Formal rules are often not flexible enough to cope with the complexity of modern societies, and are replaced by open-ended standards, such as "good faith", "good morals", "reasonableness" and "public interest". As a result, judges and officials enjoy a wide discretion in the application and interpretation of legal norms. This results in an increase in the range of facts considered relevant to a decision, and greater scope for individualised and context-specific decision-making.

It is often said that discretionary regulation leads to arbitrary decision-making, and the erosion of the determinacy and predictability which are the hallmarks of the rule of law. Some writers point out that no consensus on the meaning of standards such as "good morals" and "reasonableness" is possible in morally heterogeneous societies.[22] In their view, the introduction of such standards endangers individual freedom, as they introduce a subjectivist element into legal decision-making, and thereby undermine the predictability and calculability of government action. Law no longer consists of rules that are "fixed and announced beforehand", and that are "defined in general terms, without reference to time and place or particular people",[23] but assumes the character of a set of *ad hoc* pronouncements.

Thirdly, the introduction of discretionary regulation occasions a shift from the formal logic of the common-law or civil-law method to *purposive, public interest-oriented reasoning*. In the words of Cotterrell:

> "Discretionary regulation is . . . often associated with the dominance of substantive legal rationality, in Weber's sense, over formal legal rationality: that is, the subjugation of the internal logic of legal analysis to the fulfilment through law of particular political aims, requirements of social utility, or moral values."[24]

According to Unger, the welfare state marks a "turn from formalistic to purposive or policy-oriented styles of legal reasoning".[25] Formalistic *legal reasoning* is premised on the view of law as a (closed and gapless) system of rules, from which authoritative answers to legal questions can be deduced. The turn to purposive legal reasoning means that legal decisions are no longer justified solely by reference to the law's internal logic; the decision-maker becomes increasingly concerned with the most effective means of achieving the purposes ascribed to a rule. Particular rules, procedures and policies come to be seen as "instrumental and expendable";[26] what is more important are the general ends and implicit values in rules and policies. The emphasis on purpose and principle[27] opens up a rich resource for criticising the authority of specific rules, as particular rules may be reassessed in the light of their consequences for the values at stake.

Finally, law is no longer primarily concerned with formal justice, but becomes increasingly interested in *procedural and substantive justice*. Justice is no longer

---

21 See Unger *Law in modern society* 193–194; Cotterrell *Sociology* 172–174.

22 According to Neumann "Function of law" 107, such standards embody "a spurious generality . . . A legal system which derives its legal propositions primarily from these so-called general principles . . . is nothing but a mask under which individual measures are hidden". See also Scheuerman *Between the norm and the exception* 94–95.

23 Hayek *Road to serfdom* 54 56.

24 Cotterrell *Sociology* 172.

25 Unger *Law in modern society* 194.

26 Nonet and Selznick *Law and society* 79.

27 See Dworkin *Taking rights seriously* (1977) 22–31 71–80 90–100 on the importance of principle for adjudication.

defined in mere formal terms as the "uniform application of general rules" or the application of principles "whose validity is supposedly independent of choices among conflicting values".[28] Instead, law becomes concerned with the legitimacy of the *process* by which social costs and benefits are distributed (procedural justice), as well as the fairness of the *outcomes* of distributive decisions and bargains (substantive justice).[29]

These developments have a major impact on the principles of generality and autonomy. *Generality* (and consequently, legal certainty) is eroded by the shift to purposive legal reasoning. This is so because the policy-oriented lawyer, in her endeavour to choose the most efficient means of attaining the ends ascribed to rules, must consider changing circumstances and fluctuations in policy. The quest for substantive justice compromises legal generality to an even greater extent. Substantive justice "can be achieved only by treating different situations differently".[30] For instance, attempts to compensate for existing inequality must result in the preferential treatment of a disadvantaged group. This is a far cry from the classic image of justice blind to consequence.

The relative *autonomy* of the legal order is also severely compromised. As a result of the concern for policy considerations and substantive justice, it becomes difficult to distinguish legal reasoning from other modes of discourse. Political, economic, social and moral values are incorporated into the legal order; and legal reasoning appropriates political and economic argument. Judges are called upon to balance individual rights and freedoms against considerations of public policy, and to give effect to the policies underlying legal norms. They therefore engage in activities that were traditionally seen as falling squarely within the competence of the legislature and/or the state administration.[31]

2 2 Responsive law or arbitrary power?

Whether or not the rule of law is possible in the welfare state, and whether the turn to discretionary regulation, purposive legal reasoning and a procedural and substantive understanding of justice advances or diminishes freedom, equality and democracy, have been the subject of much debate. On the one hand, it is argued that the welfare state is in a better position to realise individual freedom and equality than its liberal predecessor. The welfare state, unlike the liberal democratic state, is not blind to actual inequality. It recognises the coercive nature of so-called private relations, and is ready to step in, if necessary, to redress market failures or to assist the weak against the strong.

Moreover, the emphasis in modern law on purpose and policy has obvious advantages over a rules-centred approach. A rules-centred approach tends to result in a rigid adherence to formal requirements. Law is detached from social reality, and

---

28 Unger *Law in modern society* 194.

29 *Idem* 194–195 illustrates the difference between formal, procedural and substantive justice as follows: "[I]n contract law, the doctrine that bargains are enforceable given certain externally visible manifestations of intent exemplifies formal justice; the demand that there be equality of bargaining power among contracting parties illustrates procedural justice; and the prohibition of exchanges of two performances of unequal value, however value may be assessed, represents substantive justice."

30 *Idem* 198.

31 *Idem* 199–200. See also Eriksson "Conflicting tendencies in modern law" 1989 *Rechtstheorie* 153 154.

the purposes, needs and consequences of legal rules are disregarded. By contrast, law in the welfare state is more responsive to social needs. It focuses on the purposes, policies and values underlying legal norms, and enlarges the range of facts considered relevant to a decision. As a result, "the boundaries of legal knowledge" are opened up; legal institutions are moved to "give up the insular safety of autonomous law and become more dynamic instruments of social ordering and social change".[32]

It is further argued that the delegation of wide grants of legislative power to judges and administrators is not necessarily inconsistent with democracy. Proponents of the welfare state point out that judges and administrators are generally more responsive to the needs and interests of individuals and groups affected by legislation than the relevant legislative assemblies, and are therefore in a position to adjust legal norms to the exigencies of concrete situations. Courts and administrative agencies, far from being antidemocratic institutions, have widened the scope for public participation in legal and political decision-making.[33]

In addition, the shift from formal justice to procedural and substantive justice has emancipatory potential. An emphasis on mere formal justice allows very little scope for challenging existing patterns of inequality and disadvantage. In fact, it often serves to normalise and entrench existing inequalities. By contrast, a concern with procedural and substantive justice translates into a more critical stance towards existing patterns of privilege and power.

On the other hand, the wide discretionary powers afforded to judges and administrators in the welfare state are reason for concern. Even defenders of the social-welfare paradigm of law concede that the greater openness and responsiveness characterising modern law, are achieved at the risk of diminishing law's authority, and of diluting the accountability of officials in the name of greater flexibility. According to Nonet and Selznick, modern law is characterised by the tension between openness and fidelity to law. Accountability is most readily maintained by strict fidelity to law; by an adherence to determinate standards. However, this breeds formalism and a retreat from responsibility behind legal rules; and renders institutions incapable of adapting to new contingencies. Openness, on the other hand, requires wide grants of discretion; and readily degenerates into an arbitrary adjustment to social changes and pressures.[34]

It is, moreover, not to be taken for granted that the social-welfare paradigm of law promotes equality, or benefits the weak and marginalised members of society. It has, for instance, been pointed out that the effects of social welfare law are highly ambivalent: while the recipients of social-welfare benefits are given the chance of a more dignified existence, the welfare system also creates new forms of surveillance and dependence, which compromise the freedom and dignity of the very same people. Social welfare law is therefore seen by some authors as

> "a device for incorporating the working class in the state by buying its allegiance . . . 'Government largesse' . . . through legal benefits is seen as defusing class antagonism while maintaining the class system. It is a way of 'regulating the poor' . . . making

32 Nonet and Selznick *Law and society* 74.

33 See Stewart "The reformation of American administrative law" 1975 *Harvard LR* 1667 for a discussion of attempts in the United States to secure a fair representation of interests in the administrative process. See also, in the South African context, Mureinik "Reconsidering review: Participation and accountability" in Corder (ed) *Administrative law reform* (1993) 35.

34 Nonet and Selznick *Law and society* 76.

> explicit their dependence not only on the economic order but also on its political and legal structure and facilitating more sophisticated forms of surveillance and control of the recipients of social welfare benefits as the price of providing these benefits."[35]

Moreover, open-ended standards and purposive legal reasoning do not necessarily promote social justice. According to Scheuerman,[36] the opposite is true: deformalised, vague legal standards benefit the most privileged strata of society, who are able to exploit the indeterminacy of such standards. Scheuerman draws upon the writings of Franz Neumann, a member of the Frankfurt School, who challenged the orthodox view, shared by thinkers as diverse as Marx, Weber, Schmitt and Hayek, that the rule of law goes hand in hand with capitalism. According to Neumann, it is only during the early, competitive stage of capitalism that capitalism requires formal law. In advanced capitalist societies, big, monopolistic enterprises are best positioned to take advantage of the flexibility of vague, open-ended standards. Such standards are far less effective in combating monopolistic practices than formal rules.

Scheuerman makes use of these insights in his analysis of the role of law in a globalised economy.[37] He points out that international economic law rests upon vague legal standards, and consists of a series of *ad hoc* pronouncements made by agencies (mostly arbiters) that are characterised by secrecy and a lack of transparency. This allows multinational corporations to avoid public institutions, and to negotiate legal outcomes that are favourable to them. For instance, the open-ended nature of the norms governing the IMF enables creditors to extract greater concessions from poor countries. Rich countries and multinational corporations are also able to use the legal uncertainty surrounding GATT to their own advantage. In short, the lack of formal, general rules benefits the rich and powerful, and creates new forms of privilege and dependency.

3 CAN THE RULE OF LAW BE RESCUED?

Despite the existence of serious questions about the capability of law to set limits to power in the modern state, the rule of law remains a widely cherished ideal which not only continues to inspire reform movements in the West, but has guided the transition to democracy in Eastern Europe, South Africa and other parts of the world. It has even been suggested that the idea of an international rule of law governing the relationships among states, is becoming a real possibility.[38]

However, scholars on the left are divided on the question whether the rule of law can be rescued, and whether it is desirable to do so.[39] Scholars associated with the

---

35 Cotterrell *Sociology* 118–119. See also Reich 1964 *Yale LJ* 756–760.

36 Scheuerman *Between the norm and the exception* 43–51 126–133.

37 Scheuerman "Economic globalization and the rule of law" 1999 *Constellations* 3.

38 See Georgiev "The collapse of totalitarian regimes in Eastern Europe and the international rule of law" in Krygier and Czarnota (eds) *The rule of law after communism: Problems and prospects in East-Central Europe* (1999) 329.

39 The ambivalence of the left on the desirability of the rule of law is, of course, nothing new. During the 1970s and 1980s, many leftist scholars abandoned the view that law is but an instrument to protect capitalist relations of production. Legal rules were no longer analysed as a direct expression of class interests, but as an important site of political struggle. In this view, law is neither wholly autonomous, nor is it simply an instrument in the hands of the powerful. It is, rather, partly or relatively autonomous. On the one hand, law favours the ruling class; on the other, it also imposes constraints upon the actions of the rulers. See Balbus *The dialectics of legal repression* (1976); Davis "Legality and struggle" in Corder (ed) *Essays on law and social practice* (1988); Edelman *Ownership of the image* (1979) 134; Hunt "The theory of critical legal studies" 1986 *Oxford J of Legal Studies* 1 10 28–32; Poulantzas *State, power, socialism* (1980); Thompson *Whigs and hunters* (1975) 264; Trubek 1977 *Law and Society R* 547.

critical legal studies (cls) movement have generally denied the possibility of the rule of law, and denounced it as liberal ideology. Joseph Singer argues that if "traditional legal theorists are correct about the importance of determinacy to the rule of law, then – by their own criteria – the rule of law has never existed anywhere".[40] Allan Hutchinson's attack is even more ferocious:

> "The rule of law is a sham; the esoteric and convoluted nature of legal doctrine is an accommodating screen to obscure its indeterminacy and the inescapable element of judicial choice. Traditional lawyering is a clumsy and repetitive series of bootstrap arguments and legal discourse is only a stylized version of political discourse."[41]

The rule of law, in this view, is not only an impossible ideal; it is also an ideology which serves to entrench the individualistic premises of liberalism, stymie communal values,[42] frustrate democracy,[43] negate difference, and blind us to more humane alternatives. By exposing the crumbling foundations of the rule of law, by showing that law is politics, cls scholars hope to liberate us from the narrow confines of the liberal ideology of the rule of law; and to show that we do have a choice, that we are not condemned to our present world of inequality and stratification.[44]

Some analyses also claim that law as a normative structure of rules is in the process of being replaced by scientific-administrative mechanisms of social order and control. According to Foucault, law does not disappear, but is subordinated to disciplinary power. Legal institutions are "increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory".[45]

However, to some extent at least, the appeal of the rule of law transcends political and ideological division. EP Thompson invokes it from the political left as an "unqualified human good";[46] and many progressive scholars are deeply concerned about the apparent demise of the rule of law. There is a widespread belief that only the rule of law can save us from arbitrary government.[47] Many scholars believe that the radical critique of legal determinacy, objectivity and neutrality is dangerous, as it embraces nihilism, and leaves us without standards against which we can assess acts of power. In the absence of rational grounds to restrain government and private

---

40 Singer "The player and the cards: Nihilism and legal theory" 1984 *Yale LJ* 114.

41 Hutchinson *Dwelling on the threshold* (1988) 40.

42 See Sandel "The political theory of the procedural republic" in Hutchinson and Monahan (eds) *The rule of law: Ideal or ideology?* (1987) 85.

43 See Hutchinson and Monahan "Democracy and the rule of law" in Hutchinson and Monahan (eds) *Rule of law* 97.

44 Freeman "Truth and mystification in legal scholarship" 1981 *Yale LJ* 1229 1230–1231 describes the cls strategy of demystification or "trashing" as follows: "The point of delegitimation is to expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rightsy, traditional, bourgeois notions of the contradictory scholarship. One must start by knowing what is going on, by freeing oneself from the mystified delusions embedded in our consciousness by the liberal legal worldview."

45 Foucault *The history of sexuality* vol 1 (1981) 144.

46 Quoted by Hutchinson and Monahan "Introduction" in Hutchinson and Monahan (eds) *Rule of law* ix.

47 The assumption that arbitrary government is the necessary antithesis of the rule of law, is shared by some cls scholars. Eg Tushnet "Constitutionalism and critical legal studies" in Rosenbaum (ed) *Constitutionalism* (1988) 150 maintains that constitutionalism is impossible, yet indispensable in preventing oppressive government.

power, we are relegated to a state of totalitarianism or a Hobbesian state of nature.[48] Moreover, it is argued that the rich and powerful stand to benefit most from the absence of clear and general legal norms, and that the cls indeterminacy critique is therefore misguided.[49]

Not surprisingly, recent years have seen a variety of attempts to show that the rule of law remains possible. In the first place, there have been attempts to strip the rule of law of unrealistic claims and excessive ideological baggage, and to defend a more modest version of the rule of law, which is primarily concerned with the need to protect citizens against cruel or arbitrary government action.[50]

Secondly, some scholars have drawn upon linguistic theory to defend a more realistic account of the rule of law. Even though many legal theorists and practitioners still cling to a "rulebook" version of the rule of law, which treats law's claims to determinacy and objectivity as unproblematic,[51] some writers have taken up the critical challenge by trying to show that the rule of law can be reconstructed on the basis of contemporary theories of language or meaning.[52] These writers generally accept that judges do make value choices, and that their judgments need to take the relevant social context(s) into account. However, they argue that a value-based, contextualist approach is not tantamount to arbitrary decision-making, as judges are constrained by virtue of their membership of an interpretive community: judges, like all of us, inhabit a cultural and social world that limits the available range of interpretive possibilities.

Thirdly, recent years have seen a series of attempts to roll back the welfare state. Programmes for reversing state intervention, resurrecting the market and reviving the rule of law were first announced under the banner of "neo-conservatism" and "neo-liberalism", but are today implemented even by "leftist" ruling parties who are convinced that such policies are necessitated by the need to survive in a globalised economy. However, Fitzpatrick notes that the effects have been "deeply ambiguous"; in Britain, for instance, "the reversal of state intervention in some areas has been accompanied by its overall expansion".[53] Moreover, the current drive towards privatisation and market liberalisation, far from signalling a return to the ideals of

---

48 These fears are described by Singer 1984 *Yale LJ* 47–56.

49 See Scheuerman *Between the norm and the exception* 245–248.

50 Cf Shklar "Political theory and the rule of law" in Hutchinson and Monahan (eds) *Rule of law* 1 16 (arguing for a return to Montesquieu's basic concerns over "the fear of violence, the insecurity of arbitrary government and the discriminations of injustice" as basis for the possible reconstruction of the rule of law).

51 See eg Scalia "The rule of law as a law of rules" 1989 *Univ Chicago LR* 1175. Justice Scalia endorses the assumption that the meaning of a legal rule exists prior to the application of the rule to a particular dispute. Such meaning inheres in the plain meaning of the words used to state the rule. He therefore urges judges not to employ discretionary or fact-based modes of analysis, in so far as a legal question can be settled with reference to the plain meaning of the words used. For an analysis and critique of traditional formalist approaches to the rule of law, see Radin "Reconsidering the rule of law" 1989 *Boston Univ LR* 781. See also De Ville *Constitutional and statutory interpretation* (2000) 3–7 (criticising the assumption that legal texts can sometimes be understood without having to interpret them).

52 Cf Radin *ibid* (outlining a possible reconstruction of the rule of law on the lines of a Wittgensteinian theory of language); Mootz "Is the rule of law possible in a postmodern world?" 1993 *Washington LR* 249 (arguing that Gadamer's philosophical hermeneutics provides the basis for a "post-Enlightenment" understanding of the rule of law).

53 Fitzpatrick *The mythology of modern law* (1992) 148.

legal generality and autonomy, deepens the crisis of the rule of law. The privatisation of traditionally public functions, no less than the expansion of government power in the welfare state, causes a breakdown in the distinction between public and private law, and between the law of the state and the normative order of non-state institutions. It also raises serious questions about the accountability of the state for privatised functions.[54]

Fourthly, a whole body of legal doctrine has developed to limit the discretion of state and corporate bureaucracies, and to hold them accountable. The rules and principles of administrative law have been developed and interpreted to meet new exigencies, while constitutional guarantees of fundamental rights and a range of statutory requirements have been similarly used to expand the grounds of judicial review of administrative action,[55] constrain the power of the state administration to make subordinate legislation,[56] and subject decisions of the state's welfare apparatus[57] and corporate bureaucracies[58] to judicial scrutiny.

4 THE RULE OF LAW AND SOCIAL TRANSFORMATION

4 1 The Constitution of the Republic of South Africa, 1996

The rule of law is foundational to South Africa's new constitutional order. It is enshrined as one of the values on which the Republic is founded.[59] All organs of state are bound by the provisions of the Constitution as the supreme law of the country.[60] Moreover, the Constitution guarantees the right to administrative action that is lawful, reasonable and procedurally fair,[61] and provides, as a threshold requirement, that the rights in the Bill of Rights may be limited only in terms of law of general application.[62]

However, it is clear that the Constitution does not embrace the classical ideal of a formally rational legal system, which should not be tainted by the consideration

---

54 See Unger *Law in modern society* 193 200–203 on the implications of corporatism for the rule of law.

55 Eg the recognition of "unreasonableness" as a separate ground for invalidating administrative action. See eg s 33(1) of the Constitution of the Republic of South Africa, 1996 and s 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000.

56 See O'Regan "Rules for rule-making: Administrative law and subordinate legislation" in Corder (ed) *Administrative law reform* (1993) 157.

57 See Wiechers "Administrative law and the benefactor state" in Corder (ed) *Administrative law reform* 248 for a discussion of the constitutional and administrative-law constraints to which the "beneficial" state administration is subject. See also Reich 1964 *Yale LJ* 733 (arguing for the recognition of "government largesse" as a form of property); and *Goldberg v Kelly* 397 US 254 (1970) (landmark decision of the US Supreme Court, in which it was held that a welfare recipient was entitled to a hearing before welfare benefits were terminated).

58 See Cockerell "'Can you paradigm?' – Another perspective on the public law/private law divide" in Corder (ed) *Administrative law reform* 227 230–234.

59 S 1(c) of the Constitution.

60 Ss 2 ("The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled"), 7(2) ("The state must respect, protect, promote and fulfil the rights in the Bill of Rights"); and 8(1) ("The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state").

61 S 33(1). See also s 195 (basic values and principles governing the public administration); Sch 6 item 23(2)(b); and the Promotion of Administrative Justice Act 3 of 2000, which was adopted in terms of s 33(3) to give effect to the right to administrative justice.

62 S 36(1). See also s 25(1) and (2).

of substantive moral values or of specific socio-economic contexts. In the first place, the Constitution is expressly value-based, and requires judges to shape law in accordance with substantive values.[63] Secondly, the Constitution rejects the image of the state as a neutral arbiter among private interests. It guarantees social, economic and cultural rights alongside civil and political rights,[64] and imposes positive duties on the state to assist individuals in the exercise of their rights.[65] Thirdly, the Constitution goes beyond the recognition of mere formal equality, and recognises the need to protect and advance the historically disadvantaged.[66] Finally, the Bill of Rights affects not only the relationship between the state and individual, but applies to so-called private relationships as well.[67] The fact that private law is not shielded from the transformative effect of the Constitution, has caused consternation among certain legal academics, who set great store by the rationality and determinacy of civil law, and view the horizontal application of the Bill of Rights as a threat to legal certainty and individual freedom.[68]

The Constitution therefore seeks to combine a commitment to the rule of law with a substantive normative vision and a transformative political agenda. This raises a number of questions. Does the Constitution attempt to reconcile what is really irreconcilable? Does it endanger the rule of law at the very moment it seeks to protect it? Or does the Constitution provide us with an opportunity to rethink the rule of law, strip it of its formalist and classical-liberal baggage, and find a new articulation between the rule of law, democracy and social justice?

The judges of the Constitutional Court seem to believe that the rule of law still has an important role to play in ensuring state accountability, and that it has not been compromised by the Constitution's transformative vision.[69] In the first place, the Constitutional Court regularly stresses that the principle of legality is fundamental to the Constitution, and that the legislature and executive may exercise no power beyond that conferred upon them by law.[70] Secondly, the Constitutional Court has

---

63 Ss 1, 7 and 39(1) and (2).

64 See ss 23 (labour relations), 26 (housing), 27 (health care, food, water and social security) and 29 (education).

65 See eg ss 7(2), 24(b), 25(5), 26(2), 27(2), 28(1)(h) and 35(2)(c).

66 S 9(2). Affirmative action measures which comply with the requirements of this subsection, are clearly viewed as a means of ensuring equality, rather than as an exception to the anti-discrimination provision in s 9(3). The Constitution also affords special protection to vulnerable and marginalised sections of the community. See eg ss 9(3) (outlawing discrimination on grounds such as sexual orientation, age and disability) and 28 (rights of children).

67 Ss 8(2), 8(3), 9(4), 32(1)(b) and 39(2).

68 See Davis *Democracy and deliberation: Transformation and the South African legal order* (1999) 99–163 for a critique of attempts to shield private law from the transformative impact of the Constitution.

69 Eg in the first certification judgment, the court rejected arguments that the horizontal application of the Bill of Rights and the inclusion of socio-economic rights in the Bill of Rights were inconsistent with the separation of powers between the legislature and judiciary. See *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) paras 54–55 and 77–78. See also the discussion of the *Mpumalanga* decision below.

70 See eg *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC) paras 56–59 (all acts of the legislature and executive are subject to the principle of legality, even if such acts do not constitute "administrative action" for purposes of s 24 of the interim Constitution); *President of the RSA v SARFU* 1999 10 BCLR 1059 (CC) para 148 (the exercise of the President's power to appoint commissions of inquiry is constrained by the principle of legality).

made it clear that arbitrary or irrational government action cannot be tolerated in a constitutional state.[71] The exercise of public power is arbitrary and therefore unconstitutional if it is not rationally related to the purpose for which the power was conferred.[72] Whether or not such a rational relationship exists should be determined objectively; it is not sufficient that the relevant functionary believed the decision to be rational.[73]

Thirdly, the Constitutional Court has held that broad grants of discretion to the state administration are, in the absence of legislative guidance as to when the limitation of fundamental rights will be justifiable, inconsistent with the rule of law and therefore unconstitutional. In *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*,[74] the Constitutional Court invalidated section 25(9)(b) of the Aliens Control Act 96 of 1991. The effect of this subsection was that the foreign spouse of a South African citizen was not allowed to reside in South Africa while her application for an immigration permit was being considered, unless she was in possession of a valid temporary residence permit. The refusal of a temporary permit limited the right of spouses to cohabit, which is an aspect of their right to human dignity. The court found that, in the absence of clear guidelines from the legislature as to when it would be justified to refuse a temporary permit, such limitation was not justifiable in terms of section 36(1) of the Constitution. In the words of O'Regan J:

> "It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision."[75]

Fourthly, the requirement that the rights in the Bill of Rights may be limited only in terms of law of general application, has been similarly used to ensure that the government act only in terms of clear, general and accessible rules, and to prevent the usurpation of legislative power by other organs of state. It has, for instance, been held by the Constitutional Court that the Electoral Commission may not deny prisoners the right to vote in the absence of a legislative provision disqualifying prisoners from voting.[76] Moreover, the Cape High Court found that the suspension

---

71 Ackermann J stated in *S v Makwanyane* 1995 6 BCLR 665 (CC): "We have moved away from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and future in a constitutional state where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order." See also *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 25.

72 *New National Party of South Africa v Government of the RSA* 1999 5 BCLR 489 (CC) paras 19 24–36; *Pharmaceutical Manufacturers Association of SA; In re: Ex parte Application of President of the RSA* 2000 3 BCLR 241 (CC) paras 84–90. A similar test is used to establish whether there has been a breach of s 9(2) (equality before the law). See *Prinsloo* para 26.

73 *Pharmaceutical Manufacturers* para 86.

74 2000 8 BCLR 837 (CC).

75 Para 47. See also *Janse van Rensburg v Minister of Trade and Industry* 2000 11 BCLR 1235 (CC) paras 24–25.

76 *August v Electoral Commission* 1999 4 BCLR 363 (CC) paras 20–23 31 33–35.

of a member of Parliament was not authorised by law of general application.[77] According to Hlophe J, the law of parliamentary privilege is too indeterminate and open to manipulation to qualify as law of general application; it is "essentially *ad hoc* jurisprudence which applies unequally to different parties".[78] The following conduct was also held to fall short of the requirement of law of general application: a policy of selective enforcement of debts owed to a city council;[79] the decision of a provincial government to terminate bursaries;[80] and the policy of an airline company not to employ persons who are HIV positive as cabin attendants.[81]

Finally, decisions of the state administration to terminate welfare payments have been successfully challenged on the basis of the principles of legality and procedural fairness. For instance, it was held in *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government*[82] that a disability grant could not be cancelled without giving the beneficiary proper notice of the intention to do so, and affording her the opportunity to advance reasons why the grant should not be cancelled.

4 2 Making sense of the commitment to the rule of law *and* social transformation

The decisions referred to above may be analysed from a number of perspectives. One can, for instance, ask whether the standards employed by the Constitutional Court to determine whether executive or administrative action is rational, or whether a broad grant of discretion to functionaries is consistent with the rule of law,[83] or whether a fundamental-rights limitation is authorised by law of general application[84] are clear and determinate enough to serve as significant constraints on official discretion. However, I should like to take a different route. Rather than analysing the nature and content of the standards enunciated by the courts, I should like to focus on the possible implications of these (and other) decisions for our understanding of the relationship between the rule of law on the one hand, and democracy, transformation and social justice, on the other.

In the first place, the case law suggests that the demands of the rule of law often coincide with those of democracy. The principle of legality enables us to resist the

---

77 *De Lille v Speaker of the National Assembly* 1998 7 BCLR 916 (C).

78 Para 37.

79 *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) para 82.

80 *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC) para 42.

81 *Hoffmann v South African Airways* 2000 11 BCLR 1235 (CC) para 41.

82 2000 7 BCLR 728 (E). See also *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 12 BCLR 1322 (E), and the discussion of the *Mpumalanga* case below.

83 Critics may point out that the court did not find in *Dawood* that the refusal of a temporary residence permit was, in the absence of clear legislative guidance, not authorised by law of general application. Instead, the court held that the absence of guidelines introduced an element of arbitrariness, which did not serve any legitimate government purpose and was, therefore, unjustifiable. The court therefore held open the possibility that similarly vague provisions may sometimes be constitutional, to the extent that the absence of guidelines may be proportionate to an important government purpose.

84 There is still much uncertainty over the meaning of the phrase "law of general application". See eg the different interpretations of Kriegler and Mokgoro JJ in *President of the RSA v Hugo* 1997 6 BCLR 708 (CC) para 76 fn 7 and paras 96–104. See also generally De Waal, Currie and Erasmus *The bill of rights handbook* (2001) 147–154.

usurpation of legislative power by the executive; to force democratically elected legislatures to provide guidelines to administrative officials, rather than to leave it to bureaucracies to determine the rights and duties of individuals.[85] This is particularly significant in the light of South Africa's constitutional and political history. As Froneman J recognised in *Ngxuza*:

> "Prior to 1994 the South Africa Act of 1909 in effect created a bifurcated state whereby the white minority was governed by a system of parliamentary democracy, whilst the majority of black South Africans were subject to administrative rule . . . Some social theorists argue that the bifurcated state bequeathed to post-independence Africa by colonialism and apartheid is alive and well in post-colonial form, thereby presenting a real threat to the future of democracy in Africa . . . This case is an illustration of the dangers associated with unaccountable administrative rule."[86]

Froneman J's emphasis in *Ngxuza* on the principle of legality is not rooted in legal formalism, nor does it stand in the service of a capitalist elite. It is, rather, rooted in the conviction that the new Constitution requires us to break with a past in which the majority of the people were not citizens with the right to participate in the legal and political process, but subjects of an inhuman, unaccountable state administration. Thus conceived, the rule of law is not an ahistorical construct which stands in the way of democracy and the need to redress past injustices, but is rooted in the historical struggle of black South Africans for democracy and equal rights.

Secondly, the decisions referred to suggest that the rule of law is not necessarily antithetical to the idea of a state administration which dispenses welfare benefits. On the contrary, the rule of law is vital in keeping a "beneficial", though potentially oppressive, state administration in check.

Thirdly, it seems as if the style of legal reasoning and the image of justice usually associated with the rule of law, namely that of a detached and neutral formalism and of a justice that is blind to consequence or to social context, need not characterise a jurisprudence that takes the rule of law seriously. Again, the reasoning of Froneman J in *Ngxuza* is instructive. One of the questions before the court in *Ngxuza* was whether the applicants could institute a representative or class action on behalf of a class of persons whose social grants had been cancelled or suspended. Froneman J made it clear from the outset that he would not attempt to interpret section 38 of the Constitution (which sets out who has standing to approach a court to enforce the rights in the Bill of Rights) in isolation from his own understanding of the social context within which it had to be applied. In the words of the judge:

> "In my view it is necessary in this case, because of the relatively new legal position and the changed social context within which it is to be applied, to be open about one's own views of that context. The reality is that the outcome of this case is not dictated by precedent or deductive legal reasoning alone: my interpretation of section 38 of the Constitution is inevitably also influenced by my own views of the context in which it is to be interpreted and applied."[87]

---

85 See the references to case law in fns 74–81 above. See also *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 10 BCLR 1289 (CC) paras 51–65 (Parliament may not delegate the power to amend or repeal Acts of Parliament to the executive); *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development; Executive Council of KwaZulu-Natal v President of the RSA* 1999 12 BCLR 1360 (CC) paras 120–126 (Parliament may not delegate the power to determine the term of office of municipal councils).

86 1329B–C.

87 1327I–1328A.

Froneman J had regard to the history of the apartheid state, where the majority of the population were not citizens, but subjects of an unaccountable state administration. He also took notice of the poverty of the majority of the inhabitants of the province, as well as a host of other factors that made it impossible for many people affected by the cancellation of the grants to institute legal action. In the light of these and other factors, he concluded that a restrictive interpretation of section 38 was not warranted, and that the applicants did have standing to institute a class action.

Froneman J acknowledged that there are many practical difficulties associated with representative or class actions. However, he showed how the practical objections could be met by certain procedural requirements. In any event, he argued:

> "If there is a clearly defined class of people who have been wronged in the manner required by section 38 it is no answer for either the judicial or administrative arms of government to say that it will be difficult to give them redress. If it means that courts will have to act in new and innovative ways to accommodate them, then so be it."[88]

In his view, the rule of law is not synonymous with rigid formalism. It is not served by value-free or acontextual legal reasoning. On the contrary, the rule of law requires us to engage with our social and historical context, to be flexible and imaginative in our responses to legal questions. Only thus can we make the personal security which is bred by legality, a reality in the lives of the poor and destitute.[89]

It would appear, then, that the rule of law is vital in ensuring democratic accountability and in fighting social injustice. Moreover, sensitivity on the part of judges to substantive values and social context may strengthen the principle of legality, rather than diluting it. However, that is not to say that the demands of legality will always coincide with those of social transformation. Inevitably, the rule of law will sometimes conflict with the demands of social transformation or other[90] pressing needs.

The tension between legality and the need to eradicate patterns of racial discrimination came to the fore in *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*.[91] In this case, the Constitutional Court had to pronounce upon the constitutionality of the decision of a provincial government to terminate bursaries for needy students in traditionally white schools. It was common cause that the bursaries were part of the legacy of racial discrimination; however, the decision to terminate the bursaries was challenged on the ground that reasonable notice had not been given.

---

88 1333A–B.

89 "[F]lexibility and a generous approach to standing in a poor country is 'absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective'" (1331D; quoting from an opinion of Baghwati J).

90 The need for national reconciliation also came into conflict with the rule of law. Cf the challenge to the constitutionality of s 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 in *Azanian People's Organisation (Azapo) v President of the RSA* 1996 8 BCLR 1015 (CC). The Truth and Reconciliation Commission (TRC) was also criticised for its failure to uphold established legal principles, such as the need to verify evidence, take account of all relevant information, observe the *audi alteram partem* rule and give reasons for its findings. See Jeffery *The truth about the Truth Commission* (1999). More recently, the proposed amnesty for perpetrators of human-rights abuses who either did not apply to the TRC for amnesty, or were refused it, raised serious questions about the relationship between the rule of law and considerations of political expediency. See Pigou "Amnesty debate continues" *Mail & Guardian* (2001-06-15–21) 38.

91 1999 2 BCLR 151 (CC).

The court found that there had indeed been a breach of the right to procedurally fair administrative action, and that the decision was unconstitutional. It stressed the need to honour both the constitutional commitment to social transformation and the constitutional commitment to procedural fairness. In the words of O'Regan J:

> "This case highlights the interaction between two constitutional imperatives, both indispensable in this period of transition. The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society, and the second is the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or procedural fairness. A characteristic of our transition has been the common understanding that both need to be honoured."[92]

Both legality and social transformation, both procedural and substantive justice are fundamental to the new constitutional dispensation. The challenge, in the view of the court, is to try to harmonise these two sets of aspirations, rather than to subordinate the one to the other.

4 3 Reconceiving the rule of law

I have suggested that the South African Constitution invites us to reconceive the rule of law, and that the rule of law, so reconceived, can facilitate the democratisation and transformation of South African society. However, a few qualifications are in order. In the first place, we should remember that the Constitution does not contain only formal[93] and procedural guarantees of fundamental rights. These guarantees are no doubt important; however, we should be careful not to overestimate the capability of formal guarantees to constrain the exercise of administrative discretion,[94] and to reduce substantive guarantees to a thin rationality test.

Secondly, there is not a perfect fit between the rule of law and social transformation. The two will often be in tension, presenting the courts with the difficult task of finding a balance between procedural and substantive fairness. Inevitably, this will sometimes result in setbacks to transformative policies and initiatives.[95]

Thirdly, there are assumptions that are deeply embedded in the traditional conception of the rule of law, which may be at odds with the transformative message of the Constitution. For instance, some judges continue to hide behind the idea that law is neutral, objective and determinate. This enables them to evade responsibility for

---

92 Para 1. See also paras 7 and 44.

93 Eg the requirement that administrative action be lawful, or the rational connection test employed by the Constitutional Court, or the requirement of law of general application.

94 For instance, it is questionable whether it is always possible for Parliament to give detailed guidelines to administrators, given constraints on Parliament's time and resources, as well as the need to be able to adapt policies to changing circumstances. See Stewart 1975 *Harvard LR* 1693–1697.

95 Decisions to invalidate legislation or administrative acts on the ground that they do not conform to the principle of legality or procedural fairness, will sometimes benefit the privileged strata of society at the expense of the underprivileged. However, that is not necessarily the case. The principle of legality may also be relied upon to challenge the validity of transformation-minded decisions which have the unintended effect of weakening the position of the most vulnerable members of society. See Van der Walt "Tentative urgency: Sensitivity for the paradoxes of stability and change in social transformation decisions of the Constitutional Court" 2001 *SAPR/PL* 1 for an analysis of the Constitutional Court's decisions in cases where transformation-minded laws and policies result in harm or prejudice to the people intended to benefit from them.

their own decisions, and serves to frustrate the transformative aspirations of the Constitution.[96]

There are also other assumptions that are rooted in the traditional rule-of-law model, which make it difficult for lawyers and judges to heed the Constitution's call for transformation. Many lawyers, academics and judges still cling to the idea of a rigid division between the public and private spheres, despite the fact that the public and private are thoroughly intermeshed in the modern administrative state. Moreover, traditional assumptions about what constitutes a legally protected interest, or who is deserving of legal protection, are likely to continue to colour the courts' judgments. In the United States, social welfare programmes have experienced severe setbacks because of the persistence of a set of ideological presuppositions about the labour market and the causes of poverty. In terms of this ideology, the market is free; workers are independent; state intervention in the economy results in relations of dependency; and individual failing is the root cause of poverty. These presuppositions hide the extent to which the government is always already implicated in the distribution of resources, and poverty is sustained by the legal system. Accordingly, welfare is often treated as a privilege, rather than a right – especially where welfare benefits are based solely on the needs of the recipients, rather than being "deserved" through contributions to social insurance programmes.[97]

5 CONCLUDING REMARKS

The pervasiveness of bureaucratic and corporate power in the modern state raises serious questions about the capability of law to set limits to power. Lawyers can react to these questions in a number of ways. First, they can ignore the problem, and pretend that law's claims to generality and autonomy are unproblematic. This approach is dangerous, as it severs legal ideals from social reality, and tends to result in clashes between a legal profession bent on retaining the *status quo*, and agents of social change. Secondly, lawyers can choose to give up on the ideals traditionally associated with the rule of law, and embrace the rule of bureaucratic expertise. Such an approach is equally dangerous, as it submits the discourse of legitimacy to the authority of fact. State authority is no longer grounded in normative ideals, but in its claim to correspond to reality – a reality which is captured by the social sciences, which provide "means and justifications for observing, measuring and evaluating human behaviour".[98]

Thirdly, lawyers can attempt to mediate between the demands of the rule of law and those of bureaucratic power – to give each its due. This approach sounds more sensible than the previous two; however, it is fraught with difficulties. Often, attempts to mediate between the rule of law and administrative power ultimately fall into both the trap of legal formalism and that of deference to the authority of fact. For instance, it is sometimes assumed that there is a clear boundary between areas in which it is right and proper for the courts to strike down administrative action, and areas in which courts should not interfere with the exercise of administrative discretion. The idea that such a boundary exists, enables lawyers to cling to the

96 See Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* 146; and Botha "Democracy and rights: Constitutional interpretation in a postrealist world" 2000 *THRHR* 561.

97 See Williams "Welfare and legal entitlements: The social roots of poverty" in Kairys (ed) *The politics of law: A progressive critique* (1998) 569 for a critique of this ideology.

98 Fitzpatrick Mythology of modern law 61.

formalist fallacy that judges can exercise their review power without having to make difficult value or policy choices. At the same time, it allows judges to affirm the legitimacy of the administered world; to defer to the "nature of things". As Peter Fitzpatrick notes, the law, by delimiting its own power to intervene in the workings of the administration, "constitutes itself and its interventions as occasional and discontinuous". "Through law's shaping and dealing with the exceptional and the aberrant, with what is outside the properly administered world, administration is rendered normal and right".[99]

The critical challenge, then, is to avoid the dangers of both a formalistic approach which detaches law from social reality, and a deferential approach which subordinates the rule of law to the rule of administration. It is critically important to keep the ideal of the rule of law alive; to resist the power of state and corporate bureaucracies to define individual rights and duties through a series of *ad hoc* decisions. The ideals traditionally associated with the rule of law therefore remain important. At the same time, however, there is a need to re-evaluate these ideals in the light of the legal, social and political realities of the modern state. We need to be conscious of the contradictions inherent in the liberal legal order, of the ways in which ideals such as equality and freedom are often negated by legal formalism. We need to accept that the traditional liberal idea of law as neutral, objective and determinate, is no longer realistic. In the words of Trubek, we need to "find within the formalist tradition the basis for a critical postformal law".[100]

The South African Constitution offers us a unique opportunity to develop a critical postformal jurisprudence – one that takes account of substantive values, is sensitive to the social and historical context, and yet is serious about legality and procedural fairness. It invites us to rethink the relationship between the rule of law and social transformation; between law and politics; between substance and procedure. It requires us to resist power in the name of the law, but also to be alert to the fact that our conceptions of legality and justice are themselves products of particular historical experiences, and are therefore inscribed in power relations. On this reading, the Constitution invites us to participate in a disruptive discourse of legitimacy; to criticise current distributions of wealth and power in the name of legal ideals, but also to reinterpret these ideals in the light of actual social experience.[101]

To abandon the ideals associated with the rule of law would be the worst kind of cynicism. However, to keep these ideals alive, they must constantly be considered within new contexts. Jacques Derrida writes:

> "Nothing seems to me less outdated than the classical emancipatory ideal. We cannot attempt to disqualify it today . . . But beyond these identified territories of juridico-politicization on the grand geo-political scale, beyond all self-serving interpretations, beyond all determined and particular reappropriations of international law, other areas must constantly open up that at first can seem like secondary or marginal areas."[102]

---

99 *Idem* 160.

100 Trubek 1977 *Law and Society R* 563. See also Nonet and Selznick *Law and society* 107–108 (arguing that legality is as much the "master ideal" of responsive law as of autonomous law, but that legality needs to be cured of formalism).

101 See Botha "The legitimacy of legal orders (2): Towards a disruptive concept of legitimacy" 2001 *THRHR* 368. See also Bernasconi "Rousseau and the supplement to the social contract: Deconstruction and the possibility of justice" 1990 *Cardozo LR* 1539.

102 Derrida "The force of law: The 'mystical foundations of authority'" in Cornell *et al* (eds) *Deconstruction and the possibility of justice* (1992) 3 28.

Derrida beckons us to consider areas that at first may seem marginal. This may seem strange to lawyers, who are trained carefully to separate legally relevant "facts" from irrelevant considerations; to seek a "core" of settled meaning and reduce the "penumbra" of ambiguity.[103] However, if we truly want to subject power to critical inquiry, we must be prepared to "leave the comfort of accepted learning and explore the fringes of the law";[104] we must counter the "official story" of the law, which tends to underplay and normalise law's violence, with unofficial stories of law's impact on people's lives. Only thus can we hope to come to a fuller understanding of the pervasiveness of power and the ways in which law – and legal theory – hide power behind a veil of formalism, objectivity and neutrality.

> *There are notionally different ways to develop the common law under section* 39(2) *of the Constitution, all of which might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law. Before the advent of the [Interim Constitution], the refashioning of the common law in this area entailed "policy decisions and value judgments" which had to "reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people". A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what "the [c]ourt conceives to be society's notions of what justice demands". Under section* 39(2) *of the Constitution concepts such as "policy decisions and value judgments" and "society's notions of what justice demands" might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.*
>
> *Ackermann and Goldstone JJ in* Carmichele v Minister of Safety and Security 2001 10 BCLR 995 (CC) *para* 56 (*internal footnotes omitted*).

103 See Hart "Positivism and the separation of law and morals" 1958 *Harvard LR* 593 607ff.

104 Van der Walt "Marginal notes on powerful(l) legends: Critical perspectives on property theory" 1995 *THRHR* 396.

Presumptions in the South African law of evidence (1)*

CRM Dlamini
BProc LLM LLD(UZ) LLD(UP) LLD(UWC) LLD(SA) LLD(UZ)
Rector and Vice-Chancellor, University of Zululand

OPSOMMING

Vermoedens in die Suid-Afrikaanse bewysreg

In hierdie reeks bydraes word die effek van vermoedens op die bewyslas ondersoek. Die algemene standaard van bewys in strafsake is dat die staat die skuld van 'n beskuldigde bo redelike twyfel moet bewys. 'n Vermoede kan hierdie standaard beïnvloed. Gevolglik is dit nodig om die impak van vermoedens op die bewysstandaard te bepaal, des te meer in die lig van die Grondwet wat voorsiening maak vir 'n reg op 'n billike verhoor. Die reg sluit onder meer in om onskuldig geag te word tot skuldigbevinding en die reg om te swyg. Aangesien die Grondwet die hoogste reg van die land is, is enige regsvoorskrif of optrede in stryd daarmee, ongeldig. Die Grondwet bepaal verder dat by die uitleg van die Handves van Regte 'n hof buitelandse reg in ag kan neem. Daar word dus ondersoek ingestel na die Amerikaanse en Engelse reg se bepalings oor vermoedens. Die skrywer kom na 'n ondersoek van die Suid-Afrikaanse posisie tot die gevolgtrekking dat daar – na jarelange afwyking van die basiese vermoede – 'n effektiewe ommekeer was en dat die staat weer eens bo redelike twyfel 'n beskuldigde se skuld moet bewys. Dit impliseer nie dat vermoedens nie meer toelaatbaar is nie. Dit beteken wel dat ten einde ten volle van krag te wees, vermoedens aan die bepalings en kernwaardes van die Grondwet moet voldoen. Dit is veiligheidsmaatreëls wat die vryheid van die individu beskerm en verkeerde beslissings tot die minimum beperk.

1 INTRODUCTION

There are differences of opinion among various writers on evidence about the precise definition of presumptions.[1] However, there is sufficient agreement about the effect[2] of presumptions to render exact definition unnecessary, since the legal import of presumptions is not dependent on definition.

Generally, it is agreed that a presumption is an evidential device which is employed by the legislature to allocate certain evidential burdens among the actors in a suit, and to prescribe the evidential import of evidence in certain circumstances.[3]

---

* This series of articles has been extracted from the author's unpublished LLD thesis *Proof beyond a reasonable doubt* UZ (1999).

1 "There is no agreement among legal writers as to exactly what a presumption is or how it operates": Ashford and Risinger "Presumptions, assumptions and due process in criminal cases: A theoretical overview" 1969-1970 *Yale LJ* 165; Kadisch *et al Criminal law and its processes: Cases and materials* (1983) 84–85.

2 Murphy *A practical approach to evidence* (1980) 35; Heydon *Evidence* (1984) 43; Tapper, Cross and Wilkins *Outline of the law of evidence* (1986) 39; Tapper and Cross *Cross on evidence* 131–132.

3 Morgan *Evidence* (1961) 15.

Presumptions are grist to the mill of the evidential process because "presumptive and assumptive devices are among the most basic elements in the judicial process. They shape, define and alter how courts and juries reach decisions. They are part of the epistemology of judicial proceedings".[4]

The purpose of this series of articles is to analyse the effect of presumptions on the burden of proof. The general standard of proof in criminal cases is that the state must prove the guilt of the accused beyond reasonable doubt.[5] A presumption may affect this. It is therefore necessary to determine what the effect of presumptions is on the onus of proof. This is even more important today, since the Constitution provides for the right to a fair trial which includes, *inter alia*, that an accused person should be presumed innocent until proven guilty and has the right to remain silent.[6] As the Constitution is the supreme law of the country, any law or conduct that is in conflict with it is invalid.[7] The Constitution further provides that in interpreting the Bill of Rights, recourse may be had to foreign law.[8] It will therefore be instructive to refer to American and English law on the point.

2 PRESUMPTIONS IN AMERICAN LAW

Since the criminal proceedings in American law are adversarial in nature, "presumptions have the effect of aiding a party in the presentation of his case".[9] In American law

> "true presumptions deal with inferences drawn from a fact actually proved (the basic fact) to some other critical fact (the presumed fact). Typically the presumed fact is one on which the prosecution bears the onus of persuasion. The presumption serves, however, to make this burden somewhat easier to carry".[10]

2 1 Classification of presumptions in American law

Presumptions need to be classified in American law because legal consequences flow from such classification. Authors classify presumptions variously[11] but the most rationally acceptable classification in American law is the one adopted by Bewley,[12] according to which presumptions may be classified according to their evidential effect, that is, presumptions may be permissive, mandatory or conclusive. The permissive presumption allows the trier of fact to find the presumed fact as established upon the proof of the basic fact if no contradicting evidence is led, but does not impose a duty on the trier of fact to so find.

---

4 Ashford and Risinger fn 1.

5 Beinart "The rule of law" 1961 *Acta Juridica* 119; Van der Merwe *et al Evidence* (1983) 415, 425; Hoffman and Zeffertt *Evidence* (1989) 195; Schwikkard *et al Principles of evidence* (1997) 2; *Pillay v Krishna* 1946 AD 946.

6 S 35(3)(h) of the Constitution of the Republic of South Africa Act 108 of 1996.

7 S 2.

8 S 39(1)(c).

9 Donigan *et al Evidence handbook* (1975) 22; Bewley "The unconstitutionality of statutory criminal presumptions" 1970 *Stanford LR* 341.

10 Kadisch (fn 1) 85; Nesson "Reasonable doubt and permissive inferences: The value of complexity" 1979 *Harvard LR* 1187.

11 "Indeed presumptions have defied most attempts to classify them coherently" Murphy (fn 2) 34.11.

12 (Fn 9) 343.

The mandatory presumption obliges the trier of fact to find that the presumed fact is established by the proof of the basic fact unless contradicting evidence is led. A duty is imposed on the trier of fact to find that the presumed fact exists, a finding he would not necessarily make were he not directed to make it.

A conclusive presumption forecloses the argument on a certain issue no matter how much evidence is led in contradiction of the presumed state of affairs.[13]

> "In effect it is not a presumption at all because it establishes a substantive rule rendering the basic fact determinative and the presumed fact legally irrelevant."[14]

Presumptions may be classified according to whether they affect the burden of producing evidence, or the burden of persuasion[15] or both. They may also be classified according to the quantum of evidence required to rebut them. Some evidence, believable evidence, substantial evidence, evidence to support a finding, or preponderant evidence, are all gradations of the quantum of evidence which, depending on the terms of the particular presumption, may be required to rebut a presumption.

2 2 Application of presumptions in American law

The creation of presumptions is a matter of legislative choice since it falls within the sphere of legislative authority to make policy decisions regarding the desirability of repressing certain conduct as well as to determine the most efficient way of repressing such conduct.

> "The constitution's relative lack of substantive restraints leaves a legislature free, within extremely broad limits, to choose its criteria for criminal conviction and punishment. It may establish a defence or withhold it, specify precise grades of crime or create broad categories with a wide range of possible sentences."[16]

A state is also entitled to regulate procedures which govern the execution of its laws, "including the burden of producing evidence and the burden of persuasion unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental".[17] However, the tremendous criminal definitional authority is tempered by the need to comply procedurally with the dictates of fundamental principles of justice as well as the obvious requirements of constitutionalism. In other words, the creation of offences and procedures to prosecute them must not be in conflict with any provision of the Constitution of the United States.[18]

---

13 Mosher calls a conclusive presumption irrebuttable and incorrectly equates mandatory presumptions with conclusive presumptions; see "Statutory criminal presumptions: Reconciling the practical with the sacrosanct" 1920 *UCLA LR* 157 158 fn 6.

14 Kadisch (fn 10) 86.

15 The stand taken in this series is that it is inelegant, incorrect and confusing to speak of burdens in the law of evidence but that, since the nomenclature has become firmly established, one must conform to its usage for the sake of clarity.

16 Underwood "The thumb on the scales of justice: Burdens of persuasion in criminal cases" 1977 *Yale LJ* 1299; see also *Tot v US* 319 US 463 467 (1942).

17 Brennan J for the court in *Spencer v Randall* 357 US 513 523.

18 In so far as constitutional limitations to the power of the legislature to formulate rules of evidence are conceded, this represents a restriction on Wigmore's view that such powers are unlimited Wigmore *Treatise on the Anglo-American system of evidence in trials at common law* (1981) 724–725.

According to Mosher,[19] the use of presumptions in criminal statutes in the United States is vulnerable to attack on constitutional grounds on at least four grounds:

(a) By laying down that one fact will be presumed from the existence of another, the legislature may be violating some basic due process requirement, that is, some fundamental principle of justice.

(b) By influencing or directing the jury in its decision-making, the accused is deprived of his right under the sixth amendment to have the jury make an unbiased independent determination of his guilt.

(c) If rebuttal of a presumption requires that the accused testify in person, it will violate the accused's fifth amendment right against self-incrimination by putting him to a choice – either to present such evidence or to be convicted.[20]

(d) An instruction to the jury explaining the presumption to the jury and the requirement that the accused present evidence to the jury in rebuttal is unconstitutional comment on the defendant's failure to testify.

According to Kadisch *et al* a further ground for constitutional challenge is that

> "to the extent that a presumption draws its validity either from specialized research or from intuitive judgments debated in the legislature but not made explicit in court, the accused is in effect denied his 6th amendment right to be confronted with his accusers".[21]

It has been said that in order to be valid, presumptions must pass the test of constitutionality. The question which arises is: What does the test of constitutionality comprise?

Peculiarly, the problem of presumptive constitutionality did not first arise in a criminal context but in a civil context, namely in *Mobile, Jackson and Kansas City Railroad Company v Turnipseed, Administrator*.[22] In that case the defendant was a railroad company. An employee of the company was killed when a truck was derailed and fell on him and crushed him. A dependant of the deceased person sued the railway company.

A provision in the law of Mississippi stipulated that in actions against railway companies for damage caused to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company would be *prima facie* evidence of lack of reasonable skill and care on the part of the servants of the company with reference to such injury. The defendant raised the argument that the provision was contrary to the general law of tort then prevailing, namely that the plaintiff must prove both damage and negligence on the part of the defendant or his servant. Railway companies were being discriminated against and were being deprived of the equal protection of the laws under the 14th amendment or due process of law.

The court held that it was within the power of government to enact a rule of evidence stipulating that one fact shall constitute *prima facie* evidence of another.

For a legislative presumption of one fact from evidence of another not to constitute a denial of due process of law or a denial of the equal protection of the

---

19 (Fn 13) 157 164.

20 As Kadisch (fn 10) points out, a presumption which relates to the accused's state of mind creates an irresistible pressure on the accused to testify, as evidence of the accused's state of mind is unlikely to be available from any source other than the accused himself.

21 (Fn 10) 81.

22 219 US 35 (1910).

law, it is essential only that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another not be so unreasonable as to be a purely arbitrary mandate. Likewise, it must not under the guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defence to the main fact thus presumed.[23]

Thus arose the rational-connection test of presumptive constitutionality in civil matters. However, it must be noted that the court did indicate, *obiter*, that the rational-connection test was also applicable to criminal trials.[24]

The first criminal case in which constitutional challenge was mounted against presumptions in the US Supreme Court was *Yee Heun v US*.[25] The accused was found trying to hide a quantity of opium. The importation of opium after 1 April 1909 was prohibited in terms of a congressional statute. The act provided that proof of possession of opium would be sufficient for conviction of the accused for illegal importation to the satisfaction of the jury. A further provision laid down that all opium found in the United States after 1 July 1913 would be presumed to have been imported after 1 April 1909. It placed the burden to rebut the presumption on the accused.

The court held that the presumptions challenged satisfied the rational-connection test and confirmed the decision. The decision was remarkable in that the court displayed no appreciation of the constitutional issues raised and gave no reason why it applied a test which had been formulated for civil suits, in a criminal case in which different considerations obviously applied. It seems inescapable that the court was not adequately sensitive to the fundamental differences between civil and criminal cases and the additional constitutional problems which criminal cases posed.[26]

A fundamental shift occurred in *Tot v United States*.[27] In this case the accused was charged with illegal receipt of a firearm or ammunition which had been supplied or transported in interstate or foreign commerce. In terms of the applicable legislation, mere possession of a firearm or ammunition was presumptive evidence that such firearm or ammunition had been shipped or transported or received contrary to the Act in question.

The court held:

> "The Congress has power to prescribe what evidence is to be received in the Courts of the United States. The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated: The question is whether, in this instance, the act transgressed those limits."[28]

The court for the first time, therefore, approved of constitutional constraints on the power of government to prescribe evidential processes in courts of law, but seemed to restrict constitutional challenge to the due process clauses of the fifth and

---

23 *Turnipseed* 43.

24 "If a legislative provision not unreasonable in itself prescribing a rule of evidience, in either criminal or civil cases . . ." *Turnipseed* 43.

25 268 US 168 (1925).

26 (Fn 13) 163.

27 319 US 463.

28 467.

fourteenth amendments. The test of the validity of such a presumption, the court said, was that there must be:

> "a rational connection between the facts proved and the fact presumed . . . But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of the courts".

Black and Douglas JJ in their concurring opinions clearly showed that constitutional challenge is not limited to the due process clauses only. According to them:

> "The procedural safeguards found in the Constitution and in the Bill of Rights, *Chambers v Florida*, 309 US 227, 237, stand as a constitutional barrier against thus obtaining a conviction, ibid, 235–238. These constitutional provisions contemplate that a jury must determine guilt or innocence in a public trial in which the defendant is confronted with the witnesses against him and in which he enjoys the assistance of counsel; and where guilt is in issue, a verdict against a defendant must be preceded by the introduction of some evidence which turns to prove the elements of the crime charged. Compliance with these constitutional provisions, which of course constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observance cannot be sustained."[29]

It is clear from the judgment that not all presumptions which pass the rational-connection test will be valid. Even before a presumption is subjected to the rational-connection test, it must be submitted to a constitutionality test because the constitution is the supreme law of the land.[30]

However, the conviction was set aside because the presumption failed the rational-connection test. Black and Douglas JJ were still in the minority, otherwise the statute concerned would have failed on constitutional grounds.

The decision left certain questions unanswered, to wit: (i) What presumptions, according to various classifications, would meet the threshold constitutional standard? (ii) How strong must the connection be between the predicate fact and the presumed fact in order to pass the rational-connection test?

In *United States v Gainey*[31] the defendant was charged with illegally operating a still. He had been found at a still site by federal and state officers. The presumption which was operative mandated:

> "Whenever . . . the defendant is shown to have been at the site or place where and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without a jury)."[32]

The court of appeals held that the presumption was not rationally connected with the predicate fact and therefore invalid. The Supreme Court reversed the finding of the court of appeals, holding that the presumption merely allowed the jury to draw an inference and nothing more. It was therefore a rule of evidence which did not impinge on any constitutional right of the accused and therefore passed the threshold test of constitutionality. The court also held that the presumption passed the rational-connection test, because the inference permitted was rationally connected to the predicate fact.

---

29 473.
30 *Ibid.*
31 380 US 63 (1964).
32 64.

In *Leary v United States*[33] the accused drove from New York to Mexico with two of his children and two other adults. They were denied entry into Mexico and were returned to the US side of the border by United States officials. There the accused's car was searched and some cannabis was found in the car and in a purse which was in possession of the accused's daughter.

The accused was charged with three offences. He was acquitted on one count but convicted on the other two. (On appeal the Supreme Court reversed the conviction of the accused on the count of failing to comply with the transfer tax provision of the Marijuana Tax Act on the basis that the said provisions violated the accused's fifth amendment privilege against self-incrimination. That decision is not relevant to this work but is noted for the sake of completeness.)

The crucial question to be answered by the court in respect of the remaining charge was

> "whether the petitioner was denied due process by the application of the part of 21 USC section 176(a) which provides that a defendant's possession of marijuana shall be deemed sufficient evidence that the marijuana was illegally imported or brought into the United States, and that the defendant knew of the illegal importation or bringing in, unless the defendant explains his possession to the satisfaction of the jury".[34]

The court approved and applied the rational-connection test, holding that

> "the upshot of *Tot, Garney* and *Romano* is, we think, that a criminal statutory presumption must be regarded 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend".[35]

The court then applied the test of the factual situation presented and concluded that there was no connection between the predicate fact and the presumed fact and declared that the offending provision was an unconstitutional infraction of the accused's right to due process of law.

In *Turner v United States*[36] narcotics agents stopped a car in which the accused was travelling. The accused threw away a packet which was retrieved and later examined and found to contain a mixture of sugar and cocaine. A quantity of heroin was also found in the car. The accused was charged and convicted of knowingly receiving, concealing and facilitating the transportation and concealment of heroin and cocaine knowing that such heroin and cocaine had been illegally imported into the US and also of knowingly purchasing, possessing, dispensing and distributing heroin and cocaine not in or from the original stamped package. The court of appeals confirmed the conviction.

The court applied the rational-connection test, finding that the charges relating to heroin had been established, since the inference sought to be drawn was rationally connected, on the facts of the case, with the predicate fact. The court confirmed the finding of the court of appeals on this aspect. However, with regard to the cocaine, the court found the reverse on the facts and therefore reversed the finding of the court of appeals.

---

33 395 US 6 (1969).

34 *Leary*'s case 12; Morgan, *Some problems of proof* vol 1 (1961) 76–77 therefore avers: "Where a presumption comes into operation during the course of the trial, its effect is always at least to fix the burden of evidence upon the party who is denying the existence of the presumed fact."

35 (Fn 33) 36.

36 396 US 398 (1970).

"Rational connection" has been regarded as a useful screening test, but not a conclusive one. This was acknowledged in *County Court of Ulster County, New York v Allen*.[37]

In regard to a mandatory presumption, Stevens J, handing down judgment for the majority of the Supreme Court, said that "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt".[38]

What becomes abundantly clear from the decisions of the Supreme Court of the United States is that, while the legislature has wide power to legislate, its power must be exercised subject to the Constitution.[39] The Constitution prevails absolutely. Any legal measure adopted by the legislature or the executive, no matter under what guise it masquerades, is examined by the courts for its substantive effect upon constitutional rights. If that effect is in conflict with a provision of the Constitution in the sense that it affects a constitutionally protected individual right, then the constitutional provision takes precedence and the right of the citizen involved is vindicated.

That is why the law of the United States on presumptions is relatively simple. The testing of a presumptive provision is done by reference to one *suprema lex* and there is no need to go into semantic contortions either to sustain or to strike down an offending provision. In sum:

The use of presumptions in the criminal law is already limited by constitutional principles. To allow a conclusive or mandatory presumption against a criminal defendant on an element of the crime would infringe his right to be free from a directed verdict for the prosecution. The jury must always be allowed to determine whether there is reasonable doubt as to each element in a criminal case. A conclusive or mandatory presumption as to some element of the crime would have the effect of granting the prosecution a directed verdict on that element in violation of this principle. Thus with respect to elements of the crime, at most only permissive presumptions are allowed.

In the words of Bewley:

> "A presumption that shifts to the defendant the burden of persuasion on an element of the crime may not be used in a criminal trial. The burden of persuasion must always rest on the prosecution; and therefore, the effect of a presumption against the defendant must be limited to shifting the burden of coming forward with the evidence. A corollary to this requirement would seem to be that the amount of evidence required to rebut the presumption ought to be only that amount which raises a reasonable doubt as to the existence of the presumed element. If more were required, the presumption would shift the burden of persuasion to the defendant. Consequently for any presumption to be constitutional in the criminal context, it must be permissive and may not have the effect of shifting the burden."[40]

The aforegoing, it is submitted, is a correct statement of American law pertaining to the use of presumptions, save that it is not quite complete. The author should have added that in addition the presumption must pass the rational-connection test; in other words, a presumption, in order to be valid, must be such that the presumed fact "must follow as a logical consequence of the known or established facts".[41]

---

37 442 US 140 (1979).
38 167.
39 Cooley *A treatise on the constitutional limitations* (1972) 28.
40 (Fn 9) 343–344.
41 Donigan and Fisher *The evidence handbook* (1975).

3 ENGLISH LAW

3 1 Definitional confusion

The law relating to presumptions is a veritable welter of confusion in English law.[42]

> "Every writer of sufficient intelligence to appreciate the difficulties of the subject matter has approached the topic with a sense of hopelessness and has left it with a feeling of despair."[43]

Indeed, Cross and Tapper are moved to aver that "[i]t would be unreasonable to expect anything approaching neat precision in this area of the law".[44]

The confusion of presumption classification in an attempt to create order which exists in English law is most ably cleared up by Murphy[45] who shows clearly that the term "presumption" is often used to refer to four different legal situations. First of all, there are rules of law which provide that some fact will be taken in all cases to be true without proof of any other primary fact, until the contrary is proved (eg the rule that all persons are presumed to be innocent until proved guilty). According to Nokes,[46] these are not presumptions but rules of substantive law which have no place in the law of evidence.[47] These are the so-called irrebuttable presumptions. Murphy asserts, correctly it is submitted, that an irrebuttable presumption is a *contradictio in terminis*.

Secondly, there are rules of law which preclude the assertion of some necessary fact, without which cases of a certain sort cannot be maintained; for example, the rule that a child under the age of seven is *doli incapax*.

Thirdly, there are inferences of common sense, which a tribunal of fact may (purely as a question of fact) but need not draw, having regard to the recurrence or common incidence of certain items of circumstantial evidence.

Finally, we have the true presumptions, in relation to which, on proof of some primary fact or facts, the court will find proved a presumed fact, in the absence of evidence to the contrary.

3 2 Characteristics of true presumptions

In English law, rebuttability is the distinguishing characteristic of the true presumption.[48] Presumptions are factual conclusions, which, by law, "must be drawn if particular facts are established or particular circumstances exist, and there is no evidence to the contrary".[49]

3 3 Effects of true presumptions

Obviously, if the aforegoing description of the effect of a presumption in English law is correct, and it is submitted that it is, then the operation of a presumption affects the incidence of the burden, since it is quite obvious that there must be an allocation of the burden of establishing the primary fact upon which hinges the

---

42 Heydon *Evidence* 43–45.
43 Morgan "Presumptions" 1937 *Washington LR and State Bar J* 253.
44 (Fn 2) 132.
45 *Idem* 135.
46 *An introduction to evidence* (1967) 64.
47 *Ibid.*
48 65.
49 *Ibid.*

operation of the presumption as well as the proof of the ultimate fact which the presumption is aimed at helping to prove. Cross and Tapper show that the question of allocation of the burden is affected by the meaning attached to the burden as well as the source of the presumption, that is whether it is a common-law presumption or a statutory presumption.[50] This is a matter of crucial importance in English law.

3 4 Common law presumptions and their effects on English criminal law

According to Cross and Tapper:

> "Although there is some older authority to the contrary it is hard to believe, since the decision in *Woolmington*, that an English court would be prepared to apply a common law presumption so as to cast a legal burden upon the accused in a criminal case. It is rare for an evidential burden to operate against the accused."[51]

Since, in English criminal law, the prosecution bears both the legal and the evidential burden (according to the meaning allocated by Cross and Tapper to the two burdens) to prove all the elements of the offence charged, "[p]roof of the basic facts of a common law presumption can cast nothing more than an evidential burden on to the accused and nothing less than a legal burden on to the prosecution".[52]

3 4 1 Effect of the evidential burden at common law

A question which immediately arises is the quantum of proof that the accused must adduce in order to discharge the evidential onus in common law.

There is some confusion among the commentators in English law on the subject, as many of them do not make the distinction made by Cross and Tapper between common-law presumptions and statutory presumptions. Writers also do not always make the clear distinction between the legal onus and the evidential onus. Thus Phipson makes no mention of the quantum of evidence required to be adduced by the accused in criminal cases where the latter bears the evidential onus by virtue of common law.[53] May,[54] when discussing quantum of proof in those cases where the burden of proof is on the defence, makes no distinction between the evidential onus and the legal onus. So it is not clear whether the standard of a balance of probability is applicable to both onera, whether it applies to the persuasive onus (legal onus) only, or to the evidential onus. Nokes is also ambiguous, as he does not indicate whether the burden he refers to is the legal burden or the evidential burden.[55]

Cross and Tapper, however, show very clearly[56] that there is a difference in the required quantum of evidence when the defence seeks to discharge an evidential onus and when it seeks to discharge a persuasive onus in criminal cases. According to them:

> "When the accused bears the evidential onus alone, it is only necessary for there to be such evidence as would, if believed and uncontradicted, induce a reasonable doubt in the mind of a reasonable jury as to whether his version might not be true . . ."[57]

---

50 (Fn 2) 132–133.
51 *Idem* 133–134.
52 *Idem* 135.
53 Buzzard *The law of evidence* (1998) 64.
54 May 60–61.
55 Nokes 492.
56 (Fn 2) 140.
57 *Ibid.*

Cross and Tapper seem to be correct because of the decision in *R v Schania and Abramovitch*.[58] In that case the accused were charged with receiving stolen goods well knowing them to have been stolen. That the goods had in fact been stolen when acquired by the accused was not in dispute.

The court of criminal appeal held that the test to apply was whether the jury was satisfied "that the explanation given by the appellant might reasonably be true . . ." and that if they were so satisfied, the "crown had not established beyond a reasonable doubt the guilt of the prisoners . . .".[59]

In *Bratty v Attorney-General for Northern Ireland*[60] the accused was charged with murder. The defence advanced was that of insanity. During the course of the trial some evidence was led which suggested that the accused may have acted under automatism or may not have had the requisite intent at the time of the commission of the alleged offence. Clearly, in terms of the common law, both the evidential and legal (persuasive) onus in respect of insanity rested on the accused.[61] The court *nisi prius* left the issue of insanity to the jury but refused to leave the matter of automatism or lack of intent to the jury. The jury convicted the accused of murder. An appeal was noted against the court's refusal to leave the two matters mentioned to the jury. The court of criminal appeal confirmed the verdict, whereupon the matter was taken to the House of Lords.

The House of Lords considered the matter and declared:

> "A consideration of his evidence and of the other evidence in the case leads me to the view that it did not provide a proper foundation for a submission that (apart from any question of insanity) the actions of the appellant had been unconscious and involuntary. There was no sufficient evidence, fit to be left to a jury, on which a jury might conclude that the appellant had acted unconsciously and involuntarily or which might leave a jury in reasonable doubt whether this might be so."[62]

The test was therefore whether the evidence led could have raised a doubt in the mind of the jury.

In sum, therefore, the effect of presumptions in the English common law is almost identical to that in American law. In both systems, a presumption which casts a persuasive burden is not countenanced, except where the defence of insanity is raised. The difference is that there is no requirement in English law that a presumption should be permissive and not mandatory.

3 5 Statutory presumptions in English criminal law

Because of the English doctrine of legislative supremacy, the legislative branch of government is entitled to create presumptions: "[N]ew presumptions are created all the time by particular statutory provisions . . ."[63] The power of the legislature to create presumptions cannot be doubted in English law.[64]

---

58 (1914) 11 CAR 45.
59 49.
60 1963 AC 486.
61 Phipson (fn 51) 54.
62 418–419.
63 Tapper and Cross (fn 2) 43.
64 Mizel and Warren (1973) *WLR* 899 904.

The power of the legislature is unlimited. Therefore the legislature may make inroads into the settled rules of criminal law and evidence and thereby restrict[65] individual liberties at will. No challenge has ever been addressed to the power of the legislature to pass such provisions. The legislature has therefore, in England, adopted many statutes which cast burdens of proof on the accused.[66] In this context, burden of proof connotes both the evidential and legal burden on certain issues, for example section 1 of the Prevention of Crime Act, 1953. This provides that "any person who without lawful authority or reasonable excuse, the proof of which shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence . . .".

Clearly the duty to lead evidence that the accused had lawful authority or reasonable excuse, as well as the duty to persuade the fact-finder that the accused had such authority or excuse, falls on the accused, since he is required to establish "proof" of such authority or excuse.[67]

Though the legislature does on occasion impose a legal burden on the accused, it does not, as a rule, require the same standard of proof as where the burden is borne by the crown. Therefore, in *R v Carr-Briant*[68] where an onus was placed on the accused in terms of the Prevention of Corruption Act 1916, the King's Bench held:

> "We see no reason why the rebuttable presumption created by the section should not be construed in the same manner as similar words in other statutes or similar presumptions at common law, for instance, the presumption of sanity in the case of an accused person who is setting up a defence of insanity."[69]

Since the applicable standard in a defence of insanity was proof on a balance of probabilities,[70] the court held that that was the applicable standard of proof required to discharge the legal onus in cases where the legal onus is created by statute.[71] The courts have since confirmed the decision in *Carr-Briant*'s case.[72]

A further question arises as regards the statutory imposition of the evidential burden on the accused. Again the statute normally simply imposes the burden but does not indicate the standard of proof required to discharge the onus. Cross and Tapper contend:

> "Although there is little direct English authority on the point, it seems that where the accused bears an evidential, but not legal burden, he may discharge it by adducing evidence of a reasonable possibility of the existence of the defence."[73]

It is submitted that there would be little sense in applying any other standard, since this is the standard of proof which is applied in cases where the common law imposes an evidential burden on the accused. There would be no logical justification for applying a different standard simply because the evidential burden is imposed by statute instead of the common law.

---

65 *R v John* (1974) All ER 561 565.
66 Phipson (fn 51) 51–52; May *Criminal evidence* (1986) 49; *R v Warner* (1969) 2 AC 280 A 302 B.
67 Williams "The evidential burden: Some common misapprehensions" 1977 *NLJ* 156.
68 (1943) KB 607.
69 610.
70 *Sodeman v R* (1936) All ER 1138.
71 612.
72 *Islington London Borough Council v Panico* (1973) WLR 1166–1168.
73 (Fn 2) 111.

Troublesome questions have arisen in English law regarding the propriety of the imposition of the legal burden on an accused person. In contravention of the clear mandate of *Woolmington v Director of Public Prosecution*[74] there is a "tendency in modern legislation to cast the persuasive burden of proving particular issues on the defendant . . .".[75]

Some writers deplore the policy of imposing any burden on the accused. Glanville Williams avers: "There is no absolute need to place any evidential burdens on the defence . . ."[76] Dean,[77] being fully aware of the policies that lie behind the imposition of burdens on the accused,[78] is of the view that only the evidential burden should be placed on the accused in those circumstances where policy demands it. Phipson takes the view that only an evidential burden should be cast on the accused. It seems that he considers it unfair to cast a persuasive burden on the accused because

> "[a]s a rule the persuasive onus is cast upon the defendant upon the issues which determines whether the defendant's act was criminal, and which is therefore decisive of guilt or innocence".

According to Phipson, discharging the onus in those circumstances amounts to the establishment of his innocence by the accused.[79]

This is quite clearly an undercutting of the mandate in *Woolmington*'s case.[80]

How have the judges reacted to this criticism? According to Cross and Tapper:

> "Even when there are no words dealing expressly with the burden of proof, a statute will frequently be construed so as to place an evidential, if not legal, burden on a particular issue on the accused."[81]

In other words, Cross and Tapper are of the view that on this particular issue, the English courts are prepared to bend over backwards to interpret statutory provisions in favour of the state. It is submitted that Cross and Tapper are not correct. The decision they quote in support of their contention[82] does not support it. If anything, the decision confirms the English courts' appreciation of the rights of the individual. However, it also reflects the English courts' respect for the supremacy of Parliament.[83]

At worst, therefore, one may say that the English courts will, if a suitable occasion arises, enforce a legal presumption which casts an onus on the accused – be it legal or evidential – which undermines the basic rule of common law that the onus rests on the state to prove the case against the accused beyond a reasonable doubt. As is said above, this result is attributable to the great respect that courts have for the legislative enactments of Parliament.

(To be continued)

---

74 (1935) AC 462, (1935) All ER 1.
75 Phipson (fn 51) 73.
76 Williams 1977 *NLJ* 156 158; Williams is fully aware of the policy considerations; see *The proof of guilt* (1963) 185.
77 Dean "Negative averments and the burden of proof" 1966 *Crim LR* 594.
78 *Idem* 597.
79 (Fn 51) 53.
80 *Ibid.*
81 (Fn 2) 111.
82 *R v John* (1974) 2 All ER 561.
83 566A–J.

Are the Canadian Charter and Charter jurisprudence suitable sources of reference for human rights and particularly criminal procedure and evidence rights in South Africa? (2)

Wium de Villiers
BIuris LLB LLD
Senior Lecturer in Mercantile Law, University of Pretoria

3 8 The period from 1960 to 1980

3 8 1 Loss of enthusiasm by the judiciary

During the 1960s and 1970s, just as the rest of North American society, including the United States Supreme Court, was being caught up in the great libertarian tidal wave of the 1960s, the Canadian judiciary seemed to lose its enthusiasm for civil liberties. The Canadian courts appeared to take a more restrained approach to the protection of fundamental freedoms.[127] The idealism of the 1950s faded, and a marked change of attitude on the part of Canadian judges was obvious. The "implied bill of rights" and "criminal law" techniques for protecting civil liberties were gradually abandoned.

In 1969 both these techniques were finally buried with the decision of *Attorney-General of Canada v Dupond*.[128] This case dealt with the validity of a controversial ban on public assemblies by the City of Montreal. Because of political unrest in Quebec in the late 1960s, numerous and often violent street demonstrations were held. Montreal passed a by-law prohibiting public demonstrations that endangered tranquillity, safety, peace or public order. Furthermore, all public assemblies (even peaceful ones) could be temporarily prohibited if recommended by law-enforcement authorities. In November 1969 such an ordinance suspended all public assemblies, parades and gatherings in Montreal for a period of 30 days. The validity of the ordinance was challenged on the following constitutional grounds:

- It invaded the federal domain of "criminal law".
- It abrogated the "right of public debate . . . in public meetings".

---

127 Gibson "– And one step backward: The Supreme Court and constitutional law in the sixties" 1975 *Can Bar R* 621.

128 1978 84 DLR (3d) 420 (SCC). See Swinton's comment "Constitutional law – freedom of assembly – criminal law power" 1979 *Can Bar R* 326.

These arguments were rejected by Beetz J, on behalf of the majority of the Supreme Court of Canada.[129] The court referred to the "criminal law" argument and held that the by-law constituted valid "regulations of a merely local character".[130] The court rejected the "implied bill of rights" argument outright, saying that none of the freedoms referred to was so enshrined in the Constitution as to be beyond the reach of competent legislation.[131]

3 8 2 Libertarian initiatives by politicians

3 8 2 1 Adoption of human-rights legislation

The traditional deference of Canadian judges towards elected authorities and their instinctive diffidence concerning social or political controversy during the 1960s and 1970s stood in sharp contrast to the libertarian activism of politicians during the same period. While the judges were hesitant to protect civil liberties, new forms of human-rights legislation bloomed across the country.[132]

The most important of the new statutes dealt with the problem of discrimination.[133] Although some anti-discrimination measures had been introduced as early as the 1930s and 1940s, it was not until 1962, when the Ontario Human Rights Code[134] was passed, that an attempt was made to deal comprehensively with anti-discrimination measures. The other provinces soon followed suit. By 1977, when the Parliament of Canada enacted a Canadian Human Rights Act, all of the eleven sovereign legislators had passed similar (though not identical) legislation.[135]

At about the same time, most provincial legislators created the office of the ombudsman.[136] The ombudsman operated largely without judicial assistance, and

---

129 Laskin CJ and two other justices dissented.

130 In *Re Nova Scotia Board of Censors v McNeil* 1978 84 DLR (3d) 1 (SCC) the court on the same day upheld a provincial film-censorship statute, also denying that it involved criminal law. However, the Supreme Court did find that one severable provision involved criminal law, as it appeared to duplicate a section of the Criminal Code of Canada.

131 This statement was again approved by the Supreme Court of Canada in *Attorney-General of Canada v Law Society of British Columbia; Jabour v Law Society of British Columbia* 1982 137 DLR (3d) 1 (SCC). Hogg *Constitutional law of Canada* (1985) 638 suggests that the "implied bill of rights" notion may still have a future role to play in situations where Parliament or a provincial legislator has "opted out" of the Canadian Charter. Gibson (1986) 12 stresses that this argument has little, if any, current judicial support.

132 Gibson (1986) 28.

133 A more comprehensive discussion on this topic can be found in Gibson *ibid.*

134 SO 1961–62 c 93.

135 Although it is not appropriate to review this jurisprudence, it must be borne in mind that it may contain material of use in the interpretation of the Canadian Charter.

136 See Alberta: SA 1967 c 59; New Brunswick: SNB 1967 c 18; Quebec SQ 1968 c 11; Manitoba: SM 1969 (2nd Sess) c 26; Nova Scotia: SNS 1970-1971 c 3; Saskatchewan: SS 1972 c 87; British Columbia: SBC 1977 c 58; Newfoundland: RSN 1970 c 285; Ontario: SO 1975 c 42. See Gibson (1986) 28. This office of the independent overseer was borrowed from Scandinavia after its successful transplantation to both New Zealand and the United Kingdom. By investigating complaints about administrative actions, it oversaw government administrators. The ombudsman tried to resolve the complaints by conciliation, but normally had no legal powers other than those that are necessary to carry out investigations. The ombudsman published reports and their potential impact on the public, and the prestige of the office, proved to be reasonably effective in persuading governments to remedy administrative blunders and abuses.

many of these reforms bypassed the judiciary. The human-rights violations, although not susceptible to conciliation, were carried out by specialist tribunals, with the courts playing a supervisory role.[137]

During the same two decades, other legislative initiatives strengthened the rights and freedoms of Canadians.[138] However, legislation that did not favour the rights and freedoms of Canadians still found its way onto the statute books. In response to the "October crisis" of 1970, the Public Order (Temporary Measures) Act of 1970[139] was passed. This Act, which empowered the Attorney-General to detain accused people for prolonged periods, caused much concern.[140]

3 8 2 2 The initiatives in adopting a Charter

It became apparent to the politicians that the Canadian judiciary was hesitant to protect civil liberties. Judges clung to restrictive precedents[141] and if they came across a more liberal precedent, they tended to ignore it. The politicians realised that if they wanted the judges to play an active role in meeting the public demand for improved and expanded rights and freedoms, they would require a constitutionally expressed invitation.

---

137 Under South African law the Constitution of the Republic of South Africa, Act 108 of 1996, makes provision for a Public Protector (ss 181–183). The Constitution of the Republic of South Africa, Act 200 of 1993, also made provision for the appointment of provincial public protectors which could in no way derogate from the functions and powers of the national public protector (s 114). However, it seems that the legislative powers of the provinces under the 1996 Constitution include the power to make such appointments. The powers of the Public Protector are regulated by the Public Protector Act 23 of 1994. They include the authority to investigate any conduct in the public administration in any sphere of government, or state affairs, alleged or suspected to be improper, or resulting in possible impropriety or prejudice, report on the conduct in question, and take remedial action (see Burns 234).

138 Privacy Acts were, eg, adopted by several provinces. See Gibson *Aspects of privacy law: Essays in honour of John M Sharp* (1980) 73 111. For other examples and a more thorough discussion, see Gibson (1986) 29.

139 SC 1970–1971–1972 c 2.

140 During October 1970 the *Front de Libération du Québec*, a violent Quebec separatist organisation, kidnapped a British diplomat and a Quebec cabinet minister (who was later killed by his abductors). The separatist organisation made various demands as preconditions for their release. In response, the federal government proclaimed that an "apprehended insurrection exists" in terms of the War Measures Act of 1914, bringing the Act into force. The government then issued Public Order Regulations in terms of the Act. The regulations outlawed the FLQ and conferred new powers of search, seizure, arrest and detention on the police. Some 497 people were arrested in terms of these powers, of whom only 62 were charged. Of the 62 charged, fewer than a third were convicted. From the facts that emerged during the trials of the kidnappers, it became evident that there was never any possibility of an insurrection from the small and ill-organised FLQ. The reaction by the federal government to the "October crisis" showed a remarkable suspension of civil liberties. These unnecessary and abusive detentions became contentious and contributed towards the desire for a Bill of Rights with universal values that stood above the government of the day. The proclamation of the War Measures Act and the Public Order Regulations were revoked on 1970-12-03 by the Public Order (Temporary Measures) Act. The latter Act, however, provided for a more restricted version of the laws previously contained in the regulations. See Hogg (1992) 458.

141 Such as the rule that the admissibility of evidence is not affected by the fact that it has been obtained illegally.

Prominent Canadians of most political persuasions, however, for many years prior to the introduction of the Charter, proposed a constitutionally entrenched, judicially enforced guarantee of individual rights and freedoms.[142]

After the Confederation of Tomorrow Conference in 1967 the government of Quebec had been pushing for constitutional change, giving Quebec more recognition and power as the French-Canadian homeland. The Canadian government countered these demands by proposing entrenched rights and freedoms designed to unify the provinces of Canada.[143] In 1968 the Canadian government published a white paper entitled *A Canadian Charter of Human Rights*.[144] This paper, however, only supported the idea in principle and did not discuss in specific terms the form to be taken by such a charter. In February 1968 at the constitutional conference the Canadian government took the position that first priority should be given to that part of the Constitution which deals with the rights of the individual. This included the individual's rights as a citizen of a democratic federal state and as a member of the linguistic community in which he has chosen to live.[145] Because of Quebec's reluctance to proceed without agreement on some important amendments, a number of possible substantive changes were proposed, including the addition to the Constitution of an entrenched Charter of Rights.[146]

By the time of the second constitutional conference in February 1969, the government had drawn up a paper entitled *The Constitution and the People of Canada*.[147] The paper repeated the Charter of Rights as the first priority in constitutional change.[148] Although the paper mostly referred to provisions that it "should" contain, some rights and freedoms were drafted in precisely the same language as in the Canadian Bill of Rights. It seems that an attempt had been made to preserve as much of the Bill's text as possible.[149] The variations that were thought necessary to achieve constitutional entrenchment and to avoid perceived problems in the interpretation of the Charter were included. Some new rights were also included.[150] It was also no longer possible to employ a "notwithstanding" clause.[151]

---

142 For earlier initiatives, see fn 74. The move towards protected rights was assisted by the erosion of the connection between the United Kingdom and Canada. In addition, many of the post-War immigrants came to Canada from countries where there was not the same trusting attitude towards the state implicit in British parliamentary supremacy. British parliamentary supremacy no longer seemed central to Canadian identity, and an interest in and positive appraisal of American constitutional theory developed. In the late 1960s and 1970s support for the Charter was driven by the need to contain centrifugal pressures. See Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 603–604.

143 *Idem* 606–607.

144 *Hansard* (1968) 6233.

145 Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 607.

146 The Fulton-Favreau amending formula. See Gibson (1986) 30.

147 See Gibson (1986) 31.

148 Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 607.

149 Gibson (1986) 31.

150 Eg, freedom of conscience was added to freedom of religion (s 1(a)); protection was added against "unreasonable searches and seizures" (s 2(a)); and protection was added against retroactive penal laws (s 2(g)). In the light of previous problems, no specific reference was made to rights having existed in the past. A specific provision was included calling for "past or future" laws interfering with protected rights and freedoms to be "invalid" to the extent of the interference (s 5). See Gibson (1986) 31.

151 See my discussion of the Bill of Rights, 1960 (esp para 3 7 3 1) for the effect and function of a "notwithstanding" clause.

The proposals did not meet with wide acceptance at the conference. A decision was made to refer some of the rights to committees. The "fundamental" rights were studied by one of the committees and at the third constitutional conference in February 1971 tentative agreement was reached on entrenching two groups of rights. Several alterations were made and new rights were added.[152]

Of importance is that it was agreed to qualify all the "political" rights.[153] They were made subject to "such limitations as are prescribed by law and as are reasonably justified in a democratic society in the interests of national security, public safety, health or morals, or the fundamental rights or freedoms of others".[154]

A "Canadian Constitutional Charter" was prepared for the fourth and final constitutional conference held at Victoria in June 1971. It seems that the spirit which pervaded earlier conferences had dissipated by June and an agreement was reached (subject to ratification) only on a modest group of amendments known as the Victoria Charter. In the end, the accord failed because the government of Quebec refused to ratify it.[155]

In 1972, the final report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada appeared, being the only event of significance for the next seven years concerning the entrenchment of rights and freedoms.[156] Immediate developments after the report seemed to indicate that the energy and optimism of the report did not persist. Several new features were, however, proposed which found their way into the Charter. The references to "public safety, order, health or morals, . . . national security or . . . the rights and freedoms of others" were removed from the Victoria Charter. A proposal was made that the phrase "due process of law", which had caused so much trouble under the Canadian Bill of Rights, be replaced by the expression "principles of fundamental justice".[157]

During 1974 the Trudeau government pressed for provincial acceptance of the Victoria proposals, or something similar.[158] The efforts did not impress the provinces. In April 1976 Trudeau sent a letter to the provinces indicating three possible ways of achieving patriation. He also indicated that the federal government would proceed unilaterally if provincial accord could not be reached.[159] This "threat" caused a flurry of activity during the summer, but by the scheduled federal-provincial meeting of mid-December an agreement had not been reached. The election of the separatist *Parti Quebecois* government in Quebec on 15 November changed everything and the plans by the federal government fell by the wayside.[160]

---

152 Gibson (1986) 31.

153 The fundamental rights of the Charter were referred to as "political" rights.

154 The "reasonable limits" concept referred to borrowed greatly from the European Convention on Human Rights (1950) and evolved into s 1 of the present Charter. See Gibson (1986) 32.

155 Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 610.

156 This report was referred to as the "Molgat-MacGuigan Report" in honour of its joint chairmen. See Gibson (1986) 32; Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 611.

157 Record 16 of the Report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (4th Session, 28th Parliament), 1972, App B, 106. See Gibson (1986) 32.

158 See *Winnipeg Tribune* 1974-10-03 8.

159 *Winnipeg Free Press* 1976-04-06 4. See also Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 609.

160 *Winnipeg Free Press* 1976-04-06. A softer "Draft Resolution" was circulated in January 1977. See also *Proposals on the Constitution 1971-1978* 14 cited by Gibson (1986) 33.

After these unsuccessful attempts to achieve patriation, the Trudeau government in June 1978 introduced the Constitutional Amendment Bill.[161] The Bill was designed with eventual entrenchment in mind, but was described as an interim measure. It was to be applicable at federal level only, until constitutional entrenchment became possible. The text took the 1972 Special Joint Committee Report to heart and expanded upon the rights embodied in the Victoria Charter.[162] For the first time, an enforcement provision was expressly included, empowering courts "of competent jurisdiction" to grant relief by means of declaration, injunction or "similar relief".[163]

The provincial leaders resented the ultimatum that was put to them in April 1976 and also disagreed on some of the substantive provisions of the proposal, including the basic principle of constitutionally entrenching rights and freedoms.[164] This resentment led to the provincial premiers opposing the proposal made at a meeting in Regina in August 1978. This was followed (not surprisingly) by failure to achieve an accord on constitutional revision in the Federal Provincial First Ministers Meetings in October 1978 and February 1979.

Some good nevertheless came from the controversy and the discussions. A "best efforts" draft was released in early 1979 by the Continuing Committee of Ministers on the Constitution. Some progress was made, but foundered on the concept of entrenchment owing to the opposition of several provincial leaders. One of the co-chairmen of the Continuing Committee of Ministers on the Constitution stated the problem as follows: "The largest continuing obstacle to full agreement remains the fundamental difference between those who favoured the principle of entrenchment and those who supported the *status quo*."[165]

The idea of a legislative "notwithstanding clause" capable of overriding a Charter, was introduced to the debate by Saskatchewan as a possible compromise. The gulf between the participants on the fundamental question of entrenchment was too wide, however, and grew wider with each attempt to expand the scope of the Charter.

In spite of the serious disagreement by the provinces, several new ideas that later found their way into the final Charter were introduced at this stage.[166]

---

161 Bill C–60. See Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 611. It had been preceded by a white paper called "A time for action". See *House of Commons*, *Debates*, 30th Parliament, 3rd Session, 121: 6278, 1978-06-12. See also Gibson (1986) 33.

162 Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 611.

163 S 24. This power was not available with respect to certain rights that would involve the prerogatives of Parliament or legislators (s 27). See Gibson "Charter or chimera? A comment on the proposed Charter of Rights and Freedoms" 1979 *Man LJ* 363 388–391. Bill C–60 led to considerable controversy and much discussion. The government of Canada referred the Bill to another special committee of the Senate and the House of Commons. On 1978-10-10 after 35 meetings, the committee's interim report (see the Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, Issue 20, 1978-10-10) was submitted containing several suggestions for improvement. See Gibson (1986) 34.

164 Romanow, White and Leeson *Canada-notwithstanding: The making of the Constitution* (1984) 12.

165 *Idem* 45.

166 For a discussion of these ideas, see Gibson (1986) 35.

3 9 The period from 1980 to 1982

During 1980 to 1982 the patriation of Canada's Constitution took place.[167] A new Charter and a new amending formula emerged. The momentum in the quest for a charter was re-established by two events early in 1980: the re-election of Trudeau's Liberals federally and the defeat of the *Parti Quebecois*'s proposal for "sovereignty association" in a Quebec referendum. On the back of this, the federal government took the initiative and sent a new set of proposals to the provincial governments. The new federal proposals were a thoroughly revised edition of previous versions and in style much closer to the final Charter than the Canadian Bill of Rights.[168]

The new federal draft of the Charter went further than any previous proposal. Its sweep was made wider by expressly stating that the draft was binding on both federal and provincial orders of government, and it was now furthermore unequivocally designed to be entrenched. The draft stated that law and administrative acts inconsistent with the Charter would be "inoperative and of no force or effect to the extent of the inconsistency".[169]

In September 1980 a revised federal draft was presented by the Continuing Committee of Ministers on the Constitution, which brought the draft much closer to the final form.[170] In this revised draft the "reasonable limits" clause was for the first time inserted at the beginning of the document and a specific list of purposes for such limits was eliminated where they had been retained in the last few drafts.[171] The principle of "due process" also seen in recent drafts was rejected in favour of "principles of fundamental justice" and this provision was no longer grammatically linked to more specific legal rights.[172]

In October 1980 the federal government could wait no longer, and on the back of the Ministers' failure to achieve consensus announced its intention to proceed unilaterally to obtain patriation and an entrenched charter from the British government.[173] The document discussed at the first Ministers Conference, having been slightly rearranged and modified, was included in the resolution placed before Parliament.[174]

This unilateral initiative by the federal government was followed by rancorous debate on many fronts. The constitutionality of the action was challenged in Newfoundland, Manitoba and Quebec.[175]

---

167 "Patriation" of the Canadian Constitution means bringing it home to Canada. Because the British North America Act has never been a Canadian Act, it cannot be "repatriated". Although the term is widely accepted by Canadians, its exact meaning is still unclear. See Hogg (1992) 53.

168 Federal Draft of the Charter – Document No 830 – 81/027, 1980-07-04 as cited by Gibson (1986) 35.

169 S 18.

170 Document No 800 – 14/064, 1980-09-03 as cited by Gibson (1986) 36.

171 S 1.

172 S 6.

173 *The Canadian Constitution 1980: Proposed resolution respecting the Constitution of Canada* (1980). See Gibson (1986) 36.

174 The only major difference was that a section was included which explicitly stated that the Charter applied to the parliaments, legislators and the governments of Canada and the provinces, and to "all matters within the authority" of those bodies (s 29(1)).

175 The initiative was opposed first in six and ultimately in eight provincial governments. See *Reference re Amendment of the Constitution of Canada* 1981 117 DLR (3d) 1 (Man CA); *Reference re Amendment of the Constitution of Canada (No 2)* 1981 118 DLR (3d) 1 (Nfld CA); *Reference re Amendment of the Constitution of Canada (No 3)* 1981 120 DLR (3d) 385 (Que CA). The idea was apparently that the actions would be consolidated in a final appeal before the Supreme Court of Canada.

The issue was once again referred to yet another joint parliamentary committee after a vicious debate in Parliament.[176] A sense of urgency and vigour saw the committee meet 106 times between 6 November 1980 and 13 February 1981.[177] A great number of comments, presentations and briefs were received from most of the principal political parties as well as a large number of individuals and groups from the general public.[178] From the comments received, approximately two thirds favoured constitutional entrenchment.[179] The committee's hearings resulted in a total of 76 amendments being recommended.[180]

Important alterations were made to the proposed Charter on the lines of these amendments:

- The "reasonable limits" clause took its final form with the elimination of the reference to parliamentary government, and the addition of the requirement that the reasonableness of limits be capable of being "demonstrably justified".[181]
- The enforcement provision was reinstated after having been dropped from the previous version.[182]
- The draft also contained a declaration that the Constitution "is the Supreme Law of Canada", making inconsistent laws "of no force or effect".[183]

In April 1981 the parliamentary committee reported back and two further amendments were made in Parliament. The preamble was added, recognising the supremacy of God and the rule of law.[184] A statement, now found in section 28, was added that the Charter's rights and freedoms "are guaranteed equally to male and female persons".[185]

In September 1981 the Supreme Court of Canada delivered its judgment on the constitutional challenge to unilateral patriation. The Supreme Court ruled that Canada would defy constitutional convention if it proceeded unilaterally but added that it had a distinct legal right to do so.[186] The judgment was followed by intense negotiations between the federal government and the nine provinces on a package of constitutional reforms that included patriation, an amending formula, and an entrenched charter of rights. The government of Quebec was, however, left out of these discussions and consequently refused to accept the compromise.[187]

Although it was agreed that fundamental rights and freedoms should be entrenched, the cost of an agreement was the shrinkage of some of its protections. The "opt out" clause again came to the fore and was included by section 33, which

---

176 See Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, issue 57, 1981-02-13 as cited by Gibson (1986) 37.

177 See Gibson (1986) 37.

178 *Ibid.*

179 *Idem* 92.

180 *Idem* 6.

181 S 1.

182 S 24(1).

183 S 58. Changes were made to many of the rights and freedoms. Native rights were also strengthened. See Gibson (1986) 37–38.

184 See Elliot *Interpreting the Charter – use of the earlier versions as an aid* 15 and 23, cited by Gibson (1986) 38.

185 Elliot 15 52.

186 *Reference re Amendment of the Constitution of Canada (Nos 1, 2 & 3)* 1981 125 DLR (3d) 1 (SCC).

187 Romanow, White and Leeson 209–210.

permitted Parliament or a provincial legislator to opt out of many of the Charter's most fundamental guarantees with respect to particular legislation, for renewable five-year periods. The federal or provincial legislator could therefore enact legislation that would operate "notwithstanding" the provisions of the Charter.

The resolution received final approval from the House of Commons on 2 December 1981, and from the Senate on 8 December 1981. The United Kingdom Parliament, acting on the joint address contained in the resolution, enacted the Canada Act 1982, which received royal assent on 29 March 1982. The Canada Act brought into existence the Constitution Act 1982, part 1 of which is the Canadian Charter of Rights and Freedoms. The Constitution Act 1982 came into force on 17 April 1982, and the Charter came into effect on the same date with the exception of the equality-rights provision, section 15, which took effect on 17 April 1985.[188]

3 10 The Constitution Act 1982

Some of the main features of Canada's Constitution are that it:

- establishes a political and economic union based on federal and democratic principles;
- outlines a framework for the machinery of government and establishes governmental institutions (eg Parliament and the courts);
- distributes legislative and executive powers between the provincial and national levels of government, thereby imposing legal limits on what a particular level of government can do and not do in relation to other governments; and
- provides the rules and procedures for changing the Constitution itself.[189]

Since 1982 it also guarantees certain individual and collective rights, and places limits on the powers of governments and legislators respecting these matters by way of the Charter. Because this constitutional renovation is extremely relevant, a brief overview of the Charter follows.

Section 1 guarantees the rights and freedoms contained in the Charter "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This section recognises that rights and freedoms are not absolute. Section 2 guarantees certain fundamental freedoms such as conscience and religion. Sections 3, 4 and 5 entrench democratic rights. Section 6 provides for mobility rights of citizens. Sections 7 to 14 outline a series of constitutionally entrenched legal rights primarily designed to protect people who are subject to the criminal process. Section 15 guarantees equality rights. Sections 16 to 22 concern language rights. Section 23 provides for "minority language educational rights". Section 24 makes it clear that the enforcement of the Charter rights is the responsibility of the judiciary. Sections 25 through 31 provide interpretative tools for Charter analysis. Section 32 provides that the Charter applies to the Parliament and government of Canada and to the legislature and government of each province and territory. Section 33 provides for an override of some Charter rights, including the legal rights contained in sections 7 to 14.

---

188 S 32(2) postponed the commencement of s 15 to enable federal and provincial governments to put their houses in order. It gave them three years to study their statute books, policies and practices to deal pre-emptively with any equality violations, rather than waiting for challenges to be raised in court. See Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 987.

189 Funston and Meehan 8.

Section 52, although not actually part of the Charter, states that the Constitution (of which the Charter is part) is the supreme law of Canada and that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

3 11 1982 up to the end of June 1999

3 11 1 The judiciary

The early Charter judgments by the Supreme Court exuded confidence in the court's new role. The Canadian judges seemed to accept that they were being called upon by the Constitution to play a major new socio-political role, and the complacency and diffidence referred to earlier were, for the most part, put aside. The courts did not, however, set out on a novel venture in applying the Charter. There were other instruments that shared certain features of the Charter, and therefore the courts had developed bodies of principles on which to rely.[190]

As can be expected, there were also exceptions to the rule. Scollin J in *Re Balderstone and The Queen* observed that the "Charter did not repeal yesterday and did not abolish reality".[191] He also warned that the Charter should not be understood as being a warrant for rule by a judicial oligarchy.[192]

In the first Charter case heard by the Supreme Court of Canada, *Law Society of Upper Canada v Skapinker*[193] Estey J said:[194]

> "We are here engaged in a new task . . . The Charter comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian Law. Indeed, it 'is the supreme law of Canada' . . . It cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch . . . With the Constitution Act, 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court."

In *Hunter v Southam Inc*[195] Dickson J pointed out on behalf of the entire court that the function of a constitutional Charter of Rights is to provide a framework for "the unremitting protection of individual rights and liberties", and that "the judiciary is the guardian of the Constitution".[196]

In February 1985, after Dickson J became Chief Justice of Canada, he explained the difference in approach by the courts to the Charter and the Canadian Bill of Rights to an audience of Alberta lawyers.[197] He expressed his belief that the experience of the Canadian Bill of Rights would not be repeated. He also mentioned that it was often said that, when dealing with the Bill of Rights, members of the Canadian judiciary

---

190 Eg the American Bill of Rights and the International Covenant on Civil and Political Rights (1966). See Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 627.

191 1983 143 DLR (3d) 671 680 (Man QB), confirmed 4 DLR (4th) 162 (Man CA), leave to appeal to SCC refused 4 DLR (4th) 162n.

192 *Ibid.*

193 1984 9 DLR (4th) 161 (SCC).

194 167–168.

195 1984 11 DLR (4th) 641 (SCC).

196 649.

197 Address to mid-winter meeting of the Alberta Section, Canadian Bar Association, Edmonton, 1985-02-02, as cited by Gibson (1986) 41.

were indecisive and unadventurous, and that they "sapped the Bill of Rights of necessary potential for protection against government heavy-handedness".[198] He did not think, however, that the same accusation could be levelled against the judiciary in dealing with Canadian Charter cases:

> "Canadian courts, including the Supreme Court of Canada, have accepted the new responsibility which has been thrust upon them by the Parliamentarians. They recognise the vital role they will play in determining the kind of society Canada is and will become under the Charter. I expect that in our Court we will proceed with the Charter cases one by one in a reasonable and principled way, guarding against excessive enthusiasm in light of the various and serious implications of striking down otherwise valid legislation, but willing to impose limits upon governmental action when warranted by the dictates of the Charter."

Dickson CJ underlined the incremental nature of the process. He added that a charter must be capable of growth and development over time to meet new social, political and historical realities, often recognised by its framers.

The framework within which the Supreme Court operates, seems to have evolved. Early on, the Supreme Court seemed to suggest that its role as the guardian of the Constitution dictated its interpretative choice. The court understood its mandate as measuring all other laws against the supreme law of the Constitution and adopted a purposive approach, looking for the purpose underlying the guarantee from the view of the holder of the guarantee. The court understood that it had to constrain governmental action inconsistent with those rights and freedoms. The court also accepted the generality of the formulation of the rights, as an invitation to a liberal interpretation of the guarantees. The early cases seemed to take the line that rights were the norm and limits the exception. The limits were subject to stringent principled justification by their proponents.[199]

This trend towards a relatively stringent view, which limits the protection of rights and freedoms in rare instances only, culminated in *R v Oakes*.[200] While the *Oakes*

---

198 *Ibid.*

199 The Supreme Court held that administrative expediency often relied on by governments would be allowed to justify a rights infringement only in exceptional circumstances, such as in an emergency (see *Reference re Section 94(2) of the Motor Vehicle Act* 1985 2 SCR 486 (Can)), or where protection of the right would entail prohibitive costs (see *Re Singh v Minister of Employment and Emigration* 1985 17 DLR (4th) 422, 1985 1 SCR 177 (SCC)).

200 1986 1 SCR 103; 26 DLR (4th) 200. As South African limitation analysis has borrowed heavily from the Canadian Charter, the guidelines in *R v Oakes* 1986 1 SCR 103, 26 DLR (4th) 200 227–228 (SCC) have been quoted by many South African courts dealing with limitation issues. See, eg, *Qozeleni v Minister of Law and Order* 1994 3 SA 625 (E); *S v Majavu* 1994 4 SA 268 (Ck). See also *Kauesa v Minister of Home Affairs* 1995 1 SA 51 (Nm). See *R v Chaulk* 1990 3 SCR 1303, 62 CCC (3d) 193 216–217 (SCC) for a concise exposition of the limitation test under Canadian law. The guidelines from *Oakes* were crucial in applying the "more vague" limitation clause (s 33) in the 1993 Constitution, but were discounted in the more detailed s 36 of the 1996 Constitution. The *Oakes* test requires the following: "To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. . . The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at the minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable

continued on next page

case has become a paradigm for constitutional interpretation, there has been a movement towards a more deferential, flexible, "reasonableness-based" approach to the *Oakes* test. The Supreme Court seems to hold the view that its initial approach was too stringent and mechanistic. A less stringent view on justification was taken where the court tried to balance competing interests.[201]

3 11 2 On the political front

Since 1983 there has been a search for a new federation. Much constitutional debate has taken place. Aboriginal rights have been discussed and treaties concluded. Quebec demanded further reforms and in 1987 the provincial premiers and the Prime Minister agreed on the Meech Lake Accord.[202] Owing to pressure from Quebec (disappointed with the failure of the Meech Lake Accord) and the aboriginal peoples, Canada also saw the multilateral "Canada Round" of negotiations and the Charlottetown Accord was drawn up.[203] There were growing concerns about fiscal federation and there was the threat of a Quebec separation.[204]

---

and demonstrably justified. This involves 'a form of proportionality test'. . . Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals or groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question . . . Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'."

201 The limitation test is less strictly interpreted under contemporary Canadian law. The *Oakes* test required that the government go to great lengths to answer the questions satisfactorily. The courts after *Oakes* saw the requirement of impairing the right "as little as possible" as mandating the government to find and employ the least restrictive means to achieve its objectives. Because of this, the courts soon criticised this requirement, saying that it invited significant intervention into legislative policy-making, a task for which the courts are not suited. In their quest to eradicate the problem of judicial interference, the courts called for a more flexible approach which would give courts more room in which to manoeuvre. This approach was introduced in *Edward Books & Art Ltd v The Queen; R v Nortown Foods Ltd* 1986 2 SCR 713, 35 DLR (4th) 1 (SCC) and *Irwin Toy Ltd v Quebec (Attorney-General)* 1989 1 SCR 927; 94 NR 167; 24 QAC 2, 58 DLR (4th) 577 (SCC). In *Edward Books* the court changed the test from "as little as possible" to "as little as *reasonably* possible" (the italics are mine). See also *Reference re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act (Alta)* 1987 1 SCR 313 392, 38 DLR (4th) 161 (SCC). The court in *Edward Books* did also not require the same standard of proof and held that the same questions need not be asked in every case. See also *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)* 1990 1 SCR 1123 1138, 56 CCC (3d) 65 (SCC) and *RJR-MacDonald Inc v Canada (Attorney-General)* 1995 3 SCR 199; 127 DLR (4th) 1 (SCC); Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 627ff.

202 The government of Quebec did not agree to the 1982 reforms because the reforms failed to address controls on the federal spending power and increased powers of the Quebec legislature. The accord was a set of proposed constitutional amendments dealing, *inter alia*, with these matters. The accord died a natural death in 1990 because it did not have the required support in all the provincial legislatures at the end of the three-year time limit set by the amending formula. See Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 7.

203 This accord consisted of a more comprehensive set of principles. In 1992, however, the accord was rejected in a national referendum.

204 See Funston and Meehan 14, and Macklem, Swinton, Risk, Rogerson, Weinrib and Whyte 7.

On the political front, another development occurred which does not favour libertarian views.[205] Stuart explains that the recent disdainful attitude by Parliament and the Ministers of Justice of Canada towards Supreme Court decisions poses a serious threat to the standards set by the Supreme Court.[206] Parliament has succumbed to the popular concern that criminals have too many rights at the expense of victims and to constant calls in the media to toughen up the criminal law.[207] On a few recent occasions Parliament has enacted amendments to the Criminal Code to achieve positions already declared unconstitutional by the majority of the Supreme Court.[208]

4 CONCLUSION

The Canadian Charter and Charter jurisprudence are excellent sources for human rights, in particular criminal-procedure and evidence rights in South Africa. The Charter did not arrive suddenly or unexpectedly in Canada on 17 April 1982. Canada evolved from the early years of the aboriginal societies, through the early years of the colonies where the government was the prerogative of the Crown, to a federal state with democratically elected institutions based on a constitution. The present Constitution includes guarantees of certain individual and collective rights such as the legal rights in sections 7 to 14 and the language rights in sections 16 to 22, and places limits on the powers of governments and legislators in respect of these rights.

But constitutionally protected rights did not come easily. The inheritance of the principle of parliamentary supremacy from the British Empire initially formed the basis for the denial of such rights. Unlike the position in South Africa, the move away from the principle of parliamentary supremacy inherited from the British Empire was incremental. This gradual process spanned across more than a century, rather than happening overnight. Under Canadian law, tentative protection was first afforded to certain rights and eventually formally entrenched guarantees saw the light.

Some of the fundamental rights and liberties that Canadians enjoy, have their roots in manifestos like the Magna Carta, the English Bill of Rights, the Habeas Corpus Acts, and the Act of Settlement. In addition, the need for and extent of constitutional rights that are immune to legislative intervention had been debated from as far back as 1865 at the "Confederation Debate". As a result of the management of relationships, the constitutional protection of a limited number of rights already appeared in the Constitution Act of 1867. Since the formation of the Dominion in 1867, Canadians have also tried to manage relationships by way of federalism. The balancing of interests has therefore formed part of Canadian law for a very long time.

The balancing of interests still proved to be problematic, however, and led to the development and protection of interests of newly politicised categories. Before

---

205 As recently as 1997. The less stringent approach by the courts had already been adopted by the Supreme Court after *Oakes* in 1986. See fns 200 and 201.

206 "An entrenched Bill of Rights best protects against law and order expediency" 1998 *SACJ* 325 335.

207 *Idem* 325 326.

208 Eg Parliament's
- adoption of the minority position of the Supreme Court which affords very limited access to the medical and therapeutic records of complainants in sexual-assault cases (Bill C–46), and
- exclusion of the extreme-intoxication defence to sexual assault and other general-intent crimes (Bill C–77). See Stuart 1998 *SACJ* 325 335.

1982, the citizens and politicians tried to harmonise the interests of different groupings by way of federalism. The protection afforded proved to be insufficient, especially for those individuals who did not agree with the policy of the rulers of the day. Massive violations of individuals' rights took, place especially where race, religion and communism played a role. This led to an extended bout of introspection and the development of new divisions relating, for example, to ethnicity, sex and (of special relevance to this article) those confronted by the criminal-justice system. These new divisions joined the traditional divisions of federalism that required the Constitution to achieve harmonious coexistence between the federal and provincial spheres. The protection of group interests seems to have moved to newly politicised social categories. The constitutional identities of Canadians have therefore for some time not been restricted to their membership in Canadian and provincial governments. Their rights and freedoms give Canadians a legitimate basis for making constitutional claims.

As far back as 1960, the Canadian Bill of Rights already contained a declaration of fundamental rights and freedoms which contributed to the development of a human-rights culture. Although the rights in the Bill, including many criminal-procedure and evidence rights, were not constitutionally entrenched, the Bill ensured their scrutiny, especially by the courts, as both legislative and non-legislative matters had to be construed in light of the Bill. Some of these rights, including many criminal-procedure rights, for example the right to bail, were duplicated in the Charter.

In the 1960s and 1970s there were also many other legislative initiatives, mainly dealing with discrimination, that strengthened the rights of Canadians. But it was the serious and sometimes frantic debate among members of the legal fraternity, and especially politicians, from the 1950s up to 1982, when the Charter commenced, which proved invaluable in shaping these new civil liberties. Since 1982, these liberties have been guaranteed by the Canadian Constitution and utilised along with federalism to fashion harmonious coexistence. Since 1994, South Africa has also been a federal state with a supreme constitution providing protection to civil liberties along similar lines.

Of utmost importance is the clarifying role that the Canadian courts have played after the adoption of the Canadian Charter. The Canadian courts, in accepting their new socio-political role to reconcile the individual and the community, interpreted and applied the Charter responsibly, and thereby built up a huge body of judicially developed protections. The judgments by the Canadian courts not only show the experience that has been gained, but also point to the kind of society that Canada is and wants to be. It is not surprising that there is a wide perception that, as far as human rights are concerned, Canada is the best country in the world in which to live.[209]

Of course, the reference to foreign law will not be a safe guide unless the principles of comparative law are followed.[210] In the area of criminal procedure, the comparison is extremely apposite, in view of the fact that the law of criminal procedure and evidence in both Canada and South Africa is premised on the English common law of criminal procedure and evidence.[211] Both systems are therefore

---

209 See eg the United Nations *Human Development Report* (2000). According to the "human development Index" taken up in this report, Canada is ranked number 1 in terms of "life expectancy, educational attainment and adjusted real income". On the same index, South Africa is ranked number 103.

210 See *S v Makwanyane* 1995 3 SA 391 (CC) para 37 and *Bernstein v Bester* 1996 4 BCLR 449 (CC) para 133. See also the *caveat* in para 2.

211 The basic systems are derived from English law and are therefore adversarial in nature and character. Over the years, however, the South African system of criminal procedure, particularly as regards pre-trial procedures, has acquired certain distinctive features of inquisitorial

continued on next page

based on the same fundamental principles.[212] As with the Canadian Charter, the Bill of Rights in South Africa was superimposed on the English common law of criminal procedure and evidence.[213] As a result, many of the English principles were taken up in both constitutions. The underlying rationale or reasoning for the existence of these principles is therefore similar and accordingly suitable for consideration.[214]

The value of comparison is further enhanced by the similarity in the constitutional structure within which the criminal procedure and evidence rights operate under Canadian and South African law. Both constitutions provide for the "freedom and security" of the person,[215] and combine criminal-procedure and evidence rights such as the right to be presumed innocent, the right against self-incrimination, and the right to bail. In addition, both constitutions provide for a general limitation clause.[216] The undeniable debt that the South African limitation clause, which is definitive to the method of fundamental-rights analysis, owes to Canadian law, calls for an even closer scrutiny of these principles.[217] The Canadian example is therefore ideally suited to assist in the interpretation and application of these principles, which are highly contentious under South African law. It would, indeed, be folly not to look at the Canadian example, since the Supreme Court of Canada, and other courts to a lesser extent, have been particularly helpful in explaining the basis and structure of these similar fundamental rights.

Charter jurisprudence can therefore provide solutions to troublesome provisions, as the right to be presumed innocent, the right to bail, and the right against self-incrimination have proved to be in South Africa.

---

systems such as the Italian and Dutch systems. This convergence of the principles of adversarial and inquisitorial systems is not unique to South Africa. Jörg, Field and Brants "Are inquisitorial and adversarial systems converging?" in Fennel, Harding, Jörg and Swart *Criminal justice in Europe: A comparative study* (1995) 41 point out that the inquisitorial and adversarial criminal-justice systems in Europe are also acquiring features of one another. See also Dugard *South African criminal law and procedure* IV: *Introduction to criminal procedure* (1977) 25; Schmidt *Bewysreg* (1989) 12ff; Steytler 13.

212 Eg the presumption of innocence, which forms the cornerstone of the criminal-justice system in both countries, and the right against self-incrimination.

213 The Bill of Rights entrenched basic norms such as the duty on the state to prove the guilt of an accused beyond reasonable doubt and the duty on the state to make out a case against the accused before he needs to respond (see s 25(3)(c) IC), along with some "new" rights. An example of such a "new" right was the right to information in terms of s 23 IC. Although the common law afforded some protection to the basic norms that existed prior to the advent of the interim Constitution, Parliament could pass legislation amending the common law as it deemed fit. Since the advent of the interim Constitution, the courts have been empowered to declare invalid laws and conduct which are inconsistent with the Bill of Rights. The Bill of Rights therefore did not replace the ordinary rules and principles of criminal procedure but governed the way in which they should be applied. See also Steytler 1–6 and 13, and Du Plessis and Corder 172 in their discussion of s 25 of the Interim Constitution.

214 See *Ferreira v Levin; Vryenhoek v Powell* 1996 1 BCLR 1 (CC), 1996 1 SA 984 para 72.

215 The underlying reasoning for this legal norm has steadily become more universal and can therefore fruitfully be used for comparative purposes. See *Ferreira v Levin; Vryenhoek v Powell* 1996 1 BCLR 1 (CC), 1996 1 SA 984 para 72.

216 S 1 of the Charter and s 36 of the Final Constitution.

217 See fns 72 and 200.

Trade secrets and the doctrine of subjective rights*

JC Knobel
BLC LLB LLD
Associate Professor of Private Law, University of South Africa

OPSOMMING

Handelsgeheime en die leer van subjektiewe regte

Die doel van hierdie artikel is om die erkenning van 'n onafhanklike subjektiewe reg op die handelsgeheim te bevorder. 'n Uiteensetting van die leerstuk van subjektiewe regte in sy hedendaagse, Suid-Afrikaanse gedaante word gegee, tesame met 'n verduideliking van die aanwending daarvan by die bepaling van deliktuele onregmatigheid, sowel as reaksie op punte van kritiek wat al teen die leer geopper is. Vervolgens word die positiefregtelike elemente van 'n regtens beskermenswaardige handelsgeheim kortliks bespreek. Die gevolgtrekking word gemaak dat die handelsgeheim geskik is om as objek van 'n onafhanklike subjektiewe reg, meer bepaald 'n immaterieelgoederereg, te dien. 'n Saak word uitgemaak dat alhoewel die aanwendingsgebied van so 'n reg grootliks met die reg op werfkrag oorvleuel, dit nietemin 'n selfstandige bestaan verdien. Verskeie voordele van die erkenning van die reg op die handelsgeheim word aangestip.

1 INTRODUCTION

The purpose of this article is to argue that trade secrets are the objects of independent subjective rights,[1] and to suggest some advantages emanating from this proposition. The article is presented in five main parts. The first part introduces the

* Financial assistance of the Centre for Science Development (HSRC South Africa) is acknowledged with gratitude. Opinions expressed and conclusions arrived at, are my own and are not to be attributed to the Centre for Science Development.

1 This idea did not originate with me. It has been propagated for a long time by Van Heerden and Neethling *Unlawful competition* (1995) 224 (also in earlier Afrikaans versions of that book since 1983). Also in a personal capacity as mentor and promoter, Professor Johann Neethling has shaped my thoughts on the current topic, and I acknowledge his inspiration and influence with gratitude. Cf further Du Plessis "Protection of computer software" 1985 *MB* 68–69; Du Plessis "Statutêr beskermde immaterieelgoedereregte en onregmatige mededinging (veral prestasie-aanklamping)" in Neethling (ed) *Onregmatige mededinging/unlawful competition* (1990) 91–92; Knobel *The right to the trade secret* (1996) 200ff; Knobel "Die beskerming van handelsgeheime in die deliktereg" 1990 *THRHR* 492. For a contrary view see Joubert "Die reg en inligting" 1985 *De Jure* 37–38. Cf further Domanski "Trade secrets through the cases: a study of the basis and scope of protection" 1993 *THRHR* 230–231 442–443; Geldenhuys *Die regsbeskerming van inligting* (1993) 109; Pienaar *Misappropriation of confidential information as a delict* (1989) 31ff 168. In another contribution, "Wrongfulness of trade secret misappropriation; and trade secrets as objects of subjective rights", to be published in 2001 *Acta Juridica*, I investigate the degree to which South African case law provides authority for the recognition of a subjective right to trade secrets.

doctrine of subjective rights. In this part I summarise the most important tenets of the doctrine, discuss aspects of its application to determine wrongfulness in delict, and address some points of criticism which have been levelled at the doctrine. In the second part I briefly discuss the requisite attributes with which trade secrets must comply to be afforded protection by the courts. The third part is a synthesis of the first two. I argue that the positive-law "elements" of protectable trade secrets and the requirements for the recognition of an independent subjective right are eminently compatible. In the fourth part I develop the idea that a subjective right to trade secrets deserves an independent existence, even though its field of application often overlaps with that of the right to goodwill. In the fifth part some further advantages of the recognition of subjective rights to trade secrets are suggested.

2 THE DOCTRINE OF SUBJECTIVE RIGHTS

2 1 The doctrine of subjective rights in South African law

The doctrine of subjective rights[2] [3] enjoys significant support among South African academics,[4] and was given the nod of approval by the then Transvaal Division of the

---

2 The rights referred to in this doctrine are called *subjective* rights because they are the rights of legal subjects – as will be explained in the main text presently. This slightly cumbersome term originated in the need in Dutch and Afrikaans to distinguish between *law* and *right*, both of which are known as *recht* or *reg* respectively in those languages. Thus law is known as *reg in objektiewe sin* in Afrikaans, and right as *reg in subjektiewe sin*; or, more concisely, *objektiewe reg* and *subjektiewe reg* respectively. Cf Van der Vyver "The doctrine of private-law rights" in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 212. The problem does not arise in English, and Boberg *The law of delict* vol 1 (1984) 38 favours a simple term "right" instead of "subjective right" (cf Van der Vyver 201ff who uses the term "private-law rights"). For the purpose of this article I decided to use "subjective right" to distinguish the rights referred to here from eg constitutional rights, procedural rights, etc (Van der Vyver's "private-law rights" would have served this purpose equally well, but in this regard I felt that "subjective rights" would fit more naturally into the tradition of the *subjektiewe reg* as it already exists in South African case law – eg *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T); cf *Hawker v Life Offices Association of South Africa* 1987 3 SA 777 (C) 781 – and especially South African legal literature). Thus *subjective rights* as used in the context of this study signify rights (a) in a private-law context, (b) with certain specific characteristics, as enumerated in the main text below. Furthermore, the term "subjective right" was preferred because it was felt that a "doctrine of rights" would be a rather blunt and meaningless appellation. Neethling, Potgieter and Visser *Law of delict* (1999) 46 49ff also use the term "subjective right"; and so, too, do Van der Walt and Midgley *Delict: principles and cases* (1997) vol 1 55. Cf Van Heerden and Neethling 79 fn 5.

3 The doctrine of subjective rights has its origins in the legal world of continental Western Europe – cf Du Plessis and Du Plessis *An introduction to law* (1995) 143. In the Anglo-American legal world, the concepts of rights and duties have been developed by especially the American jurist Hohfeld "Some fundamental legal conceptions as applied in judicial reasoning" 1913 *Yale LJ* 16ff, "Fundamental legal conceptions as applied in judicial reasoning" 1917 *Yale LJ* 710ff. His system has been said to be perhaps not quite as consistent or as comprehensively systematic as the doctrine of subjective rights – Du Plessis and Du Plessis 146; cf Van der Vyver 206–208. Since the doctrine of subjective rights has been granted recognition by South African courts, and since the Hohfeldian system does not appear to open up other important insights relevant to this article (cf Van der Vyver 208), it was deemed unnecessary to consider the Hohfeldian system in depth (cf, however, Van der Walt "Marginal notes on powerful(l) legends: critical perspectives on property theory" 1996 *THRHR* 407–408).

4 Cf Joubert "Die realiteit van die subjektiewe reg en die betekenis van 'n realistiese begrip daarvan vir die privaatreg" 1958 *THRHR* 12ff 98ff; Neethling *Die reg op privaatheid* (1976) 287ff; Neethling, Potgieter and Visser 46 49ff; Van der Merwe *Die beskerming van*

continued on next page

Supreme Court.[5] The doctrine has been expounded in detail by writers,[6] and it is not intended to repeat everything that has been written on the topic here, nor to break any new ground in this respect. However, for the sake of clarity a brief exposition of the basics of the doctrine – in its current, adapted form[7] – will be given.

The doctrine of subjective rights postulates that people, as legal subjects, are holders of subjective rights.[8] The holder of a subjective right has a right *to* something, which right is enforceable *against* other people.[9] Thus a subjective right is typified as a dual relationship.[10] On the one hand, the right is a relationship between the person who is holder of the right (a legal subject) and the entity that is the object of the right (a legal object).[11] At the same time, the right is also a relationship between the holder of the right and other people, that is, other legal subjects.[12] The first-mentioned relationship confers powers of enjoyment, use and disposal on the legal subject in respect of the legal object.[13] The content and limits of these powers are determined by the norms of the law.[14] The second relationship implies that the holder of a right may enforce his or her powers over the legal object

---

vorderingsregte uit kontrak teen aantasting deur derdes (1959) 138ff; Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 54ff; Van der Vyver 201ff; Van der Walt and Midgley 55–56 62–64; Van Heerden *Grondslae van die mededingingsreg* (1958) 154ff; Van Heerden and Neethling 79ff; Du Plessis and Du Plessis 125ff; Van Zyl and Van der Vyver *Inleiding tot die regswetenskap* (1982) 412ff; Van der Vyver and Joubert *Persone- en familiereg* (1991) 8ff; Hosten *et al Introduction to South African law and legal theory* (1995) 277–288; Geldenhuys *Die regsbeskerming van inligting* (1993) 84ff; Venter *Die publiekregtelike verhouding* (1985) 99ff 154ff.

5 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T); cf Scott "Deliktereg 1985 – 'n besinning oor teorie, praktyk en onderrig" 1985 *De Jure* 139.

6 Cf the authors mentioned in fn 4 above.

7 The brief exposition of the doctrine of subjective rights offered here, focuses on the doctrine as developed and adapted by South African writers since WA Joubert. No attempt has been made to trace its history all the way back to its origins in the writings of continental legal philosophers like Dabin and Dooyeweerd. Cf in this regard Joubert 1958 *THRHR* 100ff; Van der Vyver 201ff; Witte "The development of Herman Dooyeweerd's concept of rights" 1993 *SALJ* 543ff. The principles summarised here differ from the original expositions of the doctrine. Especially important for the concept of delictual wrongfulness has been the synthesis of the doctrine of subjective rights and the *boni mores* criterion – see Neethling, Potgieter and Visser 54–55; para 2 2 below. Cf Van der Walt 1995 *THRHR* 413–415 who regards the *boni mores* and the doctrine of subjective rights as "not entirely mutually compatible". Viewed more positively, it is submitted that a sensible and useful synthesis between the two has been attained in the South African law of delict, admirably suited to achieve a balance between legal certainty on the one hand, and flexibility and justice in the individual case on the other (cf the views of Van Aswegen "Policy considerations in the law of delict" 1993 *THRHR* 194 on the proper role of policy considerations in delict).

8 Neethling, Potgieter and Visser 50; Van Heerden and Neethling 80.

9 Neethling, Potgieter and Visser 50; Van der Merwe and Olivier 54; Van Heerden and Neethling 80.

10 Neethling, Potgieter and Visser 50; Van der Merwe and Olivier 54; Van der Vyver 211; Van der Walt and Midgley 63; Van Heerden and Neethling 80.

11 Neethling, Potgieter and Visser 50; Van der Merwe and Olivier 54; Van der Vyver 211; Van der Walt and Midgley 63; Van Zyl and Van der Vyver 415ff; Van Heerden and Neethling 80.

12 Neethling, Potgieter and Visser 50; Van der Merwe and Olivier 54; Van der Vyver 211; Van der Walt and Midgley 63; Van Heerden and Neethling 80; Van Zyl and Van der Vyver 418ff.

13 Joubert 1958 *THRHR* 110–111; Neethling, Potgieter and Visser 50; Van der Vyver 211; Van der Walt and Midgley 63; Van Heerden and Neethling 80; Van Zyl and Van der Vyver 415ff.

14 Neethling, Potgieter and Visser 50; Van Zyl and Van der Vyver 420.

against other legal subjects.[15] A correlative duty rests on other legal subjects not to interfere with the relationship between the holder of the right and the object of his or her right.[16] Again, the content and limits of the holder's powers of enforcement, as well as the content and limits of the correlative duty of other legal subjects, are determined by the norms of the law.

Subjective rights are classified according to the legal objects to which they pertain. On this basis, subjective rights were traditionally divided into four categories: (a) real rights, pertaining to (tangible) things; (b) personality rights, pertaining to aspects of personality such as one's good name, physical integrity, honour and privacy; (c) personal rights, pertaining to performances which may be juridically claimed from another on the strength of a legal obligation *ex contractu*, *ex delicto*, or from other sources; and (d) intellectual (immaterial)[17] property rights, pertaining to intangible products of the human mind and endeavour which are situated outside the personality of their creator; for instance an invention or a work of art.[18] More recently a fifth category has been proposed,[19] namely personal immaterial property rights, pertaining to intangible products of the human mind and endeavour which are connected with the personality, such as earning capacity and creditworthiness.

A subjective right comes into existence when the law recognises and sanctions an individual interest as worthy of legal protection.[20] Some interests, for instance the interests of legal subjects in the tangible things they own, have been thus transformed into rights almost since time immemorial. Other interests have only more recently been recognised, and in principle new ones may be identified as changing sociological and economical realities may dictate. To name an example, the right to privacy has only relatively recently been recognised as an independent subjective right.[21] The transformation of privacy from an individual interest to the object of a subjective right has undoubtedly been precipitated by new and far-reaching threats to privacy posed by rapid technological developments,[22] thus necessitating the intervention of the law. Thus new threats to an old interest may prove to be a catalyst for the recognition and protection of that interest and its concomitant transformation into a subjective right. However, to qualify for such

15 Neethling, Potgieter and Visser 50; cf Van Zyl and Van der Vyver 418.

16 Neethling, Potgieter and Visser 50–51; Van der Merwe and Olivier 54; Van der Vyver 211; Van der Walt and Midgley 63; Van Heerden and Neethling 80.

17 A substantial number of South African authors use the term *immaterial property*, probably under the influence of the Afrikaans *immaterieelgoedere* and terminology employed in legal systems of continental Europe. Since the term *intellectual property* is generally used in the legal systems of English-speaking countries, it is preferred here. A distinction is sometimes made between intellectual property and *industrial* property. No such distinction is adopted for the purposes of this article – intellectual property is used here as a wider generic term inclusive of industrial property.

18 Joubert 113; Van der Merwe and Olivier 55; Van der Vyver 231–232; Van Zyl and Van der Vyver 421ff.

19 Neethling "Persoonlike immaterieelgoedereregte: 'n nuwe kategorie subjektiewe regte?" 1987 *THRHR* 316; Neethling and Le Roux "Positiefregtelike erkenning van die reg op die verdienvermoë of 'the right to exercise a chosen calling'" 1987 *ILJ* 719; Neethling, Potgieter and Visser 52; cf Du Plessis and Du Plessis 131 137–138; Van der Vyver 232–233; Van Heerden and Neethling 80.

20 Neethling, Potgieter and Visser 53; Van Heerden and Neethling 80.

21 Neethling 19 22 117 152ff 241 373ff.

22 Neethling 3ff 275.

legal protection an interest must exhibit two qualities. First, it must be of value.[23] In the second place it must have a sufficient measure of independence to be capable of use, enjoyment and disposal (if possible).[24] It must, therefore, be susceptible of human control.[25]

A fundamental premise of the doctrine of subjective rights is that the infringement of such a right constitutes delictual wrongfulness.[26] This is also the primary practical value of the doctrine – to determine whether an act harming another may be branded as wrongful or not. It has been shown[27] that a dual investigation is necessary to determine whether a subjective right has been infringed or not. First, it must be determined whether the conduct complained of factually disturbed the relationship between the legal subject and the legal object, that is, whether the holder of a subjective right was disturbed in the use, enjoyment and disposal of the object of his or her right.[28] If so, this may be an indication that the conduct was wrongful. However, this indication is not necessarily conclusive, since the law condones certain instances of factual interference in the relationship between the legal subject and his or her legal object. It must therefore also be enquired[29] whether the mentioned factual disturbance took place in a *legally reprehensible way*, that is, *in violation of a legal norm*.[30]

2 2 The relationship between the doctrine of subjective rights and legal norms

The concept of wrongfulness essentially refers to a *juridical value judgment*[31] of certain conduct in the light of its harmful or potentially harmful results. In the law

---

23 Some writers, eg Joubert 1958 *THRHR* 112, require *economic* value, but this view is criticised (cf Neethling, Potgieter and Visser 53 fn 75) mainly because some legal objects – notably personality objects – are said not to have economic value. The primary value of personality interests may perhaps best be described as sentimental in nature – cf Du Plessis and Du Plessis 132. The value requirement should therefore not be formulated exclusively in terms of *economic* value. Cf Geldenhuys 90; Van Heerden and Neethling 80 fn 11.

24 Du Plessis and Du Plessis 131; Neethling, Potgieter and Visser *Neethling's law of personality* (1996) 14; Van Heerden and Neethling 80. (The objects of personality rights cannot be disposed of in so far as they cannot be transferred, or pass by way of succession – Neethling, Potgieter and Visser *Personality* 15. Cf Van Niekerk "Is persoonlikheidsregte subjektiewe regte?" 1990 *TRW* 28 for an aberrant argument that there is no subject-object relationship between a legal subject and his interests of personality, and that personality rights are therefore not subjective rights.)

25 Cf Geldenhuys 90–93.

26 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 387; Joubert 112; Neethling, Potgieter and Visser 49–50; Van der Merwe and Olivier 50; Van Heerden and Neethling 81; cf Burchell *Principles of delict* (1993) 28 who postulates that "unlawfulness (or wrongfulness) involves the infringement of a legally-protected right or interest".

27 Neethling, Potgieter and Visser 53.

28 It is submitted that this first step does not deal directly with the delictual element of wrongfulness – rather, it concerns the elements established on the facts of the case, viz an act, damage, and factual causation. Thus the relationship between a legal subject and the object of his right is factually disturbed if there is (a) an act which (b) factually causes (c) damage. However, establishing this on the facts is an essential preliminary step in the enquiry into wrongfulness. See para 2 1 below.

29 This second step, it is submitted, is the essence of the enquiry into wrongfulness – see para 2 below.

30 Neethling, Potgieter and Visser 53–55; Van Heerden and Neethling 81, Van der Walt and Midgley 63.

31 Van der Merwe and Olivier 56–57; Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (1991) 139; Visser "Die verhouding tussen onregmatigheid en skade" 1991 *THRHR* 782.

of delict, wrongfulness is usually determined with reference to a harmful result. In the case of the *actio legis Aquiliae* (and the other two principal delictual actions – the action for pain and suffering and the *actio iniuriarum*) the focus falls on a harmful result already caused. In the case of the interdict, the harmful result may not have materialised – it might only be imminent. Because of this intimate link between a harmful consequence (actual or potential) and delictual wrongfulness, the perception that the infringement of an interest is the essence of wrongfulness can easily arise. However, it is submitted that this is incorrect. It is true that wrongfulness is inconceivable without at least a potential infringement of an interest, but interests may be infringed without wrongfulness being present, for instance where someone harms another in private defence or with the latter's consent.[32] Therefore, the essence of wrongfulness is not the infringement of an interest,[33] but rather the *condemnation by the law* of conduct infringing an interest in the light of all the circumstances.[34]

If the law is seen as a system of norms,[35] wrongfulness is fundamentally a *violation of a norm*; in a delictual context, specifically a violation of a norm of the law of delict.[36] [37] The approval and condemnation of the law finds expression in legal rules, that is, norms. The basic criterion used to determine the legal permissibility or otherwise of conduct, is a criterion of objective reasonableness,[38]

---

32 Cf eg Neethling, Potgieter and Visser 45–46.

33 That an interest has been infringed, is the essence of another delictual element, namely damage. Cf Neethling, Potgieter and Visser 210: "Damage is the diminution, as a result of a damage-causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognised needs of the person involved." Cf further Visser and Potgieter *Law of damages* (1993) 33: "In determining wrongfulness the real question is whether the infringement of interests is in violation of a legal norm. When damage is assessed, the law is concerned with the diminution in utility or quality of interests. It must be obvious that the violation of a legal norm (illegality) cannot be a prerequisite for any diminution, because the former is based on a legal evaluation whereas the latter is a quantitative phenomenon"; Visser 1991 *THRHR* 782–783 (emphasis added): "In die privaatreg word onregmatigheid (regskrenking) gesien as die feitelike aantasting van 'n individuele belang, op 'n regtens ongeoorloofde wyse . . . nalatigheid word geïdentifiseer deur 'n ondersoek na die versteuring van die betrokke belang as gevolg van 'n menslike handeling *in die lig van die relevante regsnorm wat enige onredelike versteuring verbied. Onregmatigheid is 'n abstrakte waardeoordeel* wat niks kan veroorsaak nie maar wel 'n vereiste vir skuld is . . . *Skade is die afname in die nuttigheid van 'n getroffe vermoëns- of persoonlikheidsbelang* by die bevrediging van die betrokke persoon se regserkende behoeftes . . . *Skade* word vasgestel deur die nuttigheid van iemand se vermoëns- of persoonlikheidsbelange (na gelang die geval) voor en na 'n beweerde skadestigtende feit met mekaar te vergelyk."

34 The conduct complained of and its harmful result (if it has already materialised) or the probability of the occurrence of the harmful result (if a prohibitory interdict is applied for) are established on the facts. Wrongfulness, on the other hand, is not established purely on the facts, but involves a juridical value judgment of the (factually established) conduct in the light of the (factually established) harm caused thereby or potentially caused thereby. See Van der Merwe and Olivier 56–57.

35 Cf Hosten *et al* 3ff; Van der Merwe and Olivier 1; Van Zyl and Van der Vyver 2.

36 Cf Scott 1985 *De Jure* 134.

37 Incidentally, the view that wrongfulness – or unlawfulness – is constituted by the violation of legal norms, also holds good for criminal law – cf Snyman *Strafreg* (1999) 96.

38 Cf Neethling, Potgieter and Visser 38; Boberg 33; Burchell 24; Van der Merwe and Olivier 57–58; Van der Walt and Midgley 55.

commonly referred to as the *boni mores* or so-called legal convictions of the community.[39] [40] Conduct conforming to the *boni mores* is reasonable in the eyes of the law, and thus lawful. Conduct conflicting with the *boni mores* is unreasonable in the eyes of the law, and thus wrongful. This is a very vague criterion, which is advantageous in the sense that it is flexible and adaptable to novel situations. Under the banner of he *boni mores*, the courts have the opportunity to invoke considerations of legal policy to find solutions to new legal problems or to improve existing legal rules that have proved unsatisfactory in the past. Thus the law can adapt to changing social and economic conditions. The *boni mores* have undoubtedly contributed to making the South African law of delict the dynamic and adaptable branch of the law that it is.[41]

On the other hand, the vagueness of the *boni mores* can be a disadvantage in so far as it may cause uncertainty. Thus in many instances, more specific norms have crystallised as more concrete applications of the *boni mores*, making direct reference to the *boni mores* unnecessary, except in very involved or border-line cases.[42] This, it is submitted, is the true niche of the application of the doctrine of subjective rights to establish wrongfulness today – it is a more concrete application of the *boni mores* criterion of wrongfulness.[43]

The relationship between the *boni mores* and the doctrine of subjective rights may be typified as one of ground-norm and derivative norm. The ground-norm of delictual wrongfulness is that conduct causing harm may not conflict with the *boni mores* – if it does, it is wrongful. From this basic norm flows the derivative norm that conduct *infringing a subjective right* is (in conflict with the *boni mores* and therefore) wrongful.[44] Again it must be emphasised that interference with the object of a subjective right is only an indication that conduct violates a legal norm and is therefore wrongful, since grounds of justification may be present. The grounds of justification are simply other norms – also concrete expressions of the *boni mores*[45] – indicating that conduct which harms another is reasonable in certain circumstances. Conduct interfering with the object of a subjective right, but complying with the requirements of a ground of justification, is therefore not in violation of a legal norm and is therefore lawful.

---

39 Cf in general Neethling, Potgieter and Visser 37ff 54; Boberg 33ff; Burchell 24ff; Van der Merwe and Olivier 58ff; Van der Walt and Midgley 55–57.

40 What the content of the *boni mores* is in a given instance, is not determined by the public at large, but rather by the legal policy makers of the community, like the courts and the legislature. Cf *Schultz v Butt* 1986 3 SA 667 (A) 679; Burchell 28; Neethling, Potgieter and Visser 43; Van der Merwe and Olivier 58 fn 99.

41 Cf eg Burchell 24; Van Aswegen 1993 *THRHR* 171ff; Neethling "'n Toekomsblik op die Suid-Afrikaanse privaatreg – volwaardige naasbestaan of versoenende sintese?" in Van Aswegen (ed) *Die toekoms van die Suid-Afrikaanse privaatreg/The future of the South African private law* (1994) 5; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1976 4 SA 376 (T) 387.

42 Neethling, Potgieter and Visser 45ff 73–74; Van der Merwe and Olivier 58.

43 Cf Neethling, Potgieter and Visser 46. Cf Van der Walt 1995 *THRHR* 413–415 for a view that the doctrine of subjective rights and the *boni mores* are not entirely compatible, and the reaction in fn 7 above.

44 Another derivative norm flowing from the *boni mores* is that conduct in breach of a legal duty is wrongful – para 2 3 below.

45 Cf Necthling, Potgieter and Visser 73; Van der Walt and Midgley 95.

2 3 Criticism of the doctrine of subjective rights: An answer

The doctrine of subjective rights has received its share of criticism from eminent jurists. I think there are kernels of truth and wisdom in much of this, but I would contend that the criticism is perhaps not quite as serious as it is presented to be, and that the doctrine is, in spite of its shortcomings, essentially useful and valuable. The criticism of the doctrine of subjective rights can broadly be divided into two categories: criticism based on moral-philosophical grounds and criticism based on utility grounds.

To cite an example of an objection against the doctrine on *moral-philosophical grounds*, it has been said[46] that the doctrine is founded on a social philosophy of arrogant subjectivism and individualism, which is said to be the origin of the selfishness, the social corruption and the moral bankruptcy that characterise twentieth century western society in general and contemporary South African society in particular. Thus a fundamental paradigm shift is advocated[47] towards a contextually sensitive, socially responsible and morally defensible system.[48]

I cannot but agree that there is far too much selfishness, social corruption and moral bankruptcy in contemporary South African society. However, I do not think that either the doctrine of subjective rights or a social philosophy of individualism has appreciably contributed to this lamentable situation. I doubt very much that human greed and self-centredness can be effectively addressed by a change in legal doctrine or social philosophy or, for that matter, the economic system.[49] And whereas the concept of having subjective rights to various legal objects could conceivably feed the greed and selfishness of some individuals, it might just as well inspire a work ethic, creativity, inventiveness, responsibility and productivity in others: characteristics with the potential to benefit the community at large. In my opinion the doctrine of subjective rights can indeed be a valuable tool to help regulate the relationships between potentially greedy and selfish legal subjects.

Moreover, in answer to the alleged moral deficiency of subjective rights, I would like to point out that quite a few of the traditionally recognised subjective rights are now protected as fundamental human rights in the Constitution,[50] and thus enjoy the sanction of the highest law of the land.[51] At least one subjective right, the right to the

---

46 Van der Walt "The impact of a bill of rights on property law" 1993 *SAPR/PL* 313.

47 *Ibid.*

48 Van der Walt 1993 *SAPR/PL* 316.

49 Inherent in this type of criticism is the fundamental idea that values of individualism must be rejected and communitarian values be embraced (cf Van Blerk "Critical legal studies in South Africa" 1996 *SALJ* 86 esp 104–107).

50 Act 108 of 1996.

51 Thus the rights to privacy and dignity are protected as fundamental rights *eo nomine* (ss 14 and 10 respectively); the subjective rights to bodily and psychological integrity are protected under the fundamental right to freedom and security of the person (s 12); other personality rights like the right to *fama* also fall under the fundamental right to human dignity; and many real rights and arguably all intellectual property rights are afforded constitutional protection under the fundamental right to property (s 25(1)). Cf in general Neethling, Potgieter and Visser 20–22. In a contrary opinion Dean "The case for the recognition of intellectual property in the bill of rights" 1997 *THRHR* 105ff contends that intellectual property is not protected under the property clause of the Constitution. In sketching something of the history of the property clause, Dean makes the following interesting observation (107): "It became accepted that opinion makers in the Constitutional Assembly . . . did not feel that the question of protection of IP [intellectual property] in the Bill of Rights would be adequately addressed by a property clause entrenching rights of ownership in property. It was reasoned that IP is a form of property and that if property in general is protected, the result would be that protection would be afforded to IP." I would submit that the view of those "opinion makers" is preferable to Dean's more pessimistic opinion.

fama or good name, has recently had its boundaries adjusted by the courts by virtue of its potential conflict with the fundamental right to freedom of expression.[52] If any subjective right has spawned legal rules incompatible with the spirit and values of the Constitution, such rules will doubtlessly be adapted or abolished by the courts in due course.[53] In my opinion, these safeguards should be sufficient and the wholesale jettisoning of the doctrine of subjective rights is uncalled for.

Of the arguments questioning the *utility* of the doctrine of subjective rights, the most important[54] for the present purpose relates to the inability of the doctrine to

---

52 In *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) the ambit of protection of the right to *fama* has been modified in the light of the recognition of the fundamental right to freedom of expression in s 16 of the Constitution. Cf Neethling, Potgieter and Visser 371–372; Neethling and Potgieter "Die lasterreg en die media: strikte aanspreeklikheid word ten gunste van nalatigheid verwerp en 'n verweer van mediaprivilegie gevestig" 1999 *THRHR* 442; Burchell "Media freedom of expression scores as strict liability receives the red card" 1999 *SALJ* 1; for a different view Midgley "Media liability for defamation" 1999 *SALJ* 211.

53 In terms of the provisions of *inter alia* ss 8 and 39 of the Constitution.

54 Another point of criticism relates to possession and the *mandament van spolie*. Van der Walt "The doctrine of subjective rights: a critical reappraisal from the fringes of property law" 1990 *THRHR* 316ff has argued that the doctrine cannot explain the legal protection of possession by the *mandament van spolie* (on the *mandament* in general, see Kleyn "Die mandament van spolie as besitsremedie" 1986 *De Jure* 1; Kleyn *Die mandament van spolie in die Suid-Afrikaanse reg* (1986); Kleyn and Boraine *Silberberg and Schoeman's the law of property* (1992) 128ff; Van der Walt and Pienaar *Introduction to the law of property* (1999) 224ff). Even a thief can recover possession of a thing with the *mandament*. If the doctrine of subjective rights postulates a subjective right for every legal remedy, as contended by Van der Walt 1990 *THRHR* 325, one must conclude that since a remedy – the *mandament* – is available to protect possession, possession must be a subjective right. The absurd result will be that the thief has a subjective right to the stolen thing in his or her possession. The alternative is to accept that although the *mandament* is available to the possessor, he or she does not have a subjective right. This will mean that the doctrine of subjective rights fails to explain the legal protection of possession by the *mandament*. In the light of the importance of possession in the law of property, this failure of the doctrine of subjective rights (so runs the argument) exposes a fundamental shortcoming of the doctrine, and indicates a need for (at least) its serious revision. I disagree. It must be borne in mind that the *mandament* is an *interim* remedy, and the court does not evaluate the merits of the dispute between the parties when considering an application for a spoliation order (cf eg Van der Walt and Pienaar 224). The granting or refusal of the *mandament* cannot be based on an investigation of the subjective rights of the parties, because that would require the court to give a decision on the merits. By issuing a spoliation order, the court restores what is arguably the most primitive relationship of which the law takes cognisance – physical control. It does so without making any judicial value judgment regarding that physical control. The only value judgment made at this stage pertains to the act by which the physical control was terminated: if it took place against the will of the possessor and without recourse to the legal process, it qualifies as spoliation and the *mandament* may be granted. The subsequent suit on the merits is the setting for a judicial value judgment about the physical possession of the thing. This is the stage where the doctrine of subjective rights is of help. Thus if the owner proves his or her (subjective) right of ownership to the thing, and it transpires that the successful applicant for the spoliation order has no subjective right to the thing, it will be restored to the owner (cf Kleyn and Boraine 130–132; Van der Walt and Pienaar 231). I submit that if the *interim* character of the *mandament* is kept in mind, one cannot realistically expect the doctrine of subjective rights to explain it. A conclusion that the doctrine is fundamentally flawed is therefore not justified by its inability to explain the protection of possession by the *mandament*. What the argument does demonstrate, is that a specific facet of private law cannot be explained satisfactorily by reference solely to the doctrine of subjective rights. The doctrine does have its limitations, but it is not necessarily fatally flawed.

explain all instances of delictual wrongfulness. In South African positive law wrongfulness is determined in some cases with reference to the breach of a legal duty, rather than the infringement of a subjective right.[55] This fact could justify two possible conclusions: (1) the doctrine of subjective rights is unable to explain all instances of delictual wrongfulness;[56] or (2) the doctrine can in principle explain all instances of delictual wrongfulness, but the relevant subjective rights at stake have not yet been identified in all cases.[57] Some commentators[58] and the Transvaal Provincial Division of the Supreme Court[59] appear to be comfortable with a dualistic system whereby the infringement of a right and breach of a legal duty are equally valid, independent criteria for the establishment of wrongfulness. Others are uneasy with the notion of wrongfulness in the absence of an infringed right, or reject such a proposition outright.[60] Yet others question the validity of the subjective rights doctrine, and would elevate breach of a legal duty to the only criterion for wrongfulness.[61]

If, as argued above,[62] the principle that infringement of a subjective right constitutes wrongfulness is a practical application of the *boni mores*, the principle that conduct breaching a legal duty constitutes wrongfulness is simply another concrete application of the *boni mores*.[63] Therefore both the infringement of a subjective right and breach of a legal duty are violations of the delictual ground-norm, the *boni mores,* and constitute wrongfulness. The fact that all instances of

---

55 Cf *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1976 4 SA 376 (T) 387; Van der Walt and Midgley 64ff; Neethling, Potgieter and Visser 55ff; Boberg 30–34.

56 Cf Van Aswegen 144–147.

57 The question is therefore whether there is a corresponding right – even if as yet still unidentified – for every legal duty recognised by the law. An affirmative answer is an attractive proposition – cf Joubert 1958 *THRHR* 112 – but it remains to be seen whether all the missing rights which must then be found to match the legal duties already recognised in our positive law, will still be identified. One of the instances where wrongfulness is based on breach of a legal duty, and where the subjective right at stake could in the past not be identified, is the case of negligent misrepresentation – cf Pauw "Weer eens nalatige wanvoorstelling" 1978 *THRHR* 56–58; Scott 1985 *De Jure* 134. Neethling "Die reg op die verdienvermoë en die reg op die korrekte inligting as selfstandige subjektiewe regte" 1990 *THRHR* 104–105 has proposed the right to receive the correct information as the subjective right infringed by a wrongful act of misrepresentation.

58 Cf Pretorius *Aanspreeklikheid van maatskappy-ouditeure teenoor derdes op grond van wanvoorstelling in die finansiële state* (1985) 229ff who contends (235) that it would be unrealistic to expect only one criterion of wrongfulness to accommodate all arising cases; cf Van der Walt and Midgley 55; Neethling, Potgieter and Visser 46; Boberg 30–34; Van Aswegen 140ff; De Jager "Die grondslae van produkte-aanspreeklikheid *ex delicto* in die Suid-Afrikaanse reg" 1978 *THRHR* 354–558; Pauw "Aspekte van die begrip onregmatigheid" 1980 *De Jure* 265ff.

59 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1976 4 SA 376 (T) 387.

60 Cf eg Joubert 1958 *THRHR* 112.

61 Cf Du Plessis "Onregmatigheid is alleenlik geleë in die skending van 'n regsplig" 1985 *TRW* 96ff. In some older works on the law of delict the element of wrongfulness was approached solely from the angle of the "duty of care" of English law, with no consideration of the infringement of rights as its basis – cf eg the definition of a delict given by McKerron *The law of delict* (1971) 5: "The breach of a duty imposed by law, independently of the will of the party bound, which will ground an action for damages at the suit of any person to whom the duty was owed and who has suffered harm in consequence of the breach." However, in the light of all the recent literature on subjective rights and the recognition of the doctrine in the *Tommie Meyer* case, an author writing on delictual wrongfulness today should not simply ignore the doctrine of subjective rights.

62 Para 2 2.

63 Cf Neethling, Potgieter and Visser 46.

delictual wrongfulness cannot at present be satisfactorily explained by sole reliance on the doctrine of subjective rights, does not, it is submitted, invalidate legal research based on the premise that the doctrine is essentially sound and useful. The doctrine (like any other creation of the human mind) is not without its limitations. It is after all only a model of thought used to explain certain legal phenomena. It cannot be expected to explain all legal phenomena. Incidentally, the very fact that the positive law and commentators recognise shortcomings of the doctrine, can in my opinion be taken as a sign that it has come of age. It may once have been meant as a closed system explaining the entire private law reality on an infallible, rational basis,[64] but this is certainly not the case any more.

Nevertheless, some may ask: If delictual wrongfulness is always in essence the violation of a legal norm (as contended above), and if the doctrine of subjective rights cannot explain all instances of delictual wrongfulness (as conceded above), why bother with subjective rights at all? Why not express all instances of wrongfulness directly in terms of duties? In my opinion, the focus on the nature of the legal object of protection, which is so central to the doctrine of subjective rights, has too much practical value to be disregarded. When one is dealing with the element of wrongfulness, it would be unrealistic to expect exactly the same principles and policy considerations to apply in unmodified form to interference with legal objects as diverse as corporeal things, the integrity of the human body, a person's good name, privacy and intellectual property like copyright, to name just a few. When determining wrongfulness, all the circumstances of the case must be objectively considered, and it is submitted that the nature of the legal object (where known) is one of the most important of these. It is no more than realistic to consider this. Of course, if the exact nature of the legal object is not known, for instance in some cases of pure economic loss,[65] the court must work with a legal duty and if no apposite precedent exists, it may then need to grapple extensively with very difficult policy considerations. But where a known legal object and concomitant subjective right are present, the wrongfulness inquiry can often be enormously simplified,[66] and it would be short-sighted to deliberately disregard them.[67] [68]

---

64 Cf Van der Walt 1995 *THRHR* 403ff.

65 Cf in general Neethling, Potgieter and Visser 293ff; Van der Walt and Midgley 77ff.

66 So much so that wrongfulness may not even be placed in issue in court: This is probably what happens in the majority of cases where the enquiry into wrongfulness could have been performed admirably with reference to the doctrine of subjective rights.

67 One could, of course, still refuse to work with a subjective right and simply state the *duty* with reference to the legal object, eg: "The defendant breached his duty not to infringe the plaintiff's bodily integrity" instead of "The defendant infringed the plaintiff's right to bodily integrity". But apart from being long-winded and indirect, one is then merely stating the same thing from the defendant's side rather than from the plaintiff's. The kind of legal duty referred to in this example is a duty that is the correllate of a subjective right. The insight that the nature of the legal object is central to the wrongfulness norm, remains the essence of the doctrine of subjective rights. It is a different matter altogether when the nature of the legal object cannot be (or has not yet been) identified (eg in many cases of pure economic loss). This is where a "pure" legal duty, without a correllate subjective right, is necessary to determine wrongfulness.

68 The value of the doctrine of subjective rights, with its focus on the nature of the various legal objects, is not necessarily confined to the element of wrongfulness. Thus the nature of the legal object co-determines the requisite form of *fault*: intent in the case of personality interests, and negligence in the case of non-personality interests. Cf in general Neethling, Potgieter and Visser 119ff; Van der Walt and Midgley 125ff. Similarly, different approaches to *legal causation* may be apposite in the case of differing legal objects. As long ago as 1979, Van der Walt *Delict:*

continued on next page

It is submitted that if a study is undertaken of an emergent branch of the law of delict, the identification – where possible – of the legal objects and concomitant subjective rights protected by such a branch of the law, will instil in the study a clarity of thought and an orderliness of development that can hardly be attained in any other way. To ignore the legal object and its peculiar characteristics, and the right to it and its characteristics, could conceivably result in aimless *ad hoc* development of the law, resulting in an incoherent body of loose norms.[69]

3 ELEMENTS OF A PROTECTABLE TRADE SECRET

I now propose to take a closer look at trade secrets as they are protected in South African positive law. Examples of trade secrets recognised by our courts are very diverse, including information relating to or contained in: a manufacturing process,[70] a furnace for the heat treatment of metals,[71] computer software,[72] an unpublished trade mark,[73] credit records[74] and customer lists.[75] It is difficult to find a

---

principles and cases 103 (references to Van der Walt and Midgley refer to the second edition of Van der Walt's work) suggested that there should be room for both the foreseeability and direct consequences tests, stating that direct consequences should be applied to the field of personal injuries. Thus a tentative guideline is given with reference to the type of harm caused, and, one could argue, the legal object interfered with. Similar considerations may well apply in terms of the flexible approach to legal causation adopted by the Supreme Court of Appeal more recently in *S v Mokgethi* 1990 1 SA 32 (A) and *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) (cf in general Neethling, Potgieter and Visser 181ff; Van der Walt and Midgley 168ff). The nature of the legal objects infringed also helps determine the *remedies* available to the plaintiff. Apart from the obvious choice between the classical delictual actions, the *actio legis Aquiliae*, the *actio iniuriarum* and the action for pain and suffering, one should not lose sight of special remedies like the account of profits and an order for delivery up and/or destruction of infringing materials in the case of infringement of certain intellectual property rights. Cf in general Neethling, Potgieter and Visser 8ff 259ff; Van der Walt and Midgley 178ff; Van Heerden and Neethling 72ff. Determining the existence and quantum of *damage* can also be facilitated by giving proper attention to the nature of the infringed legal object. Thus principles applicable to the calculation of damages in respect of the infringement of real rights must perforce differ from those applicable to personality rights. Similarly, damage arising from the infringement of intellectual property like goodwill necessitates its own particular principles. Cf in general Neethling, Potgieter and Visser 209ff; Van der Walt and Midgley 183ff; Van Heerden and Neethling 71ff; Visser and Potgieter 345ff. I hope these few random examples prove how important a proper understanding of the nature of the infringed legal object is in the entire delictual field. And since the focus on legal objects is the very basis of the doctrine of subjective rigths, it is then a very small step to acknowledge the value of the doctrine itself.

69 Cf Joubert *Grondslae van die persoonlikheidsreg* (1953) 117; Neethling 280; Neethling, Potgieter and Visser *Personality* 28; Van Heerden and Neethling 81–82. Even Van der Walt and Midgley, who express (62–63) some reservations about the doctrine, state 64 fn 2: "The acceptance of this particular view of the nature and classification of a right is conducive to a logical, clear and certain development of the law in regard to the element of wrongfulness. It contrasts vividly with other vague and unscientific formulations of the concept 'right'."

70 Eg *Multi Tube Systems (Pty) Ltd v Ponting* 1984 3 SA 182 (D); *Harvey Tiling Co (Pty) Ltd v Rodomac* 1977 1 SA 316 (T).

71 *Harchris Heat Treatment (Pty) Ltd v ISCOR* 1983 1 SA 548 (T); cf, however, *South African Iron and Steel Industrial Corporation Ltd v Harchris Heat Treatment (Pty) Ltd* 1987 4 SA 421 (A).

72 *Northern Office Micro Computers (Pty) Ltd v Rosenstein* 1981 4 SA 123 (C).

73 *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd, Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd* 1972 3 SA 152 (C).

74 *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) Ltd* 1968 1 SA 209 (C).

75 *Van Castricum v Theunissen* 1993 2 SA 726 (T).

comprehensive *definition* of a trade secret in South African case law.[76] However, it is possible to piece together the requirements, or elements, of protectable trade secrets from the various cases.[77]

3 1 Information

In the first place, one is left in no doubt that trade secrets consist of information. Well nigh every relevant decision typifies trade secrets as information. The term *confidential information* is frequently used (more frequently than the concept trade secret itself), usually as a wider generic concept of which trade secrets are a *species*.[78]

3 2 Commercial or industrial applicability

Although it may be difficult to find a *dictum* in the reported case law expressly stating that only information capable of commercial or industrial application may be protectable as trade secrets, it is nevertheless clear by implication that this is indeed the case – so much so that it is described by Van Heerden and Neethling[79] as self-evident.

3 3 Secrecy

The requirement of secrecy, or confidentiality as it is often referred to, frequently receives scrutiny in case law. The South African courts have been deeply influenced by English law in this regard, and English precedents are usually cited as authority for discussions of secrecy or confidentiality. The basic formulation of secrecy adopted is the well-known one of English law that confidential information is information that is not in the public domain,[80] or as it is frequently stated,[81] "it must not be something which is public property or public knowledge".[82] A relative, rather

---

76 Cf Leon "Trade secrets: protection in SA common law" 1982 *De Rebus* 381: "It is interesting to note that in no South African case is there actually an attempt at definition, no doubt owing to the judicial desire to keep this branch of the law as fluid as possible"; Domanski 1993 *THRHR* 230.

77 For a comparison with some other jurisdictions, see Knobel 14ff (English law) 65ff (American law) 113ff (German law) 163ff (synthesis).

78 Cf Domanski 1993 *THRHR* 232.

79 225.

80 Cf *Schultz v Butt* 1986 3 SA 667 (A) 680 and other authorities in fn 81; and further *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 194.

81 *Schultz v Butt* 1986 3 SA 667 (A) 680; *Van Castricum v Theunissen* 1993 2 SA 726 (T) 730 731; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 2 SA 54 (T) 64; *Cambridge Plan AG v Moore* 1987 4 SA 821 (D) 845; *Aercrete SA (Pty) Ltd v Skema Engineering Co (Pty) Ltd* 1984 4 SA 814 (D) 822; *Easyfind International (SA) (Pty) Ltd v Instaplan Holdings* 1983 3 SA 917 (W) 927; *Harchris Heat Treatment (Pty) Ltd v Iscor* 1983 1 SA 548 (T) 551; *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 1 SA 316 (T) 321 322 323; *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 1 SA 209 (C) 214. See further Van Heerden and Neethling 225; Neethling 1993 (2) *LAWSA* 281.

82 This phrase is often quoted from the English case *Saltman Engineering Co Ltd v Campbell Engineering Ltd* [1948] 65 RPC 203 215. On the secrecy requirement in English law, cf Bainbridge *Intellectual property* (1999) 287ff; Coleman *The legal protection of trade secrets* (1992) 5ff; Cornish *Intellectual property: patents, copyright, trade marks and allied rights* (1999) 307ff; Gurry *Breach of confidence* (1984) 65ff.

than absolute, concept of secrecy is employed. Thus information has been found to be secret or confidential if only available to a limited number of persons.[83] Following English law,[84] our courts have also held that information may be secret "as a whole" even though the "constituent parts" from which it has been assembled may be individually in the public domain.[85] Especially in this context, it is clear that information will be secret if it can only be produced by somebody who goes through the same process of expenditure of time, labour and effort as that gone through by the owner[86] of the information.[87] It is also recognised that secrecy is not necessarily destroyed if the information is also known to some competitors of the trade secret owner.[88] Secrecy must be objectively determined.[89]

---

83 *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 1 SA 209 (C) 221: "[T]he fact that the information is distributed upon a confidential basis to a limited class of persons prevents it . . . from becoming public property capable of being used or imitated by rival traders." Cf *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 194 where a production process was found not to be confidential because there was "no evidence that the production sequence was kept secret or limited to certain employees only; all employees and visitors had access to the plant. The various units used in the process were more or less openly used in [the] factory". Cf Van Heerden and Neethling 225; Knobel 1990 *THRHR* 491; Pistorius and Visser "Confidential information and the danger of confusing classifications" 1993 *SA Merc LJ* 344.

84 Again the *Saltman Engineering* case 215 (fn 82 above) is the *locus classicus*.

85 Eg *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 1 SA 316 (T) 323–326; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 191–192; *Harchris Heat Treatment (Pty) Ltd v Iscor* 1983 1 SA 548 (T) 550–551; cf *Meter Systems Holdings Ltd v Venter* 1993 1 SA 409 (W) 429.

86 It will be noted that I use the term "owner" in connection with trade secrets and information. "Ownership" of a trade secret obviously differs in fundamental respects from ownership of tangible things, but there are some analogies which make it a convenient term to use. Alternatively one can refer to the "right-holder" iro a trade secret.

87 Cf eg the authority quoted in fn 85; *Van Castricum v Theunissen* 1993 2 SA 726 (T) 731. Again, the origin is English case law, and in this regard, the "springboard doctrine" of English law has also received recognition in South African courts. The doctrine was formulated in the famous footnote in *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd*: "[A] person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication . . . [T]he possessor of such information must be placed under a special disability in the field of competition to ensure that he does not get an unfair start."

88 *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 2 SA 482 (T) 502; cf Van Heerden and Neethling 225 fn 14; Knobel 1990 *THRHR* 491 fn 30. Domanski 1993 *THRHR* 242 brands this a "questionable proposition". I submit that the requirement of secrecy will be met if the relevant information is still not readlily accessible to all and sundry. Where eg one competitor also knows the secret, but takes steps to prevent others from gaining access to it while there are, say, twenty other competitors who cannot readily gain access to it, secrecy is still maintained.

89 This is apparent from the way in which the inquiry into the presence or absence of secrecy is performed in cases such as *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 1 SA 209 (C) 221; *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 1 SA 316 (T) 321–325; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 194; *Harchris Heat Treatment (Pty) Ltd v Iscor* 1983 1 SA 548 (T) 550–551; *Schultz v Butt* 1986 3 SA 667 (A) 680 – cf Knobel 1990 *THRHR* 491 fn 32; Van Heerden and Neethling 225. In *Van Castricum v Theunissen* 1993 2 SA 726 (T) 732 Roos J expressly stated that the test is objective. However, strangely enough, this statement was preceded by a quotation from the English decision in *Thomas Marshall (Exports) Ltd v Guinle* [1978] 3 All ER 193 (Ch) 209–210 which may be interpreted as authority for a subjective test, in so far as the following four elements were considered important when testing for confidential quality: "(1)

continued on next page

3 4 The owner's will (or steps taken) to maintain secrecy

Dicta may be found in case law indicating that the owner of confidential trade information must have the will to maintain the secrecy thereof before it will qualify for legal protection. Most of these statements focus on the presence or absence of steps taken by the owner to preserve secrecy,[90] but some refer to the subjective will or wish of the owner to maintain secrecy.[91] In practice, this requirement may be

---

the information must be such that the owner believes that its release would be injurious to him, or would be advantageous to his rivals or to others; (2) the owner of the information must believe it to be confidential or secret and not already in the public domain; (3) the owner's belief in 1 and 2 above must be reasonable; and (4) the information must be judged in the light of usages and practices of the particular trade or industry concerned." The same passage was quoted in *Multi Tube Systems (Pty) Ltd v Ponting* 1984 3 SA 182 (D) 186. It is submitted that whereas a subjective element does enter the enquiry in so far as a trade secret will be protected only if the owner had the will to keep it secret (para 3 4), the information must nevertheless be objectively secret as well. The correct position in this regard, it is submitted, was stated in *SA Historical Mint (Pty) Ltd v Sutcliffe* 1983 2 SA 84 (C) 89: "One cannot protect what is ordinary general information by telling the employee that it is a trade secret: that cannot alter the quality of the material" and *Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner* 1984 3 SA 850 (W) 858: "It is trite law that one cannot make something secret by calling it secret. Facts must be proved from which it may be inferred that the matters alleged to be secret are indeed secret." The *Thomas Marshall* test of secrecy should therefore not be followed in our law. It is also criticised by English commentators, eg Bainbridge 292: "According to this [*Thomas Marshall*] test, a certain amount of subjectivity is allowed on the part of the owner of the information . . . On this basis, it is possible that a duty of confidence could arise and attract legal remedies even if the information was actually in the public domain if the owner's contrary belief was reasonable. This seems to go too far. Surely, the test of whether information is confidential is objective."

90 Eg *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd* 1984 4 SA 149 (T) 154: "All information and data collated and assimilated by the applicant through its investigations and research are contained in a comprehensive set of documents, *the highly confidential nature of which the applicant has at all stages impressed on all its employees*" (emphasis added); *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd; Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd* 1972 3 SA 152 (C) 153: "The decision was taken in secrecy and the confidential nature of their assignments was firmly impressed on the printers, and the marketing and advertising agents"; *Prok Africa (Pty) Ltd v NTH (Pty) Ltd* 1980 3 SA 687 (W) 690: "[W]hen Abbey devices are advertised, simple line drawings are used and there is no attempt to produce accurate details or drawings. In particular, no technical details are furnished as these are a matter of confidentiality between the applicants and their customers or their distributors or agents . . . [T]he applicants allege that the technical brochure contains confidential information . . . and for that reason is not freely distributed by them. It is supplied in confidence to certain distributors, agents and customers"; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 324: "I do not think that the process for which protection is sought in the instant case is confidential. There is no evidence that the production sequence was kept secret or limited to certain employees only; all employees and visitors had access to the plant. The various units used in the process were more or less openly used in Atlas' factory" – note how the absence of steps taken to keep the relevant information secret was here taken to establish that the information was not protectable. Cf *Northern Office Micro Computers (Pty) Ltd v Rosenstein* 1981 4 SA 123 (C) 126 where the respondent averred – unsuccessfully – that the conduct of the applicant showed that he did not regard the relevant computer program as a trade secret. Cf Delport "Trade secrets and confidential information" 1982 *BML* 165; Joubert 1985 *De Jure* 42: "[D]ie inligting moet deur die aanspraakmaker as vertroulik behandel word. Dit kan hy uitdruklik, maar ook stilswyend doen deur byvoorbeeld die vertroulike inligting binne 'n kring belanghebbendes te probeer hou en die bekendmaking van die inligting buite daardie kring te beperk en te beskerm"; Pistorius and Visser 1993 *SA Merc LJ* 344.

91 Cf *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 1 SA 316 (T) 325; *Northern Office Micro Computers (Pty) Ltd v Rosenstein* 1981 4 SA 123 (C) 126 where the respondent averred –

continued on next page

employed negatively, in the sense that the defendant or respondent may raise the *absence of a will to keep the information secret* as a ground on which the alleged secret does not merit protection,[92] rather than the plaintiff or applicant citing his will (as evidenced by steps taken) to keep it secret as a reason why the information is deserving of protection.[93]

3 5 Economic value

Explicit statements requiring trade information to be valuable to qualify for legal protection, may be found in the case law.[94] It is clear that the required value must be of an economic nature.[95] It must be objectively established.[96] Sometimes the focus falls on the value of the secret to the owner;[97] sometimes on its (potential) value to the owner's competitors.[98] It is submitted that these are merely two sides to the same coin. The value or potential value of the trade secret to the owner's competitors is a correlate of the value of the secret to the owner.

---

unsuccessfully – that the applicants *did not regard* the relevant information as a trade secret; Knobel 1990 *THRHR* 491–492; Van Heerden and Neethling 225 fn 13; Domanski 1993 *THRHR* 230.

92 Cf eg *Northern Office Micro Computers (Pty) Ltd v Rosenstein* 1981 4 SA 123 (C) 126.

93 In such a situation, the absence of steps to protect secrecy may also be construed as *tacit consent* by the owner to use or disclosure of the information, which will serve as a ground of justification to exclude the wrongfulness of such use or disclosure – cf Knobel 1990 *THRHR* 491 fn 35.

94 *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 194: "That which is sought to be protected should . . . not only differ from what was previously generally known, but be of value as well." In *SA Historical Mint (Pty) Ltd v Sutcliffe* 1983 2 SA 84 (C) 90 authority was quoted stating that business information which is not necessarily new, novel or unique, but which is nevertheless not generally available, "qualifies for treatment as a trade secret if it has value to the business"; and in *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 1 SA 316 (T) 325 the court found that the plaintiff's production process was not only confidential, it was also "a great commercial success". Cf *Meter Systems Holdings Ltd v Venter* 1993 1 SA 409 (W) 428; *Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll* 1986 1 SA 673 (O) 692 where the court asked whether allegedly confidential information was "uit 'n mededingingsoogpunt van waarde"; *Butt v Schultz* 1984 3 SA 568 (E) 577 and *Schultz v Butt* 1986 3 SA 667 (A) 680; *Multi Tube Systems (Pty) Ltd v Ponting* 1984 3 SA 182 (D) 187; *Easyfind International (SA) (Pty) Ltd v Instaplan Holdings* 1983 3 SA 917 (W) 929; *Crown Cork & Seal Co v Rheem SA (Pty) Ltd* 1980 3 SA 1093 (W) 1101–1102; *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg* 1967 1 SA 686 (W) 689 691. Cf Van Heerden and Neethling 225; Knobel 1990 *THRHR* 492; Pistorius and Visser 1993 *SA Merc LJ* 345.

95 Cf *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 1 SA 316 (T) 325 where the court found that the plaintiff's production process was "a great commercial success"; *Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll* 1986 1 SA 673 (O) 692 where the court asked whether allegedly confidential information was "uit 'n mededingingsoogpunt van waarde". The examples quoted thus highlight the value of a trade secret to the entrepreneur in a competitive context. However, it is submitted that a trade secret can also be of economic value to someone who is not an entrepreneur and who is not involved in competition with trade rivals. This conclusion follows logically from the recognition in *Harchris Heat Treatment (Pty) Ltd v Iscor* 1983 1 SA 548 (T) that trade secrets also qualify for legal protection outside the context of competition; cf para 5 below.

96 Cf *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg* 1967 1 SA 686 (W) 689; *Van Castricum v Theunissen* 1993 2 SA 726 (T) 732; Van Heerden and Neethling 225; Knobel 1990 *THRHR* 492.

97 *Multi Tube Systems (Pty) Ltd v Ponting* 1984 3 SA 182 (D) 187.

98 *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg* 1967 1 SA 686 (W) 689 691; *Butt v Schultz* 1984 3 SA 568 (E) 577.

In a number of cases the value or usefulness of information was apparently used to determine whether the information was confidential or not.[99] It is submitted that economic value or usefulness cannot be a determinant of secrecy. Secrecy simply concerns the question whether information is known or accessible to a restricted number of persons. The value of the information cannot help determine this. Thus economic value is a separate element of a protectable trade secret, but it is not an element or determinant of secrecy.[100]

3 6 Concreteness or potential concreteness

Again, although it may be difficult to find specific *dicta* requiring trade secrets to be concrete or potentially concrete, it stands to reason that a trade secret can be protected only if it has the potential to lead an existence separate from the personality of its owner.[101] On the other hand, case law does not require – correctly, it is submitted – that a trade secret be reduced to some material form before it can qualify for legal protection. Thus the minimum requirement is potential, not necessarily actual, concreteness.[102]

---

99 In *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg* 1967 1 SA 686 (W) 689 Marais J said: "The difficult question in each case would be to decide what information gleaned by an employee is to be regarded as disclosable as being harmless or general knowledge and what items are confidential or secret. The dividing line may move from case to case, according to what is the general practice or convention in the category of trade or manufacture in which the plaintiff falls, with particular reference to existing or potential competitors of his. *If, however, it is objectively established that a particular item of information could reasonably be useful to a competitor as such, ie to gain an advantage over the plaintiff, it would seem that such knowledge is prima facie confidential as between an employee and third parties* and that disclosure would be a breach of the service contract. If use has in fact been made of it in an effort to harm the business interests of the plaintiff the presumption would be even stronger that the employer and the employee, who would in the course of his employment obtain knowledge of it, intended it to be treated as confidential information not to be divulged to third parties"; and at 691: "What would constitute information of a confidential nature would depend on the circumstances of each case, and in this regard *the potential or actual usefulness of the information to a rival would be an important consideration in determining whether it was confidential or not*" (emphasis added). Cf *Multi Tube Systems (Pty) Ltd v Ponting* 1984 3 SA 182 (D) 187: "[T]he information . . . was, at the lowest, *prima facie confidential in that it was of great value to the applicant*, its disclosure was detrimental to the applicant and first respondent must have appreciated that he was under a duty to his employer . . . not to disclose this information to others because it would harm applicant" (emphasis added). In *Butt v Schultz* 1984 3 SA 568 (E) 577 the following words from the *Coolair Ventilator* case were quoted with implicit approval: "What would constitute information of a confidential nature would depend on the circumstances of each case, and in this regard the potential or actual usefulness of the information to a rival would be an important consideration in determining whether it was confidential or not", and Mullins J added that "the same considerations apply to cases where trade information is obtained from sources other than through an employee".

100 See Van Heerden and Neethling 225–226 fn 15; Neethling 1985 *THRHR* 237; Knobel 1990 *THRHR* 492 fn 40; Pienaar 26. Cf *Schultz v Butt* 1986 3 SA 667 (A) 680.

101 Cf Knobel 186. This requirement has received more attention in American law; cf eg Chisum and Jacobs *World intellectual property handbook: United States* (1992) 3.16; Jager *Trade secrets law* vol 1 (1993) 5.86ff and case law cited. In respect of the position in German law, cf Pfister *Das technische Geheimnis "Know how" als Vermögensrecht* (1974) 11–15 28–31.

102 Cf Pfister 30 who points out that should actual concretisation be required, it would be too easy to prevent a secret invention from falling into an estate for insolvency proceedings. By eg destroying the only sketches in which a secret has been embodied, its existence as a patrimonial asset would thus be terminated, only to be easily resurrected at a more convenient stage by re-embodiment in a concrete form. This would clearly be unacceptable.

3 7 Conclusion

A trade secret protectable in South African law may therefore be broadly defined as secret information which is capable of commercial or industrial application, which the owner has the will to keep secret, which has economic value, and which can lead an existence separate from its owner.[103]

4 SYNTHESIS

4 1 Trade secrets as objects of subjective rights

In the light of the foregoing, the case in favour of the recognition of a subjective right to trade secrets may now be considered. It is clear that many entrepreneurs and business concerns have very real individual interests in their trade secrets. This situation is probably as old as trade and commercial endeavours themselves. However, the technological advances of modern times pose new and more far-reaching threats to trade secrets, and highlight the need for legal recognition and protection.[104] This raises the question whether trade secrets possess the qualities necessary for them to qualify as objects of subjective rights. The question can be answered in the affirmative. First, as has transpired clearly from the elements of trade secrets expounded above, trade secrets have economic value. They also possess the requisite quality of scarceness. Indeed, the very significance of a trade secret for both its owner and his or her competitors stems from the fact that it is not accessible to many. In the second place, trade secrets exhibit the requisite qualities of independence, distinctness and definiteness to be capable of enjoyment, use and disposal. It has been shown that a trade secret consists of information that may lead an existence separate from both the mind of the person where it originated and the tangible object in which it may have been objectified. There can also be no doubt that a trade secret is capable of use, enjoyment and disposal by its owner. One may conclude that trade secrets are eminently suitable to serve as objects of subjective rights.[105]

---

103 Cf Van Heerden and Neethling 223–224: "A trade secret may be described as trade, business or industrial information belonging to a person (usually an entrepreneur) which has a particular economic value and which is not generally available to and therefore known by others" – accordingly they postulate (225) three requirements for a protectable trade secret, viz secrecy (including a subjective element in so far as the proprietor must have the will to keep the information secret – fn 13), potential application in trade or industry, and economic value. Cf further Pistorius and Visser 1993 *SA Merc LJ* 344 who state the requirements of a trade secret as follows: the information must be treated as confidential and be known to a closed circle; it must have been developed by the owner for his or her own benefit; and it must be valuable or useful to the owner. Van Heerden and Neethling 226 fn 18 express the opinion that the requirement postulated by Pistorius and Visser that the information must have been developed by the owner for his or her own benefit, should merely be taken into account when determining the economic value of the information. In my opinion it should not be seen as an element of a trade secret. However, it may be necessary for a trade secret owner to aver this fact, not to show that the information is a trade secret, but to show that he or she is the owner thereof and therefore has *locus standi*.

104 Cf eg Pooley *The executive's guide to protecting proprietary business information and trade secrets* (1987) x; Croft *Corporate cloak and dagger* (1994); Eells and Nehemkis *Corporate intelligence and espionage – a blueprint for executive decision making* (1984); Saunders *Protecting your business secrets* (1985).

105 Mention should perhaps be made of the objection of German writers that trade secrets cannot qualify as objects of subjective rights or property-like rights because the first owner of a trade

continued on next page

4 2 The right to trade secrets as an intellectual property right

More specifically, if subjective rights to trade secrets are recognised, they can be classified as intellectual property rights.[106] A trade secret is an intangible product of the human mind and endeavour which can be expressed in an outwardly perceptible form. It complies with the accepted concept of intellectual property, which may be defined as the intangible products of human skills, or inventions of the human mind, situated outside the personality of the author and which are protected by the legal order.[107] More widely known examples of intellectual property are patents, copyrighted artworks or literary works and trademarks.[108] The legal protection of most of these legal objects is a relatively recent phenomenon.[109] Most of the recognised intellectual property rights are protected by statute.[110] This does not mean that new intellectual property rights may not be identified, nor that they need to be creatures of statute.[111] There seems to be no reason militating against the recognition of the right to the trade secret as a (non-statutory) intellectual property

---

secret has no legal recourse against a so-called double inventor who gains access to the same secret in a legally permissible manner by way of independent discovery or research; cf the arguments of Gerlach *Steuerliche Behandlung des Know-how sowie der Einkünfte aus der Überlassung von Know-how nach dem innerdeutschen Steuerrecht und dem deutschen Aussensteuerrecht* (1866) discussed in Wise *Trade secrets and know-how throughout the world* vol 3 (1981) 4.31ff. This argument should not carry much weight in South African law. The powers flowing from *any* subjective right are always limited by the norms of the law, and the peculiar limitations to the powers of a trade secret owner should simply be regarded as inherent in the unique nature of trade secrets as legal objects, without posing a fundamental obstacle in the way of their recognition as objects of subjective rights. Furthermore, it may be noted that a similar situation is not unknown in copyright law, where it is theoretically possible for two persons, working independently of each other, to come to the same result, and for each of them to acquire copyright in his or her own work – even though it is the same as the work of the other; cf Copeling *Copyright and the Act of 1978* (1978) 24 and authorities cited.

106 On intellectual property rights in general, see Van Heerden and Neethling 93ff.

107 Cf Domanski 1993 *SA Merc LJ* 128: "The legal object of an immaterial-property right . . . is an intangible, incorporeal product of the human mind. This product exists outside and independently of its creator, and has an economic value"; Du Plessis and Du Plessis 130: "Immateriële goedere is nie-tasbare geestesprodukte van die mens, dit wil sê 'produkte' van menslike vindingrykheid"; Du Plessis in Neethling (ed) 89–90: "Die immaterieelgoedereregte verskil van die ander subjektiewe regte op grond daarvan dat die regsobjek by 'n immaterieelgoedereregte 'n ontasbare onliggaamlike produk van die mens se geestesarbeid is wat buite die mens en onafhanklik van hom bestaan, en wat vermoënswaarde het"; Neethling, Potgieter and Visser 52: "intangible products of the human mind, intellect and activity which are expressed in one or other outwardly perceptible form"; Van der Merwe and Olivier 55: "onstoflike goedere buite die mens geleë"; Van der Vyver 231: "the intangible expressions of human skills, or inventions of the human mind, embodied in a tangible agent and which are by law allotted to their author"; Van Zyl and Van der Vyver 408: "'n Immateriële goed is 'n onstoflike menslike geestesproduk wat 'n regsubjek regtens teenoor ander subjekte toekom"; cf 424.

108 Cf Chisum and Jacobs 1.3ff; Dratler *Intellectual property law: commercial, creative and industrial property* (1992) 1.6ff; Kintner and Lahr *An intellectual property law primer* (1982) v.

109 Van der Vyver 236; Dratler 1.7ff.

110 South African examples are the Patents Act 57 of 1978; the Copyright Act 98 of 1978; the Trade Marks Act 194 of 1993; the Designs Act 195 of 1993; and the Plant Breeders' Rights Act 15 of 1976.

111 Cf Van Heerden and Neethling 99; Du Plessis in Neethling (ed) 91–92; Mostert *Grondslae van die reg op die reklamebeeld* (1985) 343–346.

right.[112] Trade secrets law is, in fact, frequently discussed in treatises on intellectual property law.[113]

5 SUBJECTIVE RIGHTS TO TRADE SECRETS AND THE RIGHT TO GOODWILL

The legal protection of trade secrets in South Africa has largely developed in the cadre of unlawful competition law, a specialised branch of the law of delict.[114] The most important subjective right generally protected by unlawful competition law is the entrepreneur's right to the goodwill of his enterprise (*die reg op die werfkrag*).[115] Goodwill in this sense[116] has been described as "the attractive force which brings in custom".[117] The right to goodwill, pertaining as it does to an intangible creation of the human intellect and endeavour, has been classed as an intellectual property right.[118] The question arises whether trade secrets cannot satisfactorily be protected under the right to goodwill, thus eliminating the need for an independent right to trade secrets.

It is certainly true that the majority of trade secret infringements (actual or imminent) that come before the courts constitute infringements (actual or imminent) of the goodwill of a business enterprise. Even a very superficial analysis of case law

---

112 However, cf Joubert 1985 *De Jure* 34. Note, too, that some authors require intellectual property to be "embodied in a tangible agent" (cf Van Heerden and Neethling 95: "[T]he idea only becomes a real creation when it is in some way or the other expressed in a tangible agent so that it becomes externally perceptible"; further the definitions by Neethling, Potgieter and Visser 52 and Van der Vyver 231 quoted in fn 107 above); however, it was argued above (para 3 6) that a trade secret need not be embodied in a tangible agent, it must only be capable of such embodiment. Certainly embodiment in a tangible form is a prerequisite for the protection of the majority of recognised forms of intellectual property. However, it is submitted that it need not invariably be a prerequisite for the existence and protectability of intellectual property. Thus it may be argued that the goodwill of an undertaking – which is the object of a recognised intellectual property right (cf para 5 below) – is not necessarily always embodied in a tangible agent (cf Van Heerden and Neethling 98). Programme-carrying signals, which may be the object of copyright (s 2(g) Act 98 of 1978) are arguably also not embodied in a tangible agent. The true general requirement is not, it is submitted, that intellectual property must invariably be embodied in a tangible agent, but simply that it must be capable of leading an existence independent of the personality of its creator – cf Joubert *Grondslae* 21; Dratler 1 3. Trade secrets meet this requirement – they can be shared with others, can be sold, can devolve by succession, etc. However, they need not be embodied in a tangible agent – they may be transferred to other persons by the spoken word.

113 Eg Bainbridge 285ff; Chisum and Jacobs 3.1ff; Cornish (1999) 301ff; Dratler 4.1ff; Epstein *Epstein on intellectual property* (1999) 1.1ff; Kintner and Lahr 129ff.

114 Van Heerden and Neethling 62ff; Boberg 149ff; Neethling, Potgieter and Visser 313ff; Van der Merwe and Olivier 382ff.

115 Van Heerden 197ff 203ff; Van Heerden and Neethling 93ff; Neethling, Potgieter and Visser 314; Van der Merwe and Olivier 383; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 182; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 386; *Becker & Co (Pty) Ltd v Becker* 1981 3 SA 406 (A) 416.

116 The word is also used in other contexts; cf Van Heerden and Neethling 103ff; Van Heerden 207ff.

117 *Inland Revenue Commissioners v Müller & Co's Margarine Ltd* 1901 AC 217 224; cf Van Heerden and Neethling v 95 103.

118 Van Heerden 203ff; Van Heerden and Neethling 94ff; Neethling, Potgieter and Visser 314 fn 240; Van der Merwe and Olivier 383.

will show this.[119] However, although the majority of trade secret infringements also infringe the goodwill, this is by no means always the case. A pertinent example of trade secret infringement that does not affect goodwill, would be where an inventor has (perhaps entirely fortuitously) developed a trade secret which he does not intend exploiting himself, perhaps because he does not have a business enterprise of his own or because he conducts his business in an unrelated field. However, he does intend "selling" his idea to an entrepreneur who would be interested in it, and to this end he takes steps to keep it secret. A third person now acquires unauthorised access to the secret to use it in his business. This act can hardly be termed competition (lawful or unlawful), nor does it appear to me to infringe the goodwill of the inventor, since his goodwill, if any, has been built up in an unrelated field.[120] The trade secret is nevertheless a valuable asset in his patrimony, and its misappropriation should entitle him to obtain an interdict or damages (depending on whether the secrecy has been destroyed by the thief or not). To deny such an inventor legal relief, would be patently unjust. In such a case wrongfulness is based most satisfactorily on the infringement of a subjective right to the trade secret itself.[121]

6 OTHER ADVANTAGES OF THE RECOGNITION OF AN INDEPENDENT SUBJECTIVE RIGHT TO TRADE SECRETS: SOME SUGGESTIONS

It is my hope that the foregoing has already commended the right to the trade secret as a most logical and convenient tool in determining the wrongfulness of trade secret misappropriation. In the final instance I would like to suggest some further advantages to be gained by the recognition of an independent subjective right to the trade secret, with its concomitant focus on the nature of the legal object.[122]

(i) *Clarity is gained about the nature of infringing acts.* Case law generally recognises unauthorised *use* and *disclosure* of trade secrets as potentially wrongful conduct. With the knowledge that secrecy itself is a fundamental requisite of a trade secret, comes the insight that unauthorised *acquaintance* with a trade secret can already be a wrongful act. However, if the acquaintance has not been followed by unauthorised use or disclosure, the trade secret owner may not have suffered damage yet, and an interdict rather than an action for damages will be the appropriate remedy.[123]

---

119 Van Heerden and Neethling 229ff and cases cited; Knobel 289ff.

120 See in general Van Heerden and Neethling 112–116 142–145. An example could be a housewife who discovers that adding certain ingredients to washing powder increases its efficiency dramatically. She has no right to goodwill, at least not in a conventional sense, for the simple reason that she has no business enterprise. Her secret is, however, an asset with which she can reap considerable financial benefits if she can sell it to a manufacturer of washing powder. See Knobel in Neethling (ed) 77 fn 44; Knobel 1990 *THRHR* 493 fn 45; Van Heerden and Neethling 225 fn 11.

121 The wrongfulness of such conduct could also be based on an infringement of the right to earning capacity, depending on how this right is construed; cf Knobel 227ff.

122 These ideas have come to my attention by a comparative study of relevant English, American and German law, as well as South African case law. The doctrine of subjective rights provided me with a framework for an evaluation of these ideas.

123 Cf Knobel 236–237 295.

(ii) *Clarity is gained about grounds of justification.* A study of trade secret protection in other legal systems reveals the possible application of two relatively unknown defences. These are *reverse engineering*, whereby a competitor of a trade secret owner legitimately acquires the latter's product on the open market and takes it apart to unravel the trade secret employed in its use, and *double invention*, where someone obtains a trade secret already held by another by independent research, development or discovery. Both defences are ways in which more than one person can acquire rights to the same trade secret, as long as it is still secret in the sense that it is not in the public domain and not readily accessible to others.[124] The first right-holder's right is then limited by the right of the second one. Neither of them has any recourse against the other if the other uses or discloses the secret: the latter is simply exercising his powers in terms of his right.[125] The nature of a trade secret and the right to it make this possible. In this respect a trade secret differs from for instance a patent, where the inventor makes his invention public to receive statutory protection for a specified time period.[126] In the case of the trade secret, the right-holder does not make his invention public, and receives protection for a potentially unlimited period, but only as long as secrecy lasts.

By evaluating these defences from the framework of an intellectual property right to trade secrets, one can conclude that these defences should also be applicable in South African law.

(iii) *Clarity is gained about appropriate remedies.* If an infringer acquires the owner's secret in an unauthorised manner and then publishes it, secrecy is destroyed. The trade secret and the right to it are terminated. In such a case the appropriate remedy is an action for damages, and the quantum must be determined to compensate the plaintiff fully for the destruction of his right. If, on the other hand, the infringer keeps the secret to himself after the misappropriation, secrecy is not destroyed and an interdict is appropriate to protect the trade secret owner's right. Prohibiting the infringer from using or disclosing the secret enables the owner to exploit it without hindrance.

(iv) *New insights concerning the quantum of damages are gained.* Giving due regard to the nature of trade secrets, and with the benefit of an analogy with other intellectual property rights, a "reasonable royalty" commends itself as a suitable measure of damages.[127]

---

124 Cf eg the American Uniform Trade Secrets Act (which has been enacted with or without amendments in the majority of states) s 1 Commissioner's comment: "Because a trade secret need not be exclusive to confer a competitive advantage, different independent developers can acquire rights in the same trade secret"; "Often, the nature of a product lends itself to being readily copied as soon as it is available on the market. On the other hand, if reverse engineering is lengthy and expensive, a person who discovers a trade secret through reverse engineering can have a trade secret in the information obtained from reverse engineering."

125 However, if the second right-holder then proceeds to market an identical copy of the first right-holder's product (instead of marketing his own product, in the production of which the trade secret may have been employed) he may still fall foul of unlawful competition law; cf Van Heerden and Neethling 242ff.

126 Patents Act 57 of 1978 s 45(1) read with s 46(1).

127 Cf iro English law: Bainbridge 313–314; Cornish 329; and American law: Uniform Trade Secrets Act s 3(a); Chisum and Jacobs 3.50; Jager vol 3 Appendix A1.21ff.

(v) *A principled decision about the duration of legal protection is made possible.* Many trade secrets are inherently short-lived, and their primary value is the "lead-time" they give their owners in the market until the competition catches up by reverse engineering or independent invention.[128] In American law, courts focusing on the reprehensibleness of the misappropriating conduct without due regard for the inherent characteristics of the legal object, have issued perpetual injunctions even where trade secrets might have been short-lived anyway.[129] Courts that do not lose sight of the essential nature of trade secrets, on the other hand, issue interdicts of limited duration (so-called "lead-time injunctions") to protect inherently short-lived trade secrets.[130] The latter route is clearly the more realistic if one approaches the protection of trade secrets from the perspective of subjective rights. Moreover, one could on the same basis argue that the quantum in the case of an action for damages should also reflect the potential duration of the trade secret.[131]

(vi) *Trade secret protection need not be confined to a context of unlawful competition.* South African case law has on occasion expressly required the plaintiff and defendant in trade secret cases to be competitors,[132] and has on another occasion expressly rejected such a requirement.[133] Approaching this issue from the perspective of subjective rights enables one to make a principled choice between the two positions. Any person, not only a competitor, can infringe a right to a trade secret, and this need not take place in a context of competition.

(vii) *Trade secret protection need not be confined to a context of fiduciary relationships.* Some cases[134] may be interpreted to suggest that trade secrets can be protected only in a context of fiduciary relationships. Such a proposition can be rejected from a subjective-rights perspective. Anybody with a subjective right to a trade secret should in principle be entitled to legal protection. The presence of a fiduciary relationship can be a factor contributing to a finding of wrongfulness, but should not be a prerequisite for it.[135]

---

128 Cf fn 124 above.

129 Cf eg Chisum and Jacobs 3.4–3.5; Dratler 4.71.

130 Cf Jager vol 1 7.35, who describes decisions granting "lead-time injunctions" as the "middle ground" in the so-called *Shellmar-Conmar* controversy. In terms of the decision in *Shellmar Products Co v Allen-Qualley Co* 87 F 2d 104, 32 USPQ 24 (7th Cir), 301 US 695 (1937) publication of the trade secret, even by the trade secret owner, does not rule out injunctive relief against a defendant who learnt the trade secret in confidence before publication took place; while in terms of *Conmar Products Corp v Universal Slide Fastener Co* 172 F 2d 150, 80 USPQ 108 (2nd Cir 1949) trade secret protection is "cut off" by the issuance of a patent or other form of publication of the secret. Cf Jager vol 1 6.12–6.32 7.34–7.51.

131 Cf Van Heerden and Neethling 233.

132 *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 1 SA 209 (C) 222.

133 *Harchris Heat Treatment (Pty) Ltd v Iscor* 1983 1 SA 548 (T) 555.

134 *Meter Systems Holdings Ltd v Venter* 1993 1 SA 409 (W); *Telefund Raisers CC v Isaacs* 1998 1 SA 521 (C); *MV Lina Union Shipping and Managing Co SA v Lina Maritime Ltd* 1998 4 SA 663 (N).

135 This issue is discussed more extensively in my contribution "Wrongfulness of trade secret misappropriation; and trade secrets as objects of subjective rights", to be published in 2001 *Acta Juridica*.

(viii) *Use or disclosure of a trade secret by an innocent recipient may be prevented by means of an interdict.* In both English[136] and American law[137] an innocent recipient of a trade secret can use the secret with impunity until the moment he acquires knowledge that the relevant information is another's trade secret and that he has received it against the owner's will. What the South African position should be, can be determined with reference to subjective rights to trade secrets, combined with an application of general delictual principles. If a person who has received a trade secret without the owner's consent uses or discloses the secret, such conduct will (in the absence of other grounds of justification) in principle infringe the subjective right of the trade secret owner. Wrongfulness will therefore be present. However, an action for damages will not lie against the innocent wrongdoer because of the absence of fault, whether in the form of intent or of negligence. As soon as the recipient acquires knowledge that the information is a trade secret received against the owner's will, he will be liable in damages for subsequent use or disclosure of the information. The reason for this is that fault will then be present: either in the form of intent (because consciousness of wrongfulness is now present), or in the form of negligence (because the reasonable person would have foreseen that such use or disclosure could be wrongful and cause harm to the owner and would have taken steps to prevent such harm). However, an innocent recipient may be interdicted from using or disclosing the secret even before the recipient has knowledge that the relevant information is another's trade secret and that he has received it against the owner's will. This is because fault is not a requirement for the interdict in South African law,[138] and wrongfulness, which is a requirement, has been shown to be present in the infringement of the right to the trade secret.

The above list is certainly not a closed one, and I am sure that more examples can be found. Again, I should make it clear that approaching the protection of trade secrets from a subjective-rights angle is not the only way to reach the above conclusions, but it does commend itself to me as the most logical, practical and theoretically consistent way.

---

136 Bainbridge 308: "This is the one fundamental weakness of the law of breach of confidence – innocent parties are largely unaffected by this area of the law." Cf Bainbridge 308ff; Cornish 320ff; Coleman 49; Gurry 275. *Contra* Vitoria "Trade secrets, know-how and confidential information in English law" in Wise (ed) *Trade secrets and know-how throughout the world* vol 2 (19081) 342–343: "[E]ven the third party who, at the time he receives the disclosure of the secret or confidential information, does not and should not reasonably have known that the information belongs to the plaintiff and that the party disclosing to him was breaching contract or confidence in doing so, or that the disclosing party had acquired it illegally, may be enjoined from using or making further disclosure. Also, he may incur liability for damages if he uses the information after he has received notice of the true state of facts." Most of the cases cited by Vitoria do not seem to support her position unequivocally – an exception being *Printers and Finishers Ltd v Holloway* [1965] RPC 239 257: "[T]he case of *Prince Albert v Strange* (1850) 1 M&G, 41 ER 1171 shows that an injunction may be granted against someone who has acquired – or may acquire – information to which he was not entitled without notice of any breach of duty on the part of the man through whom he obtained it." However, see Gurry 276–277 who remarks that in the type of situation encountered in the *Holloway* case "the instigation of the action itself will, of course, bring the breach to the attention of the third party".

137 Cf Chisum and Jacobs 3 43.

138 Neethling, Potgieter and Visser 261; Van der Walt and Midgley 179.

Evaluating the evidence of the child witness – a common-sense approach

PJD Struwig
BIuris LLB LLM
Senior Lecturer in Applied Legal Studies, Technikon Southern Africa

OPSOMMING

Evaluering van die kindergetuie se getuienis – 'n gesondeverstand-benadering

Die howe het al dikwels in die verlede gesê dat alhoewel daar 'n versigtigheidsreël geld in die geval van die evaluering van die getuienis van jong kinders, die howe niks anders as die beginsels van gesonde verstand (*common sense*) behoort toe te pas nie. Hierdie artikel ondersoek wat hierdie beginsels moontlik kan behels en kom onder meer tot die gevolgtrekking dat die getuienis van jong kinders en dié van volwassenes nie noodwendig op verskillende wyses benader behoort te word nie. Dieselfde tekortkominge wat howe beweer by jong kinders se getuienis voorkom, blyk ook teenwoordig te wees by die getuienis van volwassenes. Die bydrae ondersoek ook wat dit behels om die geloofwaardigheid van volwasse getuies te beoordeel en pas dan dieselfde beginsels toe op die evaluering van die getuienis van jong kinders. Laastens word aan die hand gedoen dat die howe moet let op wat sielkundiges na aanleiding van navorsing bevind het ten aansien van die betroubaarheid van die getuienis van jong kinders en dat hulle moet ophou om bloot klakkeloos te steun op 'n uitgediende versigtigheidsreël wat onder meer op ongeregverdigde vooroordele berus.

1 INTRODUCTION

The cautionary rule regarding the evaluation of the evidence of children of tender age is, like the other cautionary rules, alleged to be based on the "collective wisdom and experience" of the judiciary. According to this "collective wisdom and experience", children are said to be highly imaginative and suggestible. In *R v Manda*[1] the court, without basing its opinion on any authority, said that the dangers inherent in reliance upon the uncorroborated evidence of a young child must not be underrated. The court added that the imaginativeness and suggestibility of children are only two of a number of elements that require the evidence of child witnesses to be scrutinised with care. In *S v Artman*[2] the court confirmed that a cautionary rule exists regarding young children, in terms of which a trial court must warn itself of the dangers inherent in accepting their evidence, and must require some safeguard reducing the risk of a wrong conviction.

In *Woji v Santam Insurance Co Ltd*[3] the court said that although there is no statutory requirement that a child's evidence must be corroborated, the question which a trial court must ask itself is

1 1951 3 SA 158 (A).
2 1968 3 SA 339 (A).
3 1981 1 SA 1020 (A) 1028A–D.

> "whether the young witness' evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his *Code of Evidence* para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears 'intelligent enough to observe'. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion 'to remember what occurs' while the capacity of narration or communication raises the question whether the child has 'the capacity to understand the questions put, and to frame and express intelligent answers' (Wigmore on *Evidence* vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest – is there a consciousness of the duty to speak the truth?"

I would suggest that the above quotation applies not only to the child witness but also to all adult witnesses. The question may, in addition, be asked whether this justification for a cautionary rule is based on fact and reality. A further question that arises, is whether there is any proof of the assumptions underlying this cautionary rule. Is the rule based on common sense? In *S v Snyman*[4] the court said that

> "while there is always a need for special caution in scrutinising and weighing the evidence of young children, complainants in sexual cases, accomplices and, generally, the evidence of a single witness, the exercise of caution should not be allowed to displace the exercise of common sense".

What the "common sense" referred to by the court entails is open to discussion. For a start, common sense surely dictates that the issue is not about the child's tender age, but rather about the emotional and intellectual maturity and cognitive abilities of a particular child witness, whatever the age of the witness. Dent and Flin are also of the opinion that although children's cognitive abilities increase with development, age alone should not be considered the sole determinant of a child's capacity to provide reliable eyewitness testimony.[5]

There is no cautionary rule addressing the problems and difficulties that a thirty-year-old witness with the mental capacity of a seven-year-old poses when it comes to the assessment of evidence. Nor is there a cautionary rule addressing the problems that the assessment of the evidence given by a mentally incapacitated elderly man or woman, who is a competent witness, may raise. Why, then, do we find it necessary to adopt a cautionary rule in relation to the evidence of all children of tender age? A common-sense approach should surely be followed in all of the above instances when it comes to the assessment of evidence and credibility.

Before I discuss the approach to evaluating the credibility of the child witness, it is of the utmost importance to look into the assessment of the credibility of human beings generally as witnesses. Since the child is a member of the human race, it is imperative that the courts first treat the child as an ordinary witness and thereafter give attention to the fact that the witness who has testified is a child.

2 THE ASSESSMENT OF CREDIBILITY

Mr Justice HC Nicholas[6] remarks:

> "*Human evidence shares the frailties of those who give it*, whether they arise from a defect of character – lack of veracity – or a tendency to honest error – unreliability" (my emphasis).

---

4 1968 2 SA 582 (A) 585G–H.

5 Dent and Flin (eds) *Children as witnesses* (1992) ("Dent and Flin") 30.

6 "Credibility of witnesses" 1985 *SALJ* 32.

Notice that no mention is made of children here. The frailties that Nicholas is referring to are those of mankind in general. He makes it clear that *the evidence of witnesses should be assessed very carefully for a variety of reasons.* We do not, however, need a cautionary rule to remind us of this.

As Nicholas indicates, research has shown that the credibility of the adult witness is no more reliable than that of a child. We do not generalise when it comes to the assessment of the credibility of adult witnesses. Why, then, should we generalise when we assess the credibility of child witnesses? Each individual witness should rather be dealt with on his or her own merits.

Nicholas also makes the following remarks:

> "For the assessment of the credibility of witnesses (whether it relates to their veracity or their reliability) there are no formulas, no rules of thumb . . . The evaluation is essentially a subjective judgment, and is the resultant of a number of factors whose varying weight depends on the circumstances."[7]

Nicholas investigated all possible factors that may have an influence on the credibility of witnesses. Some of these are the following:

- Veracity – Nicholas indicates that *all human beings* make mistakes. That *per se* does not establish that the witness, being human, is lying. According to Nicholas, this merely shows that, in common with the rest of mankind, witnesses are liable to make mistakes. He also says that it is his experience that people are not entirely truthful.
- Contradictions between evidence given by different witnesses – Nicholas writes:

  > "It is the case that where two or more witnesses give consistent evidence that may be a strong and indeed a decisive indication that their story is a credible one . . .
  >
  > "But the converse is not true. It is not the case that lack of consistency between witnesses affords any basis for an adverse finding on their credibility."[8]

- Demeanour – According to Nicholas, demeanour, although an important factor, is only one of the considerations that should be taken into account in making a finding of credibility.
- Crosscurrents – According to Nicholas, crosscurrents include

  > "partiality, prejudice, self-interest and corruption. Their range is great . . . They may only be such as to lead to the dilution or colouring of the evidence, to the suppression of inconvenient facts, or to additions . . .
  >
  > Although crosscurrents may influence the evidence of a witness, they do not necessarily do so, nor do they raise any substantial probability of falsehood. *The existence of one or more of these factors is a ground for caution in the assessment of the evidence of a witness, but it is no more than that . . .*" (my emphasis).[9]

- Reliability –

  > "Here one is concerned, not with defects in moral character, but with the human tendency to honest mistake . . .
  >
  > "Accuracy of observation depends in the first instance on the efficiency of the sensory system of the witness, and in this there can be wide individual differences.

---

7 32.
8 35.
9 37–38.

"Even in the case of persons with normal sensory apparatus, the liability to error is great. This has been convincingly demonstrated by the studies of experimental psychologists . . . .

"Experimental psychologists distinguish three stages in the process which leads to the giving of eyewitness testimony in a court of law: *(a)* Acquisition or perception. *(b)* Retention or storage in the memory. *(c)* Retrieval and communication.

"Experiments directed to each of these three stages have shown that failure of information can occur in any one or more of them . . ."[10]

- In addition, Nicholas makes statements like the following:

  "The human receptor system has a limited capacity" and

  "Interpretation of sense data is influenced by the prejudices, the experience, the interest, the attitudes, the personal wishes and preferences, and the expectations of the observer, and also by the conditions in which the observation is made: so mistakes easily occur when the witness is in a state of excitement or stress, as he usually is where the event is dramatic or upsetting."[11]

- Finally, Nicholas says that

  "[i]n the light of the experimental evidence, it is not surprising that *eyewitness accounts are often not an accurate representation of reality*, and that there are often profound differences in eyewitness accounts of the same event, even when it is observed by the witnesses under the same external conditions" (my emphasis).[12]

- Probability –

  "This is a matter which concerns, not the credibility of the witness as such, but the credit to be given to his story by reason of its inherent probability or improbability. Where an assertion is regarded as improbable, belief is slow and difficult"[13] and "there is frequently room for a difference of opinion in regard to probability."[14]

In the light of what Nicholas says, common sense will probably dictate that there should also be a "cautionary rule" devised for those instances in which a court has to assess the credibility of the adult witness.

In evaluating all the probative material admitted during the course of a trial, the court must determine credibility, draw inferences, and consider probabilities and improbabilities.[15] What is clear is that credibility is one of the factors which may be decisive of the outcome of a case. Schwikkard[16] quotes extensively from *Onassis v Vergottis*[17] where Lord Pearce says the following regarding credibility:

"Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others?"

---

10 38–39.
11 40.
12 41.
13 42.
14 43.
15 See Schwikkard, Skeen and Van der Merwe *Principles of evidence* (1997) 370.
16 *Op cit* 376.
17 1968 2 Lloyd's Rep 403 431.

Should a court not be warned of this before attempting to judge the credibility of a witness? Or is this a matter of common sense? The problems mentioned by Lord Pearce are not even a closed list of the factors that a court should take into account.

In *Hees v Nel*[18] the court said:

> "Included in the factors which a court would look at in examining the credibility or veracity of any witnesses, are matters such as the general quality of his testimony (which is often a relative condition to be compared with the evidence of the conflicting witnesses), his consistency both within the content and structure of his own evidence and with the objective facts, his integrity and candour, his age where this is relevant, his capacity and opportunities to be able to depose to the events he claims to have knowledge of, his personal interest in the outcome of the litigation , his temperament and personality, his intellect, his objectivity, his ability effectively to communicate what he intends to say, and the weight to be attached and the relevance of his version, against the background of the pleadings."

Another factor that the court must also consider is the demeanour of witnesses, which according to *Cloete v Birch*[19] includes "their manner of testifying, their behaviour in the witness-box, their character and personality, and the impression they create".

In *R v Abels*[20] the court came to the following conclusion:

> "It must now be regarded as settled law that the demeanour of a witness whilst testifying is in many cases the decisive and determining factor in the search for the truth. It is however difficult to conceive of a case where it is the only factor; for even when great stress is laid on the demeanour of a certain witness one knows by experience that the setting, the surrounding circumstances, the probabilities, the inferences, all go towards creating that subtle, pervasive and undefinable atmosphere at a trial from which this witness emerges as the symbol of truth."

According to *R v Masemang*,[21] demeanour is a fallible guide to credibility and it should be considered alongside all other factors.[22] It is in the overall scrutiny of the evidence that demeanour should be taken into account. What should also be remembered is that demeanour is merely one of a number of factors to be taken into account.[23]

According to Schmidt and Rademeyer,[24] the assessment of credibility deals mainly with the subjective evaluation of the reliability of the evidence, the court's impressions of the demeanour of the witness in the witness-box, the manner in which each witness answers the questions asked, his or her veracity or mendacity, his or her ability to observe, his or her bias or objectivity, and his or her opportunities to observe carefully.

Schmidt and Rademeyer[25] also say that whether a witness should be believed or not depends mainly on what he or she says. The court must determine whether his or her version corresponds to what he or she had to say earlier during the trial, and with the versions of other witnesses. The court must also consider whether the

---

18 1994 1 PH F11 (T) 32.
19 1993 2 PH F17 (E) 51.
20 1948 1 SA 706 (O) 708.
21 1950 2 SA 488 (A).
22 Compare *S v Civa* 1974 3 SA 844 (T).
23 Schwikkard *op cit* 378.
24 *Bewysreg* (2000) 79.
25 *Op cit* 104.

version of the witness seems like the truth in the light of all the circumstances. On the other hand, it is not only the contents of a person's statement that determines his or her credibility, but also the impression that he or she leaves on his or her listeners. The question that needs to be addressed is whether he or she is creating the impression of judiciousness, veracity and reliability. Is he or she a good observer? Is he or she giving evidence in a direct and resolute manner, or is he or she uncertain and evasive? Finally, is his or her demeanour that of a credible person?

In *R v Momekela*[26] the court warned that demeanour alone is an unsafe guide in determining the truth. The court added:

> "In addition to the demeanour of the witness one should be guided by the probability of his story, the reasonableness of his conduct, the manner in which he emerges from the test of his memory, the consistency of his statements and the interest he may have in the matter under inquiry."

In *S v Kelly*[27] the court said:

> "The hallmark of a truthful witness is not always a confident and courteous manner or an appearance of frankness and candour . . .
>
> Nevertheless, while demeanour can never serve as a substitute for evidence, it can, and often does, 'reflect on and enhance the credibility of oral testimony'. The experienced trial officer is well aware of this fact; it is a matter of common sense."

Hoffmann and Zeffert write:[28]

> "Demeanour should be allowed only to reinforce a conclusion reached by an objective assessment of the probabilities, or possibly to turn the scale when the probabilities are evenly balanced."

3 CHILDREN AND THE CAUTIONARY RULE

If one bears in mind that what has been said above applies equally to child witnesses, it would seem that the cautionary rule regarding the evidence of children is not in line with reality, and that it is grossly unfair that the evidence of all children of tender age should be treated in exactly the same manner.

According to Dent and Flin, the competence of child eyewitnesses has been doubted for many years by the criminal-justice system largely because of the legal community's scepticism about children's capacity to provide accurate testimony, particularly in response to leading questions.[29] In studies that they conducted, however, Dent and Flin found that children *can* recall events witnessed by them with the same degree of accuracy as adults.[30] Overall, research results seem to suggest that the memory performance of children as young as five may approach that of adult subjects if they are questioned in a manner sensitive to their verbal and conceptual abilities, one which avoids leading questions and concentrates on familiar witnessed events.[31]

In the United States of America, all states except Connecticut have rejected the need for cautionary jury instruction after a child witness has testified. Courts accord no significance to the developmental differences between children and adults, and

---

26 1936 OPD 23 24.
27 1980 3 SA 301 (A) 308C–F.
28 Hoffmann and Zeffertt *The South African law of evidence* (1988) 610.
29 Dent and Flin 74 90.
30 *Idem* 90.
31 *Idem* 94.

ignore the scientific fact that cognitive, social and moral maturity is only gradually acquired.[32]

It is furthermore suggested that the cautionary rule under discussion should be invoked only in instances where it is shown that there is a basis for the rule to be applied. This rule unjustly stereotypes all the evidence given by children as being particularly unreliable. The evidence of a particular child witness may well call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.[33]

In *R v Makanjuola, R v Easton*[34] the Court of Appeal said the following about the cautionary rule in cases of sexual offences:

> "The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them."

This applies equally to evidence given by young children. The Court of Appeal specifically mentioned that a court may well give a warning to the jury to treat the evidence of a witness with caution, but this will depend on the content and the manner of the specific witness's evidence and the circumstances of the case. Where the witness has been shown to be unreliable, the court may consider it necessary to urge caution.

The court, in providing certain guidelines, also had the following to say regarding the cautionary rule applicable to sexual offences and to accomplices:[35]

> "In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. *There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel*" (my emphasis).

There is no reason why we in South Africa should not also adopt the same approach in cases of evidence given by child witnesses.

As I have already mentioned, the courts, when referring to the cautionary rule relating to child witnesses, are quick to refer to the vivid imaginations and the suggestibility of children. They are, however, very slow to cite any authority in support of these views, other than previous case law. What is also significantly absent is a reference to authoritative sources that deal with the evidence of child witnesses from a psychological point of view.

One refreshing exception to this rule, however, is the decision in *S v S*,[36] where Ebrahim JA investigated the allegations made against child witnesses and applied his findings to the facts of the case. Ebrahim JA referred extensively to a book by Spencer and Flin entitled *"The evidence of children"* (1990). The authors list six main objections to relying on the evidence of children. According to them these are:

(a) children's memories are unreliable;

(b) children are egocentric;

---

32 McGough Child witnesses – fragile voices in the American legal system (1994) ("McGough") 21.
33 Compare *S v J* 1998 2 SA 984 (SCA), which dealt with the cautionary rule in sexual offences.
34 1995 3 All ER 730 (CA) 732*g*.
35 733*c–d*.
36 1995 1 SACR 50 (ZS).

(c) children are highly suggestible;

(d) children have difficulty distinguishing fact from fantasy;

(e) children make false allegations, particularly of sexual assault; and

(f) children do not understand the duty to tell the truth.

Ebrahim JA then attempted to summarise the authors' discussion of each point. A few quotations from his summaries appear immediately below.

1 Memory: "Research has shown that children generally have a good recall of central events but a poorer memory for detail and evidence of surrounding occurrences."[37] In the light of Nicholas's views regarding adults, it is an open question as to how children differ from adults in this regard, if at all.

2 Egocentricity: "We are all egocentric to a certain extent. *It is not a problem unique to children*" (my emphasis).[38]

3 Suggestibility: "In general, reliable psychological research shows that children, *like adults*, can certainly be suggestible" (my emphasis).[39]

4 Difficulty distinguishing fact from fantasy:

> "It is suggested that children have difficulty distinguishing fact from fantasy and, by extension, are liable to tell the court of their fantasies rather than give a factual account of what happened at the scene of the crime. It is true that a child's existence is more centred around his or her imagination than is adult existence, but anyone who has watched children at play will have noticed that their play fantasies reflect their experience, whether it be experience of real life, as when small girls play house, or experience derived from hearing stories, as when small boys play soldiers. *Children do not fantasise over things that are beyond their own direct or indirect experience*" (my emphasis).[40]

5 False allegations: The court concentrated on the cautionary rule relating to sexual offences rather than discussing the false allegations supposedly made by child witnesses as such. Ebrahim JA said:

> "It is a question of credibility in each case rather than a matter of *all* complainants in sexual abuse cases being required to show any greater quantum of proof than in any other type of case."[41]

The same principle, in my view, should be applied to child witnesses. In South Africa the cautionary rule relating to sexual offences has been effectively dealt with in *S v J*.[42]

6 Inability to understand the duty of telling the truth: According to the court, this is a sweeping judgment which ignores differences in age, intelligence and morality between children. Ebrahim JA was of the opinion that a rational decision about the credibility of a witness (especially a child witness) can be arrived at only in the light of a proper analysis by means of testing evidence against likely shortcomings in that evidence, in the manner suggested by Spencer and Flin. The judge added:

---

37 55*b*.
38 55*g–h*.
39 55*h–i*.
40 56*i–*57*b*.
41 57*i–j*.
42 1998 2 SA 984 (SCA).

> "To reach an intelligent conclusion in such an analysis it is necessary to apply, as [Spencer and Flin] do, a certain amount of psychology and to be aware of recent advances in that discipline . . . [W]ays must be sought of accommodating this, as it is the price to be paid for professionally administering justice in an increasingly complex society."[43]

4 CONCLUSION

Although psychological research on the comparative reliability of child and adult witnesses has not so far provided clear results, studies undertaken regarding child and adult witnesses have indicated that both groups of witnesses have the potential to be highly unreliable and suggestible witnesses.[44] Dent and Flin refer to a variety of studies and come to the conclusion that children as young as six years can be as reliable as adults when answering both objective and suggestive questions.[45]

With regard to child witnesses, it seems that the courts in South Africa prefer to ignore scientific research in this field, and choose to fall back on received legal doctrine, intuition, speculation and even rank prejudice.[46] Children's capacity for observation and memory, and the potential for various distorting effects, have now been subjected to exhaustive study. Accordingly, it is now possible to re-evaluate the cautionary rule under discussion in the light of the knowledge gained from the systematic study of human development.

> *It is not the function of the courts to criticise government's decisions in the area of social policy. But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of state to be loyal to the Constitution, and requires that public administration be conducted on the basis that "people's needs must be responded to". It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard.*
>
> *Cameron J in* Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Nguxa 2001 10 BCLR 1039 (SCA) *para* 15 (*internal footnotes omitted*).

43 60*b–d*.
44 Dent and Flin 2.
45 *Idem* 3 11.
46 Cf McGough 22.

"My right to refuse or consent": The meaning of consent in relation to children and medical treatment

Brigitte Clark
BA LLB LLM PhD
Associate Professor in Law, Rhodes University

OPSOMMING

"My reg om te weier of om toe te stem":
Die betekenis van toestemming in verband met kinders en mediese behandeling

In hierdie artikel word die bevoegdheid van opgeskote kinders, hulle ouers, die mediese beroep en die Hooggeregshof om beslissings met betrekking tot die mediese behandeling van kinders te neem, bespreek. Die sleutelgeskilpunt is in watter mate die ouers se belange met die regte van die kind (wat in die Verenigde Volke se Konvensie oor Kinderregte en in die Handves van Menseregte in die Suid-Afrikaanse Grondwet bevat is) versoen kan word. Die toepaslike Suid-Afrikaanse wetgewing word noukeurig ondersoek, veral in verband met die rol van die opgeskote kind se toestemming en met verwysing na die veelbesproke beslissing van die Britse House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112 (HL). Die intervensionistiese rol van die mediese beroep en die hof as oppervoog van minderjariges word ondersoek, veral met betrekking tot sake waar óf die kind óf die ouers weier om toestemming te gee. Dit word voorgestel dat die balanseringsproses wat vereis word om al hierdie faktore te versoen, dalk 'n ander bestanddeel in aanmerking moet neem: die kollektiewe gesinsbelang. Die artikel sluit af met 'n beroep om wetswysiging op hierdie gebied van die reg.

1 INTRODUCTION

A potential tension exists between the legal capacity of children, the responsibilities of parents, and the interventionist powers of the medical profession or the court in cases involving medical decision-making. The relationship between the parties has been portrayed as a partnership, but not one of equals.[1] Children have legal rights

1 See *Re J (a Minor) (Wardship: Medical Treatment)* [1990] 3 All ER 930 (CA) 934; Seymour "'Uncontrollable' child: A case study in children's and parents' rights" in Alston, Parker and Seymour (eds) *Children, rights and the law* (1992) 98; Bainham "Growing up in Britain: Adolescence in the post-*Gillick* era" in Eekelaar and Sarcevic (eds) *Parenthood in modern society: Legal and social issues for the twenty-first century* (1993) 501; Thornton "Multiple keyholders – wardship and consent to medical treatment" 1992 *Cambridge LJ* 34; Houghton-James "The child's right to die" 1992 *Fam Law* 550; Bainham "The judge and the competent minor" 1992 *LQR* 194; Douglas "The retreat from *Gillick*" 1992 *MLR* 569; Thornton "Minors and medical treatment – who decides?" 1993 *Cambridge LJ* 33; Eekelaar "White coats or flak jackets? Doctors, children and the courts – again?" 1993 *LQR* 182; *idem* "The interests of the child and the child's wishes: The role of dynamic self-determinism" 1994 *IJL & F* 42; Nicholls "Keyholders and flak jackets – consent to medical treatment for children" 1994 *Fam Law* 739.

to parental care, rights to health care[2] and limited rights to self-determination.[3] In every case, the child's best interests are paramount.[4] The child's right to parental care means that, in a Hohfeldian sense, the parents have a duty ro provide such care.[5] Parenting involves not only providing care and making decisions for children but also equipping children with the skills to make decisions for themselves.[6] The older child may have views about the medical treatment she is prepared to undergo, and these wishes may conflict with those of her parents or of the medical profession. Is it possible to give such children rights of self-determination while at the same time affording them the necessary protection? How valid is the refusal or consent of a child? Who decides what medical procedures are appropriate for such a child? On what criteria should such decisions be based?[7] For the younger child, parents are generally given an unfettered discretion. Older children, however, have a right to be heard in matters affecting their lives.[8] What constitutes the right to be heard? Can this constitute "consent" if consent involves the legal expression of the right of rational, independent individuals to bodily integrity?[9]

---

2 See s 28(1) of the Constitution of the Republic of South Africa, Act 108 of 1996.

3 Art 12 of the United Nations Convention on the Rights of the Child ("CRC").

4 S 28(2) of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter "the Constitution").

5 See Van der Westhuizen "Children as bearers of fundamental rights, and medical decision-making" 1999 *Responsa Meridiana* 63 65–66.

6 See Bridgeman "Because we care? The medical treatment of children" in Bottomley and Sheldon (eds) *Feminist perspectives on health care law* (1998) 100.

7 See Bainham *Children: The modern law* (1998) 241. See also Loughrey "Medical treatment – The status of parental opinion" 1998 *Fam Law* 146.

8 Art 12 of the CRC. See also Sloth-Nielsen "Ratification of the United Nations Convention on the rights of the child: Some implications for South African law" 1995 *SAJHR* 401 410.

9 See s 12(2) of the Constitution of the Republic of South Africa, Act 108 of 1996. See also *Re A (Conjoined Twins: Medical Treatment)* 2001 1 FLR , where these issues were raised in the English Court of Appeal in a particularly poignant way. Conjoined (Siamese) twins were born to parents with strong religious beliefs. One twin, Jodie, had a functioning heart and lungs; the other twin, Mary, had no heart or lung function and very little brain function. The medical evidence was that, separated from Mary, Jodie would be able to lead a relatively normal life. Mary, on the other hand, separated from Jodie, would die. If they were not separated, both twins would die. On the basis of unanimous medical evidence, the hospital was of the view that the twins should be separated, but the parents refused to give their consent. The hospital therefore applied to court for authority to perform the necessary surgery against the wishes of the parents. The court *a quo* (the court of the Family Division) granted the authority to the hospital, focusing on the best interests of the children and particularly on Mary. The court held that to prolong her life would not be to her advantage, and thus the proposed separation was in her best interests. With regard to the lawfulness of the operation, the court held that termination of a life could only be by withdrawal of treatment and, in this respect, the court stated that the severance of Mary's blood supply from Jodie constituted a withdrawal of treatment, not a positive act and was therefore lawful. The parents, however, appealed to the Court of Appeal, on the grounds that the court *a quo* had erred in holding that the operation was in Mary's best interests or in Jodie's best interests, or able to be performed legally. The appeal was dismissed on the grounds that, first, the parents' refusal of consent could be overridden by the court applying the welfare principle as contained in s 1(1) of the Children Act 1989. This principle placed the court under a duty to do what was dictated by the child's welfare. Furthermore, in this case a two-stage process was involved since, even if the operation was believed to be in the children's best interests, it still had to be determined whether it was lawful. The court held that the operation was an act of invasion of Mary's bodily integrity and bore no resemblance to the discontinuance of artificial feeding, which was sanctioned in previous English cases. The proposed operation would not be unlawful,

continued on next page

The central issue is the extent to which parents' interests can be appropriately accommodated in the new era of children's rights. By ratifying the Convention on the Rights of the Child, South Africa committed itself to the full implementation of the rights set out in it. In terms of these rights, children have a right to play an active role in society and to express their views freely (once they are capable of forming such views) on matters affecting them.[10] The Convention is apparently based on the philosophy of equality for children, and the best interests of the child are a "primary" (as opposed to a "paramount") consideration.[11] The issues which remain for consideration in this country are, first, whether a child under fourteen has the legal capacity to take independent medical decisions outside the area of abortion.[12] The second question relates to the limits of parental authority and the effect of the child's competence on the legal responsibility of parents: when should the child's view prevail over that of her parents in the event of a conflict?[13] The final issue relates to the question when the courts may intervene to override the wishes of parents and/or the views of a competent child.[14] So far, South African courts have not been asked to comment on the issues of child competency in medical situations.[15] The common-law position was subject to controversy.[16] Owing to a dearth of authority, two conflicting views developed: that of Boberg,[17] who was of the view that a minor had no possible competence to make such decisions, and that of Strauss, who held the contrary view[18] that it might be possible in certain circumstances for minors to possess such a competency, even without parental consent.

The issue of children's competence is currently under review in South Africa. The South African Law Commission in its Review of the Child Care Act addresses the issue of informed consent by children to medical treatment or surgical intervention, and questions whether the arbitrary (legal) age limits set in this regard are appropriate.[19] Informed consent would depend on an individual's level of mental

---

however, because a defence of necessity or a plea of quasi self-defence was available. The court referred to the Human Rights Act 1998 and held that there was nothing in that statute which demanded a different answer, since the doctrine of the sanctity of life respects the integrity of the human body and, in this case, the operation would give these children's bodies the integrity which nature had denied them. The case raises familiar issues and the judgment does not alter the existing law in this regard, but serves to illustrate an example of the complexity of the application of the best-interests test, particularly when one is required to balance competing interests. See also Douglas "Case reports" 2001 *Fam Law* 18.

10 Art 12.1 states: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

11 See art 3.1 of the CRC. Cf s 28(2) of the Constitution.

12 See s 2(1) of Choice on Termination of Pregnancy Act 92 of 1996.

13 See *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112 (HL).

14 See *Re R (a Minor) (Wardship: Consent to Treatment)* 1992 FLR 11; *Re W (a Minor) (Medical Treatment: Court's Jurisdiction)* 1992 3 WLR 758; Strauss *Doctor, patient and the law* (1991) 7–8, 171–174.

15 Ngwena "Health care decision-making and the competent minor: the limits of self-determination 1996 *Acta Juridica* 132 139. But see Van Heerden, Cockrell, Keightley *et al Boberg's Law of persons and the family* (1999) 542 for the position in cases of divorce and disputes as to custody.

16 Boberg *Law of persons* (1977) 643; cf Strauss *Doctor, patient and the law* (1991) 171–174.

17 Boberg *Law of persons* (1977) 643.

18 Strauss *Doctor, patient and the law* (1991) 7, 171–174.

19 See South African Law Commission *The review of the Child Care Act: First issue paper* Project 110 (1998) 93.

development, or mental maturity, and this may be influenced by experience of hospitalisation, treatment for terminal illness, and suffering. Apart from consent, what of refusal? Should minors with the requisite cognitive and emotional comprehension have the right to refuse life-sustaining treatment? Compassion, respect for personal autonomy, fairness and consistency are factors to be considered. Further procedural safeguards would be required, such as the competent minor's presumptive decision-making capacity, respect for parents' or guardian's authority, written certification by a psychiatrist, registered clinical psychologist or social worker, and the power of the courts to grant minors' wishes against those of their parents in highly exceptional and compelling circumstances.[20]

2 PARENTAL CONSENT

Generally, it is accepted that the consent of the patient is required for any medical examination, procedure or operation.[21] To give valid consent, the adult patient needs to have an essential comprehension of what is proposed and to agree to it.[22] The criterion to determine what risks must be disclosed is that of the "reasonable patient". Medical paternalism was firmly jettisoned in *Castell*'s case,[23] in which the court held that it was "clearly for the patient to decide whether he or she wishes to undergo the operation, in the exercise of the patient's fundamental right to self-determination".[24] The court in this case concluded that, in our law, for a patient's consent to constitute a justification which excludes the wrongfulness of medical treatment and its consequences, the doctor is obliged to warn the patient of any material risk in the proposed treatment. The risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.[25] Expert medical evidence would be relevant to determine what risks attach to particular treatment or operations. The ultimate issue, however, is whether the doctor's conduct conforms to the standard of reasonable care required by the law. That is a question for the court to determine, and it cannot be delegated to any other expert body.[26]

It is assumed that very young children are incapable of giving consent to medical treatment, and the law allows parents to give this consent. The essence of legal competency or capacity to make decisions is that the patient should be able to understand the nature and implications of the transactions. To consent to potential injury, informed consent is required, and this includes knowledge and awareness of the nature and extent of the harm, appreciation and understanding of such harm, and comprehensive consent to the harm.[27] Section 39(4) of the South African Child Care Act 74 of 1983 provides:

---

20 See South African Law Commission *Report on euthanasia* project 86 (1998) 46.

21 See Strauss *Doctor, patient and the law* (1991) ch 1; *Castell v De Greef* 1994 4 SA 408 (C). See also Ngwena "Health care decision-making and the competent minor: the limits of self-determination" 1996 *Acta Juridica* 132 134.

22 See *Castell v De Greef* 1994 4 SA 408 (C).

23 1994 4 SA 408 (C).

24 420I–J.

25 426G–H.

26 426H–J.

27 See *Castell v De Greef* 1994 4 SA 408 (C); Stern "Competence to refuse life-sustaining medical treatment" 1994 *LQR* 541; Earle "'Informed consent': Is there room for the reasonable patient in South African law?" 1995 *SALJ* 629; Van Oosten "*Castell v De Greef* and the doctrine of informed consent: Medical paternalism ousted in favour of patient autonomy" 1996 *De Jure* 164.

"Notwithstanding any rule of law to the contrary –

(a) any person over the age of 18 years shall be competent to consent, without the assistance of his parent or guardian, to the performance of any operation upon himself; and

(b) any person over the age of 14 years shall be competent to consent, without the assistance of his parent or guardian, to the performance of any medical treatment of himself or his child."

This suggests that children younger than the ages mentioned above are not competent to consent. Children below the age of fourteen apparently have no legal capacity to consent to any medical procedure or operation: they cannot play a role in medical decision-making, which leaves the decision as to the appropriate medical treatment or medical procedures totally in the hands of the child's parents or guardians or the medical profession, who are under a professional obligation to act in the best interests of the patient. In most cases, parents and doctors would probably decide jointly on a course of action if the child is younger than fourteen, with no obligation to consult the child. Children who are older than fourteen, but younger than eighteen, are competent to consent to the performance of any medical *treatment* on themselves[28] without the consent of their parents. They are, however, still incompetent to consent unilaterally to the performance of an *operation* upon themselves. Again, the decision-makers under such circumstances would be the parents and the doctor, obliged to act in the best interests of the child.

When the minor patient is older than eighteen, she possesses the competence to consent to the performance of any medical procedure or operation upon herself. The parents are then relatively powerless to enforce their own wishes with regard to medical decision-making relating to their child. Constitutionally, a child is a person under the age of eighteen.[29] The High Court is, however, the upper guardian of all minors, and is responsible for ensuring that the child's best interests are the guiding principle. The state can always be approached to intervene if it considers that the child's best interests are not being adequately served. In this context, the child may be defined as a person below the age of 21.

When a doctor feels that it is necessary to perform an operation upon or to provide treatment to a child for which she requires parental consent, and the parent/guardian refuses such consent, or is incompetent to give such consent owing to mental illness, or cannot be found, or is deceased, the Minister of Health may consent to the operation or treatment if he or she is satisfied that it is necessary.[30] The Minister acts in place of the parent or guardian, for example where a parent refuses consent because of his religious beliefs or culture,[31] but the treatment is clearly necessary and in the best interests of the child. The superintendent of a hospital may consent to life-saving treatment or an operation, or to an operation or medical treatment to save the child from lasting physical disability or injury, where the treatment or operation is so urgent that there is no time to wait for the necessary consent from the child's parent or guardian.[32]

---

28 S 39(4)(b). See Schäfer and Schäfer "Children, young persons and the Child Care Act" in Robinson (ed) *The law of children and young persons in South Africa* (1997) 73 92.

29 S 28(3) of the Constitution.

30 S 39(1) of the Child Care Act 74 of 1983.

31 Eg a Jehovah's Witness who objects to blood transfusions. See eg in English law *Re O (a Minor) (Medical Treatment)* 1993 1 FLR 149; *Re S (a Minor) (Medical Treatment)* 1993 1 FLR 376; *Re R (a Minor) (Blood Transfusion)* 1993 2 FLR 757.

32 S 39(2) of the Child Care Act 74 of 1983.

In some cases the state, in the form of the court as upper guardian, may need to override the wishes of both parents and child in the best interests of the child. With regard to non-therapeutic treatment, for example in the case of blood tests to determine paternity, parents may refuse consent to such tests, but their refusal may in certain cases be overridden by the court.[33] In such cases the child's best interests would be the dominant criterion to justify overruling parental refusal of consent. Conversely, parents may obviously not consent to a procedure which is to the detriment of the child.

3 THE CHILD'S CONSENT

Should one allow older children independence of action? The obvious incapacity of young children for rational decision-making precludes this option in their case, but wholly different considerations apply to adolescents. If the law recognises the ability of some children to provide or refuse a valid consent to medical treatment, how precisely should this relate to the powers of parents? Should parental consent be viewed simply as a substitute consent to be made available only where the child lacks capacity, or should it be viewed as an alternative consent remaining available despite the child's capacity? If so, there would be concurrent capacities, and this would raise the further issue of priority in the event of a conflict of opinion. Should the law prioritise the view of the child or that of the parent, or should the medical profession be allowed to determine a weighted order of consents?

These questions may become yet more complicated by ethical considerations of medical confidentiality.[34] Even if the requirement of parental consent is bypassed, it does not necessarily follow that a parent is not entitled to participate at all in the decision-making process. In the context of abortion, these issues may be treated as distinct. When is a minor entitled to have information kept confidential from her parents? Is only the competent child entitled to the same confidentiality as an adult patient? Are children entitled to expect confidentiality independently of their consent to treatment? Should the state be able through legislation to override the wishes of parents as to what is best for their child?

The Choice on Termination of Pregnancy Act bestows total autonomy upon a pregnant minor, allowing her to terminate her pregnancy without parental or guardian's consent.[35] No age limitations are imposed at all.[36] Issues arising from sexual activity are the ones that a young person is most likely to wish to keep confidential from her parents. Abortion has generated the greatest amount of litigation in the United States,[37] where it has been held that states may not constitutionally give parents an

---

33 See *E v E* 1940 TPD 333. The position was changed, however, by *Seetal v Pravitha* 1983 3 SA 827 (D) in which the court held (*obiter*) that it could authorise a blood test despite any objection by the parent caring for the child. See also *M v R* 1989 1 SA 416 (O); *Nell v Nell* 1990 3 SA 889 (T); *S v L* 1992 3 SA 713 (E); *D v K* 1997 2 BCLR 209 (N).

34 See Mason and McCall Smith *Law and medical ethics* (1994) ch 8, esp in relation to minors 178–180. See also *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112 (HL), where the issue was whether a doctor might lawfully provide contraceptives to an underage girl without parental knowledge or consent. There was no direct discussion in the case about whether the issues of knowledge and consent could be separated.

35 S 2(1)(a) Act 92 of 1996.

36 See the definition of "woman" in s 1 of Act 92 of 1996.

37 See *Planned Parenthood of Central Missouri v Danforth* 428 US 52 (1976); *Bellotti v Baird* 428 US 662 (1979); *Bellotti II* 443 US 662 (1979); *HL v Matheson* 450 US 398 (1981); *Ohio v Akron Center for Reproductive Health* 110 S Ct 1972 (1990); *Hodgson v Minnesota* 110 S Ct 2926 (1990).

absolute and arbitrary right of veto over abortion.[38] In some circumstances, however, it may be constitutional for a state to require that the parents of a pregnant minor be notified of an abortion.[39] States may also act constitutionally in requiring either parental notification or, alternatively, the consent of a judge.[40] The United States legislation will generally require notification of a decision to abort to one or possibly both parents, and will allow a short time, perhaps two days, to elapse after notification.[41] While parental-consent statutes[42] and parental-notification statutes without bypass procedures[43] have been struck down as unconstitutional, appropriately drafted notification statutes incorporating adequate bypass procedures have been held to be constitutional.

In the English case of *Gillick v West Norfolk and Wisbech Area Health Authority,*[44] the House of Lords confirmed the developmental nature of autonomy, with the result that children under the age of sixteen are permitted to give consent to medical treatment (rendering parental consent unnecessary) where they have "sufficient understanding and intelligence to understand the nature and implication of the proposed treatment".[45] The House of Lords in *Gillick* confirmed that a child could consent to medical treatment as long as she understood what was proposed. What a child was required to understand depended upon the circumstances, that is, her condition and the treatment proposed. While adults merely had to understand "in broad terms . . . the nature of the procedure",[46] a child was required to possess a greater understanding before she could give a valid consent.[47] A child who did not have sufficient understanding of what was proposed lacked the qualities of an autonomous individual. In this case, irrespective of her views, treatment might be carried out on the basis of consent given in her best interests by anyone with parental authority. The court therefore enabled the decisions of older children which may lead to deterioration in their health, or even death, to be set aside by a finding that the child does not possess sufficient understanding, given the circumstances of her condition and the proposed treatment.

In another English case, *Re E (a Minor) (Wardship: Treatment),*[48] E was a fifteen-year-old Jehovah's Witness who, having recently been diagnosed as suffering from leukaemia, refused his consent to the conventional treatment which necessitated blood transfusions. He had been given an alternative course of treatment. In view of the evidence that the treatment adopted was not functioning successfully, the hospital authority asked for permission to treat by the conventional means. Ward J

---

38 See *Planned Parenthood of Central Missouri v Danforth* 428 US 52 (1976); *Bellotti v Baird* 428US 662 (1979).

39 *HL v Matheson* 450 US 398 (1981).

40 *Ohio v Akron Center for Reproductive Health* 110 S Ct 1972 (1990).

41 See *Hodgson v Minnesota* 110 S Ct 2926 (1990), commenting on legislation in Minnesota.

42 As in *Planned Parenthood of Central Missouri v Danforth* 428 US 52 (1976).

43 As in *Bellotti v Baird* 428 US 662 (1979).

44 1986 AC 112 (HL).

45 188–189. See also 169.

46 *Chatterton v Gerson* 1980 3 WLR 1003; *Re C (Adult: Refusal of Treatment)* 1994 1 WLR 290 292, *per* Thorpe J.

47 The judgments are not, unfortunately, very clear as to precisely what is required for a sufficient understanding. Lord Scarman focuses on social and personal issues (189), Lord Fraser on the medical information that the doctor must provide (174). See Montgomery "Children as property?" 1985 *MLR* 323 337–338.

48 1993 1 FLR 386.

concluded that E did possess the intelligence necessary to make some decisions for himself, but that "there is a range of decisions of which some are outside his ability fully to grasp their implications".[49] In the view of the court, refusal of treatment came within this category, because E did not have sufficient understanding of

> "the pain he has yet to suffer, of the fear that he will be undergoing, of the distress not only occasioned by that fear but also – and importantly – the distress he will inevitably suffer as he, a loving son, helplessly watches his parents' and his family's distress . . . He may have some concept of the fact that he will die, but as to the manner of his death and to the extent of his and his family's suffering, I find he has not the ability to turn his mind to it, nor the will to do so."[50]

This requirement of understanding of the emotional pain which would be caused to the child's family from witnessing the death of or the pain suffered by the child, and the knowledge that she or he is the cause of their emotional distress, suggests that a child's refusal of treatment in such cases will seldom receive the imprimatur of the law.[51]

4 THE ROLE OF THE DOCTOR

There is a rational distinction to be made between giving consent and withholding it, based on the assumption that a doctor will act in the best interests of his patient. The parent-child relationship has been shifting away from protecting parental rights and intrinsic rights towards protecting the best interests of the minor, including recognition, where appropriate, of the minor's autonomy.[52] Respect for autonomy should not be treated as an overriding value, but must rather be weighed against other values, in particular the legitimate authority of the parent or guardian to decide for the minor, and the protection of the best interests of the minor.[53]

What is the extent of a doctor's power to act when what is proposed is considered by the doctor to be in the best medical interests of the child?[54] May a doctor proceed

---

49 391.

50 393.

51 See *Re S (a Minor) (Medical Treatment)* 1994 2 FLR 1065, in which S refused her consent to blood transfusions she had been receiving monthly since birth for thalassaemia. The court found her to be influenced by Jehovah's Witnesses (her mother having converted to the faith), although not to the extent that her will had been changed; however, it did not appear to the court that her capacity was sufficient to cope with the gravity of the decision (1076). See also *Re O (a Minor) (Medical Treatment)* 1993 2 FLR 149.

52 Art 12 1 of the United Nations Convention on the Rights of the Child.

53 S 28(2) of the Constitution.

54 In *Re F (Mental Patient: Sterilisation)* 1990 2 AC 1 (HL) the House of Lords held that beneficial medical treatment may be performed on a mentally handicapped adult where to do so would save her life or ensure the improvement of, or prevent deterioration in, her mental or physical health. Provided that individual decisions and treatment conformed to medical practice which would be accepted by a responsible body of medical opinion skilled in the particular field, they would be lawful. See also *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, but cf *Bolitoo v City and Hackney Health Authority* 1997 3 WLR 1151. In earlier English cases it had been suggested that all actions by the medical profession which conformed to this standard could be lawful on the basis of a general principle that they were not "hostile", and therefore not actionable in delict, if they were "acceptable in the ordinary conduct of every-day life" (*Wilson v Pringle* 1978 QB 237 and *Collins v Wilcock* [1984] 3 All ER 374). In 1988, however, the position accepted in *Re F* was that medical procedures performed without consent were *prima facie* unlawful unless a justification could be found for them.

to act with either a parent's or a child's consent alone?[55] A further issue that requires attention is whether a medical practitioner when faced with a possible claim for medical negligence in the case of an abortion by a minor could raise the defence of *volenti non fit injuria*.[56] This would ultimately be a test of whether the patient's consent had been a properly informed consent. The elements of the defence would need to be established. The minor undergoing the abortion must have had knowledge and must have been aware of the nature and extent of the harm or risk, appreciated the risk, and consented to the risk and all its consequences.[57] In the case of a young minor who had not undergone pre-abortion counselling, such a defence might be difficult to establish.

5 THE COURT'S ROLE AS UPPER GUARDIAN OF MINORS

Can the courts override the autonomous refusal by a minor to medical treatment and give consent to the proposed medical treatment?[58] It might be argued that where judges give consent to medical treatment refused by older children, this demonstrates a failure on the part of the judiciary to understand the concept of autonomy. Is paternalistic interference in the lives of others ever "justified by imperfections in the autonomy of people's choices"?[59] Decisions of older children may be regrettable, presenting as they do the risk of deterioration in health or even death.[60] The finality of such decisions prompts interference to prevent an irreversible decision from being made. But if society values autonomy and respects the right to bodily integrity, should such a decision not be respected? How can such paternalism be reconciled with an individualistic right to autonomy? Does autonomy bring with it the right to make choices which the individual may later regret (or even not live to regret)? What is the motivation behind paternalistic intervention? Why does society want to intervene to prevent competent children from refusing medical treatment and running the risk of harm or death unless there are clear explanations for this?

5 1 English law

The concept of bodily integrity and self-determination of the autonomous individual is a limited model. What can be detected from the English judgments is the extent

---

55 In England, the *Gillick* case (*supra* fn 44) had ostensibly supported the view that the wishes of a competent child should have priority over those of a parent, at least after suitable attempts had been made to persuade the child to involve her parents. It was apparent from the terms of the original departmental circular, and from the majority speeches, that it would be seen as unusual for a doctor to deal with a child without parental participation. There was evidently concern that any positive contribution which parents might make in the context of the particular family situation should be explored.

56 See *Castell v De Greef* 1994 4 SA 408(C) 420H–I, 423C–D.

57 Van Oosten *The doctrine of informed consent in medical law* (unpublished doctoral thesis, Unisa) (1989) 13–25 as cited in *Castell v De Greef* 1994 4 SA 408 (C) 425H–I.

58 In *Re W (a Minor) (Medical Treatment: Court's Jurisdiction)* 1992 3 WLR 758, a minor sixteen years old and suffering from anorexia refused her consent to be moved to a different treatment centre, wishing to remain where she was currently being treated. Lord Donaldson MR concluded that where a competent child was refusing her consent, the court or anyone with parental responsibility could give it. This is, in the words of Lord Donaldson MR, "the legal 'flak jacket' which protects the doctor from claims by the litigious" (767).

59 Harris *The value of life* (1985) 195.

60 See Bridgeman "Because we care? The medical treatment of children" in Bottomley and Sheldon (eds) *Feminist perspectives on health care law* (1998) 105.

to which the search for a legal basis upon which to provide treatment is motivated by the circumstances of existing relationships, a sense of responsibility, and sentiments of care and affection. In England it seems reasonably uncontentious that a sixteen-year-old acquires capacity to take medical decisions on attaining that age, and that there is no question of having to engage in an evaluation of individual maturity or intelligence.[61] The sole exception to this will be where the young person is mentally handicapped and therefore lacks the ability to give informed consent. Those under sixteen years of age must pass the "*Gillick* test" and, in theory at least, the leading cases require a high level of understanding, extending beyond the mechanics of the medical procedure involved, to the wider medical, moral and family considerations surrounding what is proposed.[62]

On the contraception question, the House of Lords has emphasised that a "*Gillick*-competent" child would need to understand the "moral and family" questions involved, as well as the medical issues surrounding the treatment itself. Where any adult decision-maker disagrees strongly with a child, the desire to label the child as incompetent must be almost overwhelming.[63] Where the child is capable of formulating an informed view but her preference is balanced against the harm to her welfare which will ensue if her wishes are observed, the child's consent or refusal is likely to be overridden.

There is a rational distinction drawn between giving consent and withholding it. The assumption may be made that a doctor will act in the best interests of his patient. Hence, in English law, if the doctor believes that a particular treatment is necessary for his patient, it is perfectly rational for the law to facilitate this as easily as possible and hence allow a "*Gillick*-competent" child to give a valid consent, and also to protect the child against parents opposed to what is professionally considered to be in the child's best medical interests. Conversely, the law will be hesitant to allow a child of whatever age to veto treatment designed for her benefit, particularly if a refusal would lead to the child's death or to permanent damage.[64]

The only principle which can be stated with any confidence in English law is that the court has jurisdiction to overrule the parents, the child, the medical profession or, indeed, all of them in performing its protective functions.[65] Competence is perceived as a developmental concept, although it seems that a child could be considered competent for some purposes but not for others. The acquisition of capacity requires not only the ability to understand the procedure of compulsory

---

61 S 8 of the Family Law Reform Act.

62 See Bainham *Children – The modern law* (1998) 277.

63 Bainham "The judge and the competent minor" 1992 *LQR* 194. See also *In Re W (a Minor) (Consent to Medical Treatment)* 1993 FLR 64; Lowe and Juss "Medical treatment – pragmatism and the search for principle" 1993 *MLR* 865.

64 See *Re W (a Minor) (Medical Treatment)* 1992 3 WLR 758. At first instance, Thorpe J, with support from W's consultant psychiatrist who specialised in anorexia nervosa, had "no doubt at all" that she was "*Gillick*-competent". Lord Donaldson MR, however, had serious doubts, contending that "it is a feature of anorexia nervosa that it is capable of destroying the ability to make an informed choice". See further Brazier and Bridge "Coercion or caring: Analysing adolescent autonomy" 1996 *LS* 84.

65 *Re L (Medical Treatment: Gillick Competency)* 1998 2 FLR 810. This was so even if the child was "*Gillick*-competent". See Downie "Consent to medical treatment – whose view of welfare?" 1999 *Fam Law* 818. Downie expresses concern over the potentially unlimited powers of the court's inherent jurisdiction to override the wishes of the minor.

medication, but also a full understanding and appreciation of the consequences of the treatment in terms of its possible side effects and the consequences of a failure to treat.

5 2 South African law

In South Africa, the High Court, as the upper guardian of all minors within its area of jurisdiction,[66] also has a very broad discretion to intervene between parent and child.[67] Recognising, however, that a child's custodian is generally better placed to make decisions pertaining to the child than a court, the High Court exercises its powers sparingly and usually only when requested to do so.[68] Good cause for intervention must be shown and the court must be satisfied that the child's welfare requires intervention.[69] There is no closed list of circumstances in which intervention may occur,[70] although where special circumstances indicate that the child's life, health or morals may be threatened by parental authority,[71] the court will intervene and there is no established form that intervention may take. The High Court may override parental objections and order that the child submit to a psychological examination[72] or that a blood sample be taken,[73] or authorise medical treatment.[74]

Judicial decisions are likely to be informed by attention to the utilitarian concept of children's welfare,[75] thereby avoiding the issue of children's rights.[76] The courts are faced with a complex dilemma in attempting to balance rights and welfare, which is itself a reflection of society's ambivalence about eroding the dependent status of children. It is possible to acknowledge the ways in which particular cases demonstrate judicial manipulation of welfare, while defending the judiciary's attempts to find an acceptable balance between a child's needs and her rights.

---

66 Grotius *Inleiding* 1 7 10, 1 9 2; Van Leeuwen *RHR* 1 16 4; Van der Linden *Koopmans Handboek* 1 5 2; Voet 26 5 5; *Calitz v Calitz* 1939 AD 56 63. South African courts do not have jurisdiction over children residing in a foreign country: *Di Bona v Di Bona* 1993 2 SA 682 (C). See also *Kambule v Kambule* [1998] 2 All SA 278 (E).

67 It was held (per James JP) in *Botes v Daly* 1976 2 SA 215 (N) 222H that the powers exercised by the High Court in this regard are substantially similar to those exercised by English courts in their delegated capacity as *parens patriae*.

68 *Ex parte D* 1958 2 SA 91 (GW). Apart from divorce proceedings, judicial intervention in the parent-child relationship usually comes about through motion proceedings: *Short v Naisby* 1955 3 SA 572 (D).

69 *Niemeyer v De Villiers* 1951 4 SA 100 (T); *Kustner v Hughes* 1970 3 SA 622 (W). Cf *Segal v Segal* 19714 SA 317 (C).

70 *Short v Naisby* 1955 3 SA 572 (D); *Horsford v De Jager* 1959 2 SA 152 (N).

71 *Calitz v Calitz* 1939 AD 56; *Van der Westhuizen v Van Wyk* 1952 2 SA 119 (GW); *Petersen v Kruger* 1975 4 SA 171 (C); *Re J (an infant)* 1981 2 SA 330 (Z).

72 *Davy v Douglas* (NPD 1997-10-27, case no 2958/97, unreported).

73 *Seetal v Pravitha* 1983 3 SA 827 (D). See also *M v R* 1989 1 SA 416 (O) and *Mann v Leach* 1998 2 All SA 217 (E).

74 *Oosthuizen v Rix* 1948 2 PH B65 (W) (power exercised only when clear that the parent's discretion has been improperly exercised to the detriment of the child).

75 See Sinclair "From parent's rights to children's rights" in Davel (ed) *Children's rights in a transitional society* (1999) 62 75. Sinclair discusses the tension between rights discourse, which is based on rules, and the best-interests-of-the-child standard, which is based on the exercise of discretion and the model of utility.

76 See Smith "Children's rights: Judicial ambivalence and social resistance" 1997 *IJL & F* 103.

Can the courts arrogate to themselves a right to intervene in the lives of children which is denied to natural parents?[77] What is the appropriate level of paternalism in promoting children's rights? Is this justified only in order to enable children to become rationally autonomous adults, or should the courts continue to exercise a protective jurisdiction in the face of evidence that this rationality has, in fact, been achieved before majority? It can be argued that, since many of these medical decisions are irreversible and of long-term significance to the young people concerned, an objective view is in the best interests of the minor. The question is whether to recognise autonomy in decision-making for adolescents, without excluding the opportunity for positive parental involvement. The issue is whether judges are better qualified than others to take what may be seen ultimately as value judgments about the desirability of medical intervention.

6 CHILDREN'S RIGHTS

Adolescent capacity, parental responsibility, medical paternalism and the role of the court need to be reconciled. The South African child is acknowledged as having constitutional rights to life, bodily integrity, privacy and human dignity.[78] Issues of the right to *refuse*, as well as the right to *consent*, require attention. The CRC requires States Parties, in ensuring the care and protection of the child, to take into account the rights and duties of, *inter alia*, the parents.[79] This illustrates the conflict which may have to be faced domestically as to the weight to be attached to the parents' position when giving effect to children's rights.[80] Where the interests of parents and children appear to conflict, what basis can be found for preferring the interests of one rather than the other? The best interests of the child are "paramount",[81] but the law must attempt to strike a balance in decision-making involving adolescents and with conflicts of interest between parents and children. Ultimately, it requires careful examination of what is at stake for the child and the parents, and a balancing or weighing of interests. The more fundamental the interest, and the more serious the potential consequences of failing to uphold it, the more likely it is that that interest will be regarded as primary. In cases of life and death, there are sound reasons for designating the child's interests as primary, and factors such as the religion of the parents as secondary.

This balancing process may need to include another element, which may be described as the "collective" family interest.[82] Children are not solely autonomous individuals, but are also members of a family unit, as are parents. Although they are individuals with independent interests, they are also part of the family community.

---

77 Eekelaar "The eclipse of parental rights" 1986 *LQR* 4 7–8.

78 See ch 2 of the Constitution.

79 Art 3 2. See also art 5, which requires States Parties to "respect the responsibilities, rights and duties of parents . . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance". Art 14 2 is in similar vein, and art 29, dealing generally with education, requires that the education of the child be directed to, *inter alia*, "[t]he development of respect for the child's parents".

80 See Bainham "'Honour thy father and thy mother': Children's rights and children's duties" in Douglas and Sebba (eds) *Children's rights and traditional values* (1998) 96.

81 S 28(2) of the Constitution.

82 See Bainham "'Honour thy father and thy mother': Children's rights and children's duties" in Douglas and Sebba (eds) *Children's rights and traditional values* (1998) 106.

While it may be a necessary requirement for upholding children's rights that children are accepted as autonomous people with claims and interests which are independent of, and which can conflict with, those of their parents, this does not reflect the full reality of the situation. In addition, there may be a collective interest of the family that should be considered. It is conceivable that, in some instances, the combined interests of the parents and the family taken as a whole may outweigh the interests of a particular child. An overemphasis on individual rights may result in the dilution of the interests of the family, which are then accorded inadequate attention.

The extensive long-standing debate about children's rights continues to raise controversy and dissension. Paternalism and a readiness to undermine children's participation and self-determination in legal proceedings which affect them have been criticised.[83] From a political perspective, the concept of rights has been closely scrutinised in terms of how it relates to duties, obligations and claims.[84] In terms of children's ability to make decisions in their own best interests, children are, obviously, less experienced than adults, although many adults do not possess the intelligence and reflective capacity to apply their experience. Similarly, extremely young children need material and emotional protection so that they may safely develop into intellectually and socially competent adults.

7 CONCLUSION

The United Nations Convention on the Rights of the Child ("CRC")[85] makes it clear that the protection of children needs to be balanced against a concern for their growth to independence and respect for their rights as individuals. The CRC, far from establishing a framework that would allow children to do simply what they want, relates rights to responsibilities. The right of children – particularly younger children – to their childhood must be protected against excessive demands imposed by the expectation that they should behave as adults. Though the CRC is child-centred, it should not be perceived as focusing only on the rights of children. It also sets out the rights, responsibilities and duties of parents and legal guardians. The right of parents and legal guardians is to provide "appropriate direction" in the exercise of rights by children, qualified by the need to recognise the importance of children's interests and the evolving capacities of the child. Parents and the family are to be given support and assistance, and it is only when children are not being given sufficient protection or help to express their wishes that the state has to intervene, with the child's interests a primary consideration.

The Convention does not merely provide a list of rights for children and impose a correlative set of duties on others, such as parents and the state. The CRC presents a framework whereby the very social and political status of children, and their relationship to their parents and to adults in general, may be viewed from a different perspective. It alters the balance of power between children and adults in such a way that children generally can play a more active part in decision-making. It also imposes duties on states to provide the necessary resources with which children can

---

83 Bainham "The judge and the competent minor" 1992 *LQR* 194.

84 Freeman "The limits of children's rights" in Freeman and Veerman (eds) *The ideologies of children's rights* (1992) 29.

85 Arts 3 1 and 12 1.

grow to realise their potential and can themselves contribute to social and political change throughout the world.[86]

The present South African law in this regard requires amendment to bring it into line with the CRC and the values enshrined in the Constitution. The Child Care Act,[87] although recognising that children of fourteen have the capacity to consent to treatment, is cautious in relation to consent to operations. By contrast, in the area of abortion, the provisions of the Choice on Termination of Pregnancy Act conflict not only with section 39(4) of the Child Care Act, but also with the provisions of the CRC. The lack of any provision for the notification of parents, and the lack of provision of state-funded mandatory counselling for pregnant minors, may not always provide for the paramount best interests of the child. Furthermore, the Act not only leaves those people unprotected, but also fails to take any cognisance of the family unit.

A lifestyle that makes teenage independence possible should not necessarily eclipse parental responsibility. The child's views can never be totally decisive if more than lip service is to be paid to the notion of the paramountcy of the best-interests principle. It is conceded that the coercive manipulation of a single parental decision at a time when a minor is approaching majority status[88] conveys no worthwhile gain on the minor or her relationship with her parents. It is submitted, however, that "in this hinterland between infancy and adulthood",[89] South African law needs to develop a more carefully articulated and coherent principle of self-determination and autonomy for children, balanced always against the not necessarily competing best interests of the child and the child's relationship with her parents.

> *At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what . . . lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution.*
>
> *Ackermann J in* S v Dzukuda 2000 11 BCLR 1252 (CC) *para* 11 *(internal footnotes omitted).*

86 Eekelaar "The importance of thinking that children have rights", in Alston, Parker and Seymour (eds) *Children, rights and the law* (1992) 221 234; Freeman "Taking children's rights more seriously" in Alston, Parker and Seymour *op cit* 52 53.

87 S 39(4) of Act 74 of 1983.

88 See *Meyer v Van Niekerk* 1976 1 SA 252 (T); *Coetzee v Meintjies* 1976 1 SA 257 (T); *Gordon v Barnard* 1977 1 SA 887 (C); *H v I* 1985 3 SA 237 (C); *L v H* 1992 2 SA 594 (E).

89 See Peiris "The *Gillick* case: Parental authority, teenage independence and public policy" 1987 *Current Legal Problems* 93 117.

Equality and non-discrimination in the new South African constitutional order (2): An important trilogy of decisions

Gretchen Carpenter
BA (Hons) LLB
Professor of Constitutional Law, University of South Africa

OPSOMMING

Gelykheid en nie-diskriminasie in die nuwe Suid-Afrikaanse staatsbestel (2): 'n belangrike trilogie uitsprake

In hierdie aflewering word drie belangrike uitsprake van die Konstitusionele Hof bespreek (*President of the Republic of South Africa v Hugo*, *Van der Linde v Prinsloo* en *Harksen v Lane*). Hierdie uitsprake (en veral dié in *Harksen v Lane*) vorm die kern van die Hof se gelykheidsmodel, waarop in latere uitsprake voortgebou is. Die hof se uitgangspunt is dat menswaardigheid gelykheidsberegting onderlê en dat die ontkenning van menswaardigheid en die gelykwaardigheid van individue sig manifesteer in ongelyke behandeling. Blote differensiasie kom egter nie noodwendig op ongelyke behandeling of onbillike diskriminasie neer nie. Om grondwetlik aanvegbaar te wees, moet ongelyke behandeling die uitwerking hê dat dit die individu of groep se menswaardigheid aantas of op 'n vergelykbaar ernstige wyse daarop inbreuk maak.

Die hof se benadering is deur verskeie skrywers gekritiseer op grond daarvan dat menswaardigheid as toetssteen vir gelykheidsvraagstukke nie in alle opsigte bevredig nie. Ook word daar beweer dat ten spyte van wat die regters uitdruklik sê, hulle tog steeds stereotipes perpetueer. Aan die ander kant stel die hof hom ongetwyfeld ten doel om 'n morele en waardegebaseerde basis vir gelykheidsberegting daar te stel.

1 INTRODUCTION

The first article in this series was devoted to a discussion of the early cases on equality after 1994, particularly in the Constitutional Court. This one deals with the cases in which the Constitutional Court developed a conceptual model of equality rights in South Africa.

2 PRESIDENTIAL PARDON AND EQUAL TREATMENT: *PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v HUGO*[1]

The Presidential Act 17 of 1994 provided for special remission of sentence for certain categories of prisoners, among them all mothers of minor children under the age of twelve. Applicant, a prisoner and single father with a son under the age of twelve, applied for release from prison, averring that the Act discriminated unfairly on the ground of sex.

---

1 1997 6 BCLR 708 (CC).

The High Court found that the Act was indeed in breach of the provisions of section 8 (IC).[2] Magid J found that the Presidential Act had made an "adverse distinction" between the applicant and any incarcerated mother, whether a single parent or not. This distinction was based purely on gender and was therefore unfair. He found, further, that the discrimination could not be "rescued" on the ground that it was reasonable and justifiable. It was suggested that "reasonableness" and "fairness" overlap substantially as regards meaning, but the anomaly resulting from the inclusion of the concept of "fairness" in section 8 and the criterion of "reasonableness" used in section 33 was not specifically addressed.

The matter then came before the Constitutional Court on appeal. The appeal was allowed, but the judgments handed down testified to substantial differences of opinion among the members of the court.

The judgment of the court was delivered by Goldstone J. He first dwelt at some length on the question whether the act of extending an amnesty to prisoners was still a prerogative act under the Constitution of the Republic of South Africa, 1993 (the interim Constitution – (IC) and whether the Presidential Act was justiciable. He quoted with approval from the dictum of Wilson J in the Canadian case of *Operation Dismantle v The Queen*,[3] concluding that it was the court's duty to decide whether an act of the executive violated a constitutionally protected right.[4]

The judge commented that it would have been difficult to mount a successful challenge against the pardon or reprieve of a single prisoner, and warned that even the provisions of section 8 would have limited application in such a case, since no prisoner has the *right* to be pardoned or reprieved or to have a sentence commuted.[5] In *Hugo*, however, the power of pardon had been exercised "wholesale", that is, by conferring a benefit on certain categories of prisoners. Goldstone J emphasised that discrimination is inherent in such a case. A line must needs be drawn somewhere, and that could adversely affect those who narrowly missed the prescribed cut-off date, for example. This is inevitable wherever no individual assessment takes place.

It was conceded that the Presidential Act discriminated both between mothers and fathers and between mothers with children under twelve and those whose children were older. Discrimination on the ground of sex was a listed ground in terms of section 8(2). The presumption contained in section 8(4) therefore came into operation, so that the respondent (appellant) had to prove that the discrimination was in fact not unfair.

The reason given by the President for granting remission to mothers of young children was that it would be in the interests of the children, since mothers are generally the ones primarily responsible for the care of small children in our society. The court accepted that in general mothers bear an unequal share of the burden of child rearing, but Goldstone J warned that this did not mean that it was necessarily fair to discriminate between women and men on that basis. However, what happened in this case was that the individuals who were being discriminated against (fathers of young children and parents of children over twelve) were not individuals who

2 *Hugo v President of the Republic of South Africa* 1996 6 BCLR 876 (D); 1996 4 SA 1012 (D).
3 1985 13 CRR 287 309.
4 Para 29. This aspect will not be dealt with here.
5 *Ibid.*

belonged to a class who had historically been disadvantaged. But "this does not mean that the discrimination is fair".[6] The judge continued:

> "It is not enough for the appellants to say that the impact of the discrimination in the case under consideration affected members of a group that were not historically disadvantaged . . . In section 8(3), the interim Constitution contains an express recognition that there is a need for measures to seek to alleviate the disadvantage which is the product of past discrimination. 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 our 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."[7]

The judge emphasised that to determine whether the impact of the discrimination is unfair, one must have regard not only to the group which has been disadvantaged, but also to the nature of the power in terms of which the discrimination is made and the nature of the interests affected.[8]

The court's finding that the discrimination was not unfair was based on both practical and constitutional grounds. Among the practical grounds was the consideration that there were many more male prisoners than female prisoners and that the release of all fathers would have meant a large-scale release of male prisoners. This, it was argued, would have led to public outcry in the light of escalating crime levels and would not have contributed materially to the President's purpose of releasing those responsible for raising young children.[9]

The constitutional argument was that the Presidential Act conferred a benefit on mothers of young children, a group that is particularly vulnerable in South African society. Furthermore, the release conferred a benefit on the children. As far as incarcerated fathers were concerned, they could not argue that the refusal to release them denied or limited their freedom, since this limitation was imposed by their conviction and not by the Act. The Act merely denied them an early release to which they were not entitled anyway. Nor were they precluded from appealing directly to the President for remission of sentence based on their own individual circumstances. In short:

> "The Presidential Act may have denied them an opportunity it afforded women, but it cannot be said that it fundamentally impaired their rights of dignity or sense of equal worth."[10]

The majority of the court therefore found that the impact of the discrimination on the fathers concerned was not unfair, and that it therefore was not necessary to consider the role of the limitation clause (s 33).

---

6 Para 40.

7 Para 41.

8 Para 43. These criteria are reiterated throughout the Constitutional Court's later judgments on equality.

9 Para 46. A number of commentators have pointed out that this argument is logically flawed. The comparators used should have been male and female single-parent prisoners with children under the age of twelve.

10 Para 47.

Separate concurring judgments were handed down by Didcott, Mokgoro and O'Regan JJ. That of Didcott J is not relevant to this discussion. Mokgoro J agreed with Goldstone J about the importance of the prohibition on discrimination and about the test to be applied to determine whether discrimination is unfair. She disagreed, however, about the way in which the test should be applied:

> "In my view, denying men the opportunity to be released from prison in order to resume rearing their children, entirely on the basis of stereotypical assumptions concerning men's aptitude at child rearing, is an infringement upon their equality and dignity."[11]

She added that section 8 (IC) provided an opportunity to move away from gender stereotyping. Not only did such stereotypes deprive *women* of a fair opportunity to participate in public life and from gaining economic self-sufficiency; they also deprive society of the valuable contribution women can make. By the same token, society has deprived fathers of the opportunity to participate in child rearing. This was recognised by the Constitutional Court in *Fraser v Children's Court, Pretoria North*.[12] The judge expressed the concern that the court may, because of its stance in *Hugo*, be perceived as retreating from the principles laid down in that case.

Mokgoro J added that she was unpersuaded by the emphasis placed on the vulnerable position of mothers of young children in the majority judgment; although such mothers may be at a general disadvantage in South Africa, there was no evidence that they were specifically disadvantaged in the penal situation. There should be some correlation between the nature of the disadvantage suffered by a particular group and the measures taken to alleviate the disadvantage.[13] She therefore found that the Presidential Act did discriminate unfairly, and went on to consider whether this discrimination could nevertheless be justified in terms of the limitation clause.

Considerable attention was then devoted to the requirement that any limitation of a constitutional right must be in terms of law of general application, and the judge came to the conclusion that the Presidential Act did meet this requirement. Without going into detail on this issue (which is more complex than would appear at a first glance), it is submitted that this was correct. Mokgoro J then dealt rather more expeditiously with the other requirements of section 33(1) and found that the aim of the Act (to ensure that young children are properly cared for) was legitimate and further that the Act was a proportionate response despite the gender stereotyping, about which she had expressed reservations. The judge therefore concluded that the measure was justified even though it discriminated unfairly towards certain fathers in society.

Kriegler J was the only member of the court who found that the Presidential Act constituted an unconstitutional limitation of the right contained in section 8(2) of the Constitution. He conceded that the case in issue was a very hard one:

> "[B]y anyone's lights, it seems mean spirited in the extreme to scrutinise closely the validity of an act of clemency by the newly inaugurated President aimed at enabling a few hundred women prisoners, sentenced for less reprehensible crimes, to care for their young children."[14]

---

11 Para 92.

12 1997 2 BCLR 153 (CC). See the discussion in the first article in this series (2001 *THRHR* 409).

13 Para 94.

14 Para 63 fn 1.

He further acknowledged that it was not only a hard case "but an awkward one for the development of our equality jurisprudence, one in which application to reality is slippery".[15] He nevertheless found that the Presidential Act had transgressed the bounds of section 8(2).

First of all, the judge pointed out (correctly, I submit) that it was not open to the court to make its own enquiries about the prison population and then to conclude that a large number of male prisoners would have been released had there been no differentiation between male and female prisoners. Nor could the court speculate about whether this would have caused public disquiet or what the administrative implications would have been.[16] Secondly, the question was not whether the objective of the Act was praiseworthy. That was common cause. He emphasised:

> "The crisp question is whether the Act, regardless of its impressive provenance and charitable appearance, complies with the demands of s 8(2) . . . The immediate focus is s 8(2), read with and fortified by s 8(4); but the wider context is also important. Discrimination founded on gender or sex was manifestly a serious concern of the drafters of the Constitution . . . [17]
>
> The importance of equality in the constitutional scheme bears repetition . . . Equality is our Constitution's focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred."[18]

He also pointed out that the creation of a presumption of unfairness (in s 8(4)) further reinforced the status of equality and that the special mention of both race and gender in the Constitution (for instance, in the preamble) underlined the importance of these issues, even among the listed categories of grounds of discrimination.[19]

Kriegler J then went on to make three observations in regard to the rebuttal of the presumption of unfairness. First of all, the fact that discrimination may have been unintentional or even committed in good faith does not make it fair. Bad faith or malice is not a requirement for a finding of unfairness. Secondly, the "rebutting" factors cannot themselves be unfair or otherwise objectionable: while

> "our society currently exhibits deeply entrenched patterns of inequality, these cannot justify a perpetuation of inequality . . . A statute or conduct . . . that not only presupposes them but is likely to promote their continuation, is even less likely to pass muster".[20]

Thirdly, the factors that could justify interference in terms of the limitation provision (s 33) must be distinguished from the factors relevant to the fairness enquiry.

Elaborating on the above, Kriegler J stated categorically that a finding of fairness could not be based on the good faith manifested by the President in adopting the measure in question. Nor can the fact that, as an empirically confirmed fact, mothers are the primary care givers in South Africa, establish fairness. He rejected the conclusion that although the discrimination inherent in the Presidential Act was based

---

15 Para 66.
16 Para 72.
17 Para 73.
18 Para 74.
19 Para 75.
20 Para 77. These comments are of particular interest in regard to so-called affirmative action provisions, which are often viewed (particularly by the "victims" or non-beneficiaries) as reverse discrimination and therefore unfair. There is a very fine line to be drawn here.

on this very stereotyping, it could nevertheless be vindicated as not unfair. Indeed, in his words, the notion that women are to be regarded as primary care givers of young children, is a root cause of women's inequality in South African society:

> "It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role.[21] It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns. Section 8 and the other provisions mentioned outlawing gender or sex discrimination were designed to undermine and not to perpetuate patterns of discrimination of this kind . . . *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.*"[22]

(Kriegler J based his argument *inter alia* on the Constitutional Court's approach in *Brink v Kitshoff*.)[23]

He then asked whether it was relevant that an inherently objectionable generalisation was used to benefit a specific group of women prisoners. He found that there was no suggestion that the measure was designed as compensation for wrongs of the past or an attempt to make up for past discrimination against women. On the contrary: the main rationale for the measure was the interests of the young children involved.

The judge's next comment is a very interesting one in the context of the provision made in the Constitution for measures aimed at redressing past inequalities (commonly known as "affirmative action"). He stated that he was prepared to accept the possibility that, in very narrow circumstances, a generalisation that reflected a discriminatory reality could be justified if its ultimate implications were equalising. However, there were two criteria, he suggested, that would have to be met. First of all, the advantages flowing from the perpetuation of a stereotype would need to compensate for "obvious and profoundly troubling disadvantages".[24] *In casu*, the benefit to some 440 women released from prison could not outweigh the disadvantage attendant on the perpetuation of perceptions based on paternalistic attitudes or the

> "more diffuse disadvantage [that ensues] when society imposes roles on men and women, not by virtue of their individual characteristics, qualities or choices, but on the basis of predetermined, albeit time-honoured, gender scripts".[25]

The second criterion is that there should be some connection between the discriminatory action and the advantage to the previously disadvantaged. This, too, was not met, since the present context was a specifically penal one, and there was no suggestion that women had suffered discrimination in a penal context. Just because women have suffered discrimination generally, this does not justify compensatory benefits in every context.[26]

The judge emphasised that discrimination based on gender or sex will not inevitably be found to be irredeemably unfair; what is needed is that the justification for such discrimination must be persuasive. He added that his finding should clearly not

---

21 In this regard, see Bonthuys "Labours of love: Child custody and the division of matrimonial property at divorce" 2001 *THRHR* 192.

22 Para 80, internal footnotes omitted and emphasis supplied.

23 1996 6 BCLR 752 (CC); 1996 4 SA 197 (CC). See the discussion in the previous article in this series, 2001 *THRHR* 409.

24 Para 82.

25 Para 83.

26 Para 84. See the approach of Mokgoro J above.

be construed as discouraging the conferment of benefits on previously disadvantaged groups or classes or that the legislature or executive should never recognise gender or sex distinctions. But such distinctions may not discriminate unfairly.

O'Regan J (concurring in the majority judgment) offered yet another slightly different perspective. First of all, she agreed with Goldstone and Kriegler JJ that, as a matter of fact in South African society, mothers do bear a greater share than fathers of the burden of child-rearing. However, she found the approach of Kriegler J (that two strict requirements must be met before a generalisation can be accepted as fair discrimination) too restrictive. Even when reliance is placed on a stereotype or generalisation, the question is always whether the impact of the discrimination is unfair.[27] She expressed her own approach as follows:

> "To determine whether the discrimination is unfair it is necessary to recognise that although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality. There are at least two factors relevant to the determination of unfairness: it is necessary to look at the group or groups which have suffered discrimination in the particular case and at the effect of the discrimination on the interests of those concerned. The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair. In determining the effect of the discrimination, the reasons given by the agency responsible for the discrimination will be only of indirect relevance. However, should the discrimination in any particular case be held to be unfair, the reason for the discriminatory act may well be central to an investigation into whether the discrimination is nevertheless justified in terms of section 33 of the interim Constitution."

O'Regan J found that the disadvantage suffered by women lay not in the President's statement that they were in fact the primary care givers, but in the social fact itself. The reliance by the President when deciding to confer an advantage on some women did not, in her view, harm other women. Nor did it impose any permanent or substantial disadvantage on the single-parent fathers who were in prison.

2 1 Comment

The judgment in *Hugo* attracted a good deal of comment, much of it critical. As Susie Cowen[28] puts it:"[A]t the heart of the debate . . . is the power of the Court's jurisprudence, *instrumentally*, to help achieve the transformed society that South Africa seeks."

In his critique of the Constitutional Court's dignity-based approach to the issues of equal protection and non-discrimination, Anton Fagan[29] contends that Goldstone J put dignity where it does not belong: the Presidential Act did not impair the dignity of incarcerated fathers, though it may indeed have discriminated against them. He argues that dignity may be impaired without impinging on equality, and *vice versa*. The two rights are therefore not co-extensive. However, Fagan's main criticism is aimed at the later judgments and will be dealt with there.

---

27 Para 111.

28 "Can 'dignity' guide South Africa's equality jurisprudence?" 2001 *SAJHR* 34 35.

29 "Dignity and unfair discrimination: A value misplaced and a right misunderstood" 1998 *SAJHR* 220.

Cathi Albertyn and Beth Goldblatt also express reservations about the majority approach in *Hugo*.[30] They see equality as a crucial element in the transformation process; one must agree that the achievement of substantive equality, as postulated in the Constitution, necessarily implies the presence of a transformative element. (However, as Goldstone J pointed out in *Hugo*, there is more to equality than this, otherwise only those who can show that they have been disadvantaged by inequalities in the past would be able to lay claim to the benefit of the equality clause.) The authors aver that the majority in *Hugo* moved from a group-based understanding of material disadvantage to an individualistic dignity-based conception,[31] thus moving away from the approach laid down by O'Regan J in *Brink v Kitshoff*.[32] They feel that Goldstone J's approach tends to reduce the meaning of the equality right to the right to dignity and that the court failed to place the applicant in his own social context.[33] The problem with the dignity-based approach, according to the authors, is that it centres the equality right on "individual feelings of affront" and moves the emphasis away from the transformative use of the right.[34] They prefer the approach of O'Regan J to that of Kriegler J, because the former attempts to alleviate short-term advantage rather than to concentrate on what is desirable in the long term. They argue, further, that the court confused the unfairness stage of the enquiry with the limitation stage: in particular, the criterion of the nature and purpose of the power sought to be exercised forms part of the justification stage.[35] It is suggested that the Presidential Act could have been justified under the limitation clause (s 33(1) (IC)). This was in fact the approach of Mokgoro J, but there is no discussion of her judgment, only a brief reference to it. Finally, Albertyn and Goldblatt warn that problems relating to the application of the "law of general application" requirement in the limitation clause could push the court to decide matters under unfairness rather than to apply the limitation clause.

The most trenchant criticism against the majority judgment in *Hugo* is probably that of Dennis Davis.[36] Davis is of the view that principle appeared to have made way for pragmatism – in other words, that practical considerations prevailed over principle and constitutional values.[37] He feels that the exercise of the presidential pardon was not subjected to the same rigorous constitutional scrutiny as other forms of state power. Furthermore, Davis questions the reference to the judgment in *Egan v Canada*[38] (in which dignity was held to lie at the heart of non-discrimination), holding that Goldstone J did not examine the *dictum* in question within the context of the Canadian debate. He agrees with Kriegler J that the majority conflated the first and second stages of the enquiry by speculating about outcomes instead of requiring rational justification. (Once again, though, scant attention is given to the judgment of Mokgoro J, who did in fact separate the two stages of the enquiry.)

---

30 "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality" 1998 *SAJHR* 248.
31 257.
32 1996 5 BCLR 752 (CC).
33 264.
34 272.
35 271.
36 "Equality" in *Democracy and deliberation: Transformation and the South African legal order* (1999) 70 *et seq*.
37 78.
38 (1995) 29 CRR 2(d) 79 104.

In short, Davis J accuses the majority in *Hugo* of leaving a "trail of confusion" because of its insufficient contextualisation of the problem.[39] He also questions the validity of Albertyn and Goldblatt's (somewhat tentative) defence of the position taken by O'Regan J: the release of single mothers only can hardly be construed as a short-term measure on the road to the achievement of equality between the sexes.

For the reasons stated above, Davis suggests that the court should have looked for an appropriate level of scrutiny when reviewing the exercise of prerogative power. In reality, the way in which the court applied the equality clause led to an outcome which was "the very antithesis of a culture of reason";[40] in fact, the judgment did nothing to enhance Hugo's dignity and freedom as a father.

I find myself in agreement with the critics of the majority judgment. Nor am I convinced by O'Regan J's approach: by no stretch of the imagination can the Presidential Act be seen as a measure aimed at correcting past disadvantage suffered by women (more specifically, incarcerated women who are single parents of young children) in comparison with men in the same position. Thus the matter was not sufficiently contextualised. Mokgoro J's argument has the virtue of being a consistent and systematic application – whether one agrees with the outcome or not. However, my vote must go to the judgment of Kriegler J as the one most in keeping with the values underlying the Constitution.

Secondly, when reading the judgment, one is struck throughout by the fact that the court seemed to pay far less attention to the welfare of the intended recipients of the Presidential bounty – young children whose only parent was in prison. The fact that the parents of such children shared in the bounty was not of primary importance. The emphasis on discrimination based on sex was therefore somewhat misplaced. It should have been on the unlisted ground: the real victims were young children whose only parent was a father rather than a mother and who was in prison.

Thus the majority judgment may be criticised on the grounds that the emphasis on human dignity is misplaced, that there was insufficient contextualisation and that the persons or groups most affected by it were not correctly identified.

3 STATUTORY PRESUMPTIONS IN CIVIL CASES: *PRINSLOO v VAN DER LINDE*[41]

The judgment in this case was handed down on the same day as that in *Hugo*. The main issue before the court was whether section 84 of the Forest Act 122 of 1984, which created a presumption of negligence in a civil action resulting from damage caused by a veld, forest or mountain fire, was constitutional (a somewhat unlikely factual setting for a groundbreaking case on equality!). The applicant contended that this provision differentiated between defendants in veld fire cases and those in other delictual cases and that this differentiation had no rational basis.

The majority judgment was a joint judgment of Ackermann, O'Regan and Sachs JJ. A separate concurring judgment was handed down by Didcott J.

The first point made by the three judges was that if every differentiation made in terms of the law constituted unequal treatment which had to be shown to be fair or

39 82.
40 83.
41 1997 6 BCLR 759 (CC).

to be justified in terms of the limitation clause, the courts would be compelled to review the reasonableness of every classification of rights, duties, privileges and so on, flowing from the law. This would clearly create an impossible situation. It was therefore necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation.[42]

Turning to the possible usefulness of foreign jurisprudence, the court held:

> "Even a cursory summary of international experience indicates that there are no universally accepted bright lines for determining whether or not an equality or non-discrimination right has been breached. The varying emphases given in different countries depend on a combination of the texts to be interpreted, modes of doctrinal articulation, historical backgrounds and evolving standards."[43]

The court concluded that a simplistic transplantation of formulae, modes of classification or degrees of scrutiny from the jurisprudence of other countries was not desirable. At the same time, section 35(1) of the interim Constitution enjoined courts, when interpreting the Bill of Rights, to promote the values which underlie an open and democratic society based on freedom and equality. Since South Africa was, in the words of the court, "a newcomer when it comes to ensuring constitutional respect for equality",[44] and also shared certain patterns of inequality found all over the world, any development of equality doctrine would have to take into account both our specific situation and the shared problems. It was emphasised that the court should eschew sweeping interpretations and allow equality doctrine to develop slowly:

> "This is clearly an area where issues should be dealt with incrementally on a case by case basis with special emphasis on the actual context in which each problem arises."[45]

The judges then proceeded to examine the text of section 8, and pointed out that although section 8(1) was couched in positive and section 8(2) in negative terms, it was neither desirable nor feasible to divide the subsections of the provision into watertight compartments. The concept of differentiation was held to lie at the heart of equality jurisprudence and section 8 in particular. On a comprehensive (conjunctive) reading of the section, it was suggested that two forms of differentiation arise: the first does not involve unfair discrimination; the second does.

The first type of differentiation is constituted by legitimate classification, which is found in every constitutional state. Such "mere differentiation" may not regulate in an arbitrary manner or manifest "naked preferences". It must serve a rational and legitimate governmental purpose.[46] The first step, then, once the presence of differentiation has been established, is to determine whether there is a rational relationship between the differentiation and the governmental purpose underlying the justification proffered for it. In the absence of such a rational relationship, the differentiation cannot stand; it is necessary, but not sufficient, for a finding of fairness to be made.[47] The further element was to be found in section 8(2) (IC), which refers only to *unfair* discrimination, and distinguishes between two forms of such discrimination; the first on certain grounds that are specifically enumerated,

---

42 Para 17.
43 Para 18.
44 Para 20.
45 *Ibid.*
46 Para 25.
47 Para 26.

and the second on unspecified grounds, those covered by the phrase "without derogating from the generality of this provision".[48]

Proof of unfair discrimination on a specified ground[49] was facilitated by a presumption of unfairness which took effect as soon as there was *prima facie* proof of discrimination. Unspecified grounds of discrimination did not enjoy the benefit of such a presumption. The question was therefore how the phrase "without derogating from the generality of this provision" in section 8(2) was to be interpreted. Did it mean that every conceivable ground of discrimination could be found to be unfair, and that the only difference between specified and unspecified grounds lay in the absence of a presumption of unfairness? Or was it necessary to interpret the phrase somewhat restrictively, for example to include "listed and analogous grounds" only?

The problem was addressed by a number of commentators on the interim Constitution. One school of thought was in favour of following the Canadian lead and to restrict recognition of unenumerated grounds to grounds analogous to the listed grounds.[50] Others regarded this approach as too narrow.[51] According to the latter, the listed grounds do not all involve immutable personal characteristics, as is suggested by Cachalia *et al*, but in fact give significant protection to personal choice. If a common theme can be identified, it is that the listed grounds are "constitutive of human identity"[52] or may be said to describe human attributes. The warning is sounded that accepting this interpretation may mean that juristic persons cannot claim protection under the non-discrimination clause (though this does not exclude the possibility that the wider equal protection clause could be invoked).

The court in *Prinsloo* did not find the wording of section 8(2) particularly helpful:

> "A purely literal reading and application of the phrase 'without derogating from the generality of this provision' would lead to the conclusion that discrimination on any ground whatsoever is proscribed, *provided it is unfair*. Such a reading would provide no guidance as to what unfair meant in regard to this second form of discrimination. It would provide very little, if any, guidance in deciding when a differentiation which passed the rational relationship threshold constituted unfair discrimination . . . [W]hen read in its full historical and evolutionary context and in the light of the purpose of section 8 as a whole, and section 8(2) in particular, the second form of unfair discrimination cannot be given such an extremely wide and unstructured meaning."[53]

Unfortunately this statement is also anything but clear. It would seem that the court is conflating the enquiry into what constitutes discrimination for the purposes of section 8, with the enquiry into the unfairness of the discrimination. The difficulty is, of course, the result of the way in which section 8 was worded. It is not always easy to determine where differentiation in terms of section 8(1) ends and discrimination in terms of section 8(2) starts and this is compounded by the listed/unlisted dichotomy. Is discrimination on an unlisted ground a different species altogether, or

---

48 Para 27.

49 The grounds specified by s 8(2) (IC) were: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture and language. S 9(3) (IC) lists all of these, plus pregnancy, marital status and birth.

50 Cachalia *et al Fundamental rights in the new Constitution* (1994) 30.

51 See Kentridge in Chaskalson *et al Constitutional law of South Africa* (1994) 14–22; Albertyn and Kentridge "Introducing the right to equality in the interim Constitution" 1994 *SAJHR* 149 168–169.

52 Kentridge *loc cit.*

53 Para 29, emphasis added.

does the difference relate purely to the onus of proving unfairness? To my mind, the listing itself cannot be determinative of what constitutes discrimination as opposed to mere differentiation, although there is a cogent argument to be made out that the listed grounds are more than mere examples of grounds for discrimination. They represent factors that are constitutive of human identity, as Kentridge suggests, and are also indicators of grounds on which serious disadvantage can be caused as a result of discrimination.

(The equivalent provision in the 1996 Constitution is much more simply worded. It merely proscribes unfair discrimination on "one or more grounds, *including* race, gender, . . ." and so on. However, the underlying problem remains: are these merely examples, or do the listed grounds form a *genus* requiring the court to adopt a restrictive interpretation to unlisted grounds?)

The court then proceeded to analyse section 8 in greater detail. It was pointed out that the South African provision was more comprehensive than that in the United States Constitution, for example, which merely refers, in the Fourteenth Amendment, to "the equal protection of the laws". This concept was reflected in section 8(1), which enshrined "equality before the law and equal protection of the law". Then section 8(2) went further, expressly proscribing "unfair discrimination", whether direct or indirect, and whether on a specified or an unspecified ground. The judges emphasised that it is not "unfair differentiation" which was proscribed, but "unfair discrimination", and that the history of South Africa has resulted in the word "discrimination" acquiring a

> "particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. *In short, they were denied recognition of their inherent dignity . . . In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity*".[54]

Support for this dignity-based concept of equality was sought in the words of Ronald Dworkin,[55] who defines the right to equality as the right to be treated as equals, adding the rider that this does not always mean the right to receive equal treatment, and in the judgment in the *Hugo* case[56] in which it was said 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"

and in which the words of the Canadian court in *Egan v Canada*[57] that inherent human dignity lies at the heart of individual rights in a free and democratic society, were endorsed.

---

54 Para 31, emphasis added.
55 *Taking rights seriously* (1977) 227.
56 *Supra* para 41.
57 *Supra.*

The court continued to say that when differential treatment impairs the fundamental dignity of persons as human beings, this will constitute a clear breach of the non-discrimination provision. However, there are also other forms of discrimination which may affect persons adversely in a comparably serious manner. Such discrimination may also constitute a breach of section 8(2) (IC).[58] *In casu*, there was a differentiation between defendants in veld fire issues and defendants in other cases as regards the onus of proof. Though such a differentiation could not be said to impact on the fundamental dignity of the applicant, the question was whether it affected his rights in a comparably serious manner.

Counsel for the applicant argued that section 84 failed the rational connection test because it did not use the least onerous means of achieving the objectives of the legislation (to prevent and combat veld fires). The court rejected this argument on two grounds: first of all, a criterion for justification (the least onerous means test) was being introduced at the definitional or threshold stage of the enquiry (the first stage, at which the presence of an infringement of a right is determined), instead of the justification stage, at which the application of the limitation clause is considered. The issue at the initial stage of the enquiry is simply whether there is a rational connection between means and end; if the imposition of a reverse onus meets this requirement (ie as long as it is not arbitrary), section 8(1) will not have been breached. The applicant was therefore jumping the gun.

Secondly, the applicant was assuming that there is a "presumption of innocence" in civil cases which is analogous to and as weighty as the presumption in criminal cases and as equally vulnerable to challenge. The court found that there was no basis for this underlying assumption.

The court had no difficulty in deciding that the prevention of veld fires is a legitimate governmental objective, and that the imposition of a reverse onus on a defendant in veld fire cases is rationally connected to this objective. However,

> "[t]his does not end the matter, because despite the existence of the aforementioned rational relationship between means and purpose, the particular differentiation might still constitute unfair discrimination under the second form of discrimination [ie discrimination on an unenumerated ground] mentioned in section 8(2) [IC]".[59]

The judges held simply that such differentiation can by no stretch of the imagination be said to impair the dignity of the party on whom the onus is imposed; nor can it be said that the differentiation "in some or other invidious way adversely affects [that party] in a comparably serious manner".[60]

A separate concurring judgment was handed down by Didcott J. In it, he made some observations about what he saw as the appropriate approach to equality issues. He pointed out that although these had arisen frequently in the two years since the Constitutional Court had begun its work, and although some of the challenges had proved successful,

> "[n]ot even then, however, have we yet developed a complete and coherent jurisprudence on the subject of equality. Sooner or later, no doubt, we shall have to enunciate one. But so complex, so subtle and so delicate a task ought not to be undertaken in a case inappropriate for it. We may otherwise overlook nuances and implications of the principle to which our thoughts are not immediately attuned. I do

58 Para 33.
59 Para 41.
60 *Ibid.*

> not regard the present case as a suitable opportunity for any such general endeavour. It suffices for our purposes there, I consider, to say no more than this. Mere differentiation can never amount, in itself and on its own, to discrimination or unequal treatment in the constitutional sense. The law differentiates between people on innumerable scores which sound unobjectionable and may often be unavoidable . . . What surely counts at least in those and all other instances of differentiation is always how rational in its basis, nature, scope and objectives the particular one appears to be, and sometimes how fair it also looks in those respects".[61]

He continued to say that there were two aspects left open by his judgment: the first concerned the relationship between section 8(1) and 8(2); in other words, the constitutional provision proclaiming the right to equality before the law and the equal protection of the law on the one hand, and the provision prohibiting unfair discrimination on the other. The issue is whether the prohibition (s 8(2)) is an independent and self-contained provision in its own right, or a corollary to the general right contained in section 8(1). The second question is whether the rationality test is applicable only to section 8(1) and the issue of fairness only to section 8(2) or whether both criteria may be applied to either provision. Since neither question needed to be decided *in casu*, Didcott J left the matter there, wishing merely to make it clear that these were issues that would certainly need to be addressed in the future.

3 1 Comment

The trouble with *Prinsloo*, of course, is that Didcott J was quite right: it certainly was not an appropriate one for the purpose it was required to serve. The differentiation in point gave rise to no moral outrage and could hardly be said profoundly to offend one's sense of justice. As Davis puts it: "[T]he connection between equality and the Forestry Act surely tested the most talented of lateral jurisprudential thinkers."[62] In his criticism of the dignity-based concept of discrimination, Fagan questions the logic of the argument adopted by the Constitutional Court in *Prinsloo*: The problem, as he sees it, relates to the difference between "differentiation" and "discrimination which is not unfair".

> "According to these judges, in other words, had s 8(2) spoken only of unfair differentiation, and not unfair discrimination, there would have been no basis for bringing dignity into account."[63]

Fagan then argues that the best answer to the question: What makes *differentiation* unfair? is suggested by Goldstone J in *Hugo*: "Differentiation is unfair if it infringes an independent constitutional right or a constitutionally-grounded egalitarian principle."[64] He then argues further that the analysis of unfair discrimination given by the court in *Prinsloo* does not do the notion proper justice: it is not enough for the differentiating action to impair dignity, since it must also infringe an independent right or egalitarian principle. This means that if unfair discrimination is to be linked to dignity, and the link is to be forged by the differentiation/discrimination distinction, there are three, not two, conditions to be met. First there must be a differentiating action; secondly, it must impair dignity; thirdly, it must infringe a right or egalitarian principle. In Fagan's view, this makes the test too strict to be viable; his solution is that the dignity requirement must go.

---

61 Para 52.
62 84.
63 225.
64 226.

4 THE BENCHMARK DETERMINED: *HARKSEN v LANE* [65]

Section 21(1) of the Insolvency Act 24 of 1936 provides that, on the sequestration of an insolvent spouse, the separate property of the solvent spouse vests in the Master and thereafter in the trustee of the insolvent estate as if it were property in the insolvent estate. It was averred that this provision violated the equality guarantee contained in section 8 (IC) and was therefore unconstitutional. More particularly, it was argued that this provision treated solvent spouses unequally and discriminated unfairly against them in comparison with other persons with whom the insolvent may have had dealings or close relationships or whose property is found in the possession of the insolvent. Further, that the fact that section 21(2) made it possible for the solvent spouse to claim the return of his or her property, did not solve the problem and therefore could not save the vesting provision.

Goldstone J, for the majority of the court, set out what he regarded as the proper manner to approach the interpretation of constitutional issues in general, and equality issues in particular. It is of interest, in the light of what Didcott J had said in the *Prinsloo* case, that a great deal of reliance was placed by Goldstone J on what the Constitutional Court had said in both *Prinsloo* and *Hugo*.[66]

Quoting at length from *Prinsloo*, Goldstone J reiterated that the first enquiry in section 8 (IC) issues was whether there had been differentiation between persons or groups of persons. If the impugned measure did differentiate, it would fall foul of section 8(1) unless there was a rational connection between the differentiation and some legitimate governmental purpose. If the necessary rational connection can be established, the next step is to determine whether the differentiation nevertheless constitutes unfair discrimination in terms of section 8(2). This second stage of the enquiry is divided into a number of further stages: first of all, has there been discrimination? Secondly, if there has, is the discrimination unfair?

Once discrimination has been established, the fairness enquiry is once again divided into several subsets: the discrimination may be direct or indirect; and it may be on a specified or unspecified ground (or a combination of grounds). In the latter regard, Goldstone J (para 46) expressly referred to unspecified grounds as grounds that are analogous to specified grounds.[67] If discrimination is on a specified or enumerated ground, the onus is on the defendant or respondent to prove that it is fair; if not, the plaintiff or applicant has the burden of proving unfairness.[68] The judge continued, again relying on *Prinsloo*:

---

65 1997 11 BCLR 489 (CC).

66 Para 41: "Attacks on legislation which are founded on the provisions of section 8 of the interim Constitution raise difficult questions of constitutional interpretation and require a careful analysis of the facts of each case and an equally careful application of those facts to the law. It was stated in the majority judgment in *Prinsloo v Van der Linde and Another* that this Court:
'should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises'.
Without in any way departing from that cautious approach, it appears to me that it would be helpful now to take stock of this Court's equality jurisprudence. In this regard I shall draw particularly on our judgments in the *Prinsloo* case and in *President of the Republic of South Africa and Another v Hugo*." (Internal footnotes omitted.)

67 Para 46. See the discussion on this point above.

68 S 8(3) (IC); s 9 (2) (FC).

> "There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them in a comparably serious manner."[69]

Goldstone J commented[70] that it had been pointed out in *Prinsloo* that "the pejorative meaning of 'discrimination' relates to the unequal treatment of people 'based on attributes and characteristics attaching to them'" and that it had been unnecessary to define these characteristics any further in that case. Likewise, the present case did not require such an analysis either, but the judge nevertheless felt it necessary to "caution against any narrow definition of these terms".[71]

> "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. Section 8(2) seeks to prevent the 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."

In other words, the listed grounds of discrimination should not be interpreted restrictively. The dangers attendant on an overbroad interpretation of discrimination will manifest themselves more readily when discrimination on an unspecified ground is alleged.

There is no doubt that the unenumerated grounds give rise to very difficult problems, since there may be no deep-seated patterns of discrimination, impairment of dignity and the like, yet the impact may be as severe.

Goldstone J thereupon quoted from the judgment in *Hugo*, in which it was emphasised that the prohibition on unfair discrimination in the interim Constitution was not designed solely to avoid discrimination against people who are members of disadvantaged groups. This goes without saying: otherwise the equality and non-discrimination provisions would be confined to curing past inequalities by means of measures of the kind envisaged by section 8(3) (IC) and section 9(2) (FC). However, there is no doubt that the most serious cases of discrimination will involve traditional victims of discrimination.

Reiterating that dignity is an underlying consideration in the determination of unfairness, Goldstone J again referred to *Hugo*'s case, in which it was said that the first stage of the enquiry into unfairness focuses primarily on the experience of the "victim" of discrimination. He added: "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".[72]

---

69 Para 46.
70 Para 48.
71 Para 49.
72 Para 50.

In an attempt to formulate criteria for determining unfairness, the judge then listed various factors which need to be considered:[73] first, the position of the complainants in society and whether they have suffered from patterns of discrimination in the past, and whether the discrimination is on a specified ground; secondly, the nature of the provision or power allegedly giving rise to the discrimination, and its purpose (ie whether it has an important societal objective, such as the achievement of equality and the protection of vulnerable groups in society); thirdly, 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 an equally serious nature.

This list, the judge stressed, is not a closed one, but is aimed at assisting in giving precision and elaboration to the constitutional test for unfairness.

Finally, even if all the tests for unfairness have been completed, there remains the possibility that the measure found to be unfair may nevertheless be saved by section 33(1) (IC) and found to be justifiable. This final test would involve a weighing of the purpose and effect of the provision and a determination of its proportionality *vis-à-vis* the extent of its infringement of equality.

The judge then reiterated the test formulated by the Constitutional Court for challenges based on the equality clause:[74]

> "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
>
> (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then 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.
>
> (ii) the discrimination amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
>
> If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
>
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)."

These principles then had to be applied to the facts of the case.

There is no doubt that section 21 differentiates between solvent spouses and other parties who may have had dealings with the solvent spouse. As to the rationality of this differentiation, it was found that the statutory mechanism was appropriate and effective.

---

73 Para 51.
74 Para 53.

Furthermore,

> "[w]hilst in no way wishing to minimise the inconvenience, potential prejudice and embarrassment that the provisions of section 21 of the Act may cause to a solvent spouse, and even accepting that those consequences may be described as 'drastic', I cannot agree that they are arbitrary or without rationality".[75]

Section 21 therefore did not contravene section 8(1). It then fell to be determined whether the differentiation, albeit rational, constituted discrimination on an unspecified ground. The court found that it did. The applicant then had the onus of persuading the court that the discrimination was unfair. The factors enumerated in paragraph 51 were then considered in turn.

First of all, the position of the complainant in society: solvent spouses, as the affected group, have not been the victim of past discrimination and are not vulnerable for this reason. Secondly, the nature of the power: this was exercised by Parliament, which has a duty to protect the public interest. More particularly, section 21 protects the interests of creditors of insolvent estates, a purpose that is not inconsistent with the values underlying section 8(2). Thirdly, the effect of the discrimination on solvent spouses: here the court assumed that the Master and trustees would act reasonably and honestly and would not burden solvent spouses unnecessarily; and also that the courts would intervene if they do not act reasonably and honestly. It was conceded that solvent spouses could suffer inconvenience, embarrassment and even prejudice, but the judge held that, having regard to the values protected by section 8(2), the impact of the inconvenience or prejudice did not justify the conclusion that section 21 discriminates unfairly:

> "[T]he inconvenience and burden of having to resist such a claim [as that contemplated by section 21] does not lead to an impairment of fundamental dignity or constitute an impairment of a comparably serious nature."[76]

Dissenting judgments were handed down by O'Regan J (with whom Madala and Mokgoro JJ concurred) and Sachs J.

O'Regan J emphasised that her difference with the majority lay with the application of the latter's approach to section 8, and not with the approach itself. She agreed that there was a rational connection between the differentiation brought about by section 21 and the legislative purpose underpinning it. However, as regards the fairness of the discrimination, she pointed out that the Constitutional Court had interpreted section 8(2) "as a clause which is primarily a buffer against the construction of further patterns of discrimination and disadvantage",[77] and that, in the case in point, disadvantages were being imposed on solvent spouses simply because they were married. She continued to say that although marital status was not a specified ground of discrimination under the interim Constitution, it could be argued, following the dictum of McLachlin J in the Canadian case of *Miron v Trudel*,[78] that

> "discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognised grounds of discrimination violative of fundamental human rights norms".[79]

---

75 Para 58.
76 Para 67.
77 Para 91.
78 (1995) 29 CRR (2d) 189.
79 208, quoted by O'Regan J para 92.

O'Regan J then set out at some length the way in which the relationship of marriage in South Africa has been governed by stereotypical reasoning, resulting in the entrenchment of deep inequalities between men and women. However, she acknowledged that she was not able to conclude that the present case involved a pattern of discrimination rooted in the past (and was therefore a case of indirect discrimination based on gender). Nevertheless, she found that the effect of the provisions of section 21 on the spouses of insolvents is substantial. She therefore differed from the majority on the seriousness of the impairment caused by the potential inconvenience, embarrassment and prejudice.

In her summing up, O'Regan J found that although "the extent of the infringement is not extremely offensive or egregious, it nevertheless constitutes a significant limitation of that right". Further, that the interests of the creditors of the estate were disproportionately favoured at the expense of the interests of the solvent spouse. Having examined the position in other legal systems (those of the United Kingdom, Canada, Australia and Germany) the judge concluded that the absence of similar provisions supports the conclusion that there is an imbalance in the South African legislation. Thus section 33, which required limitation of fundamental rights to be reasonable and justifiable in an open and democratic society based on freedom and equality, could not be invoked either.[80]

Although he, too, agreed with the exposition of the law and the issues as given by Goldstone J, Sachs J was even more trenchant than O'Regan J in his rejection of section 21:

> "In my view, section 21 . . . represents more than an inconvenience to or burden upon the solvent spouse. It affronts his or her personal dignity as an independent person within the spousal relationship and perpetuates a vision of marriage rendered archaic by the values of the interim Constitution, thereby being unfair in terms of section 8(2) . . ."[81]

He described section 21 as manifestly patriarchal in origin, and stated that it reinforces a stereotypical view of the marriage relationship which, in the light of the new constitutional values, is demeaning to both spouses:

> "The question, then, is not whether the trustee acts fairly in his or her application of the law, but whether the law itself, in selecting out a group defined in terms of marital relationship, is fair in its rationale, reach and impact."[82]

He continued:

> "Nor is the degree of inconvenience the critical factor. Rather, what is most relevant to the question of unfairness is the assumption which puts together what constitutional respect for human dignity and privacy requires be kept asunder. This is one of those areas where to homogenise is not to equalise, but to reinforce social patterns that deny the achievement of equality as promised by the Preamble and section 8. The intrusion might indeed seem relatively slight. Yet an oppressive hegemony associated with the grounds contemplated by section 8(2) may be constructed not only, or even mainly, by the grand exercise of naked power. It can also be established by the accumulation of a multiplicity of detailed, but interconnected, impositions, each of which, decontextualised and on its own, might be so minor as to risk escaping immediate attention, especially by those not disadvantaged by them."[83]

---

80 Para 111.
81 Para 118.
82 Para 122.
83 Para 123, internal footnotes omitted.

Associating himself with the way in which O'Regan J had set out the historical context, Sachs J described the case in point as one in which the disadvantage suffered affects the "moral citizenship (independence and self-fulfilment) of persons who happen to be married". In conclusion, he emphasised that the incremental development of equality jurisprudence requires that the impact of a challenged law on persons belonging to a class contemplated in section 8(2) be examined. More particularly, there should be a contextual evaluation of the way in which the legal underpinnings of social life reduce or enhance the self-worth of persons belonging to such groups. Section 21, in his view, endorses a stereotyped view of marriage which inhibits the potential for self-realisation of the spouses, and he concluded that "[i]f this is not a direct invasion of fundamental dignity it is clearly of comparable impact and seriousness".[84]

4 1 Comment

Once again the logic of the court is attacked by Fagan.[85] He sums up Goldstone J's test for unfair discrimination as follows:

> "First, there must be a differentiating act. Second, the differentiating act must amount to discrimination. The act does so if it has the potential to impair dignity. Third, the differentiating act must be unfair. The act is so if it in fact impairs dignity."[86]

He then analyses this test and comes to the conclusion that the second part of the test is superfluous:

> "Clearly, differentiation can actually impair dignity only if it has the potential to do so. This means that three entails two. That is, unfairness entails discrimination. But if this is right, then Goldstone J's test for unfair discrimination is in reality twofold rather than threefold: unfair discrimination arises if differentiation impairs dignity, end of story."[87]

The implication, according to Fagan, is that Goldstone J in fact abandons the *Prinsloo* rationale for the dignity analysis, which places dignity at the centre of the *discrimination* enquiry rather than the *unfairness* enquiry.[88] And, according to Fagan, there lies the rub: he points out that while many acts simultaneously impair dignity and fairness,

> "the idea that unfairness is in any sense constituted by the impairment of dignity, that we can turn to the notion of dignity to explicate that of unfairness, is plainly untenable . . .
>
> Goldstone J . . . is supposing that we can force an identity upon things which are by their nature ineluctably distinct".[89]

Albertyn and Goldblatt, in their commentary on *Harksen*, argue that the core characteristics of substantive equality are disadvantage and difference, and that the equality right should be defined in terms of these concepts rather than in terms of dignity. They acknowledge that the Constitutional Court has recognised the importance of disadvantage but then nevertheless defines equality with reference to dignity.[90] In *Harksen*, according to these authors, the criterion of disadvantage was

---

84 Para 124.
85 228 *et seq.*
86 228.
87 232.
88 See the discussion of the critique of the *Prinsloo* judgment above.
89 233.
90 256.

"further relegated to one of three criteria identified to guide the Court's analysis of impact".[91]

Albertyn and Goldblatt describe Goldstone J's judgment as "notable for its clinical commercialism".[92] They comment that "the failure to examine previous disadvantage and whether group interests have been affected, indicates a somewhat worrying disjuncture between stated principle and its actual application".[93] The fact that the litigant in this case was unlikely to evoke much sympathy, being a wealthy white woman, obscured the possibility that real hardship could be caused to other solvent spouses who do not find themselves in such a fortunate position. The majority should have focused on the broader context – as O'Regan J did, in a judgment praised by the authors as showing "a clear understanding of the meaning of terms such as context and impact".[94]

Davis, too, stressed that the facts of the case in point did not give rise to major moral debate. He regards the problem of the majority of the court as an "inability to grasp the need to transcend previous stereotypes",[95] resulting in the application of a "formal consequentialist test" to the issue of impact. He points out that O'Regan J really differed from the majority only as regards the extent of the impact on solvent spouses and not on the underlying principles applied. Sachs J, on the other hand, throws the net wider, and raises the issues of personal identity and moral citizenship.

Van der Walt and Botha[96] point out certain parallels with the approach of the Supreme Court of the United States with regard to levels of scrutiny: the strictest scrutiny is applied to discrimination on specified grounds, an intermediate level of scrutiny to unspecified but analogous grounds, and the least strict form of scrutiny to grounds that are neither specified nor analogous (the court merely enquires whether there is a rational relationship between the differentiation and a legitimate government purpose).[97] The authors have no quibble with this, and regard it as both in keeping with the language and structure of the provision and consonant with a commitment to substantive equality. However, they feel that all the judges accepted the presence of a rational link rather too readily, and could have conducted the arbitrariness enquiry more rigorously. It is further suggested that

> "the very different language employed by Goldstone and Sachs JJ makes one wonder whether serious jurisprudential (and/or ideological) differences are not lurking behind the apparent consensus on the scope and meaning of the equality provision . . . We argue that the judgments of O'Regan and Sachs JJ reveal serious difficulties in the majority's approach, and that the standard articulated by Goldstone J, unless supported

---

91 257. An interesting feature of the *Harksen* judgment is highlighted by Albertyn and Goldblatt (261–262): "There are interesting gender, race and experiential divisions among the judges, suggesting that their previous experience and social location may have informed their reasoning. Both women judges and two out of three black judges dissented from the majority judgment. Because judges tend to universalise their own experiences, judges with previous commercial practices may have focused on the difficulties of protecting creditors from insolvents while the other judges concentrated on the violation of the rights of the spouse."

92 262.

93 *Ibid.*

94 263.

95 90.

96 "Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*" 1998 *SA Public Law* 17.

97 29–30.

> by a thoroughly contextual approach and a more critical understanding of power, may give rise to a new conceptualism and conservatism".[98]

The authors conclude that, even if one accepts that the differences between the majority and the minority relate to application rather than the "core meaning" of the equality clause,

> "the judgments of Goldstone, O'Regan and Sachs JJ reveal fundamentally different assumptions about the nature of power, the division between the public and private spheres, and the context(s) in which fundamental rights should be adjudicated".[99]

To illustrate the role that power plays in the context of equality issues, they quote from the judgment of Sachs J:

> "[A]n oppressive hegemony associated with the grounds contemplated by section 8(2) may be constructed not only, or even mainly, by the grand exercise of naked power. It can also be established by the accumulation of a multiplicity of detailed, but interconnected, impositions, each of which, decontextualised and on its own, might be so minor as to risk escaping immediate attention, especially by those not disadvantaged by them."[100]

Van der Walt and Botha also comment on the fact that only O'Regan J ventured into limitations analysis in this case (having found the discrimination unfair, she proceeded to enquire whether it could be justified under section 33 (IC) and decided it could not). They suggest that the majority showed a greater readiness to defer to the legislature as regards differentiation in the economic sphere, following a definitional approach to the question of the scope and content of a particular right, rather than giving a more generous interpretation to the right and then taking policy considerations into account in the second stage of the enquiry. According to them, the definitional approach obscures difficult constitutional issues behind technical (and apparently neutral) enquiries into the scope and content of a right.[101]

But O'Regan J's approach is also criticised:

> "Like the majority, O'Regan J clung to an individualist concept of power, which left little scope for a consideration of the ways in which current beliefs and attitudes are themselves inscribed in power relations".[102]

In short, Van der Walt and Botha consider that the majority in *Harksen* adopted a subjectivist approach, which manifested itself in

> "an unwillingness to look beyond the immediate effects of a statutory provision on an individual complainant or group of individuals, and see the broader social picture – an unwillingness to subject the assumptions underlying such a provision to critical scrutiny".[103]

5 CONCLUSION

In their commentary on section 8 (IC), Catherine Albertyn and Janet Kentridge[104] remarked, somewhat prophetically:

> "It would be ironic if economic regulation cases dominated the anti-discrimination litigation of South Africa's first Bill of Rights. Moreover, there is some danger that

98 34–35.
99 35.
100 Para 123, quoted at 36.
101 38.
102 39.
103 40.
104 "Introducing the right to equality in the interim Constitution" 1994 *SAJHR* 149.

> such cases could tilt the interpretation of s 8(2) toward a formal conception of equality, making it harder for disadvantaged groups to use the clause to address pervasive systemic discrimination. That danger should be countered by adopting an approach which is attuned to the moral and political commitments underlying the anti-discrimination provisions and the Constitution as a whole."[105]

It is indeed unfortunate that the cases in which the benchmark for our equality jurisprudence was set were based on facts that did not readily lend themselves to debate about fundamental equality issues. (On the other hand, of course, one could argue that this was a blessing in disguise: at least they gave the court an opportunity to construe the equality provision in a climate not so emotionally charged that it could cloud the issues! However, I am inclined to think that the nature of the facts in *Prinsloo* and *Harksen*, in particular, was an obstacle rather than an advantage.)

There appears to be consensus among commentators about the following: first of all, that the dignity-based approach is flawed, since it defines one vitally important fundamental right in terms of another. While this may often yield satisfactory results in practice, it tends to limit the scope of the equality right. The shortcomings of this approach manifested themselves even in the early stages of our jurisprudence: the court in *Harksen* was obliged to extend the dignity criterion (in cases of discrimination on unspecified grounds) to "an impairment of a comparably serious nature". The question whether and to what extent juristic persons can claim the benefits of the equality provision had not arisen at this stage, but the application of the dignity criterion would seem to have created serious obstacles to such protection from the outset.[106]

Secondly, the majority in *Hugo* and in *Harksen* appear to have been reluctant to break away from stereotypical and traditional thinking about gender issues and roles (despite all protestations to the contrary).

Cowen, commenting both on the judgments themselves and on the debate that followed, expresses the concern that "dignity as a value and right lacks a sufficiently clear meaning to serve usefully as the dominant conceptual tool in reasoning related to the equality right".[107] She suggests that some of the criticism would fall away if the issues raised by the critics were to be understood, not as aspects of equality, but "as aspirations that fit into a forward-looking conception of dignity".[108] In short, she argues that it is the *value* of dignity, and not the section 10 *right* to dignity, that must inform the equality analysis. The value of equality, according to Cowen, cannot serve this purpose, because equality is a comparative concept, and one that necessarily relates to the distribution of a good, or to the patterns of its distribution.

---

105 169, footnotes omitted.

106 See Swart "An outcomes-based approach to the interpretation of the right to equality" 1998 *SA Public Law* 217; "The constitutional criteria for legislative differentiation in the economic sphere – an appraisal of judicial deference towards the legislature after *Jooste v Score Supermarket Trading*" 1999 *SA Merc J* 250; and "The requirements for the utilisation of assessed losses by companies – rational policy or muddled thinking?" (forthcoming).

107 37.

108 44. She refers specifically to Davis's description of equality as a value "which seeks to promote a democratic society that recognises and promotes difference and individual as well as group diversity and thereby exhibits *a commitment to ensuring that all within society enjoy the means and conditions to participate significantly as citizens*" ("Equality: the majesty of legoland jurisprudence" 1999 *SALJ* 398 413–414; Cowen's emphasis) and the comment by Albertyn and Goldblatt that equality should promote and protect "the ability of each human being to *develop to his or her full human potential* . . ." and the need for laws to *"facilitate each person's ability to be full social citizens* of our new democracy" (Albertyn and Goldblatt 254; Cowen's emphasis).

Dignity as a value, by contrast, is in line with the Kantian ideal that persons should be treated as ends and not as means.[109] She also questions the validity of the argument that dignity is too individualistic a value to serve a transformative function:

> "There is a suggestion in the critiques that dignity is somehow to be equated with protection of freedom and autonomy and thus its adoption as the polestar of equality might hinder or discourage positive steps to effect economic change and to address material disadvantage . . . Dignity as a concept does not exclude – indeed it requires – acknowledgment of the relationship between human worth and material position. The use of dignity as a concept can therefore serve to encourage, rather than hinder, a substantive equality analysis because it permits, and arguably requires, thought to be given to structural and economic factors underlying disadvantage and economic power relations."[110]

In other words, she says, "dignity is capable of serving purposes that are not limited to protecting individual or even collective autonomy".[111]

This is a most interesting approach, and one that merits serious consideration. It cannot be denied that the Constitution does not only protect the *right* to dignity, equal protection and benefit of the law, and freedom; it repeatedly emphasises the *values* of human dignity, equality and freedom. It is trite that these values can both be in tension with one another and complement one another. It is also generally accepted that they underlie all the rights protected in the Bill of Rights. It may therefore be argued that *all* these values should be considered in the analysis of *any* constitutional right and not only in the limitation of any right (as required by section 36(1)). Where there is no internal modifier or qualifier attached to a particular right, it may amount to overkill if the three values mentioned above are considered at the threshold stage; but there is surely a case to be made out for their introduction at the first stage where the right is not couched in unqualified terms.

To return to the equality right more specifically: if the value of dignity may be said to inform any enquiry into discrimination, does it not perhaps follow that the value of freedom should be considered as well? The right not to be discriminated against may, on the one hand, appear to be obstructed by the value of freedom (whether in the form of individual or collective autonomy); but can one not also argue that equality is inconceivable without freedom (and *vice versa*)?

It is clear that the three cases under discussion cannot be said to have spoken the last word about the role of dignity in the enforcement of the equality right – nor would the members of the Constitutional Court profess that they have done so.

Some important criticism has been levelled against the court's approach in the three cases under discussion: in two of them (*Hugo* and *Harksen*) there are reservations about the outcome itself and about their implications for future cases. On the other hand, there can be no doubt about the Constitutional Court's commitment to the establishment of a moral basis for the application of the equality clause, one that is consonant with the values of the Constitution and takes into account the historical and social context within which the Constitution operates. (Nor has the task been made any easier by the way in which the equality clause has been worded, both in the interim Constitution and in the 1996 Constitution.)

---

109 See Ackermann J "Equality and the South African Constitution: the role of dignity" Bram Fischer memorial lecture, 2000-05-26.

110 51.

111 53.

AANTEKENINGE

BESKERMING VAN MINERAALREGTE: 'N *SATYAGRAHA*?*

"Non-violence is the greatest force at the disposal of mankind. It is mightier than the mightiest weapon of destruction devised by the ingenuity of man."

Mohandas Gandhi

1 Inleiding

Transformasie van die Suid-Afrikaanse mineraleregstelsel word in die vooruitsig gestel deur die regering se konsep *Mineral Development Draft Bill, 2000* wat onlangs vir openbare kommentaar in die *Staatskoerant* gepubliseer is (AK 4577 GG 21840 2000-12-18. Die wetsontwerp is in Engels. Sien verder Badenhorst "Mineral rights: 'Year Zero' cometh?" 2001 *Obiter* 119; Badenhorst en Malherbe "The constitutionality of the Mineral Development Draft Bill" 2001 *TSAR* 3). Alhoewel die oorgangsmaatreëls in die wetsontwerp 'n mate van beskerming bied, sal die wet by aanname 'n nadelige uitwerking hê op houers van mineraalregte (en ander regte). Aan die ander kant bestaan daar ook verwarring omrede sommige houers van mineraalregte moontlik onder die indruk verkeer dat alle mineraalregte deur die regering "weggevat" gaan word. Onkunde oor die toekoms van mineraalregte kan lei tot die neem van verkeerde besluite (en selfs uitbuiting) indien houers van mineraalregte voor inwerkingtrede van die voorgestelde wet deur mynboumaatskappye omtrent die verkryging van regte genader sou word.

Hierdie bespreking kyk na maniere waarop houers van mineraalregte hulle regte teen die aanvanklike uitwerking van die voorgestelde wet (en foutiewe besluite) kan beskerm. Beskerming van mineraalregte teen die voorgestelde *Mineral Development Draft Bill* herinner mens aan Mohandas Gandhi se *Satyagraha* oftewel passiewe weerstand teen die Britse regering se soutbelasting en verbod op Indiërs om hulle eie sout in Indië te vervaardig. Gedurende 1930 het Gandhi met duisende volgelinge sy beroemde sout-opmars na Indiese kusdorpe gelei waar hulle sout deur middel van die verdamping van seewater vervaardig het. Ten spyte van arrestasies, aanranding en moord op sy volgelinge het niemand gewelddadig teruggeveg nie. Na Gandhi se arrestasie en toegewings deur die Britse regering, het hy sy sout-*satyagraha* afgelas.

---

* Verwerking van die teks, "Beskerming van mineraalregte" wat in die *Landbouweekblad* van 2001-08-17 verskyn het en gepubliseer met goedgunstige toestemming.

Die bespreking moet bloot as 'n voorlopige standpunt beskou word. Daarbenewens is die wetsontwerp, in sy huidige vorm, in verskeie opsigte ongrondwetlik en sal die konsep waarskynlik nog aangepas word (sien verder Badenhorst en Malherbe 2001 *TSAR* wat tot die slotsom raak dat die wetsontwerp vir doeleindes van sowel die eiendomsklousule (a 25) as die algemene beperkingsklousule (a 36), saamgelees met a 25(8) van die Grondwet, ongrondwetlik is). Die finale wetsontwerp sal waarskynlik ook eers deur die Konstitusionele Hof onder oë geneem word. Die tyd sal leer wat die finale inhoud van die *Mineral Development Act* sal wees. Met die filosofie van die wetsontwerp in die agterkop sou toekomsbeplanning in die gees van 'n mineraalregte-*satyagraha* egter gedoen kan word.

2 Mineraalregte in die huidige bestel

2 1 Eiendomsreg van grond kan "mineraalregte" as bevoegdheid insluit. Mineraalregte kan egter op verskillende wyses van die eiendomsreg van grond geskei word, naamlik registrasie van 'n sertifikaat van mineraalregte (a 70(1) van die Registrasie van Akteswet 47 van 1937 (hierna "Akteswet"); Jones en Nel *Conveyancing in South Africa* (1991) 420; Heyl *Grondregisrasie in Suid-Afrika* (1977) 190; Laurens *Inleiding tot die studie van aktebesorging* (1988) 110–111; Badenhorst "*Du Preez v Beyers* 1989 1 SA 320 (T); *Beyers v Du Preez* 1989 1 SA 328 (T) – Minerale regte en eiendomsreg – skeiding en samesmelting" 1989 *De Jure* 479 380–382; "Klassifikasie van mineraalregte" 1994 *THRHR* 34–35; *An introduction to the law of mineral rights* 2.1–2.4), 'n sessie van mineraalregte (a 3(1)(m) en a 16 van die Akteswet; Jones en Nel *Conveyancing* 410–411; Laurens *Aktebesorging* 110) en onteiening van mineraalregte of blote eiendomsreg (a 8(1) van die Onteieningswet 63 van 1975; sien verder a 32 en 70(3) van die Akteswet; Badenhorst *Mineral rights* 2–4). Afgeskeide mineraalregte voer 'n afsonderlike bestaan met 'n eie titelakte (a 70(4) van die Akteswet; Franklin en Kaplan *The mining and mineral laws of South Africa* (1982) 15; Kleyn en Boraine *Silberberg and Schoeman's The law of property* (1992) 412). 'n Mineraalreg behels dat die houer van die reg bevoeg is om vir ontginningsdoeleindes op die grond te gaan, te prospekteer en te myn vir minerale (a 5(1) van die Mineraalwet 50 van 1991 (hierna "Mineraalwet"); *Van Vuren v Registrar of Deeds* 1907 TS 294 295; *Rocher v Registrar of Deeds* 1911 TPD 311 316; *Ex parte Pierce* 1950 3 SA 628 (O) 634C–D; *Erasmus v Afrikander Property Mines Ltd* 1976 1 SA 950 (W) 956E; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 (A) 509G–H).

2 2 Mineraalregte kan by vervreemding oorgedra word deur registrasie van sessie van mineraalregte in die akteskantoor (a 3(1)(m) en a 16 van die Akteswet). Die houer van mineraalregte is ook bevoeg om teen vergoeding regte aan 'n ander persoon te verleen. So kan 'n prospekteerreg, teen betaling van prospekteergeld, aan 'n prospekteerder deur die sluiting van 'n prospekteerkontrak verleen word (formaliteite kragtens a 2(1) van die Wet op die Vervreemding van Grond 68 van 1981 moet nagekom word. Vorderingsregte, waaronder 'n prospekteerreg, kom tot stand by sluiting van die ooreenkoms). Die prospekteerder verkry dan die bevoegdheid om op die grond te prospekteer. Insgelyks kan 'n mynreg, teen betaling van tantième, by sluiting van 'n notariële mineralehuurkontrak aan 'n mynboumaatskappy gegee word (a 3(1) van die Algemene Regswysigingswet 50 van 1956. 'n Onderhandse mineralehuurkontrak is nietig: *Fuls v Leslie Chrome (Pty) Ltd* 1962 4 SA 784 (W) 787A–B; *Nortje v Pool NO* 1966 3 SA 96 (A) 111A 126–127; *Bellville-Inry (Edms) Bpk v Continental China (Pty) Ltd* 1976 3 SA 583 (C) 585H–588G; *Roets v Secundior Sand BK* 1989 1 SA 902 (T) 904G–H; *Malan v Strauss*

1994 4 SA 179 (NC) 189E–F; sien Dale "Contracts relating to prospecting and mining" in Lowe *et al* in Elliot *The South African notary* (1987) 235; Badenhorst en Van Heerden "Betekenis van die woord mineraal" 1989 *TSAR* 452 456–457. By notariële verlyding kom vorderingsregte, naamlik 'n prospekteerreg en 'n mynreg tot stand). Die mynbouer verkry die bevoegdhede om op die grond te prospekteer en te myn. Prospekteerkontrakte (a 3(1)(q) van die Akteswet) en mineralehuurkontrakte (a 3(1)(m) en a 77(1) van die Akteswet) is registreerbaar in die aktekantoor (by registrasie kom saaklike regte, naamlik 'n prospekteerreg en 'n mynreg (a 3(1) van die Algemene Regswysigingswet 50 van 1956) onderskeidelik tot stand. In *Vansa Vanadium SA Ltd v Registrar of Deeds* (1997 2 SA 784 (T) 794G 795I–J) is egter beslis dat 'n prospekteerkontrak nie by registrasie saaklike regte skep nie. Sien Nel *Prospekteerregte in die Suid-Afrikaanse mineraal- en mynreg* LLD proefskrif Unisa (1994) 551–552 en Dale "Mining law" 1996 *Annual Survey* 412 423–424. Sien egter Franklin en Kaplan *Mineral laws* 16–21; Badenhorst en Olivier "Die aard van regte ingevolge 'n prospekteerkontrak" 1997 *TSAR* 583 586–589; Badenhorst "Mining and minerals" 1999 (vol 18) *LAWSA* 14–15).

2 3 Voordat enige persoon mag prospekteer, moet 'n prospekteerpermit van die streekdirekteur van Mineraal- en Energiesake verkry word (a 6(1) van die Mineraalwet 50 van 1991). 'n Ontginningsmagtiging moet ook van die streekdirekteur verkry word alvorens vir die betrokke mineraal of minerale gemyn mag word (a 9 van die Mineraalwet). Oorleg vind plaas met die hoofinspekteur (aangestel ingevolge a 48 van die Wet op Gesondheid en Veiligheid in Myne 29 van 1996) ten einde te verseker dat mynbou op 'n veilige en gesonde wyse beoefen sal word (a 39(3) van die Mineraalwet). Prospektering en mynbou kan ook nie begin alvorens 'n omgewingsbestuursprogram aan die streekdirekteur vir goedkeuring voorgelê is nie (a 39(1)). Oorleg vind plaas met ander staatsdepartemente voordat die omgewingsbestuursprogram goedgekeur word (a 39(3)). Rehabilitasie van die grond moet as 'n integrerende deel van die prospekteer- of mynwerksaamhede en ooreenkomstig die omgewingsbestuursprogram plaasvind (a 38(1). "Rehabilitasie" van die grondoppervlak en die omgewing word in a 1 van die Mineraalwet omskryf as "die uitvoering tot die tevredenheid van die streekdirekteur deur die houer van die prospekteerpermit of ontginningsmagtiging van die ongewingsbestuursprogram . . ."). Die rol van die staat is dus om die groen lig te verleen om verkreë regte te kan uitoefen en nie om regte toe te ken nie (Kaplan en Dale *'A guide to the Minerals Act 1991* (1992) 11; sien verder Badenhorst en Van Heerden "A comparison between the nature of prospecting leases in terms of the Precious Stones Act 73 of 1964 and prospecting permits in terms of the Minerals Act 50 of 1991 – *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs*" 1993 *TSAR* 159 165–168). Goedkeuring vir die uitoefening van regte moet onderskei word van die gevalle waar die staat self mineraalregte hou en vervreem (sien a 64(1) van die Mineraalwet) of prospekteer- of mynregte verleen (a 6(3) en 9(2) onderskeidelik).

2 4 Die eienaar van die grond is die eienaar van die minerale in die grond totdat die minerale geskei word van die grond (*Van Vuren v Registrar of Deeds supra* 259; *Rocher v Registrar of Deeds supra* 315; *Natal Cambrian Collieries v Durban Navigational Colleries Limited* 1925 NPD 27 32; *Union Government (Minister of Railways and Harbours) v Marais* 1920 AD 240 246; *Neebe v Registrar of Mining Rights* 1902 TS 65 85; *Gluckman v Solomon* 1921 TPD 335 338; en *Odendaalsrus Gold, General Investments and Extensions Limited v Registrar of Deeds* 1953 1 SA 600 (O) 604E). Die eiendomsreg van die grond kan egter onderworpe wees aan 'n afsonderlike mineraalreg. Wanneer minerale van die grond geskei word, verkry die houer van 'n mineraalreg of 'n mynreg (kragtens 'n notariële mineralehuurkontrak)

wat die minerale myn, eiendomsreg van die minerale (*Trojan Exploration Co v Rustenburg Platinum Mines Ltd supra* 509J–510A; Dale *An historical and comparative study of the concept of acquisition of mineral rights* LLD-proefskrif Unisa (1979) 79–81; Badenhorst "Mining of mixed minerals – *Trojan Exploration Co (Pty) Ltd v AFC Investments Ltd*" 1995 *TSAR* 570 573–574; "Trojan trilogy: I Competing mineral rights" 1998 *Stell LR* 143 147–150).

3 Nuwe bedeling

3 1 As nuwe bedeling, word in die onderhawige konteks onder andere, beoog om:

(a) die gemeenregtelike mineraalreg en eiendomsreg van minerale te wysig (kl 2(j));

(b) erkenning te verleen aan die staat se voogdyskap van die nasie se mineraalbronne (kl 2(b));

(c) erkenning te verleen aan die universeel erkende reg van die staat om permanente soewereiniteit oor alle mineraalbronne uit te oefen (kl 2(i));

(d) gevolg te gee aan die staat se grondwetlike plig tot aanname van wetgewing om grondhervorming te bewerkstellig (a 25(8) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996) en om die regte van persone wat in die verlede deur diskriminasie benadeel is te bevorder (a 9(2) van die Grondwet) (kl 2(a)(ii));

(e) sekuriteit van titel ten aansien van aktiewe prospektering en mynbouwerksaamhede te verseker (kl 2(f) en 89(a));

(f) geleenthede vir histories agtergeblewe persone te skep om tot die mynboubedryf toe te tree of om baat te vind by die ontginning van die nasie se mineraalbronne (kl 2(e)). Sien ook kl 89(d). ('n "Histories agtergeblewe" persoon ("historically disadvantaged" person) word in kl 1(xvii) soos volg omskryf: "a person who: (a) is one of a category of individuals who, before the Constitution of the Republic of South Africa, 1993 came into operation, were disadvantaged by unfair discrimination on the basis of race; (b) is an association, a majority of whose members are individuals referred to in paragraph (a); (c) is a juristic person other than an association, and individuals referred to in paragraph (a) own and control a majority of its issued capital or members' interest and are able to control a majority of its votes; or (d) is a juristic person or association, and persons referred to in paragraphs (a), (b) or (c) own and control a majority of its issued share capital or members' interest and are able to control a majority of its votes");

(g) te verseker dat billike toegang tot die nasie se mineraalbronne bevorder word (kl 89(c));

(h) ekonomiese groei en ontwikkeling van mineraalbronne te bevorder (kl 2(c)).

3 2 Die nuwe bedeling wat in die vooruitsig gestel word, het in die huidige konteks kortliks die volgende tot gevolg:

(a) Die eiendomsreg van minerale (wat nog nie fisies van die grond geskei is nie), word in die staat gevestig (kl 3(1). Die klousule verwys na "mineral resources", welke begrip nie in die wetsontwerp gedefinieer word nie. Daar word vermoed dat die begrip met verwysing na die definisie van "mineral" gebruik word).

(b) Die begrip "mineraal" word wyd gedefinieer om stowwe soos sand, klip, gruis en klei in te sluit. Alhoewel grond ook by die definisie van mineraal ingesluit is,

word "bogrond" en, onder andere, water en veen daarvan uitgesluit (kl 1(xx). Die begrip "bogrond" ("topsoil") word omskryf as

> "that layer of soil covering the earth and which provides a suitable environment for the germination of seed, allows the penetration of water, is a source of micro-organisms, plant nutrients and in some cases seed, and a depth of 0.5 metre or any other depth as may be determined by the Director: Mineral Development for each prospecting or mining area" (kl 1(xliv)).

"Aardgas"("natural oil") en "petroleum" ("petroleum") word ook uitgesluit, maar tans buite rekening gelaat. Met ander woorde, die grondeienaar bly slegs eienaar van bogrond, veen en water!

(c) Die Minister van Mineraal- en Energiesake is bevoeg om prospekteer- en mynregte aan aansoekers te verleen (kl 3(2)(b)). Ontginningsregte word dus deur die staat toegeken.

(d) 'n Prospekteerreg word (aanvanklik) vir 'n tydperk van vyf jaar toegeken (kl 33(1)). 'n Prospekteerreg mag vir 'n verdere tydperk van drie jaar verleng word (kl 33(2)).

(e) 'n Mynreg word (aanvanklik) vir 'n tydperk van 25 jaar toegeken (kl 45(1)). 'n Mynreg kan vir 'n verdere tydperk van 25 jaar verleen word (kl 45(2)).

(f) Die houer van 'n prospekteerreg is geregtig om by aansoek 'n mynreg van die staat te verkry (kl 5(3)).

(g) Die Minister is by nie-nakoming van die regsvoorskrifte bevoeg om die prospekteerreg of mynreg te kanselleer of op te skort (sien kl 10).

(h) By die toekenning van prospekteer- en mynregte moet voorkeur aan histories agtergeblewe persone gegee word (kl 3(4)).

(i) Die houer van 'n prospekteer- of mynreg is bevoeg om vir ontginningsdoeleindes die grond te betree, te prospekteer en te myn vir die betrokke mineraal (kl 5(1)).

(j) 'n Prospekteerreg of mynreg is slegs oordraagbaar met skriftelike toestemming van die Minister, na voorlegging van omvattende redes vir die oordrag van regte (kl 61(1)).

(k) Die Minister is bevoeg om vergoeding vir die verlening van prospekteer- en mynregte te bepaal (kl 3(2) (c)).

(l) Niemand mag prospekteer of myn nie voordat 'n omgewingsinvloedstudie deur die applikant gedoen is (kl 67(1) en 66), 'n omgewingsbestuursprogram deur die Direkteur: Minerale Ontwikkeling goedgekeur is (kl 5(2)(i) en 67(1) en 3(c)) en die Minister die Direkteur se toekenning van 'n prospekteer- of mynreg goedgekeur het (kl 5(2)(ii)).

4 Oorgangsmaatreëls

4 1 Die nuwe bedeling moet gesien word teen die agtergrond van oorgangsmaatreëls wat daarop gemik is om beskerming te verleen aan *aktiewe* prospekteer- en mynwerksaamhede (kl 2(f) en 89(a)). Met ander woorde, prospekteerders en mynhuise wat aktief op grond prospekteer of myn, sal titelbeskerming geniet. Volgens 'n koerantberig ("Mineral Bill players make 'breakthrough'" *EP Herald* 2001-06-12 9) lyk dit ook asof 'n "verstandhouding" oor die konsepwet tussen die mynhuise en die Departement van Mineraal- en Energiesake bereik is. Na inwerkingtrede van die Wet, behels die oorgangsmaatreëls vir sulke instansies kortliks die volgende:

(a) 'n Prospekteerpermit (ingevolge die Mineraalwet) bly vir twee jaar geldig, as 'n prospekteerreg (kl 91(1) en 88(1)(ii)). Voor afloop van die twee-jaar-periode moet die houer van die permit by die Departement om 'n prospekteerreg of mynreg (ingevolge die voorgestelde wet) aansoek doen (kl 91(2)). 'n Prospekteerpermit bly geldig, as prospekteerreg, hangende die aansoek (kl 91(3)). By versuim om aansoek te doen (kl 91(4)(a)) of by 'n ministeriële besluit omtrent die aansoek (kl 91(4)(b)), hou die onderliggende mineraalreg op om te bestaan. By beëindiging van die mineraalreg of weiering van die Minister om 'n prospekteerreg toe te ken, is die Minister bevoeg om 'n prospekteerreg aan enige applikant toe te ken (kl 95(1)).

(b) 'n Ontginningsmagtiging (ingevolge die Mineraalwet) bly geldig, as 'n mynreg vir vyf jaar (kl 93(1) en 88(iii)). Voor afloop van die vyf-jaar periode moet die mynbouer om 'n mynreg (ingevolge die voorgestelde wet) aansoek doen (kl 93(2)). 'n Ontginningsmagtiging bly geldig, as mynreg, hangende die aansoek (kl 93(3)). By versuim om aansoek te doen (kl 93(4)(a)) of 'n ministeriële besluit omtrent die aansoek (kl 93(4)(b)), hou die onderliggende mineraalreg op om te bestaan. By beëindiging van die mineraalreg of weiering van die Minister om 'n mynreg toe te ken, is die Minister bevoeg om 'n mynreg aan enige applikant toe te ken (kl 95(1)).

(c) Bestaande goedgekeurde omgewingsbestuursprogramme bly van krag (kl 101(1)).

4 2 Daar word ook beoog dat houers van sogenaamde "ou-orde-regte" (bv mineraalregte) by die nuwe bedeling kan aanpas deur nakoming van die vereistes van die voorgestelde wet (kl 89(b)). Soos verduidelik sal word (*5 1* hieronder), sal houers van mineraalregte nie dieselfde beskerming as aktiewe prospekteerders of mynbouers geniet nie. Die maatreëls behels die volgende:

(a) Houers van mineraalregte (wat nie 'n prospekteerpermit of ontginningsmagtiging hou nie) sal by kennisgewing in die *Staatskoerant* deur die Minister uitgenooi word om binne 'n jaar: (i) aansoek te doen om 'n prospekteer- of mynreg (kl 94(1)(a)) of (ii) skriftelik en omvattende redes te gee waarom dit nie in nasionale belang is om 'n prospekteer- of mynreg nie aan iemand anders toe te ken nie (kls 94(1)(b) en 2(a)). Inligting moet ook verstrek word omtrent beoogde prospektering en mynbou-aktiwiteite, die aanvang daarvan asook redes waarom beoogde prospektering en mynbou billike toegang tot mineraalbronne sal bevorder (kl 94(2)(b)). Die Minister kan verdere inligting verlang (kl 94(2)(c)).

(b) Indien die houer van mineraalregte nie binne 'n jaar op die Minister se uitnodiging reageer nie, sal die onderliggende mineraalreg ophou om te bestaan (kl 95(3)). Indien die skriftelike redes vir die Minister onaanvaarbaar is in die lig van nasionale belang en oorwegings soos die bevordering van belange van histories agtergeblewe persone, sal die onderliggende mineraalreg ophou om te bestaan (kl 95(3)). By vermelde beëindiging van mineraalregte sal die Minister bevoeg wees om 'n prospekteer- of mynreg aan enige applikant toe te staan (kl 95(3)).

(c) Indien die skriftelike redes van die houer van mineraalregte vir die Minister aanvaarbaar is, kan hy/sy prospektering of mynbou op die grond verbied (kl 96(1)(a)) of die houer opdrag gee om aansoek te doen om 'n prospekteerreg of mynreg (kl 96(1)(b)). By uitreiking van die verbod (kl 96(3)(a)), versuim van 'n mineraalreghouer om aansoek te doen om 'n prospekteer- of mynreg (kl 96(3)(b)), of 'n ministeriële besluit oor die toekenning van die prospekteer of mynreg (kl 96(3)(c)), sal die onderliggende mineraalreg ophou om te bestaan.

(d) Ses maande na inwerkingtrede van die voorgestelde wet sal geen registrasie van mineraalregte meer in die akteskantoor plaasvind nie (kl 98(1)).

(e) By beëindiging van mineraalregte ingevolge die voorgestelde wet sal sulke regte as ongeregistreer beskou word (kl 98(2)). Die registrateur van aktes moet die aktes dienooreenkomstig endosseer (kl 98(3)).

(f) Prospekteergelde, tantième of ander vergoeding betaalbaar aan houers van mineraalregte hoef nie by beëindiging van die mineraalregte verder betaal te word nie (kl 100(1)). In uitsonderlike gevalle sal die Minister voortgesette betalings kan magtig (kl 100(2)). Die bepaling maak voorsiening vir swart stamme, soos die Bafokeng, wat tans tantième van mynhuise ontvang. Dit kan gesien word as 'n poging van die regering om 'n sebra te jag sonder om die swart strepe raak te skiet. (Die regering se "goeie bedoelings" word egter nie deur swart stamme gedeel nie vir sover histories agtergeblewe persone wat mineraalregte hou ook deur die wetsontwerp nadelig geraak gaan word: In 'n "Response by Royal Bafokeng to adverts and letters by the Department of Minerals & Energy on the Draft Minerals Development Bill" in die *Sunday Times* van 2001-04-01 21 word die volgende standpunt bv gehuldig: "It is a tragic irony that the mineral rights in such hard won land, acquired in the face of dispossession and opposition to land ownership by blacks on the part of Boer and colonial authorities and later of successive Nationalist governments, should now face expropriation without compensation at the hands of the present democratically elected government".)

(g) Aansoeke om prospekteerpermitte en ontginningsmagtigings wat 60 dae voor inwerkingtrede van die voorgestelde wet ingedien is, sal steeds volgens die Mineraalwet hanteer word in die mate waarin dit nie strydig is met die oogmerke van die voorgestelde wet nie (kl 90(1)).

5 Samevatting

5 1 Vergeleke met houers met prospekteerpermitte en ontginningsmagtigings (sien *4 1* hierbo) trek houers van mineraalregte aan die kortste ent. Mineraalregte word nie outomaties omskep in tydelike prospekteer- of mynregte nie. Die verpligting word op die houer van mineraalregte geplaas om (a) aansoek te doen om prospekteer- of mynregte, wat afgekeur kan word deur die Minister; of (b) die Minister te oortuig om nie prospekteer- of mynregte aan iemand anders toe te ken nie. By nie-nakoming van die voorskrifte van die voorgestelde wet of die neem van sekere besluite deur die Minister hou die onderliggende mineraalreg op om te bestaan. Prospekteer- en mynregte kan dan aan enige applikant, veral histories agtergeblewe persone, toegeken word (kl 2(e), 3(4) en 89(d)). Alhoewel dit in lyn is met die oogmerke van die wetsontwerp, moet in gedagte gehou word dat die Minister bevoeg sal wees om sekere kategorieë persone of sekere kategorieë van prospektering en mynbou vry te stel van die verpligting om op die voorgeskrewe wyse aansoek te doen om 'n prospekteerreg of mynreg (kl 62(1)). Die oogmerk van die vrystelling is om die deelname van sodanige vrygestelde persone aan prospektering en mynbou te bevorder (kl 62(1)(a)). Alhoewel die vrygestelde persone steeds verplig sal wees om 'n omgewingsbestuursprogram (sien *3 2* hierbo) in te dien (kl 62(3)), gaan dit lei tot oneweredige toepassing van die wet (Badenhorst en Du Toit "The Mineral Development Draft Bill, 2000 and the environment" (gepubliseer te word in 2002 *Stell L R* vol1) laat hulle soos volg uit: "The proposed preferential treatment of certain categories of persons or prospecting or mining activities by the Minister will impact negatively on environmental protection.

The culture of our government of extending deadlines for the application of statutes and exempting certain categories of people from compliance does not cultivate legal certainty and respect for the law. Law is not only applicable when it is convenient. Such a culture of convenience will furthermore also not protect the environment".)

Mineraalregte waarvoor 'n houer vergoeding betaal het of wat hy of sy geërf het, sal deur die wet vir herverdeling aan ander onteien word. 'n Mineraalreghouer wie se mineraalreg aan 'n bestaande prospekteerpermit of ontginningsmagtiging onderworpe is, verkeer in 'n nog swakker posisie. Soos aangedui (in 4 hierbo), kan houers van prospekteerpermitte en ontginningsmagtigings hul magtigings ingevolge die oorgangsmaatreëls in prospekteerregte en mynregte omskep. Tantième of prospekteergelde wat die houer van mineraalreg ontvang het, sal nie meer by beëindiging van die onderliggende mineraalreg betaalbaar wees nie. Die opbrengs van die mineraalreg verdwyn ook in die mis van transformasie (sien *4 2* hierbo).

5 2 'n Houer van 'n mineraalreg wat 'n prospekteerpermit het, geniet beter beskerming omrede sy prospekteerpermit omskep word in 'n prospekteerreg en hy die reg verkry om binne twee jaar aansoek te doen om 'n prospekteerreg of 'n mynreg (sien *4 1* hierbo).

5 3 'n Houer van 'n ontginningsmagtiging is in die beste posisie omrede sy magtiging omskep word in 'n mynreg en hy die reg verkry om binne vyf jaar aansoek te doen om 'n mynreg van 25 jaar (sien *4 1* hierbo).

6 Beplanning

6 1 'n Houer van mineraalregte (wat nie 'n prospekteerpermit of ontginningsmagtiging besit nie) wat weet of vermoed dat daar minerale teenwoordig is in die grond, kan sy posisie verbeter deur:

(a) 'n prospekteerreg ingevolge 'n prospekteerkontrak aan 'n beslote korporasie of maatskappy (waar die houer van mineraalregte of sy familielede die belange of aandele hou) te verleen. Die beslote korporasie of maatskappy kan dan aansoek doen om 'n prospekteerpermit en aktief begin prospekteer. By inwerkingtrede van die voorgestelde Wet sou die houer van 'n prospekteerpermit met een voet in die deur op die beter beskerming ingevolge die oorgangsmaatreëls geregtig wees (sien *4 1* hierbo); en/of

(b) 'n mynreg ingevolge 'n notariële mineralehuurkontrak aan 'n beslote korporasie of maatskappy (waar die houer van mineraalregte en familielede die belange of aandele hou) te verleen. Die beslote korporasie of maatskappy kan aansoek doen om 'n ontginningsmagtiging. By inwerkingtrede van die voorgestelde Wet sou die houer van 'n ontginningsmagtiging met twee voete in die deur op die beter beskerming ingevolge die oorgangsmaatreëls geregtig wees (sien *4 1* hierbo);

(c) die beslote korporasie of maatskappy kan teen vergoeding oorgeneem word deur 'n mynboumaatskappy;

(d) ingevolge die voorgestelde Wet sou aansoeke wat 60 dae voor inwerkingtrede van die nuwe Wet ingedien is, nog ingevolge die Mineraalwet hanteer word (sien *4 1* hierbo).

In die alternatief kan sodanige houer van mineraalregte:

(a) aansoek doen om 'n prospekteerpermit of ontginningsmagtiging. By inwerkingtrede van die voorgestelde Wet sou die houer van 'n prospekteerpermit of ontginningsmagtiging (met een of twee voete in die deur) op die voordeliger beskerming ingevolge die oorgangsmaatreëls geregtig wees; en

(b) prospekteer of myn.

Daar moet in gedagte gehou word dat 'n prospekteerreg of mynreg egter slegs met skriftelike toestemming van die Minister aan 'n mynboumaatskappy oorgedra sal kan word (sien *3 2*(j) hierbo).

6 2 Bona fide-aansoeke om prospekteerpermitte of ontginningsmagtigings moet deur die Departement van Mineraal- en Energiesake oorweeg word en kan nie net van die tafel gevee word nie. Tans is dit relatief makliker om vir 'n prospekteerpermit of mynreg aansoek te doen as om later ingevolge die oorgangsmaatreëls daarvoor aansoek te doen, omdat die applikant hom of haar van 'n moeilker "bewyslas" sal moet kwyt. Uit hoofde van artikel 33 van die Handves van Menseregte in die Grondwet is houers van mineraalregte geregtig op: (i) regsgeldige en billike administratiewe optrede van die Departement se kant; en (ii) die verstrekking van skriftelike redes vir die beslissing van die streekdirekteur. Die vereistes vir 'n administratiewe handeling moet dus nagekom word (sien a 3 van die Promotion of Administrative Justice Act 3 van 2000; sien verder Badenhorst en Carnelley "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)" 2000 *THRHR* 689 692–698; Badenhorst "Ontginningsmagtigings ingevolge die Mineraalwet 50 van 1991 – *Balmoral Investments (Edms) Bpk v Minister van Mineraal- en Energiesake* 1995 9 BCLR 1104 (NC)" 1996 *Obiter* 168). Houers van mineraalregte is geregtig om hulle bevoegdhede ingevolge die bepalings van die Mineraalwet uit te oefen en ingevolge die bestaande regstelsel te beskerm.

6 3 Die volgende *faktore* moet egter in gedagte gehou word:

(a) 'n Aansoek ingevolge die Mineraalwet om 'n prospekteerpermit of 'n ontginningsmagtiging (en omgewingsbestuursprogram) het tyd- en koste-implikasies.

(b) By die toekenning van 'n prospekteerreg of mynreg ontstaan statutêre verpligtinge ingevolge byvoorbeeld hoofstuk VI van die Mineraalwet (sien *2 3* hierbo) en hoofstuk 5 van die wetsontwerp vir die houer van die reg. Die verpligtinge in die voorgestelde Wet het verskeie regsimplikasies en nakoming daarvan het koste-implikasies.

(c) Die sluiting van 'n prospekteerkontrak en/of mineralehuurkontrak het uiteraard regskostes tot gevolg.

(d) Benewens uitsonderings, is prospekteergeld wat betaalbaar is ingevolge 'n prospekteerkontrak, nie belasbaar nie (Stevens "Mining law"in *Practical legal training – Law Society of South Africa: Notarial practice* (2000) 107). Hereregte is nie betaalbaar by sluiting of sessie van 'n prospekteerkontrak nie (Stevens *Notarial practice* 112). BTW mag betaalbaar wees op prospekteergeld indien die houer van mineraalregte as 'n BTW-ondernemer geregistreer is (Stevens *ibid*).

(e) Tantième betaalbaar uit hoofde van 'n mineralehuurkontrak is belasbaar in die hande van die houer van mineraalregte (Stevens 119). Hereregte is betaalbaar by sluiting van 'n mineralehuurkontrak (Stevens 118). Indien die houer van mineraalregte as BTW-ondernemer geregistreer is, is BTW betaalbaar op tantième in stede van hereregte (Stevens *ibid*).

(f) Om te prospekteer of te myn, is nie goedkoop nie en verg kundigheid.

Al hierdie faktore en onsekerheid omtrent die finale vorm van *Mineral Development Act* moet deur 'n houer van mineraalregte, in oorleg met 'n prokureur (en geoloog) opgeweeg word teen die waarde van die mineraalregte wat moontlik regmatig beskerm kan word. Slegs dan sal 'n houer van mineraalregte 'n finale besluit omtrent sy of haar regsposisie kan neem.

7 Slotsom

'n Houer van mineraalregte kan na 'n *behoorlike opweeg van belange* sy of haar regsposisie verbeter deur 'n prospekteerpermit of 'n ontginningsmagtiging ingevolge die (huidige) Mineraalwet te bekom, en aktief te begin raak op sy of haar grond indien hy of sy weet of vermoed dat daar minerale in die grond teenwoordig is. Daar moet onthou word dat die verkryging van 'n prospekteerpermit of ontginningsmagtiging verskeie regsimplikasies tot gevolg het. Nogtans is een voet, of verkieslik twee voete, in die deur steeds te verkies bo 'n ministeriële uitnodiging in die *Staatskoerant* om redes te kom aanvoer waarom iemand anders nie op die grond mag prospekteer of myn nie. 'n Minister wat moeilik vatbaar is vir oortuiging mag dalk die deur toe hou! Vir 'n geregshof om die deur weer oop te maak, het ook weer regskostes tot gevolg.

Daar word gehoop dat 'n mineraalregte-*satyagraha* tot geregtigheid vir houers van mineraalregte en beter insigte vir die opstellers van mynbouwetgewing sal lei.

PJ BADENHORST
Universiteit van Port Elizabeth

Reasonableness must . . . be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom amd equality . . . It may not be sufficient to meet the test of reasonableness to show that measures are capable of achieving a statistical advance in the realisation of the right . . . If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

Yacoob J in Government of the Republic of South Africa v Grootboom 2000 11 BCLR 1169 (CC) *para* 44.

VONNISSE

CONTRACT OF SALE – RECTIFICATION AND CANCELLATION
Singh v McCarthy Retail Ltd t/a McIntosh Motors
[2000] 4 All SA 487 (A)

1 Introduction

This case deals with a number of aspects regarding the law of contract, such as rectification of the written document where it does not reflect the parties' true intentions, the common law remedies for breach of contract (cancellation, specific performance and damages), the inclusion of tacit terms in a contract and the cancellation of a contract on the ground of (positive) malperformance. It also deals with the tests for the inclusion for tacit terms and for rescission because of malperformance.

The judgment of Olivier JA, although rather brief, is succinct and clear. In my opinion it is an ideal decision to prescribe to students as compulsory reading material in their law of contract syllabus. Young (and maybe not so young?) practitioners may also benefit from reading this judgment – it is a good example of a case that should probably never have reached the Supreme Court of Appeal.

2 Facts

The parties entered into a written contract of sale in terms of which the appellant bought a new Mercedes of a certain model from the respondent. The latter (seller) carried on business at Pinetown. Because he did not have the required vehicle in stock, the parties agreed that the seller would obtain it from another dealer in King William's Town and that it would be delivered to the appellant (buyer) at Durban, at the seller's expense. Delivery took place in due course and the appellant honoured his side of the bargain.

In order to effect delivery of the car, the seller arranged for it to be driven under its own power from King William's Town to Durban. However, the odometer was disconnected, so that when the car was delivered to the appellant it showed a kilometre reading of 160, rather than the true 920. The appellant was unaware that the car had been driven thus and only discovered the true position after delivery.

3 Proceedings before the court *a quo*

The appellant's case in the court *a quo* was that what he bought was a new car and not one which had been driven from King William's Town to Durban. He alleged that the respondent was made aware of his wishes in this regard and that they had in fact agreed that the car would be brought to Durban by road transportation carrier.

Therefore, the appellant alleged, the respondent had committed a breach of contract which entitled the appellant to rescission (cancellation) and restitutionary relief.

As regards the breach of contract, the appellant contended that the written contract did not correctly reflect all the terms agreed upon between him and the respondent because it did not record a term which the appellant formulated as follows:

> "Defendants (now respondent) will source the vehicle from another dealer in King William's Town . . . and the vehicle will be brought to Durban by road transportation carrier."

3 1 Rectification

Appellant claimed, first of all, rectification of the written contract of sale to include the above term. His allegation of breach of contract was based squarely on the above facts and the contract as rectified. The court *a quo* upheld the claim for rectification. It also held that the respondent was in breach of the rectified contract by having the car driven under its own power from King William's Town to Durban instead of having it conveyed by motor carrier transportation.

3 2 Cancellation

Appellant further claimed cancellation (rescission) of the contract and restitutionary relief. His entitlement to rescission was based on the grounds, first, that the respondent breached the contract in a material respect (ie malperformance), and secondly, on an implied *lex commissoria*. The court rejected the appellant's contention that the breach was of such a fundamental nature as to justify cancellation of the contract; it also rejected the claim that the parties had agreed tacitly to a *lex commissoria*.

The court therefore granted absolution from the instance with costs and later granted leave to appeal to the Supreme Court of Appeal.

4 Facts not in dispute

The following facts were not in dispute:

(a) That the parties entered into a written contract of sale of the car at Durban on 8 February 1996.

(b) That the written contract contained the following terms:

> "8 I [the purchaser] agree that the vehicle is new, notwithstanding –
>
> 8.1 that it may have been driven under its own power with or without the distance travelled having been recorded on the odometer –
>
> 8.1.1 from the plant where it was assembled to the place of delivery; or
>
> 8.1.2 for demonstration purposes; or
>
> 8.1.3 for pre-delivery testing;
>
> 8.2 that it may have sustained minor damage in the course of 8.1."

(c) That the car was driven under its own power from King William's Town to Durban and during that time its odometer was disconnected.

(d) That the car was so driven without the appellant's knowledge or consent.

(e) That the appellant became aware that the car had been thus driven only after delivery of the car to him and because he noticed minor damage or defects in the car that were caused by such driving.

5 Proceedings before the Supreme Court of Appeal

5 1 The claim for rectification

Oliver JA stated as "trite law" the following important principle in respect of the appellant's onus of proof as regards the alleged term (quoted in para 3 above):

> "[He] bears the burden to prove, on a balance of probabilities, either an antecedent or contemporaneous agreement or a common continuing intention of the parties, in respect of the alleged term, which was mistakenly not reflected in the written document" (490 para [8]).

This statement must be considered carefully, as it assumes that the "written document" does in fact constitute a valid contract. Rectification of an invalid contract (a nullity) is not possible – that is also trite.

The respondent expressed disagreement with the finding of the court *a quo* which had upheld the claim for rectification. It did not argue that the judge had misdirected itself or that he had applied the wrong legal principle or test, but suggested that he had made a wrong finding on the factual issue as to whether the parties had agreed on the alleged clause (490 para [9]). Olivier JA decided that, because of his finding on the appellant's right to cancel the contract (see para *5 2* below) it was not necessary for him to deal with the question of rectification at all. He was therefore prepared to assume in favour of the appellant that the court *a quo* was correct in its decision on this aspect and proceeded with his judgment on the basis that the respondent had in fact committed a breach of contract by having the car driven under its own power, instead of transporting it by carrier (490 para [10]).

5 2 Cancellation of the contract

Olivier JA correctly dealt separately with the two possibilities in this regard, namely (a) cancellation in the absence of a *lex commissoria*, where the breach (malperformance *in casu*) was material, and (b) cancellation in terms of a *lex commissoria* "entitling the appellant to cancel if the contract is breached *as aforesaid*" (my italics; the *lex commissoria* may of course entitle the injured party to resile even if the breach is of a negligible or trivial nature).

5 2 1 Cancellation because of malperformance in absence of *lex commissoria*

Olivier JA's point of departure (490 para [12]) was to reiterate the basic principle that the right of the injured party to cancel the contract on account of malperformance by the other party, depends on whether or not the breach, "objectively evaluated, is so serious" as to justify cancellation. He then asked when a breach in the form of malperformance is so serious and quoted with apparent approval (490–491 para [13]) the following summary by Van der Merwe *et al Contract general principles* (1993) 225 who refer to decided cases and other writers:

> "The test for seriousness has been expressed in a variety of ways, for example that the breach must go to the root of the contract, must affect a vital part or term of the contract, or must relate to a material or essential term of the contract, or that there must have been a substantial failure to perform. It has been said that the question whether a breach would justify cancellation is a matter of judicial discretion. In more general terms the test can be expressed as whether the breach is so serious that it would not be reasonable to expect that the creditor should retain the defective performance and be satisfied with damages to supplement the malperformance."

Olivier JA mentioned the point of view adopted almost fifty years ago in *Aucamp v Morton* 1949 3 SA 611 (A), namely that because contracts and breaches take so many forms, it was impossible to lay down a simple general principle that can be

applied to all cases. He then quoted the court's decision and reasons for deciding that the respondent in that case was not entitled to resile when it said (620) "nor were the obligations which were broken so vital or material to the performance of the whole contract that respondent could say that the foundation of the contract was destroyed".

In what is perhaps the salient point of his judgment, Olivier JA indicated what he perceived to be the correct approach (491 para [15]):

> "The test, whether the innocent party is entitled to cancel the contract because of malperformance by the other, in the absence of a *lex commissoria*, entails a value judgment by the court. It is, essentially, a balancing of competing interests – that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?"

Not only is the test formulated by Olivier JA commendable, but his reminder in respect of the common law remedies for breach of contract is also apt: Cancellation has always been regarded as a strict or drastic ("radical") remedy, carefully approached by the courts. On the other hand, a claim for specific performance (coupled perhaps with a claim for damages) has always been the natural remedy: the courts would rather see contracts being carried out and give effect to the agreement between the parties than, as the judge put it, "undo all its consequences".

Applying the above test (or "broad perspective" as he calls it) to the facts, Olivier JA closed the door firmly on the appellant, deciding that the respondent's breach did not justify rescission. Analysing the evidence, the judge concluded as follows (491 para [16]):

> "It is true that the appellant wished to buy the Mercedes . . . as a new car. He was adamant that it should be transported by road carrier. But if one analyses the evidence, the matter becomes more opaque. The appellant suggested . . . that if the respondent could not deliver the [car] by carrier, it must pay his air fare to King William's Town and he would drive it back to Durban at their expense. The true implication of this scheme was that he would drive the car to Durban as agent of the respondent . . . *His real complaint, therefore, was not that the car was driven from King William's Town to Durban, but that it was not driven by himself.* The appellant relied on this solitary fact; he did not rely on any substantial damage to the vehicle due to its having been driven as explained. The breach, in this form, does not justify rescission" (my italics).

5 2 2 Cancellation based on tacit *lex commissoria*

Olivier JA did not take long to dispose of the appellant's contention that the parties had tacitly included a *lex commissoria* (agreed right to resile) in their contract. First, he referred to Corbett AJA's definition of a tacit term in *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531H as

> "an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances" (491 para [17]).

Applying the so-called "officious bystander test" in respect of the inclusion of tacit terms in a contract, Olivier JA came to the following conclusion, which proved to be the final nail in the appellant's coffin:

> "The contract in this case makes no provision for a right of cancellation in favour of the purchaser [appellant] under any circumstances. And it is impossible to find, on a preponderance of probabilities, and applying the officious bystander test, that both parties would have agreed to a *lex commissoria* in respect of the breach now under discussion" (491–492 para [18]).

In the end, Scott JA and Mthiyane AJA concurred with Olivier JA's decision to dismiss the appeal with costs.

6 Conclusion

In my opinion the paucity of authorities referred to by Olivier JA is significant (only two cases and one text-book). Just about all the "law" applied in this case amounted to basic ("trite") principles of the law of contract that did not really need backing up by lists of decisions and articles in journals or even text-books. Why then write a case-note on this decision? Apart from Olivier JA's own contribution as regards the test for cancellation on the ground of malperformance (in the absence of a *lex commissoria*), which I find commendable, the ease with which and well-reasoned manner in which he applied the basic principles to the facts is a good example to be followed by students, academics and practitioners alike.

CJ NAGEL
University of Pretoria

SEXUAL ORIENTATION AS A CONSTITUTIONAL RIGHT
National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 1 SA 39 (CC)

1 Introduction

Of all the conditions necessary for a democracy to flourish, equality, liberty and human dignity are the most fundamental. The equality right entrenched in the South African Constitution is linked to both the concept of liberty and the concept of human dignity. The importance of these values was emphasised at the very beginning of the Constitution. In terms of section 1, the country is founded on the values of "human dignity, the attainment of equality and the advancement of human rights and freedoms". The commitment to equality guarantees that the lives of people are made better by ensuring that each person is shown equal concern and respect. From this emerges the acknowledgement of the concept of liberty, where each person is allowed to develop and explore his or her own interests as a human being. Section 7(1) describes the Bill of Rights as an instrument which enshrines the rights of all the people in the country and affirms the values which underlie the Constitution, human dignity, equality and freedom.

Liberty is so fundamental in our society that its constitutional protection is guaranteed, irrespective of the means. The question is: "How comprehensively should liberty be understood?" In the United States the widest possible meaning was given to this concept in *Meyer v Nebraska* 262 US 390 where it was stated that liberty includes

> "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children . . . and generally to enjoy those privileges long recognised as essential to the proper pursuit of happiness by free man" (399).

It is suggested by Devenish (*Commentary on the South African Constitution* (1998) that it may be deduced from the use of the word "includes", in section 12 of the 1996 Constitution, which contains the right to freedom and security of the person, that the list is intended to be merely explanatory and not exhaustive. Aspects of both bodily and psychological integrity are protected by other rights, for example the right to privacy and the right to human dignity. It is therefore essential that this right be perceived as a single one with different interrelated aspects.

We may live in a society which claims to respect individual liberties and in which extreme attempts are made to bridge the chasm caused by the past. However, the most prominent feature of the South African social order has been discrimination, which continues today for various reasons. Although no society can function without making distinctions, those distinctions which lead to discrimination have permeated into the social order of this country and have created widespread inequality. If we are to take the commitment to equality seriously, we will have to acknowledge the need to undo these existing inequalities.

It is accepted that the government is not precluded from making classifications for a number of different reasons, provided such classification is legitimate, that is, based on permissible criteria. However, the result of these classifications is that the fundamental liberty of every individual may be subject to curtailment. Autonomy and individual choice are the values that go to the heart of all democratic values of freedom and equality. These values relate to the most comprehensive of rights and to the right which is most valued by our civilisation, namely the right to be left alone and to choose one's own way of life. The Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) found that the right to make decisions regarding sexual relationships is also related to or is an aspect of the right to be left alone. The court stated:

> "[W]e all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community" (para 32).

Sachs J was of the view that the right to privacy entails the right to get on with one's life and to express one's personality, which may arguably be regarded as the essence of the concept of liberty, thereby realising the right to personal self-realisation, since the state cannot attempt to mould individuals into what it perceives to be the ideal citizen.

In *Bowers v Hardwick* US 186 (1986) the American Supreme Court's Justice Blackmun in his dissenting judgment stated:

> "The ability to define one's identity that is central to any concept of liberty cannot be exercised in a vacuum. The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests . . . that there are many 'right' ways of conducting those relationships and that much of the richness of that relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds" (205 fn 127).

To determine the legitimacy of a classification, the criterion is that such classification may not infringe on the dignity of the persons concerned. The Constitutional Court, in recognising the importance of dealing with disadvantage in society, chose to define equality with reference to dignity. However, it may be said that disadvantage and differentiation are characteristics that are central to the right to equality and that it is for this reason that the right should be defined in terms of these principles rather than in respect of the requirement of dignity.

It is evident from the cases that there are those who choose to place systemic discrimination and patterns of group disadvantage at the centre of the right to equality (eg O'Regan J's judgment in *Brink v Kitshoff* 1996 6 BCLR 752 (CC)). On the other hand there are those who choose to interpret the equality right by placing dignity at the heart of the right (eg Goldstone J in *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC)). This highlights a shift from group-based disadvantage to the protection of the right to equality with dignity as its central focus. In *Harksen v Lane* 1997 11 BCLR 1489 (CC), the court underlined the importance of dignity to the enquiry into unfair discrimination. The court said that the question of unfairness revolves to a considerable extent around the impact of the discrimination on the complainant. In *Prinsloo v Van der Linde* 1997 BCLR 759 (CC) the issue of an infringement to dignity or some comparably serious injury was said to go to the heart of the question whether the discrimination was unfair and not to the question whether the differentiation amounted to discrimination. In *Pretoria City Council v Walker* 1998 3 BCLR 257 (CC) the court found that there had been a violation on the basis of an invasion of personal individual dignity and not on the basis of material disadvantage.

The Constitutional Court formulated a systematic enquiry into a violation of the right to equality in *Harksen v Lane*. First, it must be determined whether there is a differentiation and whether the differentiation is rationally connected to a legitimate governmental objective. Secondly, if the answer to the above is in the affirmative, it must then be established whether the differentiation amounts to discrimination and whether such discrimination is unfair. If the discrimination is found to exist on one of the listed grounds in terms of section 9(3), then it is presumed to be unfair in terms of section 9(5). If it is alleged on an analogous ground then the unfairness of the differentiation must be established.

There are many academics who do not endorse the substitution of dignity for disadvantage, on the basis that the right is now being defined by the value of dignity rather than the value of equality. Goldblatt and Albertyn ("Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality" 1998 *SAJHR* 248) are of the view that the value of the equality right is realised when the courts give specific "transformative content" to the values of the right to equality, the right to dignity and freedom. They are of the firm belief that the courts should centre the value of equality within the equality right.

It must be realised, however, that in the above cases the enquiry considered the impact the differentiation has on the individual's dignity where the discrimination occurs on grounds not listed in section 9(3). Therefore, when dealing with discrimination on grounds listed in section 9(3), it must be understood that the differentiation is presumed to be unfair in terms of section 9(5). Therefore the complainant need not prove the unfairness of the discrimination.

When determining unfairness in cases where the discrimination complained of is not listed in section 9(3) and discrimination occurs on an unlisted but analogous ground or on a ground of a comparably serious nature, it is the impact that the differentiation has on the fundamental human dignity of the complainant which will be decisive. Here the onus is on the complainant to prove the discrimination. Therefore a distinction must be made between differences that affect a person's dignity and self-worth as a human being and those that do not have this effect.

From this it is clear that mere differentiation will be constitutional as long as it does not deny equal protection of the law or does not amount to unequal treatment of the law in violation of section 9(1), the right to equality. This does not mean,

however, that human dignity is not considered if the discrimination occurs on a listed ground. Ackerman J, in reaching a decision in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, demonstrated the centrality of human dignity to the equal protection right in section 9, and the prohibition against unfair discrimination. In the course of his judgment, he highlighted the fundamental importance of section 7(1) of the Constitution, which provides:

> "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

2 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*

This study analyses the route adopted by the Constitutional Court in protecting the right to equality and the right to dignity in the *Gay and Lesbian Equality* case, which the court emphasised as the core rights of the Constitution. In the discussion of the importance of these rights to society and the implications of not affording a preferred amount of protection to certain groups of people, the court's interpretation and application of the constitutional provisions will be examined. The analysis will include an attempt to find a rational justification for the protection of lesbian and gay rights, relating specifically to the prohibition of discrimination because of one's sexual orientation. I will prefer to argue that equality should be seen as the incentive for the result which law reform measures are supposed to achieve.

The court had to decide on the constitutionality of immigration law under section 25(5) of the Aliens Control Act 96 of 1991. First of all, the court had to decide whether it was unconstitutional to allow for the immigration of spouses of permanent South African residents into South Africa but not to afford the same benefits to gays and lesbians who are in permanent same-sex life partnerships with permanent South African residents. Secondly, whether, when the court concludes that a provision in a statute is unconstitutional, the court may read words into a statute to remedy the unconstitutionality.

The court *a quo*, being the High Court of the Cape of Good Hope, declared section 25(5) invalid on the ground that the benefit conferred on spouses was inconsistent with section 9(3) of the Constitution in that it discriminated against same-sex life partners on the grounds of sexual orientation. The declaration of invalidity was suspended for a period of twelve months within which Parliament had to correct the inconsistency.

Section 25(5) of the Aliens Control Act 96 of 1991 provides:

> "Notwithstanding the provisions of ss (3) and (6), a regional committee may, upon application by the spouse or the dependent child of a person permanently and lawfully resident in the Republic, authorize the issue of an immigrant permit."

The attack on this section was based on the fact that it afforded preferential treatment to an alien applying for an immigration permit who is "the spouse of a person permanently and lawfully resident in the Republic", but did not confer the same benefit on an alien who is in a permanent same-sex life partnership with a person permanently and lawfully resident in the Republic.

The issue with which the court was faced was whether this preferential treatment amounted to discrimination which was unfair. As stated earlier, the equality right prohibits unfair discrimination and the determining factor is the impact of the discrimination on the complainants. In the Constitutional Court's first case on equality (*Brink v Kitshoff*) O'Regan J had emphasised the need to analyse the equality clause in light of the past systematic and entrenched discrimination in South

Africa. She thought it imperative to consider the results of deep patterns of disadvantage. The Constitutional Court found section 44(1) and (2) of the Insurance Act to be unconstitutional because it perpetuated the stereotypical perceptions of women in society. This was the attitude adopted by the court in deciding on discrimination on the basis of sexual orientation.

The right to be free from sexual orientation discrimination is recognised as a fundamental right in section 9(3) of the South African Constitution, which provides:

> "The state may not 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."

Nevertheless, law which discriminates on the basis of sexual orientation, whether directly or indirectly, still exists today. This essentially means that there are laws which allow the choice but discourage it via other sanctions, such as opportunities that are available to heterosexual partners but are not to same-sex life partners, for example, civil marriage. From this it is evident that the effect of sexual orientation discrimination on the lives of gays and lesbians is not limited to their sexual conduct. They are treated differently in other areas such as employment, civil marriage and associated rights. The degree of this different or unequal treatment depends on the nature of the sanction imposed.

The case under discussion dealt with the distinction between heterosexual marriages and relationships and same-sex relationships and it illustrated how the concept of sexual orientation discrimination can uncover different kinds of discrimination, such as the violation of privacy rights and equality rights.

The argument of opponents of same-sex marriages has been based on the belief that the institution of marriage is centred around the concept of husband and wife. It must be realised that over the years social norms and practices have influenced the colloquial and legal definition of a family marriage. A marriage now includes a customary union, which is defined in the Aliens Control Act as "the association of a man and a woman in a conjugal relationship according to indigenous law and custom, where neither the man nor the woman is a party to a subsisting marriage which is recognized by the Minister in terms of s 1(2)". Although the recognition of customary marriages is a step forward, legal status is still denied to unions of gay and lesbian couples. South African law does not recognise permanent same-sex life partnerships as marriages. A same-sex life partnership is the only form of conjugal relationship open to gay and lesbian couples, since they cannot legally marry. The consequences for such unions will remain severe if the Marriage Act does not include these unions in the definition of marriage and if the perceptions of society do not change.

Marriage has always been regarded as a central institution. In *Griswold v Connecticut* 381 US 479 the American Supreme Court confirmed the special status of marriage by stating that

> "marriage is an association that promotes a way of life, not causes, a harmony in living, not political faiths, a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any . . ." (486).

The right to marry is therefore a freedom of intimate association which is a fundamental element of personal liberty and can be understood as limiting state interference rather than protecting personal autonomy. The state should not intrude into personal and intimate relationships of this nature on the basis that it does not conform to the traditional perceptions of marriage. It is generally accepted that

marriage is constitutionally protected because it promotes family stability. This suggests that any stable and significant relationship between two consenting adults should be afforded constitutional protection. Therefore, it may be cogently argued that gays and lesbians in stable and committed relationships should be as entitled to marry as heterosexuals.

Section 25(5) of the Aliens Control Act protects heterosexual relationships and not same-sex life partnerships. The question that follows is: Does section 25(5) limit the constitutional right of the lesbian and gay applicants in this case? The rights in issue are the right to equality provided in section 9 and the right to human dignity in section 10.

2 1 The discrimination inquiry

In determining whether the differentiation caused by section 25(5) amounted to unfair discrimination, Ackermann J applied the two-stage inquiry into the violation of the equality right developed by the Constitutional Court in *Harksen v Lane*. The judge stated that the differentiation existed in the fact that the section failed to award the same benefits to same-sex life partners as it did to "spouses". With regard to the discrimination, the court held that the Act discriminated on the grounds of sexual orientation as well as marital status, both of which are specified in section 9(3). Further, that the discrimination is presumed to be unfair discrimination by virtue of section 9(5).

The next enquiry was to examine the impact of the discrimination on the affected applicants. The factors to be considered in this regard are:

- the position of the complainants in society, whether they have suffered in the past from patterns of disadvantage;
- the nature of the provision or power and the purpose sought to be achieved by it. It must be established whether the purpose is aimed at achieving a worthy and important societal goal, and not at impairing the fundamental human dignity of the complainants;
- having regard to the above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to the impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

The first requirement of a history of discrimination is very significant, as it compels the court to consider whether the group has been subject to systematic discrimination, which is crucial to the enquiry. The court found that homosexuals have historically been the object of pernicious hostility and that they have been frequently excluded from benefits that are reserved exclusively for married spouses in a heterosexual relationship. Further, the continuous discrimination results in the denial of equal dignity and self-worth which eventually leads to the heartless and demeaning treatment of homosexual persons by the rest of society.

The next stage in the enquiry is important, as this determines the impact of exclusion from these protective measures on same-sex life partners, in other words, the discriminatory impact of section 25(5). In establishing the purpose of the provision, the court considered the respondent's contention that the section is aimed at achieving the societal goal of protecting the family life of "lawful marriages" and recognised "customary unions" by allowing spouses of permanent and lawful residence to receive permanent residence permits (para 45). The court concluded that gays and lesbians as a disadvantaged group have been subjected to these prejudices because of inaccurate stereotypes which have developed over the years.

The first of these is that their sexual orientation is due to their erotic and emotional sexual conduct with persons of the same sex. The second stereotype is based on the fact that same-sex couples cannot procreate. It must be realised that the Constitution does not protect marriage because of its link to procreation. If we look at the American decisions of *Griswold v Connecticut* and *Roe v Wade* 410 US 113 (1973), it is suggested that marriage can be understood independently of procreation. The state cannot force married persons to have children, nor can it forbid infertile persons to marry. Therefore, the exclusion of the possibility of procreation cannot be grounds for preventing people from getting married. As Ackermann J put it: "[P]rocreation is not a defining characteristic of conjugal relationships" (para 51).

The persistence of arguments based on the definition of marriage or the necessary link between marriage and procreation perpetuates these stereotypes and results in the refusal to recognise same-sex marriages. The consequences are that same-sex couples are denied the recognition of a fundamental right which results in the denial of a fundamental liberty. In *Canada (Attorney General) v Mossop* (1993) 100 DLR (4th) 658 (quoted by Ackermann J para 52) the court held:

> "Procreation may be an element in many families but placing the ability to procreate as the basis of family, could result in an impoverished rather than an enriched version."

Many may argue, as the respondents did in this case, that the court has a legitimate interest in protecting the family life of the conventional and traditional institution of marriage, and further that section 25(5) entitles them to do so. The court, in addressing this argument, had to determine whether a rational connection existed between the object sought to be achieved and the limitation of the constitutional rights of the applicants.

The court held, first, that the traditional institution of marriage need not necessarily be protected in a manner which unjustifiably limits the constitutional rights of gays and lesbians in a same-sex life partnership. Secondly, there exists no rational connection between the government interest sought to be achieved, namely, the protection of the family and the family life of the traditional marriage, and the flagrant exclusion of same-sex life partners from the benefits under section 25(5).

On these grounds, the court found that section 25(5) constituted unfair discrimination, resulting in a severe limitation of the equality right (s 9) and the right to dignity (s 10) to which gays and lesbians who are permanent residents in the Republic and in permanent life partnerships with foreign nationals are entitled. The discrimination was therefore unfair in terms of section 9.

2 2 The justification analysis

The court did not think it necessary to engage in an analysis of section 36(1). It did, however, engage in a proportionality test which incorporated the balancing of competing interests. The court emphasised that the right to equality and dignity are the core rights of our Constitution which highlight the underlying values of human dignity, equality and freedom. In this analysis the court adopted the proportionality test that had been applied in *S v Makwanyane* 1995 6 BCLR 665 (CC) in the balancing of the different interests. It found that the failure to include same-sex life partners in section 25(5), had the effect of discriminating on the grounds of marital status under section 9(3). The court concluded there was no conflicting interest on the other side that should be considered in the balancing process.

The attitude of the court must, however, not be misunderstood. The court accepted and recognised the protection of the family and of family life of conventional

marriages, and accepted that it is an important governmental objective, but emphasised that this could be done in a way which does not limit or affect the rights of same-sex life partners. Neither will extending the benefits of section 25(5) to same-sex life partners negatively affect the traditional marriage, according to the court. Finally, the court concluded, there was no justification for the limitation in the present case; it was therefore inconsistent with the Constitution and hence invalid.

Basic fairness requires that courts and legislatures should be compelled to eliminate laws and policies governing entitlements that discriminate against same-sex couples, either by affording gays and lesbians the right to marry, or at least by affording them the same personal benefits that are available to heterosexual spouses.

2 3 The appropriate remedy

In deciding on the appropriate remedy, the court realised that it had an obligation, first of all, to provide appropriate relief in terms of section 38 of the Constitution (which must be read with s 172(1)(b)) and secondly to consider the doctrine of separation of powers in order to ensure that the court did not trespass on the legislative field reserved by the Constitution for the legislature. It contemplated removing the offending part of the provision by either actual or notional severance or by reading words into the statutory provision to cure its inconsistency. The consequence of both these acts would be that a parliamentary enactment would be altered by a court order, in the former by excision and in the latter by addition. It is, however, important for the court to ensure that such an order does not impinge on the powers of the legislature.

Section 172(1)(b) of the Constitution provides the courts with the power to make an order that is "just and equitable" together with:

> "(i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period on any conditions, to allow the competent authority to correct the defect".

It must be realised that if reading-in is constitutionally justified in terms of the legislation, it would not be just to deny such a remedy on the basis of its form. Section 2 of the Constitution, which contains the supremacy clause, clearly states that "law" must be inconsistent to be invalid, not "words"; therefore the form of the provision cannot be placed above its substance. If we look at section 172(1)(a), we will observe that according to this section "any law" inconsistent with the Constitution will be invalid to the extent of its inconsistency. The provision does not refer to "any words". The court was essentially involved in an interpretation process, namely in interpreting the provisions of the Constitution to ensure that the remedy is consistent with the Constitution and that such remedy or order does not usurp the power of the legislature.

The reading of words into the statute must be an appropriate remedy which is just and equitable. Ackermann J quoted the Canadian case of *Schacter v Canada* 1992 (3) DLR (4th) 1 (para 71), in which the Supreme Court held that a court may read words into a statute in appropriate circumstances and must set out the principles to guide such decisions. He was of the view that in terms of our Constitution, (s 172(1)(b)), it is also permissible to read words into a statute to obviate unconstitutionality. The court set out the following guidelines to be adhered to:

1 The provision which results from the severance or the reading-in must be consistent with the Constitution.

2 The result must interfere with the laws enacted by the legislature as little as possible.

3 When reading words into a statute, the court must be able to define and explain how the statute ought to be extended in order to comply with the Constitution.

4 The court in this process must be as faithful as possible to the legislative powers as provided for by the Constitution.

5 Reading words into the statute must not result in an unsupportable budgetary intrusion.

6 When a court strikes down a provision, reads words into or extends the provision, the legislature is still able to make further amendments, provided such amendments are within the limits of the Constitution. Thus it may exercise final control over the nature and extent of the benefits.

In applying these principles, the court expressed its reluctance to strike down section 25(5) in its entirety, for the simple reason that this would mean that spouses who have already benefited under the section will no longer have these benefits. Thus a remedy had to be sought which does not deprive spouses of their current benefit. Ackermann J found that an effective way to achieve this was by finding an appropriate reading-in order. The aim of such an interpretation must be not only to ensure that same-sex life partnerships receive the same protection and concern from the law, but also to ensure that stereotypes applied to same-sex life partners no longer continue to escalate in society.

After considering the above factors the court concluded:

> "The Constitutional defect in s 25(5) can be cured with sufficient precision by reading in after the word 'spouse', the following words: 'or partner, in a permanent same-sex life partnership', and it should indeed be cured in such a manner" (para 86).

The court did not fail to make clear what the word "permanent" means in this context. It essentially means that the parties must intend to "cohabit with each other permanently". They must be in a committed, permanent and loyal relationship and must be capable of expressing love and supporting each other in every aspect of the relationship the way heterosexual spouses do. The court in fact laid down a guideline to ensure that such couples are capable of constituting a family and conducting a family life which is not significantly different from the family life of heterosexual spouses. The sole purpose of the court in mentioning this requirement was to ensure that the reading-in remedy is applied only to same-sex life partners who have been excluded from the benefits of section 25(5). The court held further that the words read into the statute do not encroach upon legislative territory. Thus section 25(5) was found to be unconstitutional and as a result of the reading-in, same-sex life partners are now entitled to the benefits provided by section 25(5).

3 Conclusion

The guarantee in the Constitution of equality and non-discrimination on the ground of sexual orientation is a promise of continuous evaluation of discrimination against sexual orientation. The term sexual orientation incorporates the concepts of personality and identity. The fact that it is included as a fundamental right in the Constitution and that it has definite legal meaning in our case law, indicates a significant change in the attitude of South African society to homosexuality.

In his decision, Ackermann J reminded the legal profession that when interpreting the Constitution, regard must be had to the values that underlie the Constitution, which are equality, human dignity and freedom. If section 25(5) were to remain unchanged, the consequences would be alarming. There would be a cruel invasion of the dignity and self-worth of gays and lesbians in our society and the absurd

misconceptions about their sexual orientation would be perpetuated. This blatant disregard for their fundamental human dignity and their right to be treated equally must be rejected.

It has been seen that discrimination on the basis of sexual orientation affects gays and lesbians in both the public and private spheres and that South African legislation, as it stands, appears to be inadequate to afford them consistent protection. Thus it is imperative that affirmative steps be taken to protect them against such discrimination. Despite the fact that there has been some improvement, discrimination on the basis of sexual orientation still persists in our society and our legal system. Such discrimination should be recognised as a legitimate issue and gay and lesbian concerns should become part of our legal discourse. In the interim, threatening indifference and cruel prejudices will persist. Nevertheless, it is hoped that the decision of the Constitutional Court will foster the development of laws that incorporate gay and lesbian issues. This would mean that the commitment to equality and the transformation process will have the effect it was meant to have, which is the complete reconstruction of our state and our society and the elimination of systematic forms of material disadvantage. If this purpose is served, then, in the words of Goldblatt and Albertyn, people will be given the opportunity "to realize their full human potential within positive social relationships" (249).

CHRYSTAL CHETTY
University of South Africa

'N KRITIESE EVALUERING VAN DIE NADEEL-VEREISTE VAN ESTOPPEL
Jonker v Boland Bank PKS Bpk 2000 1 SA 542 (O)

1 Inleiding

Estoppel is 'n verweer (Rabie *The law of estoppel in South Africa* (1992) 7; *Pandor's Trustee v Beatly & Co* 1935 TPD 358 364) wat geopper word waar (argumentsonthalwe) die eiser 'n wanvoorstelling gemaak het waarop die verweerder gehandel het en laasgenoemde nou poog om die eiser te keer om die wanvoorstelling wat hy gemaak het, te ontken. Die doel van estoppel is dus om die een party (die wanvoorsteller) aan sy wanvoorstelling gebonde te hou en dus te voorkom dat hy ander feite opper wat strydig is met die wanvoorstelling. Sou die wanvoorsteller toegelaat word om ander feite te opper wat strydig is met sy wanvoorstelling, sal die misleide benadeel word (sien Rabie 1; *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 3 SA 274 (A) 291D–E).

Ten einde suksesvol te wees met estoppel, moet die volgende elemente bewys word: (i) wanvoorstelling; (ii) dat die verweerder gehandel het op die wanvoorstelling – dus kousaliteit; (iii) skuld en (iv) nadeel (Rabie 1). Estoppel moet ook duidelik gepleit word en die onus rus op die party wat dit opper om al die elemente van estoppel te bewys (Rabie 8–9; *Blackie Swart Argitekte v Van Heerden* 1986 1 SA 259 (A) 260I–J).

2 *Jonker v Boland Bank PKS Bpk*

Die feite van die saak kan kortliks soos volg opgesom word: die verweerder ('n kliënt van die eiser) het 'n tjek (wat 'n derde aan hom gegee het as betaling) by sy bank, die eiser, aangebied sodat die verweerder se rekening daarmee gekrediteer kon word. Een van die eiser se werknemers het toe nalatig aan die verweerder te kenne gegee dat die tjek (van byna R12 000) gehonoreer was, terwyl dit nie die geval was nie. Op grond van hierdie wanvoorstelling het die verweerder toe R7 000 uit sy eie rekening onttrek.

Kort daarna het die eiser die verweerder se rekening met die bedrag van die tjek gedebiteer omdat die tjek (aangebied deur die verweerder) nie gehonoreer is nie. Die gevolg was dat die rekening van die verweerder oortrokke was. Die eiser dagvaar nou die verweerder vir die bedrag waarmee laasgenoemde se rekening oortrokke is. Die verweerder opper *estoppel by representation* as verweer aangesien die eiser (die bank) nalatig voorgegee het dat die tjek gehonoreer was, terwyl dit nie die geval was nie en opper hy dus estoppel ten einde die bank te keer om die honorering te ontken (545F–546E).

Die hof *a quo* het ten gunste van die bank beslis omdat, so bevind die hof, die verweerder nie nadeel of kousaliteit (as elemente van estoppel) bewys het nie (547D–E). By appèl (na die volbank van die Vrystaatse afdeling van die hooggeregshof) was die enigste geskil of die verweerder nadeel bewys het (547G).

By appèl het die hof saamgestem met die toets vir nadeel soos geformuleer deur De Wet (*"Estoppel by representation" in die Suid-Afrikaanse reg* (1939) 16–17), wat ook deur Rabie (66) ondersteun word naamlik:

> "Nadeel word bepaal deur 'n vergelyking van die werklike posisie van die persoon met 'n waarskynlike posisie, en wel dié waarin hy waarskynlik sou verkeer het indien hy nie onder die indruk sou gewees het nie. Is die posisie waarin hy sou verkeer het beter as die waarin hy inderdaad verkeer, dan bestaan daar nadeel" (548F).

Die hof het ook verwys (548G–I) na die *obiter* opmerking in *Trust Bank of Africa Ltd v Wassenaar* 1972 3 SA 139 (D), wat die hof gemeen het nie strydig was met bogenoemde aanhaling nie:

> "If, as a result of some conduct on the part of the bank, the customer believes that his account is in credit and, acting in the faith of such belief, draws a cheque for an amount which would, if that belief were correct, not result in his account being overdrawn, *circumstances may well arise when the bank would not be entitled to recover from the customer if it turned out that the effect of meeting the cheque was to overdraw the account*"(142H–143A; my beklemtoning).

Die hof het in die *Jonker*-saak bevind dat daar geen getuienis was dat die verweerder deur die wanvoorstelling benadeel is nie:

> "Myns insiens, is mnr De Wet, wat namens die respondent verskyn het, korrek waar hy aan die hand doen dat daar geen getuienis is dat [die verweerder] inderdaad na ontvangs van die R7 000 in kontant en die daaropvolgende debitering van sy rekening met die bedrag van die tjek in 'n swakker posisie was as wat hy sou gewees het indien hy nie onder die verkeerde indruk was nie" (549F–G).

Die hof het verder gesê dat die tydstip waarop benadeling bereken word, "die tydstip [is] wat die voorsteller sy nadelige voorstelling terugtrek en nie meer daaraan gebonde wil wees nie" (549G). Die hof het gesê dat omdat die eiser die verweerder se rekening met die bedrag van die gedishonoreerde tjek gedebiteer het, die dag nadat die verweerder die R7 000 onttrek het, daar geen getuienis was dat die verweerder op enige tydstip enige vermoënsverlies gely het as gevolg van die eiser se voorstelling nie (549H–I).

Die hof het verder verklaar dat al sou die verweerder nadeel bewys het, die verweerder nie kousaliteit bewys het nie. Die hof verklaar verder:

> "Die blote feit dat die voorstelling tot gevolg gehad het dat [die verweerder] 'n verpligting aangegaan het, is nie op sigself deurslaggewend nie. Hier is 'n teenprestasie ontvang vir die verpligting (en wel die kontantbedrag van R7 000). As dit nie die geval was nie, sou die aangaan van die verpligting moontlik voldoende kon gewees het" (549J–550A).

Verder merk die hof op dat indien die verweerder op grond van die eiser (bank) se voorstelling daarin sou slaag dat die hele bedrag van die oortrokke rekening afgeskryf word, dit tot 'n onbillike resultaat kan lei (550B). Die hof sê dat "[d]ie situasie sou kon ontstaan dat hy dan nie alleen oor die R7 000 kontant wat op die oortrokke bankrekening getrek is beskik nie, maar ook oor die bedrag wat van die trekker verhaal is" (550D).

Die hof bevind dat die verweerder se

> "versuim om vermoënsverlies *of selfs verwagte vermoënsverlies* ... te bewys deurslaggewend is en [dat] ... daar nie voldoende feite [is] om hom van sy bewyslas [dat sy vermoënsposisie swakker was as wat dit sou gewees het as die voorstelling nie gemaak is] te kwyt ... nie" (my beklemtoning) (550E–F).

4 Algemene opmerkings

4 1 Verryking teenoor nadeel

Ten einde nadeel te bewys, moet die estoppel-opwerper nou in 'n slegter posisie wees as wat hy sou gewees het indien die ander party nie 'n wanvoorstelling gemaak het waarop hy gehandel het nie (Rabie 66). Uit die regspraak wil dit blyk dat estoppel nie sal slaag waar die estoppel-opwerper in 'n beter posisie is, sou sy verweer van estoppel slaag, as wat sy posisie sou gewees het indien hy nooit op die misleiding gehandel het nie. In *Durban Corporation Superannuation Fund v Campbell* 1949 3 SA 1057 (D), byvoorbeeld, het die verweerderes estoppel geopper. Indien die verweer sou slaag, sou die verweerderes in 'n beter posisie gewees het as wat sy sou gewees het indien sy nooit op die misleiding gehandel nie. Die hof het gesê dat sy *verryk* is deur die misleiding en "it would be unconscionable for her to retain the money" (1068–1069).

4 2 Bankpraktyke

Daar moet verder in gedagte gehou word dat die normale bankpraktyk is dat die bank te alle tye krediete wat ten gunste van die kliënt toegestaan is, kan omswaai in die geval van gedishonoreerde tjeks. Sou die kliënt geld onttrek teen sodanige "uncleared" tjeks, en die bank sou die tjek daarna dishonoreer, dra die kliënt die verlies (*Jonker*-saak 548J–549B). Die standpunt is al deur die Hoogste Hof van Appèl bevestig in *ABSA Bank Ltd v IW Blumberg & Wilkinson* 1997 3 SA 669 (HHA) 681H–I.

Ter ondersteuning hiervan, kan ons let op die beslissing in *ABSA Bank Ltd v De Klerk* 1999 1 SA 861 (W). In hierdie saak het die verweerder 'n tjek aan sy bank gebied ten einde sy eie rekening te krediteer. Na 'n paar dae het die verweerder navraag gedoen by sy bank of die tjek al deur die betrokkene-bank gehonoreer is. Die bank (die eiser) het in die negatief geantwoord. Na nog 'n paar dae het die verweerder weer navraag gedoen by die eiser en laasgenoemde het toe gesê dat dit wel veilig was om geld te onttrek. Die verweerder het daarna die hele bedrag (wat deur die tjek inbetaal was) onttrek *en die geld gebruik om een van sy skuldeisers te betaal.* Die eiser het daarna verneem dat die tjek nie gehonoreer is nie en eis nou die bedrag van die verweerder terug (863E–I). Die verweerder opper estoppel as verweer.

Nadat die hof (in die *De Klerk*-saak) die verweer van estoppel van die hand gewys het op grond daarvan dat die verweerder nie bewys het dat die eiser nalatig was nie (865G), het die hof *obiter* die volgende opgemerk:

> "By virtue of the fact that it was conceded that the payment to [the third party] had extinguished a valid debt, the effect thereof was to create another debt for the same amount as the original debt. In other words, the defendant has replaced one creditor with another. That action did not affect his patrimony by way of reducing it. I can make no finding that in relying on the representation the defendant acted to his prejudice" (865I–866A).

Dit wil voorkom dat die saak in die lig van bogenoemde bankpraktyk korrek beslis is. Aangesien die bank (eiser) nooit die geld aan hom verskuldig was nie, is dit nie 'n verweer om aan te voer dat die geld gebruik is om 'n ander skuldeiser te betaal nie. Die verweerder kon dus nie nadeel/skade bewys nie.

4 3 Nadeel as vermoënsregtelike skade

Daar word oor die algemeen aanvaar dat nadeel verwys na vermoënsregtelike skade (verlies) (Rabie 59 60 64; Van der Merwe "A perspective on the elements of estoppel by representation" 1988 *TSAR* 570). In *ABSA Bank Ltd v De Klerk* was die hof van mening dat dit voldoende is indien die verweerder bewys dat "relying upon the representation he has *changed his position to his detriment*" (865G–H) (my beklemtoning). Soos hierbo opgemerk, het die hof in die *Jonker*-saak verklaar dat "selfs verwagte vermoënsverlies" voldoende sal wees ten einde aan die nadeel-element te voldoen (550E–F).

Dus is potensiële finansiële skade voldoende. Rabie verklaar (60) dat "it is sufficient to show *a prospect of pecuniary loss*, and that it is not necessary to show that there will in fact be a loss measurable in rands and cents if the plea of estoppel should be refused" (my beklemtoning). Dus kan ons uit bogenoemde aflei dat estoppel per slot van rekening beskikbaar is om benadeling te voorkom.

5 Spesifieke opmerkings ten opsigte van *Jonker v Boland Bank PKS Bpk*

'n Feit wat ek opsetlik weggelaat het, was dat die verweerder die tjek vir *spesiale inbetaling* ("special clearance") by die eiser inbetaal het. In die geval van 'n spesiale inbetaling, meld die invorderingsbank, teen 'n voorgeskrewe fooi wat hy van sy kliënt verhaal, die tjek op 'n spoedeisende wyse by die betrokkene-bank aan. Laasgenoemde hou dan fondse op die trekker se rekening terug totdat die tjek in die normale loop van sake by die betrokkene-bank uitkom. Wanneer die invorderingsbank die betrokkene-bank skakel, kan eersgenoemde onmiddellik vasstel of die trekker van die tjek genoegsame fondse in sy rekening het om die tjek te honoreer.

Nadat die tjek vir spesiale inbetaling inbetaal is, het 'n amptenaar van die eiser nalatig te kenne gegee aan die verweerder dat die tjek gehonoreer sal word (545H–J). Toe die verweerder die R7 000 kontant uit sy rekening onttrek, het hy weer mondeling navraag gedoen, en het die eiser weer te kenne gegee dat die tjek inderdaad deur die betrokkene-bank gehonoreer is (546I–J).

Dus kan die *Jonker*-saak onderskei word van *ABSA Bank Ltd v De Klerk* op grond daarvan dat in eersgenoemde hofsaak die verweerder die tjek vir *spesiale inbetaling* by die bank inbetaal het, waar in die *De Klerk*-saak die verweerder die tjek bloot vir *normale betaling* aangebied het. Op grond van hierdie onderskeid kan die normale bankpraktyk, soos bespreek hierbo, myns insiens nie van toepassing gemaak word op die feite van die *Jonker*-saak nie.

Op grond van *billikheid en regverdigheid* meen ek tog dat die verweerder in die *Jonker*-saak alles binne sy vermoë gedoen het om seker te maak dat die tjek wat hy inbetaal het, gehonoreer is sodat sy bankrekening later juis nie gedebiteer sou word met die bedrag van die tjek nie. Nie alleen het hy die tjek aangebied vir spesiale betaling as gevolg waarvan hy 'n groter fooi aan die bank moes betaal nie; hy het ook voor die onttrekking van die geld navraag gedoen of die tjek gehonoreer was, wat die bank weer eens bevestig het. Dat die eiser (bank) eenvoudig na die tyd kan kom en kan sê dat dit 'n fout begaan het en dat dit die geld wil terugverhaal, lyk *onregverdig en onbillik* teenoor die verweerder.

Dit bring die vraag na vore of die nadeel-vereiste dalk nie in sulke gevalle verslap moet word nie. Die vraag is dan: indien die verweerder sou slaag met sy verweer, sou die eiser (bank) enige remedie gehad teen 'n ander persoon ten einde sy skade te verhaal? Die volgende situasies kan hulle voordoen:

(a) die betrokkene-bank kon dalk nalatig aan die eiser-bank voorgegee het dat daar voldoende fondse was om die tjek te honoreer. In so 'n geval sou die eiser-bank dan met die *actio legis Aquiliae* teen die betrokkene-bank kon optree op grond van die nalatige wanvoorstelling;

(b) een van die amptenare van die eiser-bank kon nalatig gewees het. Aangesien dit *in casu* gegaan het om die bedrag van bykans R12 000, kon die eiser-bank die bedrag met die *actio legis Aquiliae* van sy amptenaar verhaal het;

(c) die oplossing in geval (b) sal egter nie altyd werk nie, byvoorbeeld waar tjeks van groot bedrae ter sprake is, byvoorbeeld 'n bedrag van R400 000 soos in *ABSA Bank Ltd v De Klerk* die geval was. In so 'n geval gaan dit die bank weinig help om sy eie werknemer aan te spreek. Wat die eiser-bank kan doen, is om die trekker van die tjek (wat gedishonoreer is) aan te spreek deurdat die verweerder sy eis wat hy teen die trekker het, aan die eiser-bank sedeer. Dit kan in baie gevalle die oplossing wees, maar kan ook in net so baie gevalle nie die probleem oplos nie, byvoorbeeld as die trekker eenvoudig net nie die geld het nie. Dan sal die bank die trekker moet aanspreek by wyse van duur litigasie en dalk moontlik nog die trekker moet laat likwideer (indien dit 'n regspersoon is) of die trekker se boedel moet laat sekwestreer (waar dit 'n natuurlike persoon is). Ons kan dus aanvaar dat 'n bank nie so 'n benadelende sessie sal oorweeg nie. Die vraag is dus: Wie moet die moontlike skade dra – die eiser-bank of die verweerder?

Ongelukkig het die verweerder geen getuienis voor die hof geplaas wat aandui of hy benadeel sou word (en of daar dalk die moontlikheid bestaan dat hy benadeel kon word) indien hy die geld aan die eiser-bank sou moes terugbetaal nie.

Daar kan omstandighede bestaan waar dit vir die verweerder nie moeilik sou wees om benadeling te bewys ten einde te kon slaag met estoppel nie. As voorbeeld kan die volgende hipotetiese geval geneem word: Jonker, die verweerder, sluit 'n kredietooreenkoms/afbetalingsooreenkoms met 'n derde op grond daarvan dat die eiser-bank hom meegedeel het dat die tjek gehonoreer is en hy dus nou geld in die bank het. (Let wel daarop dat die verweerder min geld in die bank gehad het.) Wanneer die bank dan later die verweerder laat weet dat die tjek wel gedishonoreer is, kon die verweerder al ingevolge die kredietooreenkoms meer as die deposito betaal het. As gevolg daarvan dat die tjek gedishonoreer is, moet hy nou die geld aan die bank terugbetaal. Dit kan meebring dat hy nie meer geld het om voort te gaan met die kredietooreenkoms nie, met die gevolg dat hy alles wat hy tot dusver ingevolge die kredietooreenkoms betaal het, verbeur aan die derde. In so 'n geval sal die verweerder beslis skade kan bewys. Hy sal kan steun op die uitspraak in *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 1 SA 632 (A).

In die *Resisto Dairy*-saak was die feite dat die versekeringsmaatskappy (verweerder) en die eiser ooreengekom het dat indien die eiser in 'n ongeluk betrokke sou raak, hy die versekeringsmaatskappy so gou as moontlik in kennis moes stel. Die eiser is toe inderdaad in 'n ongeluk betrokke, maar het die versekeringsmaatskappy eers vyf maande na die ongeluk in kennis gestel. Sewe maande daarna het die versekeringsmaatskappy die eiser laat weet dat dit nie die skade gaan betaal nie. Die eiser opper estoppel op grond van die verweerder se stilswye. Die Hoogste Hof van Appèl het die estoppel-verweer gehandhaaf en gesê:

> "*The representation in the present case caused prejudice to the appellant by lulling him into a false sense of security*. The appellant believed, and justifiably believed, that the respondent was dealing with its claim . . . and . . . therefore made no attempt to investigate or to prepare a possible defence or to attempt a reasonable settlement. After the lapse of seven months it was suddenly and unexpectedly faced with the problem of dealing with the summons itself" (643B–C; my beklemtoning).

'n Verdere gevolg wat dit kan meebring, is dat dit die besigheidsreputasie van die verweerder kan aantas. In *Autolec Ltd v Du Plessis* 1965 2 SA 243 (O) het die hof met betrekking tot vermoënskade die volgende gesê:

> "*Although the change of position must involve the practical or business affairs of the representee* and not merely affect him philosophically . . . the detriment is not limted to direct, instantaneous and palpable loss of money but also included less gross and easily calculable detriment" (250H; my beklemtoning).

6 Slotopmerkings

Die vraag wat dus nog steeds beantwoord moet word, is: Wie moet die moontlike skade dra, Jonker of die bank, indien Jonker (die verweerder) nie kan bewys dat hy skade/nadeel gaan ly indien hy die geld aan die bank moet terugbetaal nie? Dit bring ons weer by die vraag of die nadeel-vereiste absoluut moet geld.

Onder normale omstandighede, waar die verweerder bloot die tjek by sy bank vir betaling aanbied, die tjek daarna gedishonoreer word en die verweerder dan die geld moet terugbetaal aan sy bank, wil ek saamstem dat estoppel nie moet slaag nie. Dit is bankpraktyk en beskerm banke teen finansiële verliese. Verder word die hele bankbetalingstelsel nie ontwrig *indien die verweerder (kliënt) nie kan bewys dat hy finansiële skade gely het nie*.

Maar die feite van die *Jonker*-saak wil tog daarop dui dat die bank deur die "spesiale aanbod"-prosedure daar te stel, waar die kliënt 'n duurder fooi moet betaal, juis die risiko aanvaar dat indien die bank te kenne sou gee dat die tjek gehonoreer is, en dit later blyk verkeerd te wees, die bank die skade moet dra en nie kan omdraai en beweer dat die tjek gedishonoreer was nie.

Ek is derhalwe van mening dat waar die howe met soortgelyke feite as in die *Jonker*-saak te doen kry, hulle op grond van *billikheid en regverdigheid* die nadeel-vereiste in sulke gevalle nie as vereiste moet stel nie; indien aan die ander vereistes van estoppel voldoen word, die verweer, naamlik estoppel, behoort te slaag. Die oplossing is in ooreenstemming met die *obiter* opmerking van die hof in *Trust Bank of Africa Ltd v Wassenaar* (*supra*).

GJ EBERSÖHN
Universiteit van die Oranje-Vrystaat

RELIGIOUS CONFUSION
Christian Education South Africa v Minister of Education 2000 4 SA 757 (CC)

1 Introduction

In *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) (hereinafter referred to as "*Christian Education*") the Constitutional Court decided on an appeal against a judgment by Liebenberg J in the South Eastern Cape Local Division of the High Court (reported as *Christian Education SA v Minister of Education of the Government of the RSA* 1999 9 BCLR 951 (SE) ("the High Court judgment")) that section 10 of the South African Schools Act 84 of 1996 (which prohibits the administration of corporal punishment in schools) does not violate the constitutional rights to freedom of religion and to religious practice. The appellant, an organisation of independent Christian schools, argued that corporal punishment of children constituted an integral premiss of the Christian faith and that, by prohibiting the administration of corporal punishment even in schools founded upon Christian doctrine, the South African Schools Act disregarded the religious rights of the appellant and its members. The Constitutional Court dismissed the appeal in an unanimous judgment by Sachs J, who held in essence that, even if the religious rights of the appellant were impinged upon by the challenged legislation, such a limitation was reasonable and justifiable in terms of the general limitation clause (s 36) of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution").

This note aims to evaluate the Constitutional Court's decision by concentrating in particular on the court's treatment of the two central constitutional rights involved in the matter, as well as its engagement with the general limitation clause. I shall argue that, whereas the outcome of the *Christian Education* case is laudable, the way in which that outcome was reached leaves much to be desired.

2 The judgment

After setting out the facts of the case, Sachs J observed that "a multiplicity of intersecting constitutional values and interests are involved in the present matter – some overlapping, some competing" (*Christian Education* para 15). He identified the interests of parents and children to live according to their religious beliefs, the rights of children to protection of their dignity and to freedom from maltreatment, abuse and neglect, and the interests of the broader community in reducing violence and protecting children from harm as the main competing interests in this regard (*ibid*).

Thereafter, Sachs J examined the nature of the two constitutional rights relied upon in the challenge. These were the right to "freedom of conscience, religion, thought, belief and opinion" guaranteed by section 15(1) of the Constitution and the right of members of religious or cultural communities to practise their religion or culture guaranteed by section 31 of the Constitution. Whereas the appellant contended that these rights should be treated cumulatively and that the challenged provision of the South African Schools Act violated both rights (para 16), the respondent argued that section 15 did not apply to the matter and that the case should accordingly have been decided exclusively under section 31. Since section 31 contains an internal limitation to the effect that cultural and religious practices may not be exercised in a manner inconsistent with other rights in the Bill of Rights,

the respondent submitted that the administration of corporal punishment violated the rights of children to dignity (contained in s 10 of the Constitution), protection from maltreatment, neglect, abuse or degradation (set out in s 28(1)(d) of the Constitution), and freedom and security of the person (entrenched in s 12 of the Constitution), and that a prohibition on corporal punishment accordingly did not contravene section 31 (paras 17 21).

Whereas section 15 of the Constitution is similar to section 14 of the interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993), section 31 is unique to the 1996 Constitution. While briefly contemplating the significance of the addition of section 31 and the content of sections 15 and 31 respectively (paras 18–26), Sachs J decided to

> "adopt the approach most favourable to the appellant and assume without deciding that appellant's religious rights under ss 15 and 31(1) are both in issue. I shall also assume, again without deciding, that corporal punishment as practised by the appellant's members is not 'inconsistent with any provision of the Bill of Rights' as contemplated by s 31(2)" (para 27).

Accordingly, the court held that section 10 of the South African Schools Act limited the appellant's rights under both these sections of the Bill of Rights, and proceeded to contemplate whether such a measure was reasonable and justifiable under the limitation clause.

An analysis of section 36 and the various requirements posited in it followed. The court held that section 36 required an overall, context-based balancing exercise of the factors listed in it in relation to the facts of each specific case (paras 30–32). The problematic nature of this balancing exercise in the context of the present case was summarised by Sachs J as follows:

> "The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law" (para 35).

After reiterating the fundamental importance of protecting religious rights in an open and democratic society (paras 36–38), and considering the interests of the state in upholding the ban on corporal punishment in all schools (including, most importantly, the state's interests in upholding the value of human dignity (paras 43–47)), Sachs J concluded that an exception to the ban on corporal punishment on religious grounds would disturb the "symbolic, moral and pedagogical purpose of the measure" (para 50). This, combined with practical burdens associated with monitoring the administration of corporal punishment (*ibid*) and the fact that a ban on such punishment in schools did not encroach on the rights of parents themselves to discipline their children in accordance with their religious beliefs (para 51), led Sachs J to uphold the limitation on the religious rights of the applicants. The appeal was accordingly dismissed.

3 Comment

As indicated at the beginning of this note, I agree with the outcome of the *Christian Education* case. However, I find the method of adjudication and the reasoning

leading to that outcome somewhat perplexing. As Sachs J indicated at the outset of his (with respect) sensitive and powerfully written judgment, the case involved a number of competing and interacting fundamental values. Specifically, a great deal seemed to depend on the interpretation of the two constitutional rights relied upon by the appellant, that of freedom of religion and the right of religious communities to practise their religion.

As mentioned above, the latter right was absent from the interim Constitution, meaning that the *Christian Education* case would in all likelihood have turned solely on the right to freedom of religion guaranteed by section 14 of the interim Constitution had it been decided before the coming into effect of the final Constitution. I have argued elsewhere that the intention of the drafters of the 1996 Constitution was to remove the right to engage in religious practices from the ambit of the right to freedom of religion, in which it was previously implicit, by making it the subject of separate protection under section 31 (Pieterse "Many sides to the coin: The constitutional protection of religious rights" 2000 *CILSA* 300 309–310). It is, of course, likely that section 15 of the Constitution retains a residual right to religious practice, though this would probably come into play only in situations not involving public and/or communal manifestations of religious belief (Pieterse *op cit* 310).

If my reading of sections 15 and 31 is correct, then there seems to be considerable merit in the respondent's contention that section 31, and not section 15, was the operative provision in *Christian Education*. This was also the approach followed by the high court in this matter, Liebenberg J holding that the applicant could not prove that the administration of corporal punishment was an integral component of Christian doctrine, and that it could at most be classified as a religious practice by a certain segment of the Christian community (959D–961A). While Liebenberg J has been criticised for his restrictive approach to the concept of religious belief (see Du Plessis "Doing damage to freedom of religion" 2000 *Stell LR* 295), his finding that a prohibition on corporal punishment would in any event not substantially burden the applicant's right to freedom of religion (960I–961A) seems to be in line with the Constitutional Court's own view of the ambit of the section 15 right, namely that it serves primarily as protection against religious coercion and is not violated by measures which do not require an applicant to abandon or significantly alter his or her religious beliefs (see *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC) and Freedman "The right to religious liberty, the right to religious equality, and section 15(1) of the South African Constitution" 2000 *Stell LR* 99 105–108).

While Sachs J alluded to the close relationship between religious belief and religious practice, to the protection of both religious belief and religious practice in international law, and to the possible reasons for including a separate right to religious practice in the 1996 Constitution (paras 19–25), he nevertheless chose not to distinguish between the rights guaranteed by sections 15 and 31, respectively, for purposes of his decision. Instead, he assumed that both rights were in issue (para 27). This assumption not only brushed aside an issue that was rightly and directly before the court, but also had significant implications for the process that the court was to follow in resolving the matter, as I shall now illustrate.

As set out by the Constitutional Court in *Ferreira v Levin* 1996 1 SA 984 (CC), a court deciding on the constitutionality of legislation in a dispute to which the Bill of Rights applies, should first enquire whether the constitutional right(s) relied upon in the matter have been infringed. This will generally involve the interpretation of the right(s) in question, but will also require applicants to prove the facts upon which

their claims of infringement are based. After a *prima facie* violation of the right(s) has been established, the court should consider whether the limitations placed by the legislation under scrutiny on the fundamental right(s) in question are reasonable and justifiable under the limitation clause. At this second stage of the enquiry, the onus is generally on the party relying on the legislation to show that it is indeed so justifiable (*Ferreira v Levin* para 44; see also De Waal, Currie and Erasmus *The Bill of Rights handbook* (2001) 26–34 for an exposition of the general structure of litigation involving fundamental rights in the Constitution). This was also roughly the approach adopted by Sachs J in the *Christian Education* case.

This process is, however, complicated when the right in question contains an internal limitation that restricts its ambit and scope. There are different opinions as to whether an internal limitation requires an additional step, or an additional shift in onus, in the adjudication process. Woolman, for instance, argues that the presence of an internal limitation requires a third, intermediate stage in the constitutional enquiry, with the onus on the party defending the infringing measure to show that it is saved by the internal limitation (Woolman "Limitation" in Chaskalson *et al* (eds) *Constitutional law of South Africa* 12-24E–12-25), whereas Carpenter contends that the onus would shift to the respondent only where the internal qualification does not form part of the definition of the right (Carpenter "Internal modifiers and other qualifications in Bills of Rights – some problems of interpretation" 1995 *SA Public Law* 260 262). These intricacies notwithstanding, commentators seem to agree that the question whether a restriction of a fundamental right is saved by an internal limitation involves a different exercise from that required by the general limitation clause, to which recourse should be had only once it has been shown that the internal limitation does not apply to the particular matter (see Woolman 12-25–12-26). Questions posed by an internal limitation therefore seem to be decided in the first (interpretative) stage of the constitutional enquiry, although it is uncertain whether or not this should take the form of a separate "sub-stage". Only where a right is violated notwithstanding the internal limitation should a court move to the second (justificatory) stage of the enquiry. This seems also to be the approach of the Constitutional Court (see, for instance, the majority judgment in *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC) in relation to s 26(2) of the interim Constitution, and *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) in relation to s 27(3) of the final Constitution).

The limitation imposed by section 31(2) of the Constitution directly restricts the ambit of the right of religious communities to practise their religion. Section 31(2) makes it clear that the protection afforded by section 31(1) does not extend to practices which violate other rights in the Bill of Rights (see Currie "Minority rights: Education, culture, and language" in Chaskalson *et al* 35-23–35-24; De Waal, Currie and Erasmus 481–483). Where religious practices violate such rights, they do not enjoy constitutional protection, and it is not necessary for a party seeking to uphold measures which outlaw such practices to justify the measures in terms of the provisions of section 36 of the Constitution. This was acknowledged by Sachs J when he stated (*Christian Education* para 26) that

> "[s]ection 31(2) ensures that the concept of rights of members of communities that associate on the basis of . . . religion, cannot be used to shield practices which offend the Bill of Rights. These explicit qualifications may be seen as serving a double purpose. The first is to prevent protected associational rights of members of communities from being used to 'privatise' constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control . . . The second relates to oppressive features of internal relationships primarily within the communities concerned . . .".

Because of this internal limitation in section 31, it was vital for the Constitutional Court to determine whether section 15 or section 31 of the Constitution was in issue in the *Christian Education* case. If, as the respondent (in my view correctly) submitted, the matter fell to be decided exclusively under section 31, the court would have had to consider the impact of the internal limitation on the appellant's case. If the internal limitation were to have been found to apply to the religious practice in question, the appeal would have had to be dismissed without consideration of the provisions of section 36 of the Constitution. This was the route followed in the high court, where Liebenberg J held that, since corporal punishment violated the constitutional rights to dignity, to freedom from public and private violence, not to be tortured or punished in a cruel and degrading fashion, and (in the case of children) not to be subjected to maltreatment and abuse, the religious practice of administering corporal punishment did not qualify for constitutional protection under section 31(1), and the applicant's rights were therefore not violated (1999 9 BCLR 963B–965C).

Not only did Sachs J decline to decide whether the case turned on section 15 or section 31; he also proceeded to assume that both those provisions were affected by section 10 of the South African Schools Act, thereby neglecting to determine whether the appellant's dedication to corporal punishment constituted a sincerely held religious belief, and refusing to consider the impact of section 31(2) on the appellant's case. Instead, he proceeded directly to the second stage of the constitutional enquiry. This double assumption has the effect of unnecessarily blurring the boundaries between the two main stages of constitutional adjudication. Specifically, it creates confusion by failing to distinguish between values which enter into disputes involving religious practices at the internal-limitation stage of the enquiry, and which do so at the general-limitation stage. Such confusion is unfair to respondents in such cases, for the message conveyed by the *Christian Education* judgment is that they must justify legislative and other restrictions on religious practices regardless of whether the practices themselves are constitutionally permissible and protected in the first place. The drafters of the Constitution clearly intended that respondents should be required to justify such restrictions only when the restricted practices themselves do not violate other rights in the Bill of Rights. While the outcome of the *Christian Education* case was not influenced by this confusion, it provides little clarity to future respondents in like matters.

To be fair, the court in all likelihood chose confusion over clarity in the circumstances of the case because it did not want to pronounce on whether or not the appellant's alleged religious beliefs were genuine or, more importantly, whether administration of corporal punishment *per se* violated other rights in the Bill of Rights, for that would in all likelihood have provoked a possible future challenge to the administration of such punishment by parents. As Currie indicates, the Constitutional Court has on more than one occasion wisely opted for "decisional minimalism", which involves concentrating in judgments on specific issues at hand rather than delivering judgments with a broader, more general impact, and for incompletely theorised judgments which leave as much as possible undecided, in order not to complicate future unrelated matters (Currie "Judicious avoidance" 1999 *SAJHR* 138–165). In the light of the compelling interests justifying such judicial "minimalism" (as expounded by Currie 147–150 165), Sachs J, for example, correctly distinguished between corporal punishment in schools and in the home, emphasising that the latter manifestation of the punishment was not before the court and declining to make any finding on it (para 48).

The difference between such justified "minimalism" and the rest of the *Christian Education* judgment, however, is that the issue of corporal punishment in schools *was* pertinently before the court. Even more so was the application and interpretation of the two interacting and competing religious rights, much of the argument relating specifically to the applicability of sections 15 and 31 to the matter, and to the impact of the limitation contained in section 31(2) on the appellant's case. The Constitutional Court was called upon to provide answers to a number of controversial questions: To what extent (if any) does a religious practice fall to be protected under section 15 of the Constitution, notwithstanding the presence of section 31? Does a restriction on religious practice limit freedom of belief through direct or indirect coercion? Can the administration of corporal punishment be seen as a *religious* practice? Does the practice of corporal punishment in schools violate the fundamental dignity (among a cluster of rights) of those punished? The decision in the *Christian Education* case does not furnish answers to any of these questions.

Instead, we are treated by the court to a balancing exercise of "values" under section 36, during which we are given hints as to what the court might have decided on the issues before it had it chosen to decide those issues. For instance, Sachs J considers the possibility that corporal punishment might violate the rights of children to dignity and to freedom from violence, without clearly pronouncing on whether it in fact does so (paras 43 –47). Similarly, *dicta* at paragraphs 38 and 51 suggest that the restriction on corporal punishment in schools may very well not violate the right to freedom of religion, even though the court chose to assume that it did. These pronouncements (which would otherwise have formed part of decisions at the first stage of the constitutional enquiry) are thrown into the pot together with statements on the fundamental nature of religious belief (paras 36–37), differences between the school and home environment (para 49), the "whole symbolic, moral and pedagogical purpose" of the prohibition against corporal punishment (para 50), the difficulty of monitoring the equitable administration of the punishment (*ibid*), and the "very special meaning that corporal correction in school has for the self-definition and ethos of the religious community in question" (para 51). After listing these values, the court eloquently concluded that "[w]hen all these factors are weighed together, the scales come down firmly in favour of upholding the generality of the law" (para 52). Knowing that the scales came down is satisfying. Knowing why or how they came down as they did would have been even more so.

Ironically, the fact that a general-limitation analysis was undertaken when it might very well have been unnecessary in this case (had it turned, as all indications would have it, on section 31), defeats the very purpose of "decisional minimalism". Instead of a minimalist judgment, which is characterised as "cautiously, incrementally, emphasising the particular rather than the general, avoiding large-scale theorising and relying instead on incompletely reasoned agreements" (Currie 1999 *SAJHR* 165), the *Christian Education* judgment rather presents an extreme example of what Cockrell calls "rainbow jurisprudence", which

> "is the equivalent of the pleader's strategy of confess-and-avoid: it admits that constitutional adjudication involves substantive reasoning, but seeks to avoid the attendant difficulties by means of a bland assertion that all normative options can be accommodated in harmonic coexistence" (Cockrell "Rainbow jurisprudence" 1996 *SAJHR* 1 37).

By trying to show sensitivity to all sectors of society and to avoid controversy, the *Christian Education* judgment failed to lay any foundations of jurisprudence on religious rights, leaving the Constitutional Court (and other courts) little (if anything) to fall back on when confronted by similar matters in future. Such matters are bound

to arise. In fact, the Constitutional Court itself will in the near future be required to take a final decision on whether a prohibition on the use of marijuana by Rastafarians is constitutionally permissible. (An appeal against the judgment of the Supreme Court of Appeal in *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA) is already before the Constitutional Court, which has called for further evidence – see *Prince v President, Cape Law Society* 2001 2 SA 388 (CC).) It is hoped that the court will not once again let the opportunity pass of clarifying the uncertainty surrounding the interpretation of religious rights evident in judgments in the high courts (see, eg, the failure of the courts to draw any meaningful distinction between ss 15 and 31 in *Prince v President of the Law Society, Cape of Good Hope* 1998 8 BCLR 976 (C) and *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society* 1999 2 SA 268 (C)).

A jurisprudential rainbow may already be shining over constitutional matters concerning religious beliefs and practices, but the storm is unfortunately yet to come.

MARIUS PIETERSE
University of the Witwatersrand

AFPERSING VAN 'N SEKSUELE VOORDEEL
R v Davis (2000) 139 CCC (3d) 193 (SCC)

1 Inleiding

In hierdie saak, wat in finale instansie voor die hoogste Kanadese hof (Supreme Court; SC) gedien het, het die volgende feitestel na vore getree: D het tereggestaan op 10 klagtes waarby sewe klaers betrokke was. Dié klagtes het gehandel oor seksuele aanranding, strafbare sodomie ("buggery") en ook afpersing. In die onderhawige bespreking word slegs gefokus op die twee klagtes van beweerde afpersing, wat na bewering gepleeg is teenoor die klaers PVB en CD. In al die klagtes waarop D hom moes verweer, het hy hom voorgedoen as 'n fotograaf wat aan 'n modelagentskap verbonde was. In werklikheid het hy geen verbintenis met sodanige agentskap gehad nie. Onder voorwendsel dat hy 'n portefeulje van foto's, met die oog op 'n moontlike loopbaan as model, namens die modelagentskap neem, het hy die belangstelling van meisies tussen die ouderdomme van 15 en 20 jaar gewek. Hy het hulle almal oorreed om naak of semi-naak te poseer. PVB, wat 15 jaar oud was, het D deur 'n motorfietsvereniging, waarvan hy voorsitter was, ontmoet. Sy het later vir verskeie fotosessies na sy huis gegaan, waar sy, na mooipratery, tot naakfoto's toegestem het. Aangesien hy geweier het om die foto's vir haar te wys en die negatiewe vir haar te gee, het sy verdere fotosessies geweier. Hy het haar vervolgens meegedeel dat indien sy die negatiewe wou hê, sy sekere seksuele gunsies vir hom moes toelaat. As gevolg van die vrees vir blootstelling het sy oor 'n tydperk van twee tot drie maande herhaaldelik by sy woning met hom geslagsomgang gehad. Gedurende

dié besoeke is sy vasgebind en geslaan en 'n vibrator en dildos in haar vagina opgedruk. Aan die einde van elke sessie het sy 'n strook van die negatiewe ontvang. Sy het uiteindelik al die negatiewe ontvang en verbrand. Na oorweging van PVB se getuienis, asook ander getuienis, is D aan seksuele aanranding (oortreding van a 246.1(1)(a) van die Kanadese Strafkode) en afpersing (oortreding van a 305(1) van die Kanadese Strafkode) skuldig bevind.

CD, toe 19 jaar oud, het D in 1984 in 'n plaaslike winkelsentrum ontmoet en foto's is aanvanklik by haar ouerhuis geneem. 'n Tweede fotosessie het later plaasgevind in die kelder van die woonstelblok waar sy gewoon het. Haar vriend het haar vergesel, maar toe hy vir 'n tydperk weg was, het D gevra dat sy haar klere uittrek. Sy het geweier, maar later, nadat hy haar oorreed het, het sy haar bostuk uitgetrek. Hy het daarna haar borste met sy hande aangeraak en gedruk en onsedelike opmerkings gemaak. Hy het ook sy hand in die onderstuk van haar bikini tot by haar vagina ingedruk. Sy was baie ontsteld daaroor en D het kort daarna vertrek. Hy het later met die foto's teruggekeer en haar meegedeel dat sy daarvoor moet betaal indien sy dit terug wou hê. Sy het gesê dat sy nie geld het nie, waarop hy gesê het dat sy dit kon terugkry indien sy met hom geslagsomgang sou hê. Hy het ook gedreig dat hy dit in 'n pornografiese tydskrif sou publiseer en daarvan in haar vader se posbus sou plaas indien sy nie met hom geslagsomgang het nie. Sy het geweier. Hy het egter nie sy dreigemente uitgevoer nie. D is ook in CD se geval aan seksuele aanranding en afpersing skuldig bevind.

Teen die agtergrond van die uitspraak van die SC in dié saak word die vraag onder die loep geneem of die afdreig van 'n seksuele voordeel in die Kanadese reg, asook in die Suid-Afrikaanse reg, afpersing daarstel.

2 Die Kanadese reg

Hoofregter Lamer, wat namens die hof uitspraak lewer, vra ten aanvang die vraag of dit 'n misdaad daarstel om 'n seksuele guns of voordeel ("sexual favour") af te pers. D is (onder andere) van oortreding van artikel 305 (SC 1985, c 19, s 47) van die Kanadese Strafkode, dit wil sê van afpersing, aangekla. In artikel 305(1) word afpersing soos volg omskryf:

> "Every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done, is guilty of an indictable offence and is liable to imprisonment for fourteen years."

Hierdie artikel is intussen vervang deur artikel 346(1) wat soos volg lui:

> "Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom is shown, to do anything or cause anything to be done."

Die belangrikste verskil tussen dié twee bepalings is dat in eersgenoemde die woorde "with the intent to extort or gain" die verwysing na "anything" voorafgaan, terwyl dit in laasgenoemde voorafgegaan word deur die woorde "with intent to obtain". Artikel 305(1) is op die onderhawige saak van toepassing, aangesien artikel 346(1) eers later in werking getree het. Die konklusie sou in elk geval nie anders gewees het indien artikel 346(1) van toepassing was nie. Namens D is aangevoer dat die woord "anything" tot sake van ekonomiese waarde beperk moet word. Hoofregter Lamer wys daarop dat dié siening in stryd met die doel en aard van die misdaad afpersing is:

> "Extortion criminalizes intimidation and interference with freedom of choice. It punishes those who, through threats, accusations, menaces, or violence induce or attempt to induce their victims into doing anything or causing anything to be done. Threats, accusations, menaces and violence clearly intimidate . . . When threats are coupled with demands, there is an inducement to accede to the demands. This interferes with the victim's freedom of choice, as the victim may be coerced into doing something he or she would otherwise have chosen not to do" (210).

Die sentrale tema in dié verband is gevolglik intimidasie waardeur die vryheid van keuse van 'n ander geskend word (sien ook *R v Bird* (1970) (3) CCC 341 (BCCA) 354).Wat insiggewend is, is dat die misdaad afpersing in die Engelse gemenereg asook in die vroeëre Kanadese reg suiwer as 'n vermoënsmisdaad beskryf sou kon word (210–212). So wys Smith en Hogan *Criminal Law* (1996) 618 daarop dat dit "seems to have been pretty well co-extensive with robbery and attempted robbery, but over the years the definition has been extended to embrace more subtle methods of extortion". Hier het 'n mens 'n pragtige voorbeeld van 'n misdaadinhoud wat met die verloop van tyd nie slegs 'n verbreding ondergaan het nie, maar wat ook toenemend in meer abstrakte en wyer terme beskryf word (sien hieroor Labuschagne "Die legaliteitsbeginsel in die strafreg en die groeiende geregtigheidsbehoefte aan abstrakte misdaadomskrywing: 'n Regsantropologiese perspektief" 2000 *TSAR* 311). Die skuldigbevindings van die hof *a quo* word deur die SC bevestig. Die feit dat daar in geval van CD slegs 'n "poging" tot afpersing was, verskaf geen probleme nie aangesien dit in artikel 305(1) as voldoende beskou word.

3 Die Suid-Afrikaanse reg

Wat insiggewend is, is dat ook in ons gemenereg, naamlik die Romeins-Europese reg, die grensgebied van afpersing en roof nie behoorlik afgebaken was nie. Hoewel daar teenstrydige uitsprake van ons gemeneregskrywers, asook in vroeëre Suid-Afrikaanse gewysdereg, bestaan oor die vraag of afpersing tot 'n vermoënsregtelike aangeleentheid beperk is, het die Appèlhof in *Ex parte Minister van Justisie: In re S v J en S v von Molendorff* 1989 4 SA 1028 (A) beslis dat slegs 'n ekonomiese voordeel afpersbaar is (sien Labuschagne "Afpersing" 1985 *De Jure* 315 316–319 en gesag daarin aangehaal). Die wetgewer was nie hiermee tevrede nie en het deur die uitvaardiging van artikel 1 van die Algemene Regswysigingswet 139 van 1992, die beperking van die afpersingsmisdaad tot vermoënsregtelike sake ongedaan gemaak, met ander woorde 'n saak van nie-vermoënsregtelike aard kan ook in die hedendaagse Suid-Afrikaanse reg die voorwerp van afpersing wees (Snyman *Strafreg* (1999) 405–406). In *S v J* 1980 4 SA 113 (E), wat die 1992-wetgewing voorafgegaan het, het J, soos in die Kanadese saak *R v Davis* (hierbo bespreek), naakfoto's van die klaagster geneem en haar gedreig dat indien sy nie met hom geslagsomgang het nie, hy die foto's vir haar ouers sou wys. Sy het egter geweier om dit te doen. J is van poging tot afpersing aangekla en ook skuldig bevind. Hierdie bevinding word by appèl bevestig. By appèl verklaar regter Smalberger:

> "The gravamen of the offence of extortion is the use of threats or intimidation to obtain a benefit . . . There seems to be no logical reason to distinguish between the situation where such pressure is applied to secure an advantage of a pecuniary or proprietary nature, or some other subjective advantage. In either case the mischief which the crime seeks to punish is the same – the use of threats or intimidation to secure a benefit for oneself" (116).

Die ooreenkoms hiervan met die uitspraak van die SC in *R v Davis* is treffend. Soos elders aangetoon, kan afpersing met geslagsmisdade, soos verkragting en onsedelike aanranding, oorvleuel (Labuschagne "Die misdaadkonkurrensie van afpersing en verkragting" 1993 *SAS* 326).

4 Konklusie

Die evolusie van die voorwerp van die misdaad afpersing, en in besonder dat dit voortdurend uitbrei en minder konkreet word, toon treffende ooreenkomste in sowel die Kanadese as die Suid-Afrikaanse reg. Dit bevestig 'n standpunt wat vroeër ingeneem is, naamlik dat 'n universele evolusieproses in die sosio-juridiese waardestrukture van die mens sigbaar is waarvolgens die misdaadinhoud al hoe minder konkreet en gevolglik al hoe meer abstrak omskryf word (sien Labuschagne "Evolusielyne in die regsantropologie" 1996 *SA Tydskrif vir Etnologie* 40 41–43; "Die voorrasionele evoulsiebasis van die strafreg" 1992 *TRW* 27 41; "Die proses van dekonkretisering van noodweer in die strafreg: 'n Regsantropologiese evaluasie" 1999 *Stellenbosch LR* 56). Hierdie dekonkretiseringsproses behoort ook tot gevolg te hê dat die hoeveelheid misdade in die toekoms aansienlik sal verminder (sien bv Labuschagne "Aanranding en misdaadkondensering: opmerkings oor die strafregtelike beskerming van biopsigiese outonomie" 1995 *De Jure* 367 en "Die dinamiese aard van die inhoud van die misdaad aanranding en geregtigheidskonforme analogie in die strafreg" 1998 *THRHR* 482).

JMT LABUSCHAGNE
Universiteit van Pretoria

DELIKTUELE AANSPREEKLIKHEID VIR VEROORSAKING VAN SUIWER EKONOMIESE VERLIES: DIE DEUR WORD WYER OOPGEMAAK

Dersley v Minister van Veiligheid en Sekuriteit 2001 1 SA 1047 (T)

1 Inleiding

Dat die moderne Suid-Afrikaanse Aquiliese aksie beskikbaar is vir die verhaal van suiwer ekonomiese verlies wat op onregmatige en skuldige wyse veroorsaak is, val nouliks te betwyfel (sien in die algemeen *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A); Neethling, Potgieter en Visser *Law of delict* (1999) 293–300; Van der Walt en Midgley *Delict: Principles and cases* (1997) 79–80). Trouens, die nie-kontensieuse aard van sodanige vordering in ons regspleging was klaarblyklik die oorsaak dat die regter in die onderhawige saak nie eens uitdruklik vermeld het dat hy te doene gehad het met 'n geval van deliktuele aanspreeklikheid vir die veroorsaking van suiwer ekonomiese verlies nie. Regter Van Dyk het die swaartepunt van die problematiek wat hom in die gesig gestaar het in die proses van toepassing van die relevante regsbeginsels op die feite wat voor hom gedien het, gevind in die delikteregsreëls van toepassing op die *late* as verskyningsvorm van menslike gedrag. Dienooreenkomstig het hy sy aandag uitsluitlik daaraan gewy om die moderne Suid-Afrikaanse bestel weer te gee rakende die toets vir onregmatigheid in geval van 'n late. Bykomstig daartoe het hy enkele gedagtes kwytgeraak oor die deliktuele nalatigheidstoets, asook 'n praktiese toepassing daarvan benut om tot 'n beslissing te geraak met betrekking tot die eiser se moontlike bydraende nalatigheid. Sy beslissing insake die delikselement van (juridiese) kousaliteit vind ons as 't ware as 'n nagedagte.

Neethling, Potgieter en Visser 294 is van oordeel dat die veroorsaking van sogenaamde "suiwer ekonomiese verlies" sig as eisoorsaak op een van drie wyses kan manifesteer: Eerstens is daar die veroorsaking van ekonomiese verlies wat nie die gevolg is van saakbeskadiging of persoonsnadeel nie, soos in geval van nalatige wanvoorstelling en onregmatige mededinging. Tweedens vind ons die veroorsaking van finansiële verlies wat volg uit saakbeskadiging of persoonlikheidskrenking waar die eiser se eiendom of persoonlikheidsbelang nie in die gedrang kom nie, soos waar A ('n fabriekseienaar) nadeel ly omdat 'n elektriese kabel wat aan B ('n elektrisiteitsverskaffer) behoort deur C beskadig word. (Sien bv *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D), 'n saak deur Van Dyk R vermeld, dog nie in konteks van die problematiek verbonde aan die veroorsaking van suiwer ekonomiese verlies as eisoorsaak nie.) Derdens verwys die vermelde skrywers na die veroorsaking van vermoënsverlies deurdat die eiser se eiendom of persoonlikheidsbelange wel aangetas word, dog "the *defendant* did not cause such damage or injury" (*ibid*). Hierdie derde wyse is treffend geïllustreer deur die feite en uitspraak in *Kadir v Minister of Law and Order* 1992 3 SA 737 (K): As gevolg van die nalatige optrede van motoris X het motoris Y van die pad af gejaag en in die proses beserings opgedoen en sy motor beskadig. Twee polisiemanne, werknemers van die verweerder, het op die toneel verskyn, dog nagelaat om enige gegewens aangaande die identiteit van X op rekord te plaas (dit was vir hulle moontlik). Die feit dat Y nie vir X kon opspoor of identifiseer nie, het sy eis teen die MMF belemmer. Die hof het Y laat slaag met 'n eis teen die verweerder, wie se werknemers se nalatige late as eisoorsaak aanvaar is ten spyte daarvan dat X in wese die skade en persoonlikheidsnadeel direk veroorsaak het. Hierdie skoolvoorbeeld uit die regspraak van Neethling, Potgieter en Visser se derde kategorie is ongelukkig waardeloos gemaak deur die omverwerping van die uitspraak deur die appèlhof (*Minister of Law and Order v Kadir* 1995 1 SA 303 (A); hierdie uitspraak het academici tot aksie laat oorgaan: sien bv Burchell 1995 *SALJ* 211; Scott 1995 *De Jure* 164; Neethling en Potgieter 1996 *THRHR* 333; Dendy 1995 *Annual Survey of SA Law* 242; vgl Dendy 1992 *Annual Survey of SA Law* 433 ev). Ek het in my pasvermelde vonnisbespreking tot die gevolgtrekking gekom dat die appèlhof die moontlikheid van die derde kategorie van veroorsaking van suiwer ekonomiese verlies soos deur Neethling, Potgieter en Visser geskets, die nek omgedraai het. Daardie skrywers het my tereggewys (294 vn 114) en daarop gewys dat die feite en uitspraak in *Joubert v Impala Platinum Ltd* 1998 1 SA 463 (BHH) 'n sprekende bewys lewer van hul derde kategorie. Verwysend na my standpunt na aanleiding van die appèlhofuitspraak in die *Kadir*-saak, laat hulle hul soos volg uit, voordat hulle die *Joubert*-saak aanhaal (*ibid*; my kursivering):

> "This view is, however, not acceptable, the reason being that it is still possible for the courts to construe a legal duty to avoid economic loss in an analogous situation *where the police is not involved*."

Hierdie skrywers het my dus by implikasie gelyk gegee vir daardie gevalle waar die Minister van Wet en Orde (tans Veiligheid en Sekuriteit) as werkgewer van polisiebeamptes as verweerder betrokke sou wees. In die lig van regter Van Dyk se uitspraak blyk dit dat sowel die vermelde skrywers as ek ons standpunt moontlik sal moet aanpas (aangesien dit aansluit by die uitspraak van die hof *a quo* in die *Kadir*-saak), tensy die geskiedenis van litigasie gaan bewys dat regter Van Dyk in sy uitspraak fouteer het. In hierdie stadium dien vermeld te word dat die allerbelangrike *Kadir*-uitsprake geen vermelding in die onderhawige saak verdien het nie.

2 Feite en uitspraak

Die eiser het 'n voertuig gekoop van 'n persoon wat beweer het dat dit vroeër gesteel is en aan die versekeringsmaatskappy wat die destydse eienaar vergoed het vir sy verlies, oorhandig is nadat dit opgespoor is. Die eiser het finansiering vir sy aankoop van die voertuig met 'n bankinstelling gereël, maar omdat hy twyfel in sy gemoed gehad het oor die vraag of die verkoper by magte was om die voertuig aan hom te verkoop en in eiendomsreg oor te dra, het hy die bank versoek om betaling aan die verkoper terug te hou. 'n Dag nadat die voertuig deur die verkoper aan die eiser gelewer is, het hy dit na die kantore van die polisie se voertuigdiefstaleenheid buite Pretoria bestuur. Sy eerste teëspoed het hy reeds by die ontvangslokaal op die lyf geloop, toe die vroulike polisiebeampte aan diens meer as 15 minute geneem het om te begryp dat hy die betrokke voertuig wou laat ondersoek ten einde vas te stel of dit gesteel is, al dan nie. Toe hy daarna op haar aanwysing 'n nabygeleë lokaal betree, het hy daar 'n sersant H aangetref wat aan hom bekend was. Aan H het die eiser verduidelik wat die doel van sy besoek is en daarna sekere dokumentasie wat die onderstel- en enjinnommer van die voertuig bevat het, aan H oorhandig. H wat besig was om op 'n rekenaar te werk, was egter nie aan die polisie se voertuigdiefstaleenheid verbonde nie, dog aan die voertuigbewaringseenheid. Hierdie feit is op onverklaarbare wyse deur H verswyg en die eiser was dus salig onder die indruk dat die proses in ooreenstemming met die normale prosedure by die voertuigdiefstaleenheid verloop het. Nadat H die gegewens op die dokumentasie in sy rekenaar ingevoer het, het hy die eiser doodluiters meegedeel dat die voertuig "skoon" is en dat hy gerus met die aankoop daarvan kon voortgaan. Vervolgens het die eiser die bank in kennis gestel dat 'n tjek aan die verkoper uitgemaak mag word vir die koopprys. Groot was die eiser se skok egter toe die polisie vyf maande later by hom opdaag en op die voertuig beslag lê, omdat dit glo vroeër as gesteel aangemeld is. Hy is eenvoudig meegedeel dat die verkoper hom bedrieg het!

Hierop het die eiser 'n vordering ingestel teen die verweerder, op grond van die mededelings wat H aan hom gemaak het en op sterkte waarvan hy die betaling aan die verkoper gemagtig het. Die hof het bevind dat alle delikselemente in H se optrede teenwoordig was, dat daar verder geen sprake van bydraende nalatigheid aan die eiser se kant was nie en gevolglik het die eiser ten volle in sy eis geslaag.

3 Kritiese kommentaar

3 1 Die eisoorsaak

Regter van Dyk stel dit eenvoudig (1054E) dat die eiser se

> "saak . . . gebaseer [is] daarop dat verweerder op 'n nalatige wyse, 'n regsplig wat op hom berus (*sic*) het, teenoor die eiser, verbreek het met die gevolg dat hy skade gely het".

Enigsins merkwaardig vervolg hy (1054E–F):

> "Twee elemente van die delik is derhalwe pertinent ter sake: *eerstens* die vraag, was daar 'n onregmatige en nalatige optrede aan die kant van die verweerder wat gehandel het deur middel van sersant H wat destyds in diens van die verweerder was as polisiebeampte, en *tweedens*, het dit die gevolg gehad dat eiser skade gely het."

Hieruit blyk dit duidelik dat *drie* sogenaamde delikselemente in werklikheid onder die loep kom, te wete onregmatigheid en nalatigheid, wat die regter bymekaar groepeer, asook kousaliteit, wat hy skynbaar as die tweede element aanstip. Hierdie onakkuraatheid beïnvloed egter glad nie die uiteindelike verloop van sake negatief nie.

Soos hierbo ter inleiding vermeld is, weerspieël die feite in wese 'n eisoorsaak wat tipeer kan word as die veroorsaking van suiwer ekonomiese verlies. Hierdie feit word geensins in die uitspraak in soveel woorde vermeld nie. Trouens, regter Van Dyk spreek die mening uit dat die tipe geval onder bespreking baanbrekersaandag van hom verg (1055G):

> "Voor hierdie Hof, het sover as wat die advokate kon nagaan, en ook die navorsing wat ek in die beperkte tyd tot my beskikking gehad het, aandui, het (*sic*) nog nie spesifiek so 'n geval in die regspraak voorgekom nie."

As hy daarmee te kenne wou gee dat daar nog nie 'n *identiese* geval voor 'n Suid-Afrikaanse hof gedien het nie, kan mens met hierdie stelling vrede hê. Indien dit egter gaan oor 'n geval waar 'n ondersoek gedoen is na die optrede van polisiebeamptes as oorsaak van 'n ander se suiwer ekonomiese verlies, doem die redelik resente *Kadir*-sake (*supra*) onmiddellik voor die geestesoog op. Na my oordeel is dit verbasend dat hierdie beslissings nie onder die hof se aandag gebring is nie. Die analoë regspraak wat regter Van Dyk vermeld, hou beslis minder direk verband met die onderhawige feite, as die *Kadir*-sake (sien die verwysings – 1055H–1057J – na *Mpongwana v Minister of Safety and Security* 1999 2 SA 794 (K); *Minister van Polisie v Ewels* 1975 3 SA 590 (A); *Nkumbi v Minister of Law and Order* 1991 3 SA 29 (OK); *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd supra*; en *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A)).

3 2 Die onregmatigheidsvraag

Regter Van Dyk konstateer inleidend in sy behandeling van die onregmatigheidskwessie (1054H) dat daar allereers vasgestel moet word of die dader onregmatig opgetree het, alvorens die vraag na nalatigheid aan die orde kom. Hiermee volg hy die ongetwyfeld korrekte teoretiese benadering dat "the issue of wrongfulness is logically anterior to the issue of fault" (Boberg *The law of delict vol I – Aquilian liability* (1984) 271; sien ook Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 111; Van der Walt en Midgley 54 125; Neethling, Potgieter en Visser 119; *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 364G–I; vir 'n ongesonde resente neiging in die geledere van die appèlregters om skuld (nalatigheid) as determinant van onregmatigheid aan te wend, sien bv *Cape Metropolitan Council v Graham* 2001 1 SA 1197 (HHA); vgl oor hierdie uitspraak Scott 2001 *De Jure* 198, in besonder 199–200).

Die regter heg groot waarde (1054I–1055A) aan 'n bydrae van JC van der Walt (1993 *THRHR* 558) waarin die basis van onregmatigheid uitgewys word as synde geleë in óf 'n aantasting van die eiser se subjektiewe reg, óf die nie-nakoming van 'n regsplig teenoor die eiser – sentimente wat al sedert die sestigerjare gedeel word deur die meerderheid akademiese vakgenote wat beïnvloed is deur die pennevrug van swaargewigte soos WA Joubert en NJ van der Merwe. Ook die aanvaarding van Van der Walt se opinie aangaande die meer gesofistikeerde hedendaagse aard van die *boni mores*-toets dui nie sodanig op iets wat in akademiese kringe as revolusionêr beskou sal word nie; dit behoort eerder vir akademici wat in die delikteregakker werksaam is onrusbarend te wees dat gedagtes soos dié deur Van der Walt uitgespreek, op die regbank as merkwaardig ervaar word (sonder om hierdeur enigsins afbreuk te wil doen aan 'n gewaardeerde kollega se heldere bydrae oor 'n spesifieke onderwerp).

Regter Van Dyk se begeestering met die aanslag van Van der Walt, aangevul deur 'n ondersoek van die regspraak wat hy later aanhaal (3 1 *in fine* hierbo), lei hom tot die volgende konklusie (1055A–B):

> "[D]it [het] my getref dat die basiese toets verander het en dat dit vandag daarin geleë is dat 'n judisiële waarde-oordeel uitgespreek moet word of die eiser se betrokke aangetaste belang in die omstandighede en tipe situasie wat voor die hof op die feite sou dien, ooreenkomstig die *boni mores* (dit wil sê, die regsopvatting van die gemeenskap) beskermingswaardig is al dan nie; en indien wel, is daar inderdaad 'n regsplig op sodanige persoon wat hy nie mag nalaat nie. Andersins is daar geen regsplig op 'n verweerder om die regte van die eiser te beskerm nie."

Hierdie uiteensetting skep ongelukkig 'n skewe beeld van die toepassing van die *boni mores*-toets: Eerstens is dit duidelik dat regter Van Dyk hier die aanwending van die onregmatigheidstoets in geval van beoordeling van 'n *omissio* as oorsaak van *suiwer ekonomiese verlies* uiteensit, terwyl hy in algemene terme voorgee dat hy die toets vir onregmatigheid *in die algemeen* omskryf. Onregmatigheid as skending van 'n regsplig – die bestaan en omvang waarvan deur die *boni mores* bepaal word – is by uitstek die model van toepassing op die beoordeling van *omissiones* (vgl Van der Walt en Midgley 70; Neethling, Potgieter en Visser 55) en gedraginge wat suiwer ekonomiese verlies veroorsaak (vgl Van der Walt en Midgley 77; Neethling, Potgieter en Visser *loc cit* en veral gesag aangehaal 295 vn 120). In konteks van die feite van hierdie geval is die formulering dus wel aanvaarbaar. Tweedens dien daarop gelet te word dat dit simplisties is om te sinspeel daarop dat die *boni mores* alleen relevant is by die bepaling van die beskermingswaardigheid, al dan nie, van 'n belang: dit is tog oorbekend dat 'n regtens beskermde belang onder omstandighede geskend mag word, soos in geval van 'n regverdigingsgrond. Regter Van Dyk se formulering laat nie reg geskied aan die funksie van die *boni mores* in die proses van afbakening van die omvangsbreedte van die regsbeskermde belang nie.

Nadat regter Van Dyk aan die hand van die *locus classicus* op die terrein van onregmatigheidsbepaling by 'n late, te wete *Minister van Polisie v Ewels* (*supra*), beklemtoon het dat die *boni mores*-toets die regsoortuiging van die gemeenskap as kriterium verteenwoordig, en nie "noodwendig 'n sedelik (*sic*), of sosiale, of 'n moderne morele maatstaf" (1055C) is nie, formuleer hy die toepassing van hierdie maatstaf verrassend bondig (1055E):

> "Lê die redelikheid by die dader dan het hy geen regsplig nie. Lê dit by die benadeelde was daar 'n regsplig op die dader."

Dit is interessant dat die regspraak wat regter Van Dyk aanhaal uitsluitlik uit die terrein van die *late* as onregmatige gedragsvorm afkomstig is. In wese wil dit voorkom of H die eiser op positiewe wyse skade berokken het. Daar is 'n groot verskil tussen 'n geval soos die onderhawige en 'n geval soos dié in *Ewels* se saak, waar dit juis daarom gegaan het dat die polisiemanne *versuim* het om hulle te bemoei met die eiser se lot. Hier het die werknemer van die verweerder uit sy pad gegaan om die eiser "behulpsaam" te wees. Hy het positiewe dade verrig ('n oënskynlike rekenaartoets gedoen en die eiser mondelings verseker dat die betrokke voertuig "skoon" is) wat die eiser tot sy nadeel laat handel het. Die blote feit dat hierdie optrede 'n *versuim* was om sy pligte as polisiebeampte na behore uit te voer, in stryd met spesifieke en algemene wetgewing (sien a 13 van die Wet op die Suid-Afrikaanse Polisiediens 68 van 1995; a 5 van die Polisiewet 7 van 1958 (herroep); en a 205(3) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996), behoort tog nie sy "doen" in 'n "late" om te tower nie! (Vgl Van der Walt en Midgley 52 se waarskuwing ten aansien van hierdie tipe geval: "The failure to stop

('omission') at a stop street indicates negligent or deficient positive conduct – *culpa in faciendo*. The mere fact that linguistic alternatives enable us to describe the positive occurrence in a negative way (for example, 'the driver failed or omitted to stop at the stop street') is legally irrelevant in the determination of the nature of the conduct.") Daar word dus aan die hand gedoen dat van die oorwegings wat normaalweg ter sprake sou kom in die proses van beoordeling van 'n late, in 'n mindere mate in die onderhawige geval sou figureer. *De facto* was dit dan waarskynlik nie anders gewees nie, gesien die feit dat regter Van Dyk sonder veel moeite tot die gevolgtrekking gekom het dat H onregmatig gehandel het. (Juis in hierdie opsig sou die diskrepansie tussen die onderhawige bevinding en die beslissing van die appèlhof in die *Kadir*-saak geregverdig kon word.) Ongelukkig formuleer regter Van Dyk sy gevolgtrekking onder invloed van die gewysdes wat uitsluitlik met deliktuele aanspreeklikheid op grond van 'n *omissio* handel – sodanig dat mens deur die strenge toepassing daarvan elke denkbare positiewe daad ook tot 'n *omissio* sou kon relegeer (10159H–I):

> "Gemeet aan die algemene vereistes van redelikheid, en in die lig van die regsoortuiging van die gemeenskap soos ek reeds hierbo uiteengesit het, was dit nie onredelik nie om te vereis dat 'n polisiebeampte in die posisie van Hettinger in daardie bepaalde omstandighede redelik moes opgetree het. Ek is derhalwe tevrede dat hy nie redelik opgetree het nie, en daar inderdaad op hom 'n regsplig was om te verhoed dat die eiser skade kan ly deur slegs maar redelik op te tree en dat die eiser derhalwe geslaag het om die element van onregmatigheid te bewys."

3 3 Die nalatigheidsvraag

Grondliggend is daar nie fout te vind met die regter se gevolgtrekking dat H se optrede nalatig was nie. Ongelukkig word daar in die loop van sy uitspraak, en meer in besonder waar die term "nalatigheid" die eerste maal gebesig word, 'n stelling gemaak wat dui op 'n verwarring tussen 'n *nalate* (as verskyningsvorm van menslike gedraging) en nalatigheid as skuldvorm (1059C):

> "Myns insiens het die versuim van Hettinger om aan die eiser te sê dat hy nie 'n deskundige is in die ondersoek van voertuie nie en tweedens, dat binne 'n kwessie van meters daarvandaan af (*sic*), die betrokke afdeling se deskundiges behoort te wees, en dat hulle die voertuig sou ondersoek, is vir my onverklaarbaar en kom neer op nalatigheid."

Hier word die begrippe *versuim* en *nalatigheid* in soveel woorde gelykgestel, iets wat regswetenskaplik onmoontlik is (vgl Neethling, Potgieter en Visser 130). Dat regter Van Dyk se bedoeling nie werklik was om dit te doen nie, en dat hy eerder wou sê H se gedrag "kom neer op nalatigheid" (so gestel ook nie werklik, puristies besien, korrek nie: "nalatige optrede" sou meer van pas wees), blyk uit sy volgende stelling (1059F):

> "Deur ligtelik op hierdie wyse die regsplig wat daar op hom was te negeer het hy myns insiens op 'n ernstige wyse nalatig opgetree."

Enige moontlikheid dat hierdie stelling ook geïnterpreteer sou kon word as 'n voorbeeld van verwarring wat daar tussen die onregmatigheids- en skuldelement in die regter se gemoed sou bestaan, word uitgeskakel deur die sin wat direk daarop volg, waarin H se optrede gemeet word aan die kriterium van die "redelike polisiebeampte", wat 'n meer subjektiewe nalatigheidstoets as selfs dié van die *diligens paterfamilias* is (sien bv Van der Walt en Midgley 158). Die stelling dat H "op 'n ernstige wyse" nalatig opgetree het sou, meer elegant, liefs deur "grof" nalatig vervang kon word.

Ten spyte daarvan dat regter Van Dyk aanvanklik sinspeel op 'n strenger nalatigheidstoets (nl dié van die redelike polisiebeampte), verkies hy om na die klassieke algemene toets van die *diligens paterfamilias* soos geformuleer in *Kruger v Coetzee* 1966 2 SA 428 (A) 430E–G te verwys as gesag. Hy verskaf sy eie parafrase daarvan, wat ongelukkig die tweede lid van daardie toets, soos destyds deur appélregter Holmes geformuleer, in die slag laat bly: Hy beskryf die vermelde toets soos volg (1059H–1060A):

> "[S]ou die *diligens paterfamilias* in dieselfde omstandighede die redelike moontlikheid voorsien het dat sy optrede die eiser kan skade aandoen (of sy versuim om sy regsplig na te kom die eiser skade kan aandoen) en hy [bedoelende H] nie redelike stappe geneem (*sic*) het om dit te voorkom nie dan was hy nalatig in die uitvoering van sy pligte."

Direk na die sinsnede in hakies sou daar, in die lig van die erkende formulering, woorde met die volgende strekking ingevoeg moet word: "en sou die *diligens paterfamilias* redelike stappe gedoen het om sodanige nadeel te vermy . . .". Volgens my oordeel het hierdie onakkuraatheid egter geen materiële weerklank in die uiteindelike bevinding van regter Van Dyk gevind nie.

Byna as 'n bykomstigheid – en, kry mens die gevoel, *ex abundanti cautela* – neem die regter die optrede van die ontvangsdame wat die eiser aanvanklik moes help in behandeling en konkludeer hy dat haar optrede ook nalatig was (1060B–C). Dit behoef bykans geen betoog nie dat al sou hierdie bevinding daargelaat gewees het, die uitspraak verder presies identies sou bly (sien ook 1060E–F).

3 4 Die kousaliteitsvraag

Regter Van Dyk beskou dit as 'n uitgemaakte saak dat daar ongetwyfeld 'n juridiese kousale verband bestaan tussen die gewraakte optrede van die polisie en die nadeel wat die eiser gely het. Hy formuleer sy gedagtes hieroor soos volg (1061D–E):

> "Laastens wil ek net daarop wys, volledigheidshalwe, dat dit nie betwis kan word nie, dat hierdie optrede van die polisie die direkte oorsaak was dat die eiser die voertuig gekoop het . . ."

Tegnies gesproke is hierdie formulering nie korrek nie, want die feite staaf dat die eiser ten tye van die gewraakte polisie-optrede *reeds* die voertuig gekoop het (hy was trouens reeds die geregistreerde eienaar daarvan, alhoewel hierdie feit natuurlik ten opsigte van die gemeenregtelike posisie by die koop geen juridiese relevansie het nie). Al wat die eiser probeer vasstel het voordat hy die opdrag aan sy finansierder/bank wou gee om die koopsom oor te betaal, is of hy nie moontlik later uitgewin sou word nie (wat dan inderdaad gebeur het). Dieselfde verwarring blyk uit die volgende sin (*ibid*):

> "Die laaste handeling ten einde 'n volledig afdwingbare koopkontrak tot stand te bring was juis die oorbetaling van die tjek deur Wesbank aan die verkopers . . ."

Die *causa* vir die betaling was juis die reeds aangegane koopkontrak; betaling van die koopprys is immers nie een van die konstitutiewe vereistes vir 'n koopkontrak nie. Hoe dit ook al sy, dit is duidelik dat regter Van Dyk onomwonde wou sê dat daar aan die vereistes van die kousaliteitselement voldoen is – niks meer, en niks minder nie. Na my oordeel regverdig die feite ongetwyfeld sy uitspraak in hierdie opsig.

3 5 Bydraende nalatigheid

Vir die akademiese vakgeleerde bied hierdie saak 'n verbasingwekkende voorbeeld van hoe daar in die praktiese litigasieproses soms na strooihalms gegryp word ten

einde 'n eiser te probeer dwarsboom. In 'n gewysigde pleit is daar namens die verweerder betoog dat die eiser bydraend nalatig sou gewees het, eerstens omdat hy sou versuim het om die doel van sy besoek aan die polisiekantoor behoorlik onder die aandag van die betrokke polisiebeamptes te bring en tweedens sou versuim het om daarop aan te dring dat die voertuig fisies deur die voertuigdiefstaleenheid ondersoek moet word.

Regter Van Dyk het hierdie argumente tereg summier verwerp. Hy wys daarop dat die bewese feite die eerste argument teëspreek (1060H–1061B). Wat die tweede argument betref, bevind hy dat 'n normale lid van die publiek nie die durf aan die dag sal lê om aan te dring daarop dat die polisie hul verpligtinge op 'n bepaalde manier moet nakom nie, dog slegs sy of haar behoeftes by wyse van 'n duidelike versoek sal stel (1061B–D). Hierdie konklusies is klaarblyklik korrek en behoef geen verdere bespreking nie.

Gesien die bewese feite ten aansien van die optrede van polisiebeampte H kom dit nie vergesog voor nie om sy optrede selfs as opsetlik aan te merk: hy moes immers uit die aard van sy werk daadwerklik besef het dat sy optrede sinloos was en tot moontlike nadeel van die eiser kon strek: 'n argument ten gunste van 'n bevinding van ten minste *dolus eventualis* aan sy kant sou beslis nie onvanpas wees nie. Dit sou die hof tot dieselfde gevolgtrekking gebring het, indien regter Van Dyk om die een of ander rede 'n bevinding van bydraende nalatigheid aan die eiser se kant sou gemaak het (vgl Boberg 656).

3 6 Allerlei

In die lig van die basis waarop die eiser se saak beredeneer is, kom dit as onverklaarbaar voor waarom die eiser slegs die koopprys van die voertuig as skadevergoeding gevorder het. Hy het verkies om nie "die enorme hoeveelheid finansieringskoste, rentes ensovoorts" (1054G) wat hy aan die bankinstelling wat sy koop gefinansier het, tot die skadebedrag toe te voeg nie. Die enigste aanvaarbare verklaring vir hierdie versuim is 'n vrees aan die eiser se kant dat sodanige addisionele skadepos(te) deur die hof as te ver verwyderd van die polisie se gewraakte optrede bevind sou word en dat die hof dus sou kon konkludeer dat 'n juridiese kousale verband ontbreek – 'n bevinding wat negatiewe implikasies in die toestaan van 'n kostebevel sou kon meebring. Indien hierdie premis korrek sou wees, was daar na my mening oordrewe versigtigheid in hierdie opsig, in die lig van die huidige stand van ons deliktereg rakende die voorsienbaarheid van skade as determinant van juridiese kousaliteit (sien bv Neethling, Potgieter en Visser 185–187 210–203 en gesag daar aangehaal tav die sg "soepel benadering" tot juridiese kousaliteit).

Dit is jammer dat hierdie uitspraak ontsier word deur talle spel- en taalfoute: die skuld hiervoor moet vierkantig voor die deur van die redaksionele versorgers van die betrokke uitgewer geplaas word. (Ter illustrasie word slegs voorbeelde hiervan verskaf. Voorbeelde van spelfoute: "òf" ipv "óf" (1054I); "belange aantasting" ipv "belange-aantasting" (1055F); "polisie getuies" ipv "polisiegetuies" (1058F); "voortgegee" ipv "voorgegee" (1059G). Voorbeelde van taalfoute: "ernstig betwis *was* nie: ipv "ernstig betwis *is* nie" ((1053B – hierdie foutiewe gebruik ten aansien van die passiewe verlede tyd kom onrusbarend baie in moderne Afrikaanse taalgebruik voor); "naby aan" ipv "naby" (1053H); "onregmatighede" ipv "onregmatigheid" (1056A); "verstandelik besonder goed *ge*deeld" ipv "verstandelik . . . goed *be*deeld" (1059C); "stappe geneem" ipv "stappe gedoen" (1060A); "sal selde die durf *het*" ipv " . . . durf *hê*" (1061C).)

4 Slot

Dit is te verwelkom dat regter Van Dyk in die eiser se guns beslis het. Soos vroeër opgemerk (sien 1 hierbo) blyk dit dat daar nou selfs weer 'n "polisie"-saak is waarin ons 'n voorbeeld aantref van Neethling, Potgieter en Visser se derde kategorie van wyses waarop suiwer ekonomiese verlies veroorsaak kan word om as eisoorsaak vir 'n deliktuele vordering te dien.

Ten slotte kan 'n mens jou afvra of hierdie beslissing nie strydig is met die uitspraak van die appèlhof in *Minister of Law and Order v Kadir* (*supra*) waarna vroeër (sien 1 hierbo) verwys is nie. Myns insiens is die aard van die gewraakte optrede in die twee gevalle verskillend. In *Kadir* se geval was daar beslis 'n late in die ware sin van die woord teenwoordig: die polisiemanne se optrede kan nie anders ten aansien van die eiser se uiteindelike skade omskryf word as 'n *late* nie. In die onderhawige geval kan polisiebeampte H se optrede primêr as 'n *positiewe dadigheid* ten opsigte van die eiser se gelede nadeel bestempel word (sien 3 2 hierbo) en slegs in sekondêre sin as 'n *late* (indien hoegenaamd). In hierdie opsig val die vermelde beslissings dus te onderskei.

5 Naskrif

Hierdie is die laaste gerapporteerde uitspraak van regter HP (Henk) van Dyk wat op 28 Januarie 2001 onverwags oorlede is. Met sy heengaan het die regsberoep in Suid-Afrika 'n merkwaardig veelsydige lid verloor.

Hy is op 3 Desember 1926 in die Waterbergdistrik gebore, wat verklaar waarom hy sy lewe lank jagter en natuurbewaarder gebly het. Nadat hy sy BA- en LLB-graad aan die Universiteit van Pretoria behaal het, het hy in 1954 aan die Rijksuniversiteit Leiden in Nederland gepromoveer met 'n proefskrif getitel *Die pogingsprobleem in die moderne strafreg*, onder promotorskap van die beroemde professor JM van Bemmelen. Na 'n kort akademiese loopbaan het hy in 1955 by die Pretoriase Balie aangesluit. In Desember 1977 is hy permanent as regter van die Transvaalse Provinsiale Afdeling van die Hooggeregshof aangestel, 'n betrekking wat hy tot sy ontydige dood met onderskeiding beklee het.

Met hierdie bydrae eer ek graag sy nagedagtenis.

JOHAN SCOTT
Universiteit van Pretoria

The [Universal Declaration of Human Rights] does not purport to offer a single unified conception of the world as it should be nor does it purport to offer some sort of comprehensive recipe for the attainment of an ideal world. Its purpose is rather the more modest one of proclaiming a set of values which are capable of giving some guidance to modern society in choosing among a wide range of alternative policy options.

Philip Alston "The Universal Declaration at 35*: Western and passé or alive and universal?"* 1983 ICJ Rev 69.

BOEKE

ROMAN LAW AT THE CROSSROADS: PAPERS OF THE CONGRESS ORGANISED BY THE DEPARTMENT OF ROMAN LAW OF THE UNIVERSITY OF UTRECHT AND THE FACULTY OF LAW OF THE UNIVERSITY OF NAMIBIA (WINDHOEK 30 JUNE – 1 JULY 1997)

by

JE Spruit, WJ Kamba and MO Hinz

Juta Kenwyn 2000, xv and 182 pp: price R133,75 (soft cover)

In the "Acknowledgement" MO Hinz sketches the background to the Congress which gave rise to these proceedings: The idea of the congress arose within the framework of the teaching assistance project agreed upon between the University of Utrecht and the University of Namibia on the basis of the UNESCO-sponsored UNITWIN network of which both universities form part. Roman law has been a compulsory course in the Faculty of Law since the establishment of the University of Namibia in 1994. The reason for this is the fact that Roman-Dutch law is the common law of Namibia. It soon became obvious to the academics concerned that the role and future of Roman law in the Southern African Roman-Dutch law countries need to be considered again. Questions such as "Was Roman law an imposition of colonialism that would have to go with dawning of freedom and independence?", "Were Roman-Dutch law and Roman law outdated burdens to legal practice and education?", "Was it worthwhile spending time and money cultivating a field that certainly had its importance in the development of law as a universal project, but was not a priority in African countries, the indigenous legal cultures of which would need much more attention than Roman law imported with colonialism and anyway not being the 'law way' of the majority in those countries?" were to be brain stormed at this congress.

The publication contains the congress's "Welcome address" by WJ Kamba, in which he says that the basic question to be answered is whether Roman law should continue to be taught at all or whether it should be taught differently. The "Introduction" to the proceedings was written by JE Spruit, Professor of Roman Law and Legal History at the University of Utrecht and Visiting Professor of Roman Law at the University of Namibia since 1995.

Thirteen papers delivered at the congress are contained in this publication:

MO Hinz's contribution is titled "Roman Law: Living heritage of humankind? Introductory remarks". He briefly discusses the universal dimension of Roman law which has been expanding since the twelfth century. The jurisprudence of Roman

law combined certainty and flexibility, openness and conservatism, authority and liberalism. It is the task of legal education to equip students with all the tools that are necessary to function within the legal profession. And in this spectrum of legal education Roman law occupies a special place in the catalogue of mind-broadening subjects: According to the author, the study of Roman law possesses the potential to enhance integrated or holistic jurisprudence. This would contribute to broadening the legal horizons of other forms of jurisprudence, in particular the jurisprudence of African law and also offers legal concepts and models conducive to new regional and international developments.

In "Roman law – to assist law reform and law development" DM Balatseng argues that a study of Roman law can assist in the development of the South African legal system, since the principles and history of Roman law are quite similar to those of indigenous legal systems. BF Bankie's contribution ("Sources and resources – Roman and Dutch law – a retrospect") gives an overview of the history and development of the South African legal system. According to him, there should be no conflict between the continued influence of Roman law and the increased influence of African values, otherwise called *ubuntu*. A Domanski ("The ethical argument for teaching Roman law") is very concerned about unethical conduct in the legal profession, and is of the opinion that law students must be taught the vital importance of honesty, integrity and fairness in legal practice. This can be done, inter alia, by a study of Justinian's *Institutes*. In the *Codex*, judges were directed that "in all things, the principles of justice and equity, rather than the strict rules of law, should be observed". The *Institutes* have the potential to shape the ethical attitudes of the next generation of legal practitioners, and so bring about renewal in the profession. In "Roman law and common law in Southern Africa: Past and future" HJ Erasmus gives a brief exposition of the interaction of common law and civil law in the Southern African context. He concludes that the law of the countries of Southern Africa, with its historic links with two of the major legal systems of the world, has a richness which should be exploited in the creative adaptation and development of our law. In "The Roman law in Roman-Dutch law – weft or woof?" ML Hewett discusses the ways in which the older customary law of the Netherlands adopted and adapted Roman law in its *ius commune* form with the purpose of finding pointers as to how African customary law and Roman-Dutch law can be harmonised to produce a truly African, yet worldwide legal system.

In "Equality in contract in South Africa: Squandering our heritage", LF van Huyssteen briefly discusses a few examples (undue influence, the doctrine of *laesio enormis* and the *exceptio doli generalis*) and then comes to the conclusion that the application of Roman-Dutch law has, through our own shortcomings, not led us further up the road of development in the field of equality of contract. South Africa has thus squandered our heritage (the *ius commune*) and has failed to put it to use. In "The role and function of Roman law in South African legal education" DG Kleyn concentrates on the role and function of Roman law in present-day South Africa. After having discussed the state of South African education in general and legal education in particular, as well as Roman law in the South African legal system, he concludes that a utilitarian approach to the method and purpose of teaching Roman law should be followed in the present situation, and that the emphasis should be on the relevance of Roman law for present day purposes. According to GJ van Niekerk in "A common law for Southern Africa: Roman law or indigenous African law?", there is no doubt that Roman law gave Southern Africa a scientific legal framework and structure which can fulfil the needs of a changing

Africa. Although the underlying values of Roman law and the African values founded in the spirit of *ubuntu* differ in many respects, they are not irreconcilable. Both Roman law and indigenous African law have much to contribute to a common law for Southern Africa. The African *ius commune* should be based on Roman law as well as African law. "Recurriculization and legal history: Imperatives, needs and the new higher education context" is the title of NJJ Olivier and W du Plessis's contribution. A brief outline of the constitutional and statutory provisions regarding the recognition of African customary law and religious-based legal systems is followed by an overview of some of the commonalities and differences between the various systems in order to indicate the possibility of including these systems in the existing curricula. Thereafter, recurriculisation is discussed and finally also the adaptation of legal education. E Schoeman discusses the historical development of domicile as a jurisdictional and a conflicts-connecting factor in regard to private-law status in "Domicile, status and divorce: Denying our Roman roots?" She concludes by saying that our Roman law heritage in the field of conflicts of law cannot and should not be ignored. "Roman law, fundamental rights and land reform in Southern Africa" is the title of AJ van der Walt's contribution. He is of the opinion that at a congress entitled "Roman law at the crossroads", a closer look should be taken at the dysfunctional aspects and the discontinuities of Roman law, and at the way in which it functioned along some of the fault lines and breakdown points during its long history. After a brief discussion of land reform in South Africa, he concludes that we should study the way in which Roman law changed and was transformed by its crises. Roman law is of interest to a Southern African lawyer today because of the examples and illustrations of the ways in which it was transformed to help society transform itself and to survive crises. The last contribution in this volume is that of Mr Justice DH van Zyl: "Roman-Dutch law: A South African perspective". He gives a brief South African perspective of Roman-Dutch law in these times of transition and transformation, also referring to the Constitution of 1993 and the *Du Plessis* and *Roland* cases. In conclusion, he categorically states that the common law of South Africa is not an endangered species, nor is it likely to become one in the foreseeable future. As never before, the judiciary has the opportunity to become actively involved in the improvement and development of our common law for the benefit of all South Africans.

In the three and a half years since the congress, much thought has been given to the issue of Roman law as a subject in the law curriculum: whether it should be taught at all and if so, how? Today most universities still offer Roman law, mostly as a foundations course. Advanced courses are still offered at a few universities. See in this regard WB le Roux "The de-Romanisation of legal history courses at South African universities" published in 2000 *Fundamina* 6.

The organisers should be congratulated on their initiative in organising this congress, and the editors and publishers with this fine volume containing the papers delivered at the congress.

RENA VAN DEN BERGH
University of South Africa