Speculum Juris

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ARTICLES

NOTES AND COMMENTS

Legal pluralism in South Africa: The resilience of Transkei's separate legal status in the field of private law

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1 INTRODUCTION

In South Africa different legal systems are observed. This emanates largely from the fact that the country itself has different peoples with different cultural backgrounds. Legal pluralism exists as a result of, or as a corollary to, this cultural pluralism.[1]

In the field of private law it is the cultural backgrounds and legal systems of the European and African people that have given prominence to legal pluralism. This has a bearing on the issue of the recognition or non-recognition of the private law of the indigenous people, ie customary private law. The initial approach of the conquering nation was to deny recognition so that western law would be the only law applicable throughout South Africa. However, as I shall show presently, that approach could not work as far as Transkei was concerned because of certain distinguishing features. These features were the foundation of the resilience of Transkei's legal system in the field of private law; a resilience which continues right up to the present day.

2 TRANSKEI AND ITS PEOPLE

The Transkeian Territories comprise the area between the Kei River in the west and the Umtamvuna River on the Natal Border in the East. That stretch of territory lies between the Indian Ocean in the South, and the Queenstown-Ugie-Maclear districts in the North. They are made up of what Saunders describes as not one tribe but several nations, each with its own legal systems, political organization and military structure.

He says:

> "When the Cape's first responsible ministry decided in 1873 that the self-governing colony should expand across the Kei there were a considerable number of important independent African states within what was in 1910 to become United South Africa; by 1894 Pondoland was the only such state in that area to have survived. The independent states were Fingoland annexed in 1879, Griqualand East (the Bacas) annexed in 1884, Thembuland annexed in 1885; Gcalekaland (Xhosa

1 Van Niekerk "Legal Pluralism" in Bekker *et al* (eds) *Introduction to Legal Pluralism in South Afric*a (2002) 3.

> proper) annexed in 1885, Bomvanaland annexed in 1885; Xesibe annexed in 1886, Rhode annexed in 1887 and Eastern Pondoland annexed in 1894."[2]

If anyone feels that Saunders is overly liberal or generous in calling them nations, then the most conservative among us will at least be prepared to agree that these were the principalities of Transkei or the counties of Transkei along the same lines as is indicated by De Wet[3] in respect of similar entities that existed in Germany and Holland. Despite differences in language, customs and traditions,[4] history has bound these people as one political entity as they together became part of the Union of South African in 1910, the self-governing Transkei in 1963, the independent Transkei in 1976, and the Transkei that was re-incorporated into South Africa in 1994.[5]

3 REASONS FOR THE RESILIENCE OF TRANSKEI'S PRIVATE LAW

In South Africa, the early policy of the colonial power was one of dislodgement of the indigenous authority, accompanied by an institutional deconstruction and displacement of the indigenous law.[6]

When the British occupied the Cape in 1795, Roman-Dutch law was maintained as the general law of the colony. The reason that was given was that it was a civilized system that could be recognized and enforced, as opposed to customary law.[7] This attitude was encouraged by the fact that Khoisan people living in the Western Cape were few in number and were scattered over a wide area, with their own social and political institutions having disintegrated beyond recognition.

As the whites moved more and more to the East they came into contact with large numbers of blacks, especially in the area later to be known as British Kaffraria. The policy of the Governor of the time, Sir George Grey, was to convert Africans to white civilization and Christianity. As part of his *modus operandi* in implementing this policy, customary law was denied recognition and was therefore not allowed in the courts. In 1865, British Kaffraria was incorporated into the Cape Colony and thus customary law became subject to the prevailing policy of non-recognition. There seemed to be nothing wrong with that, because in terms of Ordinance 50 of 1828, discrimination between black and

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2 Saunders in Saunders & Derricourt (eds) *Beyond the Cape Frontier* (1974) 35.

3 Kroniek "Kodifikasie van die reg in Suid-Afrika" 1961 *THRHR* 152.

4 For instance Sotho is the language of Lesotho, and the customs of the Sotho people differ from those of the Xhosas.

5 The name Transkei means the area across the Kei. The territories were known as such before Union in 1910, and they will remain so forever. Some people, being overly cautious not to offend the new dispensation by appearing to adhere to pre-1994 political descriptions of areas, refer to the area as "the former" Transkei: what would be correct of course would be to say "the former Republic of Transkei". The same applies to the Ciskei.

6 The policy was the same in other colonized countries like Java, India, etc. See Darboe *The Interaction of Western and African Traditional Systems of Justice: The Problem of Integration* (1982) 188ff. With respect to Java, Darboe reveals that the British Colonial administrators described the reason for dislodgement thus: "[T]o act on the broad and enlightened principles which are recognized by all civilized societies . . . instead of continuing to mould our Government according to the vague and childish notions of an uncultured people . . ."

7 Bennett *Application of Customary Law in South Africa* (1985) 40.

white was outlawed and all inhabitants of the Cape Colony were equal before the law. From this it followed that there was no justification for recognition of personal law that was different from the Roman-Dutch law. A fundamental reason for non-recognition is, however, identified by Bennett: "The white opinion of customary law was a low one and it was argued that if everyone in the colony were compelled to abide by the laws of the more civilized section of society those of the lower station would be forced to reach the higher standards."[8]

Before very long the colonial authorities in various parts of Africa and Asia found themselves compelled to abandon the policy of non-recognition of customary law. The reality of the situation was that customary law was there to stay and could not be wished away. It was sustained by the vigour of the living indigenous population, which proudly proclaimed its attachment to customary law as its way of life despite any enactments aimed at relegating it to the background and, if possible, to oblivion.[9]

In South Africa the policy of non-recognition was also soon to be abandoned. Such abandonment was precipitated by the incorporation of the Transkeian territories under British rule via the Cape Colony. Bennett explains why this had to come about. The Transkei was remote from the centre of power. It had very few whites and a large, well-organised African population. The people had not been completely subjugated nor had they been demoralized by white rule.[10] The various territories or principalities were not incorporated into the Cape's political legal and administrative systems as had been done with British Kaffraria (Ciskei) in 1866. They were governed in a distinctly different way. Saunders explains that the basic reason for this special status was that "the great bulk of the Transkeian population was black and these blacks lived not on white farms but on their own land".[11] This special status created the possibility for the customary law of Transkei to remain unshaken in the years that followed. That was despite the powerful winds of Roman-Dutch law that would inevitably blow from the west as a result of the administration of justice itself being in the hands of individuals cooked and boiled in the pots of Roman-Dutch law.

Having decided to accord Transkei the special status indicated above, the Cape British authorities then dealt with the administration of justice partly via diplomatic agents and magistrates. The authorities initially thought that by reason of the various principalities having agreed through their leaders that they be peacefully annexed,[12] there was no law, or that the indigenous law ceased to be of any force and effect, leaving a vacuum to be filled by the Roman-Dutch Law. This is

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8 Bennett *Application of Customary Law in South Africa* 41.

9 In the Gambia the first cracks in the policy of complete non-recognition appeared in the statement of Governor Cameron who said: "Our desire is to make them good Africans, and we shall not achieve this if we destroy all the institutions, all the traditions, all the habits of the people, superimposing upon them what we consider to be better administration methods and better principles, but destroying everything that made the administration really in touch with the thoughts and customs of the people." See Darboe 188–189.

10 Bennett *Application of Customary Law in South Africa* 42.

11 Saunders in Saunders & Derricourt (eds) *Beyond the Cape Frontier* 193.

12 The Transkeian leaders obviously took the peaceful route because of the ravage, destruction and enormous loss of life, property and nationhood that had befallen the Ciskei-Xhosa during the seven years war with the colonists.

clear from a letter written by the Chief Magistrate of Thembuland dated 4 April 1881 addressed to the Under-Secretary for Native Affairs, Cape Town, reading as follows:

> "It appears by the conditions under which the Thembu tribe came under the Government, that in 1875 all authority in this country was voluntarily handed over to the Colonial Government and accepted by it. I therefore infer that the existing law ceased from that date, and from the letter now under reply, that no law has existed in the country since."[13]

The various Transkeian nations were therefore expected to obey colonial/Roman-Dutch law and employ the same in their daily lives. But when faced with the realities of the situation on the ground, the agents and magistrates found the force and power of customary law to be insuperable. They understood this when they found that they could not solve the people's problems unless they applied customary law. When their judgements were taken on appeal to the Supreme Court they were reversed on the ground that they should have applied Colonial/Roman-Dutch law. A lot of similar incidents showing confusion and uncertainty occurred, and these led to the appointment of the Cape Government Commission on Native Laws and Customs, 1883. This step, of course, worked in favour of customary law. The people got an opportunity to go on record and indicate just how impracticable it would be for colonial law to replace their customary law. Thus one Maki, "on behalf of the heathen headmen and natives", responding to sentiments expressed against the continued application of polygamy, *lobola*, circumcision and *intonjane*, exclaimed:

> "The customs . . . are very ancient among us, and hitherto we have always practised them. We wish to say that we are being killed in reference to these customs as we are being prevented from practising them. We ask you what we ever did to the government that these customs of ours should be interfered with as they are at present — [These customs] are part of our creation and enjoyment of life."[14]

The sentiments against the continued application of the customs were strongly expressed by westernized blacks, including their religious leaders who urged that the customs of *lobola* and polygamy were "evils" which the government should abate and remove by refusing them recognition.[15] The views expressed by Maki to the Commission, however, appear to date to hold the upper hand and the feminists are therefore seemingly fighting a losing battle.

Apart from the protestations of the men folk,[16] the women folk also made a substantial contribution to the resilience of Transkei's private law. Initially the colonial authorities were sympathetic to what they perceived to be the plight of women in the patriarchal society on the African continent as a whole. They thus introduced various legislative measures which were aimed at "liberating" women in the Colonial spheres of authority from the perceived plight. In Transkei in particular, s 39 of Proclamation 110 of 1879 fixed the age of majority for women

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13 See Report of the 1883 Commission, Minutes of Evidence 429, quoted by Kerr "The Cape Government Commission on Native Laws and Customs (1883)" 1986 *Transkei LJ* 11 12.

14 See Report of the 1883 Commission, Minutes of Evidence 464.

15 Per Reverend Gway Tyamzashe in Report of the 1883 Commission, Minutes of Evidence 152. Today the feminists are saying exactly the same thing that was said by their colleagues, the westernised blacks, 120 years ago, the difference being only that they are more vehement and more intolerant in their protestations.

16 Like Maki and others did before the 1883 Commission.

at 21 years so as to bring to an end the customary law rule that women are under perpetual tutelage regardless of age. The weakness of this provision, however, lay in the fact that the legal independence that it offered did not come about in an evolutionary manner or by reason of the changing nature of African society, but was imposed from outside and could therefore only be guaranteed by state courts. For instance in *Noeli Silinga v Nowaka*[17] a case from Butterworth, the court said:

> "It is a well-known principle of Native Law that a woman remains a chattel all her life, but it has been ruled . . . that when Native laws are in conflict with justice and equity, and opposed to proclamations for the government of the native Territories, Native Law must give way. The legal age of majority . . . is fixed by s 39 of Proclamation 110 of 1879 as 21 years . . ."[18]

The legal independence guaranteed by the machinery of the state did not recommend itself much to the women folk because it meant that they should in exchange forfeit the various and more meaningful protections accorded them by customary law.

Thus, a woman living with her husband (to whom she is married by customary law) in remote rural areas like Xolobe in Tsomo district, is a minor, and her husband is her guardian.[19] Now suppose the wife is severely injured in a motor vehicle accident and sustains severe damages to the extent of say R 750 000.00. Her husband discovers only when he goes to the mines six years after the accident that she is entitled to claim this amount from the third party insurer of the vehicle concerned. Normally such claim has become prescribed but by reason of the above stated provisions (which merely endorse the customary law) the wife's claim does not prescribe as long as she still lives with her husband as his customary wife, because, in terms of s 7(1)(b) of the Prescription Act, the running of prescription during minority is suspended.[20] The advantage flowing from minority is therefore indisputable.

The authorities also made efforts to discourage *lobola* and polygamy so as to "liberate" the women from these "distasteful" practices of customary law.[21] The response of the women was negative: none among them regarded themselves as properly married if no lobola was paid and this applied (and applies to date) even

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17 (1918–1922) 4 NAC 301.

18 See also *Nolanti v Sintenteni* (1894–1909) 1 NAC 43, a case from Mqanduli, and *Nosanti v Xangati* (1894–1909) 1 NAC 50, a case from Engcobo. In contrast to the Cape Proclamation, the Natal Code of Native Law 1891 provided that "a native female is deemed a perpetual minor in law". Repealing but following the principle of the Transkei Proclamation, the South African legislature introduced, as late as 1972, the Age of Majority Act 57 of 1972. Section l states that all persons, males or females, attain the age of majority when they attain the age of 21 years. As to glaring inconsistencies arising from the resolution to fix the age of majority at 21 for women, see Koyana *Customary Law in a Changing Society* (1980) 144.

19 This position was endorsed by s 38 of the Black Administration Act 38 of 1927 for South Africa, and later by s 37 of the Transkei Marriage Act. The latter Act is relevant to both civil and customary marriages contracted under it, the aim of course being to ensure equality of the spouses.

20 See the Prescription Act 18 of 1943; *Bolo v Royal Insurance Company of South Africa Ltd* 1969 3 SA 102 (E).

21 See *Bennett Customary Law in South Africa* (2004) 31.

to the most highly westernised black women, be they teachers, doctors, lawyers, nurses, secretaries, parliamentarians etc. Likewise none among those living in the customary law jurisdictions where polygamy is rife has ever declined offers of marriage merely because of the husband being already a partner to a customary marriage. On the contrary, it is known that Transkeian nurses working in England and getting married to English men over there have insisted on their husbands visiting with them to Transkei and paying *lobola* to their people as is required by custom. This proves the correctness of the contention that *lobola* is not a sale of the woman (for no one would agreed to or insist on being sold), but that it is a rock on which the African marriage is founded.

To conclude therefore, the customary law of Transkei derived its staying power from the fact that after colonisation the people remained on their land as before, without being forced into huge townships like Mdantsane, Zwelitsha and Soweto, which would have been the case if Transkei had fallen into white occupation and had been cut up into white forms. The people were therefore not destabilised or dislodged by white rule, and the practice of customary law was therefore not affected. Being a vibrant and unshaken legal system, it kept the inevitable intrusions of Roman Dutch law at arms' length and the people themselves took every available opportunity to state clearly their unwavering attachment to customary law in circumstances where anyone discouraged its continued application. Statutes or proclamations aimed at destabilising customary law did not achieve their goals and both men and women clung tenaciously to their legal system. The picture that finally emerges therefore is that while one can take the African people out of customary law through various mechanisms such as proclamations and court judgments, discouraging measures and even having them living in far away, highly modernised countries like England, one can never take customary law out of them. The legislature has had to learn this the hard way and has at last had to give way on these issues, even if somewhat grudgingly.[22]

4 RESILIENCE: THE LAW RELATING TO MARRIAGE

The most prominent illustration of the resilience of Transkei's separate legal status is the law relating to marriage. During their time the colonial and subsequent South African authorities adopted a sustained policy of discrimination against customary forms of marriage in accordance with their own idea of marriage as being the model to which the subjects should conform.[23] This was based, *inter alia*, on Brouwer's definition of marriage in his work *De Jure Connobiorum*[24] that "it is a joint living together in a common dwelling, in a common apartment sharing the same bed and board, a mutual carrying out of each other's wishes in equal family life . . . a common family intermingling and *one home*."[25] The other spouse has no right to share these privileges, which include the privilege of sexual intercourse, with any one else. With reference to

22 See discussion on the Recognition of Customary Marriages Act 120 of 1998 below.
23 See Bennett *Customary Law in South Africa* (2004) Ch 8.
24 2.28.5.
25 *Sishuba v Sishuba* (1940) 12 NAC (C&O) 123 (my emphasis).

men he calls this "wasting his substance with other women far from the marriage '*qui procul a freno conjugii forte luxuria cum aliis mulieribus diffuit*'".[26]

Quite strangely, the earliest voice of reason that was heard protesting against the discrimination meted out to the customary form of marriage emanated from within the Native Appeal Court, a creature of statute manned by senior white civil servants which was expected to judge cases of customary law in accordance with the views of the authorities. It was in the Transkeian case of *Gomani v Baqwa*[27] that Garmichael, Resident Magistrate of Tsolo, Transkei and esteemed member of the Native Appeal Court sitting at Umtata, filed a dissenting judgment which will go down in history as one of the most lucid objections to the discrimination that was being meted out against customary law in the field of marriage. He said:

> "At this stage, indeed, the majority judgment prepares itself to jettison Native law in the name of 'justice and equity' if not 'public policy and good morals' – the more usual formula for such occasions. Such a course raises very debatable questions; whatever one's personal opinion may be, one cannot overlook the fact (that) to a large portion of the ecclesiastical world divorce from a Christian marriage is itself an immoral proceeding . . ."

The wise words of Garmicheal, however, fell on deaf ears until the Transkei National Assembly came to being and passed the Transkei Marriage Act.[28] In his second reading speech of the Transkei National Assembly on 31 March 1978, the relevant Minister declared:

> "Although it has always been the custom of our people to have more than one wife, the custom was thwarted by legislation at present applicable to Transkei. . . . The Bill now before the house is unique in that in certain circumstances our custom can again be fully lived out."[29]

The then Prime Minister of Transkei, Dr K D Matanzima, in his contribution to the debate on the second reading speech, said that the Bill was important because it was a reorientation of social and marital relations in a nation with its own laws, traditions and customs:

> "The basic principle is that our marriages shall not have inferior consequences to those of civil marriages . . . [at present] customary marriages are termed customary unions and they are not regarded as marriages."

He contended that the Bill did not encourage polygamy but was intended to protect children born of customary "unions" and their mothers. "The effect of foreign laws on marriages is to destroy the impact which our own marriage laws have on our society".[30]

The Transkei Marriage Act immediately began the process of bringing marriage law in line with African culture and tradition. In terms of s 3(1) thereof, the Act permitted polygamy. Secondly, it placed women married by civil rites in terms of it on par with women married in terms of customary law and placed all

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26 *Sishuba*'s case 123. Also see *Seedat's Executors v The Master (Natal)* 1917 AD 302 309 and *Nkambula v Linda* 1951 1 SA 377 (A), where Fagan CJ said explicitly that South African law did not regard a customary union as a legal marriage.

27 (1912–1917) NAC Records 71.

28 Act 21 of 1978.

29 *Hansard* (1978) 386.

30 *Hansard* (1978) 421.

of them under the guardianship of their husbands.[31] Thirdly, the Act laid down that where two women were married to a man one by civil rites and one by customary rites, the status of the wives and children of both marriages would be determined in accordance with customary law.[32] This was tantamount to a reversal of the judgment of Sleigh P in the Native Appeal Court judgment in *Sishuba v Sishuba*[33] and Fagan CJ in *Nkambula v Linda*.[34] It was also a vindication of the dissenting judgment of Garmicheal, as early as 1912, in the case of *Gomani v Baqwa*,[35] where the learned member of the Native Appeal Court protested against the principles of customary law being jettisoned in the name of "justice", "equity" and "good morals" when honest introspection would reveal that Roman-Dutch law procedures like divorce could similarly be jettisoned for lack of "good morals", "justice" and "equity". At that one stroke of the Transkei legislature's pen, the discrimination that had lasted so long against the customary law of marriage was ended in respect of the 3 million people of Transkei but it remained alive and well in respect of the 17 odd million people of the rest of South Africa.

A warm welcome was extended to the Transkei Marriage Act by seasoned authorities on customary law such as Professor Bennett.[36] He described Transkei as "the only territory in Southern Africa where an attempt has been made to devise a code of marriage law that is uniformly applicable to all persons in the country regardless of their personal legal regime".[37] Inspired by the Tanzanian Law of Marriage Act,[38] the Transkeian Act had not gone so far as to create a hybrid code applicable to all marriages. It had preserved the integrity of the two forms of marriage, the exceptions being only the property consequences, the status of the wife, and divorce procedures. Admittedly, the introduction of a polygamous civil marriage was a radical departure from the orthodoxy of Western Christianity, but the established churches were placated by s 9 of the Act, which allows a minister of religion to refuse to solemnise a marriage that would not conform to the dictates of his religion. He made a prediction that has turned out to be quite correct: that Transkei might be providing a model for future development of the marriage law in South Africa.[39] The Recognition of Customary Marriages Act is proof of the correctness of that prediction.[40]

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31 Section 37.
32 Section 38.
33 (1940) 12 NAC (C&O) 123.
34 1951 1 SA 377 (A).
35 (1912–1917) NAC Records 71.
36 See Bennett *A Source Book of African Customary Law for Southern Africa* Cape Town (1991).
37 Bennett *Sourcebook* 459.
38 Act 5 of 1971.
39 Bennett *Sourcebook* 460.
40 The leadership role of Transkei in other spheres of legal development in South Africa is beyond doubt. For instance in the field of constitutional law the Transkei Constitution Act 48 of 1963 served as a model for the National States Constitution Act of 1971, on which the constitutional development of all the Black territories within South Africa was based (and on which, to some extent, the provincial system of the new South Africa is based). The authorities are unanimous on this point. See Venter *Die Staatsreg van Afsonderlike Ontwikkeling* (1981); Carpenter *Introduction to South African Constitutional Law* (1987) 405; Basson & Viljoen *South African Constitutional Law* (1988) 305. The last-named

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In his *Customary Law in a Changing Society*[41] the present writer also welcomed the Act. I argued that the South African law never forbade African men married by customary law from going ahead and marrying second wives by civil rites. This had been said in so many words by Fagan CJ in *Nkambula v Linda.*[42] It was therefore not a Christian solution for the law to punish the innocent customary law wives by declaring their marriages inferior and their children illegitimate.[43]

Not unexpectedly, there was, in some semi-enlightened circles among blacks both in Transkei and South Africa, a great deal of anger against the provisions of the Transkei Marriage Act, the argument of the westernised elite being that these provisions amounted to "switching the clock backwards". Upon the advent of the new South Africa, therefore, the sympathy which the colonial authorities had initially shown in the 1880s towards the perceived plight of women in a patriarchal society again flared up, this time somewhat aggressively and uncompromisingly fuelled by the pilots of gender equality among black South Africans themselves. Aided by the equality clause in s 9 of the Constitution (which clause they themselves had secured[44]), the feminists applied to the Transkei High Court in 1996 for an order setting aside the Transkei Marriage Act as being in conflict with the Constitution as it imposed guardianship and marital power of the husband over the wife, whether married according to civil rights or customary law.[45] No doubt having failed to get a black woman to pilot the case as an applicant, the promoters of the reform got a white lady, Anne Prior, to marry her husband, Donald Battle, under the Transkei Marriage Act, and then to immediately approach the court and apply for the relief stated above. The case was strenuously contested by a cross-section of the Transkei people, including female law lecturers, female practising attorneys and male and female members of several Tribal Authorities, who contended on affidavit that there was nothing offensive, as far as they were concerned, with the provisions of the Act. In his judgment Miller J ruled that a white woman had no *locus standi* to challenge the marital power and guardianship of husbands over their wives married according to customary law. The learned Judge reasoned that if particular rules of customary law (or common law for that matter) were struck down, gaps would result and the judiciary had no solution as to how those gaps would then be filled.[46] The indignant tirade against the rule of customary law and the Transkei Marriage Act thus received a major setback.

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authors attribute this to "certain favourable conditions". Such favourable conditions are of course nothing other than the unification of the Transkeian Territories and the enormous training in self-rule by the people of Transkei through the Council system that they enjoyed from 1894 to the taking of self-government in 1960.

41 (1980) 145ff.

42 1951 (1) SA 377 (A).

43 See Koyana *Customary Law in a Changing Society* 149 and cf 28. See also Van Loggerenberg "The Transkeian Marriage Act, 1978 – A New Blend of Family Law" 1981 *Obiter* 1.

44 See Currie "The Future of Customary Law" in Murray (ed) *Gender and the South African Legal Order* (1994) 146; Nhlapo *Weekly Mail Review/Law* (1993) II; Bennett *Customary Law in South Africa* Ch 8.

45 Sections 37 and 38 of the Transkei Marriage Act. See *Prior v Battle* 1999 2 SA 850 (Tk); 1998 8 BCLR 1013 (Tk).

46 See discussion by Bennett *Customary Law in South Africa* 92.

In their attempt to entrench the discrimination against customary forms of marriage and thus demolish the victory brought about by the Transkei Marriage Act, the feminists paid undue emphasis to the literal meaning that can be attributed to the equality clause, but overlooked the overriding importance of s 15(3)(a) of the Constitution.[47] That section authorised Parliament to pass legislation recognising marriages concluded under any tradition, or system of personal or family law. The Constitution went further and encouraged cultural diversity by requiring the government to abolish all laws discriminating against customary marriages, and the new South African state was automatically placed under an obligation to give full recognition to cultural institutions, which, of course, include customary marriages.[48] In those circumstances, the main aspects of the Transkei Marriage Act became assured of survival in the new South Africa, and removal of discrimination against the institution of customary marriage (which is embraced by the vast majority of the people of South Africa) was in sight. Such removal was indeed achieved with the passing of the Recognition of Customary Marriages Act.[49] It must be stated that the Act went further than the Transkei Marriage Act in including features of western law among quite a few of its provisions.

The Transkei Marriage Act therefore remained a force to be reckoned with. Many marriages had been contracted in terms of it since 1978, and marriages were continuing to be contracted in terms of it after the passing of the Final Constitution and of the Recognition of Customary Marriages Act in 1998. A temporary set back was secured for it, however, via the case of *Kwitshane v Magalele*,[50] where Kruger AJ ruled that the marriage relied on by the respondent to enable it to inherit was unlawful and void *ab initio* because it was not registered as required by s 32 of the Transkei Marriage Act. Even if the community regarded it as legal, that was just not the case in terms of the law.[51]

Based as it was as on a technicality, this reversal of the fortunes of the Transkei Marriage Act was soon terminated by the courts in *Sokhewu v Minister of Police*.[52] In that case Jafta AJP overruled the decision of Kruger AJ in *Kwitshane*. He found that that decision was wrong because what the Transkei Marriage Act did was to accord the customary marriage a status equivalent to that of the civil marriage, but not to invalidate it if it was not registered. This reasoning is in line with and is strengthened by the *dictum* of the full bench of the Zimbabwe Supreme Court in *Zimmat Insurance Co Ltd v Chawanda*.[53]

The Transkei High Court continued to uphold the good reforms brought about by the Transkei Marriage Act, despite incessant attacks. The judgment of Pakade J in *Feni v Mgudlwa*[54] is proof of this. The eminence of the judgment lies in the fact that the learned judge saw through the contention (once more strenuously made as in the *Kwitshane* case), that a customary marriage is not valid if it is not

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47 108 of 1996.
48 See *Ryland v Edros* 1997 2 SA 690 (C). See also the discussion by Bennett *Customary Law in South Africa* 192.
49 Act 120 of 1998. See especially ss 2(2), 2(3), 7(6), 7(7), 7(8) and 7(9).
50 1999 4 SA 610 (Tk).
51 613 F–H.
52 Unreported Transkei Division decision, case no 293/94.
53 1991 2 SA 825 (ZS) 831G–H.
54 Unreported Transkei Division decision, case no 24/2002.

registered, as being in effect a veiled revival of the old colonial approach that a customary marriage is not a valid marriage because it is not contracted according to western legal norms. He therefore took the novel approach of discussing the customary law method of formation of marriage via the *ukuthwala* custom. He showed that invalidating a customary marriage because of the absence of the Western law rule of registration would automatically invalidate a customary marriage formed via the non-western method of *ukuthwala*, which also knows no registration. On this point he relied on the writer's views,[55] and then made the following important statement:

> "It is clear from the case law[56] that the reason for not recognising customary marriages as valid in South Africa is that they contain elements which are foreign to the policy and legal institutions of both Holland and England. But what about the fact that elements of African law are not foreign to the majority of the people of South Africa."[57]

In the more recent case of *Wormald NO v Kambule*, decided on 20 May 2004 in the Eastern Cape Division (Grahamstown), the ruling of the Transkei Court in *Sokhewu*'s and *Feni*'s cases were upheld. The widow of a marriage contracted under the Transkei Marriage Act was held not to be an unlawful occupier of a very expensive house that the deceased husband of herself and the widow of a civil marriage (Second Applicant) had bought and given to the Respondent (Transkei Marriage Act widow) to occupy. The latter widow therefore remained entitled to stay in the house with the deceased's estate being liable to pay the costly bond thereof despite her marriage not having been registered. The High Court is therefore unshaken in its resolve to uphold the reform to the law of marriage as contained in the Transkei Marriage Act.

The new Recognition of Customary Marriages Act has been hailed as the measure that repealed much of the Transkei Marriage Act and brought about enormous reforms and uniformity to the law relating to marriage throughout South Africa, Transkei included. However, the staying power of the Transkei Marriage Act will be evident for decades to come for several reasons. First, where spouses have contracted a customary marriage before the Act came into force, their proprietary relations continue to be governed by customary law. The husband will therefore continue to exercise customary law powers over her estate. "He will therefore enjoy a considerable degree of control if not outright ownership."[58] Secondly, by harping on the principle of equality and equal treatment between the wife/widow of the civil marriage and the widow of the customary marriage, the new South African Act says nothing new because this was the very basis on which the Transkei Marriage Act was conceived. One need only recall the statements of the Transkei Ministers during the second reading of

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55 Koyana *Customary Law in a Changing Society* 1.

56 See *Gronn v Fritz Gronn's Executors* (1860) 3 Searle 314; *Seedat's Executor v The Master (Natal)* 1917 AD 203, which he had reviewed scientifically.

57 The learned Judge further broadened his approach by protesting against the whole issue of the imposition of western legal notions in the wider South African customary law setting. This had been attempted in respect of the customary law of procedure and evidence, but the efforts had been admirably thwarted by Madlanga J in his landmark judgment in *Bangindawo v The Head, Nyanda Regional Authority* 1998 3 SA 262 (Tk) 273, said the learned Judge.

58 Bennett *Customary Law in a Changing Society* 262, who refers to the judgment of Miller J in *Prior v Battle* in support of this contention.

the Bill that introduced the Act in 1978.[59] Indeed, the new Recognition of Customary Marriages Act removes all doubt about the validity of a marriage under the Transkei Act when it provides in s 4(9) that failure to register a customary marriage under it (the 1998 Act) does not affect the validity thereof. Chetty J made this point in the *Wormald* case to strengthen his finding. Thirdly, it is noteworthy that the new South African Act follows customary law in general and the Transkei Marriage Act in particular in embracing polygamy and the payment of *lobola*. The bold initiatives of the Transkei Legislature in 1978 have therefore borne fruit and the discrimination of centuries against the customary form of marriage has been terminated for all time.

59 *Hansard* (1978) 386, 421.

Rights-based theory, postmodernism, and the challenge of juridical scholarship

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"Whether to insist that a pitcher is half full or half empty may turn on whether you are combating the illusion that it is completely empty or completely full." – Paul A Freund

"[M]any of our evolved concepts . . . have defects." – Robert Nozick[1]

1 INTRODUCTION

One of the epistemological insights that undergird modernity is that knowledge is a product of human understanding, whatever received wisdom says, and whatever it is analytically. That, in turn, implies an answer to the question: Is knowledge, in comparison to the *object* of knowledge, ultimately fallible*?* The question is probably as old as learning itself. A *common* view that goes at least as far back as Socrates is that confession to ignorance, both before and after inquiry, is the hallmark of the learner. The resultant humility teaches that inquiry is a perennial intellectual activity, cautions scholars against any supposed "infallibility of great names",[2] and enjoins them to always keep close in mind the *presence* of the *subject* in the world of learning. A corollary of this is that no learner could or should say, "Stop! Inquire no more. I *know* the *final* answer, *the* truth". But the most cursory look at the history of learning will quickly unsettle the *common* view.

Until the latter part of the twentieth century, when the conviction that "all science is cosmology"[3] festered into the notion that all philosophy is cosmography, philosophers did not hesitate to advertise their *systems* as *the* truth, behind and beyond which no one can go. One cannot go behind the truth because it stands on its own; one cannot go beyond the truth because it is all there is. Immanuel Kant explicitly stated the *logical* ground for the claim to the truth:

> "[S]ince, considered objectively, there can be only one human reason, there cannot be many philosophies; in other words, there can be only one true system of philosophy from principles, in however many different and even conflicting ways men

1 Freund *On Law and Justice* (1968) 109; Nozick *Invariances: The Structure of the Objective World* (2001) 9.
2 The phrase is from Bentham *A Fragment on Government* ed Burns & Hart (1988) 114.
3 Popper *A World of Propensities* (1990) 7.

> have philosophized about one and the same proposition . . . So anyone who announces a system of philosophy as his own work says in effect that before this philosophy there was none at all. For if he were willing to admit that there had been another (and a true) one, there would then be two different and true philosophies on the same subject, which is self-contradictory."[4]

As the history of learning shows, however, every now and then a learner appears on the scene and systematically disturbs the established equilibrium. Such personalities are known to history as "originators", "reformers," "revolutionaries", "paradigm-shifters", etc; traditionally, such personalities are known as skeptics.

There were skeptics in the ancient world, but it suffices for our purposes to limit ourselves to the period contiguous to modern times. In the later medieval world, that is, the period between the thirteenth and the sixteenth centuries, skeptics were mostly humanists. Now, humanist skeptics operated in a closed world, before the schism that fragmented European Christendom, and the development of nation-states. The distinguishing feature of humanist skepticism was that it not only eschewed, but also called into question "the very possibility of ever having true and systematic knowledge"[5] of or about phenomena, natural or ethical. As such, humanist skepticism could not instigate new inquiry nor spur scholars to question established knowledge and institutional practices. In short, until after the Reformation and, specifically, the advent of modern skepticism, which required that the slate be wiped clean as a prelude to a fresh intellectual start, skepticism did not entail rejection of an inherited intellectual framework or established paradigm. Further, although ancient skeptics were empiricists,[6] there is no necessary connection between empiricism and skepticism.

With regard to truth, humanist skeptics were agnostic: they neither denied nor asserted the truth of philosophical beliefs, including their own. To the extent that they had a concept of truth, theirs paralleled the "'No Truth' theory of truth" that sees the word truth as no more or less than "a linguistic device for converting an unasserted into an asserted sentence."[7] And, because humanist skeptics regarded their immediate sociopolitical and legal institutional world as "the only place in which man can dwell,"[8] they entertained neither the de-constructive thought of shaking the foundations of traditional institutions nor even the constructive one of supplying foundations for traditional institutions. In short, humanist skeptics were neither system builders nor system shakers. As Stephen Toulmin puts it, humanist skeptics

> "no more wished to *deny* general philosophical theses than to *assert* them. . . . the humanist [skeptic] saw philosophical *questions* as reaching beyond the scope of experience in an indefensible way. Faced with abstract, universal, timeless theoretical propositions, they saw no sufficient basis in experience, either for asserting or denying them . . . Rather, what they had to offer was a new way of understanding human life and motives . . . they taught readers to recognize how philosophical theories overreach the limits of human rationality."[9]

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4 Kant *The Metaphysics of Morals* tr Gregor (1991) 36–37.
5 Tuck *Hobbes* (1989) 14.
6 Frede "The Ancient Empiricists" in *Essays in Ancient Philosophy* (1987) Ch 13.
7 Black *Language and Philosophy: Studies in Method* (1949) 105.
8 Strarobinski *Montaigne in Motion* tr Goldhammer (1985) 293.
9 Toulmin *Cosmopolis: The Hidden Agenda of Modernity* (1992) 29. (Emphasis in the original)

The upshot was that, unlike their modern successors, humanist skeptics used doubt as a shield, rather than as a sword:

> "In theology or philosophy, you may . . . adopt as personal working positions the ideas of your inherited culture; but you cannot deny others the right to adopt different working positions for themselves, let alone pretend that your experience "proves" the truth of one such set of opinions, and the necessary falsity of all the others."[10]

Yet the radical implication of humanist skepticism was unmistakable. Specifically, the skeptical outlook meant that existing principles of legal and political right were not necessarily right. Rather, they are (in contemporary parlance) principles gleaned from and warranted only by "local knowledge".[11] Put differently, existing principles of political and legal right are contingent, not necessary facts. Nonetheless, the immediate consequence of humanist skepticism was neither political liberalism nor critical pluralism, but obtuse legal and political conservatism.[12] In the later medieval period, scholars were predominantly traditionalists.

The thesis of this paper is that contemporary rights-based theorists are traditionalists who systematically blunt modern (liberal) legal and political theory. That thesis is probably not new, which is not to say that it is already exhausted. Postmodernism *methodologically* reawakens the skeptical impulse, and thus provides a necessary antidote not only against the modern claim to objectivity, but all proprietary claims to *the* truth. Postmodern skepticism untethers theory from ideology, and opens the way for the advancement of learning. However, the way to advancing juridical learning does not lie in postmodernism's negative stance. Nor does it lie in interpretive theories and descriptive justification and systematization of local or cultural practices. Rather, the forward way lies in fresh investigation of the *concept* of legal and political *right* via the laws of *free* polities/peoples, and "global" hermeneutics.

2 RIGHTS-BASED THEORY: MODERNISM TO POSTMODERNISM

Rights-based theorists follow the social contract tradition that stretches from Hobbes[13] and Locke[14] in the seventeenth century to Rousseau[15] and Kant[16] in the

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10 *Ibid*.

11 On "local knowledge" see Geertz *Local Knowledge: Further Essays in Interpretive Anthropology* (1985).

12 Strarobinski *Montaigne in Motion* 81, 96: ". . . the lesson of [humanist] scepticism is precisely the return to appearances. Appearances cannot be transcended, but this fact, rather than turn us away from appearances, frees us from the need to search for a hidden reality that would justify our contempt for them. We can now abandon ourselves to appearances without afterthought, and without idle ambition to discover an intelligible world beyond sensible phenomena . . . *the equal probability of all opinions provide a paradoxical reason for keeping our peace and leaving our fellows in peace*." (Emphasis added). See further Popkin *The History of Sceptism* (2003) Ch 3.

13 Hobbes *Leviathan* ed Pogson-Smith (1909).

14 Locke *Two Treatises of Government* ed Laslett (1975).

15 Rousseau *The Social Contract* ed Cranston (1968).

16 See eg Kant *The Metaphysics of Morals* and *Perpetual Peace and Other Essays* tr Humphrey (1983).

eighteenth century of the Christian era. Its fulcrum is the voluntaristic basis of the legal entity called "the State", otherwise known as *political* society. In brief, the social contract theory rejected the ancient, medieval, and pre-modern notion that the State was a natural, hierarchically structured entity in which individuals merely find their own places. Instead, the moderns invented the "state of nature" populated by free and equal individuals. And, they effected the transition from the state of nature to political society through the medium of the "social contract." The advent of the social contract theory marked the abandonment of the philosophical naturalism of the ancients, and culminated in the "philosophical contractarianism"[17] of the moderns. Philosophical contractarianism focuses on the principles, rules, and policies necessary to guarantee and effectuate individual freedom and equality in the form of the right to life, liberty, and estate and its manifold derivatives. Philosophical contractarianism undergirds contemporary rights-based theory exemplified by the three widely studied Anglophone political and legal theorists: Rawls;[18] Nozick;[19] and Dworkin.[20] Rawls and Dworkin provide the dominant brand of rights-based theory (or liberalism) in politics and law, respectively. Opposition to it stems from both the left and right on the ideological spectrum.[21]

As John Rawls remodelled the social contract theory, it is the form of the discourse not the content or protection of a particular set of rights that is decisive. But that does not mean that rights-based theory is devoid of content or that it could accredit any content whatever. Anglophone political and legal theories generally, and rights-based theories particularly, are not, strictly speaking, species of supposedly "pure" theories of law and politics. Nor are they variants of continental idealism, whether individualist or organicist. Rather, the decisiveness of the form of discourse underscores the nativity of rights-based theory or its concession to postmodernism.

The meaning of "postmodernity" and "postmodernism" is best ascertained if we juxtapose and contrast them with other buzzing words like modernity/modernism. In general, the suffix "-ity" denotes a period, class, state, condition, group, type, etc, while "-ism" denotes beliefs, assumptions, doctrines, characteristics, associated with a period, class, state, condition, group, type, etc. Thus, while modernity/postmodernity identifies and contrasts two epochs, modernism/postmodernism identifies and contrasts the "cultural and intellectual phenomena"[22] that characterize and differentiate these two periods. Modernity dates back to the seventeenth or sixteenth century, and by the turn of the nineteenth century its intellectual legacy had devolved on its beneficiaries.[23] Analytic philosophy

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17 Thompson "Significant Silences in Locke's Two Treatises of Government: Constitutional History, Contract and Law" 1987 *Historical Journal* 275 281.

18 Rawls *A Theory of Justice* (1971) and *Political Liberalism* (1993).

19 Nozick *Anarchy, State and Utopia* (1974)

20 Dworkin *Taking Rights Seriously* (1977); *A Matter of Principle* (1985); *Law's Empire* (1986); *Freedom's Law: The Moral Reading of the American Constitution* (1996).

21 Craig *Public Law and Democracy in the UK and the USA* (1990) 245; Howard *The Specter of Democracy* (2002) 179.

22 Lyon *Postmodernity* (1994) 7.

23 Toulmin *Cosmopolis* 7; McGowan, *Postmodernism and its Critics* (1991) 4.

turned postmodern only in mid-twentieth century;[24] and its impact was not felt in rights-based theory until the late nineteen seventies.[25]

Modernism is the philosophical position that characterizes European enlightenment. We now know that Enlightenment was not as monolithic as it was once represented to be.[26] Yet, as a philosophical orientation, modernism moved on three tracks or axes. The first axis was epistemological foundationalism, that is, the view that knowledge must not only be justified but it must also rest on unshakable foundation. The second axis was the representational or expressivist theory of language, that is, the view that language either represents objective facts – ideas or state of affairs, or expresses subjective facts – the attitude of the speaker. The third axis was atomism or reductionism, that is, the view that reality is best understood not as a collective but as a conglomeration of atoms. On this view, there are no collective entities, the individual is prior to the community, and society is an aggregation of individuals, not an organism.[27] Postmodernism is best described negatively as "any form of reflection which departs significantly from one or more of the three axes of modernist thought",[28] but "without reverting to pre-modern categories".[29] Specifically these are: "holism in epistemology, a focus on discourse or use in philosophy",[30] and, in critical hands, relentless lifting of the veils on traditions and modern society characterize postmodern thought.[31]

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24 Patterson "Postmodernism" in *A Companion to Philosophy of Law and Legal Theory* (1996) 375 378.

25 Minda *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (1995) 5, 79.

26 On the diversity of European Enlightenment, see, *inter alia*, Wittrock "Modernity: One, None or Many? European Origins and Modernity as a Global Condition" 2000 *Daedalus* 31 57; Porter & Teich (eds) *The Enlightenment in National Context* (1981); Jacob *The Radical Enlightenment: Pantheists, Freemasons and Republicans* (1981); Manuel *The Eighteenth Century Confronts the Gods* (1959); Pocock *Barbarism and Religion Vol I: The Enlightenments of Edward Gibbon, 1737–1764* (1999); Sher *Church and University in the Scottish Enlightenment: The Moderate Literati of Edinburgh* (1985); James Jacob & Margaret Jacob, "The Anglican Origins of Modern Science: The Metaphysical Foundations of the Whig Constitution" 1980 *Isis* 251 265–266; Greene "Augustianism and Empiricism: A Note on Eighteenth Century English Intellectual History" 1967 *Eighteenth Century Studies* 33; Trevor-Roper "The Scottish Enlightenment" 1977 *Blackwood's Magazine* 371. For a reaffirmation of the unity and essentially radical and pan-European character of the Enlightenment, see particularly Israel *Radical Enlightenment: Philosophy and the Making of Modernity 1650–1750* (2001).

27 Patterson "Postmodernism" 376; Murphy & McClendon "Distinguishing Modern and Postmodern Theologies" 1989 *Modern Theology* 191 192.

28 Patterson "Postmodernism" 377.

29 Murphy & McClendon 1989 *Modern Theology* 199.

30 Murphy & McClendon 1989 *Modern Theology* 191; Murphy *Anglo-American Postmodernity: Philosophical Perspectives on Science, Religion, and Ethics* (1997) 8.

31 On the themes, strengths, and frivolities of postmodernism, see, *inter alia*, Berman *All That is Solid Melts into Air: The Experience of Modernity* (1988); Bookchin, *Re-enchanting Humanity* (1995) Ch 7; Harvey *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (1989) Ch 3; Norris, *The Truth About Postmodernism* (1993); Nanda "The Epistemic Charity of the Social Constructivist Critics of Science and Why the Third World Should Refuse the Offer" in Koertge (ed) *A House Built on Sand: Exposing Postmodernist Myths about Science* (1998) 286–311; Berman "Postmodernism" in *The Oxford*

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Before the late nineteen seventies, when postmodernism impacted legal and political scholarship, rights-based theorists followed the path of modernism. But since then postmodern legal movements generally, and rights-based legal theorists in particular, have eschewed what modernists asserted, namely, the existence or the possibility of the existence of right principles of political and legal right or the truth of a set of principles of political and legal right.[32] This is because, in postmodern discourse, there is not one but many "objective" worlds. Rights-based theorists tacitly concede the multiplicity of "objective" worlds. Now, the multiplicity of "objective" worlds implies that if there is truth at all it is not one, but many. But precisely because truth is not one there can be "no search for truth, but only ideology."[33] A corollary of this is that rights-based theorists have abandoned the historic role of philosophical contractarianism, namely, the relentless critique of historical socio-political and economic institutional practices that fail to align with (supposed) abstract, universal principles of political and legal right. Instead, they have substituted the phenomenological "poetics" of cultural liberal tradition[34] or, more banally, the coherent articulation or interpretive construction of the principles of political and legal right embedded in culturally liberal polities. Variations and differences between and among rights-based theorists hinge on the ideological point on the historical canvas at which such a scholar is located.[35]

Contemporary rights-based theory is not reformatory; rather, it is conciliatory or therapeutic. Specifically, it sets for itself the singular prophylactic task of remedying the schizophrenia evident in the yawning gap between erstwhile lofty notions of freedom and equality fostered by the liberal idea[36] and actual, historical, political and legal institutional reality. In John Rawls's carefully chosen words, it is when "we are torn within ourselves," in the face of "deep political conflict" and the breakdown of "our shared political understandings" that we embark on "the work of abstraction" called political philosophy, an offshoot of moral theory. And, moral theory consists solely in investigating "the substantive moral *conceptions* that people hold, or would hold under suitably defined conditions" and characterizing "the *structure* of the *predominant* conceptions familiar to us

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Companion to Politics of the World 2 ed (2001) 685–686; Feldman *American Legal Thought: From Premodernism to Postmodernism: An Intellectual Voyage* (2000) 38–44.

32 See generally Minda *Postmodern Legal Movements* 79ff.

33 The phrase is from Peters & Schwenke, "Comparative Law Beyond Post-Modernism" 2000 *ICLQ* 800 822. For the idea of "multiple objective worlds" see Shweder "Post-Nietzschian Anthropology: The Idea of Multiple Objective Worlds" in Krauz (ed) *Relativism: Interpretation and Confrontation* (1989) 99.

34 Kelley "Veils: The Poetics of John Rawls" 1996 *Journal of the History of Ideas* 343.

35 Rawls is situated in the third quarter of the twentieth century, while Nozick is situated in the heyday of nineteenth-century *laissez faire* in economics, politics, and law. It is more difficult to place Dworkin, but it suffices to say, with MacCormick *Legal Right and Social Democracy* (1982) 128, that Dworkin is best described as "pre-Benthamite". That is, Dworkin is situated in the period after the metaphysical scaffolds of modern liberalism – the state of nature and the social contract – had been discarded but before the radical Enlightenment's assault on history and tradition or the ascendancy of utilitarianism.

36 The liberal idea stipulates that "every member of the commonwealth must be permitted to attain any degree of status . . . to which his talent, his industry, and his luck may bring him." Kant "On the Proverb: That May be True in Theory, But is of No Practical Use" in *Perpetual Peace and Other Essays* 73.

from the philosophical *tradition*" and the working out of "those that strike us as most promising".[37] In other words, rights-based theory addresses itself to a culturally embedded or culturally grateful group; it is blissfully unconcerned and unperturbed with the lag between ideal and reality. In short, rights-based theory does not and cannot see many individuals within the confines of its own cultural world, and *the whole of the third world.*

This is just another way of saying that rights-based theorists have relieved philosophical contractarianism of its potential critical capacity. Postmodernism teaches that political love is a local affair – a view that, perhaps unsurprisingly,[38] goes back to the great Greek philosopher, Plato.[39] Rights-based theorists add that love is not so much a political as a private affair; like religion in secular polities, love is the drudge of private persons and associations. In short, rights-based theory stymies the Enlightenment project of universal(?) love. Consequently, the best that rights-based theorists aspire to do is to jealously guard and energetically protect the localities and enclaves over which cultural liberal principles of political and legal right hold sway. To put it starkly, it was not the presence or consciousness of the presence of injustice, national or international, continental or inter-continental, social or economic, racial or interracial, class-, gender- or rank-based, that called rights-based theories into being.[40] Rather, it was the desire to fashion and defend an abstract *form* for existing leading liberal polities by providing philosophically satisfying accounts of inherited principles of political and legal right, and which meet the stern rebukes of the postmodern turn in philosophy.

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37 Rawls *Political Liberalism* 44–45 and "The Independence of Moral Theory" 1974–1975 *Proceedings and Addresses of the American Philosophical Association* 1. (Emphasis added).

38 Filtering Plato through philosophical hermeneutics, Gadamer recently points out that the notion that Plato was a transcendent *political* philosopher is probably folkloric. Gadamer *The Beginnings of Philosophy* tr Coltman (1998) 54.

39 See, Plato *Republic* 5.470C–D, where, speaking to and for Greeks, the philosopher states that whereas Greeks and non-Greeks are enemies by nature, all Greeks are naturally friends. The "friend-enemy" or insider-outsider syndrome is a staple historical fact and the subject of constant rhetorical endorsement. See, *inter alia*, De Coulanges *The Ancient City: A Study on the Religion, Laws, and Institutions of Greece and Rome* (ed 1980) 86–92; Snell *The Discovery of the Mind: The Greek Origins of European Thought* tr Rosenmeyer (1953) 165–7; Sombart *The Quintessence of Capitalism: A Study of the History and Psychology of the Modern Business Man* tr Epstein (1915) 265; Boas *The Mind of Primitive Man* (ed 1983) 202; Spencer *The Principles of Ethics Vol I* (1903) 322; Weber *The Protestant Ethic and the Spirit of Capitalism* tr Parsons (1955) 57; Weber *Ancient Judaism* tr Gerth & Martindale (1956) 343–355; Weber, *The Sociology of Religion* tr Fischoff (1963) 250–251; Ludovici *A Defence of Aristocracy: A Text Book for Tories* 2 ed (1933) 282ff; Sumner "On In-Groups and Out-Groups" in Truzzi (ed) *Sociology: The Classic Statements* (1971) 285–289; Fukuyama *Trust: The Social Virtues and the Creation of Prosperity* (1995) 252; Howland "Retelling Genesis" 138 *First Things* 20.

40 See Rawls "The Basic Structure as Subject" 1977 *American Philosophical Quarterly* 159 164: "[T]he need for a structural ideal to specify constraints and to guide corrections does not depend upon injustice." Dworkin *Taking Rights Seriously* 312: "[T]here is no revolutionary force in the rights thesis . . ." Dworkin's mission is to *rehabilitate* a historical idea: Dworkin "Law's Ambition for Itself" 1985 *Virginia LR* 173; Nozick *Anarcy, State and Utopia* ix–xii. See further Kantz *Liberalism and Community* (1995); *Judging Rights: Lockean Polities and the Limits of Consent* (1996).

The resultant traditionalist liberalism accepts as a matter of principle the discontinuity with Enlightenment's belief in the existence or the possibility of the existence of universal principles of legal and political right.[41] Consequently, rights-based theorists adopt, deploy, and extol the virtues of a philosophical enterprise that simultaneously accommodates "rights" and satisfies the demands of what it proudly calls "respectably empirical metaphysics"[42] or "the canons of reasonable empiricism".[43] It is also why an admittedly "callous"[44] rights-based theory could nevertheless proclaim that it is faithful to the characteristically modern way of looking at issues of individual freedom and the state. Rights-based theorists have quietly substituted liberal ideologies for liberal theory. It has been pointed out that it is impossible to harmonize liberal and communitarian ideologies.[45] Even so, communitarians like Michael Sandel[46] and Alasdair MacIntyre,[47] a non-communitarian critic of constitutional rights like Jeremy Waldron,[48] and neo-Aristotlean liberal scholars like Will Kymlicka and Stephen Macedo[49] are best understood as different attempts at providing phenomenological/anthropological basis for political and legal right.[50] With rare exception, Anglophone scholars ignore Kant's[51] unexceptionable interdiction of empirical metaphysics or anthropologically determined reason.

The institutionalization of empirical metaphysics has its roots in the philosophy of David Hume, but it attained artistic peak on the Continent. As such, we can confine ourselves to its continental expression. And, for that Leo Strauss provides a succinct account. Early in his career in the Anglo-American world, Strauss underscored a salient fact of modern intellectual history. This is that Germany, which, in its desire for world dominion in the twentieth century, fought two brutal but unsuccessful wars, had nonetheless conquered its conquerors.

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41 "In law, postmodernism signals the movement away from interpretations premised upon the belief in universal truths, core essences, or foundational theories. In jurisprudence, postmodernism signals the movement away from 'Rule of Law' thinking based on the belief in one true 'Rule of Law,' the fixed 'pattern', set of 'patterns,' or generalized theory of jurisprudence." As such, rights-based theorists have eschewed "the century old quest for universal truth based on faith in the omnipotence and liberating potential of reason and science": Minda *Postmodern Legal Movements* 3 5.

42 Dworkin *Taking Rights Seriously* xi.

43 Rawls 1977 *American Philosophical Quarterly* 165

44 Nozick *Anarchy, State and Utopia*. However, Nozick's later non-foundational analytic philosophical forays reveal a benign, beneficent, and non-rigid outlook. See, particularly, Nozick "The Zigzag of Politics" in *The Examined Life: Philosophical Meditations* (1989) 286–296; Nozick *Invariances: The Structure of the Objective World.*

45 Bauman "On Communitarians and Human Freedom" 1996 *Theory, Culture, and Society* 79.

46 Sandel *Liberalism and the Limits of Justice* (1982); *Democracy's Discontent: America in Search of a Public Philosophy* (1997).

47 MacIntyre *After Virtue* (1981); *Whose Reason? Whose Justice?* (1988).

48 Waldron "A Right-Based Critique of Constitutional Rights" 1993 *OJLS* 18.

49 Macedo *Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism* (1990); Kymlicka *Liberalism, Community, and Culture* (1989).

50 McCready "The Limits of Logic: A Critique of Sandel's Philosophical Anthropology" 1999 *Philosophy and Social Criticism* 81; Murphy & McClendon 1989 *Modern Theology* 204.

51 Kant *The Metaphysics of Morals* 4; *Groundwork of the Metaphysics of Morals* Preface; *Critique of Practical Reason* tr Gregor (1997) *passim*.

Strauss was referring to the pervasive intellectual effect of the "historical sense" perfected on the continent in late eighteenth and early nineteenth century, and which displaced two age-old concepts in political and legal theory, namely, the concept of non-positive, non-conventional, a-historical, universal, "natural" right, and "humanity".[52] In brief, when Germany led Europe in reacting to the radical phase of European enlightenment and the upheavals of the French Revolution, scholars attacked and destroyed not just this or that notion of natural right, humanity, and universality, but the very concept of natural right, humanity, and universality. In the place of "nature", they put history, and in the place of "humanity", they substituted humanism, and in the place of universality, they inserted particularity. The consequence, Strauss stressed, was the disappearance of all evaluative and critical criteria. As he put it, the rejection of natural right and the denial of the existence of universal norms "is tantamount to saying that all right is positive right, and this means that what is right is determined exclusively by the legislators and the courts of the various countries."[53]

The historical school was, of course, the intellectual arm of romanticism,[54] and hermeneutics[55] was its methodological expression. Now, romanticism itself was a European humanistic reaction to European enlightenment. Intellectually radical but politically conservative and backward-looking, romanticism was, in Isaiah

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52 Strauss *Natural Right and History* (1953) 2.

53 *Ibid*.

54 Gadamer *Truth and Method* 2 ed (1986) 244: "It was romanticism that gave birth to the historical school." The literature on romanticism and its impact is vast. But see, *inter alia*, Berlin *The Roots of Romanticism* ed Henry Hardy (1999); Beir *Enlightenment, Revolution, and Romanticism: The Genesis of Modern German Political Thought, 1790–1800* (1992); Trevor-Roper *The Romantic Movement and the Study of History*, (1969); Furst *Romanticism in Perspective: A Comparative Study of Aspects of the Romantic Movements in England, France and Germany* 2 ed (1979); Cranston *The Romantic Movement* (1994); Porter & Teich (eds) *Romanticism in National Context* (1988); Ziolkowski, *German Romanticism and its Institutions* (1990); Babbitt, *Rousseau and Romanticism* (ed 1955); Harwell *Ranges of Romanticism: Five for Ten Studies* (1991).

55 "Hermeneutics" is as old as Greek mythology and Biblical exegesis. In Greek mythology, Hermes is the god messenger of "the gods", an intermediary who transmits and translates divine speeches to mortals. In religion, hermeneutics was the rite through which mortals communed with deities or the Deity. In philosophy, hermeneutics refers "to the task of the interpreter, which is that of interpreting and communicating something that is unintelligible because it is spoken in a foreign language". All three – the mythological, religious, and philosophical – share the fundamental tenet that the speech, rite, and process lead to a single product, which "the ancients" cryptically called "the immortals". Unlike language, rhetoric, poetry, and the like, divine speeches are stable, religious rites are constant, and the meanings of philosophical messages are invariant. In the modern world, however, hermeneutics was construed as an approach necessitated by the character of the objects of study in the human sciences: the character was that the objects of study in the human sciences are "reality posits" of which there are different cultural forms. Modern hermeneutics is enamoured of anthropological representations: natural languages, symbols, myths, and texts. It assumes three forms: as method, critique, or philosophy. See generally, Gadamer *Truth and Method*; Bleicher, *Contemporary Hermeneutics: Hermeneutics as Method, Philosophy and Critique* (1981); Howard, *Three Faces of Hermeneutics*: *An Introduction to Current Theories of Understanding* (1982). For a conceptual history of hermeneutics, see Phillips *Philosophy, Science, and Social Inquiry: Contemporary Methodological Controversies in Social Science and Related applied Fields of Research* (1987) 102–107; Burns *Hermeneutics: Ancient and Modern* (1992).

Berlin's words, a complex and "extremely valuable and important movement". But insofar as we are concerned, it suffices to say that romanticism aimed primarily at retrieving, describing and systematizing "the robust vitalising spirit which fortified and preserved the legitimate organs, institutions, and traditions of the past"[56] in order to shape the present and influence the future.

Strauss wryly pointed out that the historical school could have accomplished the task of "preserving or continuing the traditional order without a critique of natural right as such" and without disaffirming believe in the existence or possibility of the existence of universal norms.[57] Specifically, the historical school could have resorted to the classic natural right doctrine of "the ancients" which Strauss counterpoised to both "the moderns" and historicism. For, according to Strauss, in spite of its capacity to transcend the actual and to provoke seditious, unsettling or disturbing thought,[58] the natural right doctrine of "the ancients" accommodates traditional established orders. Specifically, classic natural right doctrine supposes the continued existence of ancestral or traditional structure, and it does not countenance indiscriminate criticism or violent renunciation of the here and now. Indeed, the natural right doctrine of the ancients upholds a hierarchical view of society,[59] which is not materially dissimilar to the traditional structures that the historical school everywhere sought to preserve. In short, the historical school of thought overshot its target when it laid claim to truth, and attacked and destroyed not just the moderns' notion, but the very *concept* of "natural" right and repudiated universal norms. In Strauss's views, the historical school could and should have confined itself to the critique and rejection of the inflammable natural rights theory of the moderns. Thus, Strauss's critique of historicism parallels his conception of what "the ancients" did when the latter reacted to the Greek enlightenment and pilloried Athenian democracy. In other words, Strauss damns the moderns and the historical school not so much as episodes in conceptual history, but as philosophic enactment. To Strauss, "the ancients" had more or less perfected political theory and wisely located the individual within the republic. The moderns disestablished and disoriented the individual and prepared the ground not only for the excesses of the French Revolution but also the emergence of post-Enlightenment historicism. That, in turn, ensured the eclipse of the theory-perfect political thought of the ancients, along with the demise of the concept of "natural right" and "humanity" and disbelief in the existence or possibility of the existence of universal norms.

Whatever may be the merits or demerits of Strauss's position, the demise of the concept of "natural" right and the rejection of the existence of universal norms made possible the installation of and satisfaction with "empirical metaphysics". The forceful impact of post-Enlightenment thought sent political and legal scholars scuttling back straight into their historical and traditional intellectual tents, thus limiting the imagination and annihilating all skeptical strands. This was due largely to the work of eminent non-Kantian German thinkers.[60] And,

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56 Trevor-Roper *The Romantic Movement and the Study of History* (1969) 9.
57 Strauss *Natural Right and History* 13.
58 *Ibid.*
59 Strauss *Natural Right and History* 148.
60 On "eminent non-Kantian German thinkers", see, particularly, Beiser *The Fate of Reason: German Philosophy from Kant to Fichte* (1987) and "The Context and Problematic of post-

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through the transfer, reception, and dissemination of German intellectual culture, the turn to history became so pervasive that scholars grew accustomed to descriptive theories of law and politics and to thinking, teaching, and writing "as if philosophy had been superseded by history."[61] The change cannot be detailed here. It suffices to say that the historical outlook cascaded into the analytic and general theoretic moulds in the nineteenth century, and was repackaged at its homeland in the twentieth century as "philosophical hermeneutics." It finds resting place in neo-Wittgensteinian traditionalism with its "one size fits all"[62] view of liberalism. It underwrites, as well, both political "conservatism without delusions"[63] and political liberalism sans democracy.[64] Clearly, this northern blanket is long, thick, and warm. And, to insider observers, the *theory* of political and legal right it fashions is generous and just. But those who are only vicariously protected by it have good reasons to be unhappy.[65] Specifically, the "third world" generally, and very "visible" minorities within liberal polities particularly, need to and must be skeptical of the inherent willful intellectual saturation point marked by contemporary liberal political and legal theory. Vis-à-vis the "third world" and very "visible" minorities within liberal polities, *that* legal and political theory hides a lot of "inconvenient facts"[66] that make the historical home of liberalism looks like its grave. Learners must not be afraid to contradict intellectual ideologies.

With the probable exception of a small band of formalists[67] or avowedly natural law theorists, whether secular or religious, Anglophone political and legal scholars tacitly concede that principles of political and legal right are products of local knowledge, and contingent through and through. As such, they are not

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Kantian Philosophy" in Critchley & Schroeder (eds) *A Companion to Continental Philosophy* 21–34; Berlin *The Roots of Romanticism*.

61 Hewitson *National Identity and Political Thought in Germany: Wilhelmine Depictions of the French Third Republic, 1890–1914* (2000) 31; Ben-Israel *English Historians and the French Revolution* (1968).

62 Winter "One Size Fits All" 1994 *Texas LR* 1857.

63 Neuhaus "Liberalism Without a Left, Conservatism Without Delusions" 1999 *First Things* 68 69: "In the political and cultural world generally defined as conservative, there is no dispute comparable to that among [liberal] theorists . . . Except for a few libertarians, conservatives have no utopias to propose. In the spirit of Isaiah Berlin and Michael Oakshott . . . conservatives have quite enough to do in coping with the assaults upon decency, justice, and common sense perpetrated by those who call themselves liberals . . ."

64 Political liberalism's unease with or rather indifference to democracy has been underlined by, among others, Unger and Waldron. See Unger *What Should Legal Analysis Become?* (1996); Waldron *Law and Disagreement* (1999).

65 This sentence paraphrases Joyce *Ulysses* (1986) 26:
Ulsterman Deasy: "We are a generous people but we must also be just."
Stephen Dedalus: "I fear those big words which make us so unhappy."

66 "The primary task of a useful teacher is to teach his students to recognize 'inconvenient facts' – I mean facts that are inconvenient for their party opinions. And for every party opinion there are facts that are extremely inconvenient, for my own opinion no less than for others . . . the teacher accomplishes more than a mere intellectual task if he compels his audience to accustom itself to the existence of such facts . . ." Weber "On Science as a Vocation" in Truzzi (ed) *Sociology: The Classic Statements* (1971) 16, 22.

67 See, particularly, Weinrib "Legal Formalism: On the Immanent Rationality of Law" 1988 *Yale LJ* 949; "Law as a Kantian Idea of Reason" 1987 *Columbia LR* 472; *The Idea of Private Law* (1995).

vulnerable to the criticisms leveled against continental rationalists in the social contract tradition, namely, Rousseau and Kant. Specifically, rights-based theorists avoid the charge that Kant's deontological break with the social contract construct and the consequent foundation of rights on "reason" alone turned philosophical contractarianism into an empty formalism. In the prosaic words of a recent chronicler, liberal pedagogues have always had to make substantive assumptions about moral attitudes and desires before their theories could yield recognizable moral principles.[68] This somewhat wayward[69] criticism of Kant goes back to the pre-eminent modern philosopher of history, GWF Hegel.[70] But as contemporary rights-based theory is a procedural carapace that shelters the abstract form assumed by the institutional morality that evolved over the last two hundred years or so, it conveniently sidesteps that criticism without reverting to pre-modern categories.[71]

Unsurprisingly, rights-based theorists locate liberal culture in the West. Now, politically, the modern west is democratic; socially, it is individualistic; economically, it is capitalistic; legally, it is rights-oriented. Further, philosophically, the modern west is interpretive, that is, it sees philosophical understanding as a form of (cultural) self-understanding. Epistemologically, the west is presently anti-foundational; that is, it eschews "all appeals to ontological or epistemological or ethical absolutes," or "the search for a permanent and unique set of authoritative principles for human knowledge."[72] Instead, it is predominantly

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68 Morawetz, "Efficiency, Morality and Rights: The Significance of 'Cleaning Up'" 1987 *Harvard Journal of Law and Public Policy* 431 443.

69 See Riley *Will and Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant, and Hegel* (1982) 146ff; "'The Elements' of Kant's Practical Philosophy: The 'Groundwork' after 200 Years, 1795–1985" 1986 *Political Theory* 552; Ping-Cheun Lo "A Critical Reevaluation of the Alleged 'Empty Formalism' of Kantian Ethics," 1981 *Ethics* 181; Sedgwick "On the Relation of Pure Reason to Content: A Reply to Hegel's Critique of Formalism in Kant's Ethics" 1988 *Philosophy and Phenomenological Research* 59.

70 Smith *Hegel's Critique of Liberalism: Rights in Context* (1989) 73–75; Hegel *The Philosophy of Right and the Philosophy of History* (46 Great Books of the Western World, 1952) s 135.

71 As Rawls put it, neo-Kantian political and legal theory develops by detaching Kant's doctrine "from its background in transcendent idealism," and then proceeds to show that the resultant "construction is not subject to the cogent objections that idealists raised against the contract doctrine of their day . . . The procedural interpretation of Kant's view not only satisfied the canons of a reasonable empiricism, but its use of the idea of the social contract meets Hegel's criticisms. At the same time, since it proceeds from a suitably individualistic basis, it presents the details of a moral conception that can take appropriate account of social values without falling into organicism." Rawls "The Basic Structure as Subject," 1977 *American Philosophical Quarterly* 165. Dworkin has sketched a comprehensive political theory that traces the intellectual roots of rights-based theory not so much to European enlightenment ambition of universal(?) emancipation and enlightenment but to "the Enlightenment created humanism". See Dworkin "The Roots of Justice" in *Debating Dworkin* (1999). There, Dworkin impatiently discounts universalists or "one worlders", and depicts "the phenomenology of our moral life" from its origin in the human will through its cultural manifestation and intellectual affirmation to its culmination in the "right-understanding" of rights-based political and legal theory.

72 McGowan *Postmodernism and its Critics* ix; Toulmin *Cosmopolis* 174; Patterson "Law's Pragmatism: Law as Practice and Narrative" in Patterson (ed) *Wittgenstein and Legal Theory* (1992) 95. A corollary of this is that it upholds a "coherence theory of truth". That

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hermeneutic. And, hermeneutics holds that theory is interpretation and the determination of meaning, and interpretation and meaning as necessarily holistic and practice-based.[73] Thus, notwithstanding globalization, rights-based theorists speak to but not for everyone within and without the cultural limits of liberalism.

3 GLOBALISATION AND LAW

Aside from the technological wizardry, marvel communication sciences, and the new world geopolitical conditions that make it practicable, globalization[74] – the sometimes forceful, sometimes gentle, and at other times stealthy but steady extension of capitalistic institutions across the globe in defiance of political and cultural boundaries – derives much strength from a simple discovery. This is the realization that liberalism and a market-oriented economy are not dependent on a particular form of government. Specifically, there is no necessary connection between liberalism and democracy on the one hand, and democracy and capitalism on the other. Aside from those polities in which liberalism, capitalism, and democracy are triumvirs, capitalistic institutions can function in non-democratic and non-liberal or ostensibly liberal democratic polities.[75] And, having been persuaded by the postmodern turn in philosophy not only to eschew foundationalism but also to avoid "the offensive rationalization of things as they are,"[76] rights-based theory simply clings to its own cultural point of view. It matches along

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is, the theory that "the truth of any one statement or proposition is a function not of its relationship to the world but to the degree to which it "hangs together" with everything else taken to be true". See Dennis Patterson "Postmodernism" 378; *Law and Truth* (1996).

73 Radin "Reconsidering the Rule of Law" 1989 *Boston University LR* 781 at 813. See further Dreyfus "Holism and Hermeneutics" 1980 *Review of Metaphysics* 3. "The legacy of philosophy from the middle of this [twentieth] century to the present has been the systematic replacement of foundationalist epistemology with holism, the substitution of referential theories of language with an emphasis on speech as action, and a general movement away from the individual as the foundation of empirical, linguistic, and moral judgment. The nineteenth-century's emphasis on the individual as the site of judgment has been replaced with various conceptions of "group" knowledge, the language game, the scientific community, and the web of belief". See Patterson "Wittgenstein and Constitutional Theory" 1994 *Texas LR* 1837 1854–1855.

74 There are many definitions of globalization but, for our purposes, Thomas Friedman's is apposite. According to Friedman, globalization is "the inexorable integration of markets, nation-states, and technologies to a degree never witnessed before – in a way that is enabling individuals, corporations, and nation-states to reach around the world farther and faster, deeper and cheaper than ever before, and in a way that is enabling the world to reach into individuals, corporations and nation-states farther, faster, deeper, cheaper than ever before . . . The driving idea behind globalization is free market capitalism – the more you let market forces rule and the more you open your economy to free trade and competition, the more efficient and flourishing your economy will be. Globalization means the spread of free-market capitalism to virtually every country in the world": Friedman *The Lexus and the Olive Tree* (2001) 8–9. Held & McGrew provide a neutral description: "Globalization" in *The Oxford Companion to Politics of the World* 2 ed (2001) 324: "Globalization . . . can be thought of as the widening, intensifying, speeding up, and growing impact of worldwide interconnectedness."

75 Fukuyama "The Limits of Liberal Democracy" in *The Oxford Companion to Politics of the World* 201: "It is possible to have liberalism without democracy; . . . it is possible to have democracy without liberalism; . . . and it is possible to have a market-oriented economic system without either democracy or liberalism . . ."

76 The phrase is from Dewey *Reconstruction in Philosophy* (1948) 102.

alone in the self-confident belief that it would not fail to save the portion of humankind under its sway from ending up either in the slaughterhouse or the marketplace.

One might say that if and when the Herculean task of globalization is accomplished, liberal cultural principles of political and legal right would suppress local convictions of justice. In other words, the received principles of political and legal right would automatically become right principles of political and legal justice. But there is another possibility. Progress in political and legal institutional practice is sometimes the cause and sometimes the result of advancement in learning. Now, intellectual freedom is an integral part of liberal culture. In fact, Raymond Aron[77] has identified intellectual freedom as the "essence" of the West. If intellectual freedom is safeguarded *and* if scholars engage in vigorous intellectual pursuits, the resultant mutual reaction, interpenetration, and cross-fertilization of "local" and "global" political and legal thought might suitably transform the received principles of political and legal right.

A cynic would say that this is hopelessly optimistic. He or she might say that the singular goal of globalization is the promotion of skeletal political institutional framework conducive to capitalistic economic activity; that experience suggests that, left to itself, a capitalistic institution would bite the very finger that feeds it and ride roughshod on "rights". But this may not be as forlorn a hope as it first appear, for beneficent principles of political and legal right are not necessarily the products of conscious, deliberate, humane actions. An example that readily comes to mind is the debacle between King John and his barons. What started as baronial struggles against feudal monarchs resulted in the greatest gift of English political and legal history to political and legal theory – due process or the rule of law, and its corollaries, especially equal protection of and equality before the law. There is scarce doubt that the rule of law is one of the defining ideas in the political organization of modern liberal polities.[78] Its importance is heightened not lessened by globalization.[79]

This is not the place to launch into a disquisition on the meaning and fortunes of the concept of the rule of law or to discuss the rigid "constitutional ideologies"[80] that developed around it in Anglo-American jurisprudence or its judicial applications under the guise of the doctrine of *ultra vires*. But the fact that this pillar of modern constitutional law, theory, and practice was born under baronial travails shows that beneficent principles of political and legal right sometimes have strange parentage. Thus, while it may be true that the creation of "low intensity democracy"[81] in the third world that camouflage capitalistic institutions

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77 Aron *The Opium of the Intellectuals* tr Kilmerton (1957) 258.

78 Beatty "The Forms and Limits of Constitutional Interpretation" 2001 *American Journal of Comparative Law* 79.

79 Hirst & Thompson *Globalization In Question* 2 ed (1999); Scheuerman "Globalization and the Fate of Law" in Dyzenhaus (ed) *Recrafting the Rule of Law: The Limits of Legal Order* (1999) 243–266, esp 264–266.

80 A "constitutional ideology" is the sum of particular sociopolitical and economic vision that underlies and structures a person's discourse on constitutional law, theory, and practice. See Macklem "Constitutional Ideologies" 1988 *Ottawa LR* 117.

81 Evans "If Democracy, then human rights?" 2000 *Third World Quarterly* 623 630: "In countries where 'low intensity democracies' operate, the governments pay little attention to developing an open, rights-based culture." Instead, "democracy often means little more

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are the immediate and sole goal of globalization, globalization itself might be attended with unforeseen social, economic, and above all intellectual benefits. Here, we should recall that, in spite of all its evils, brazen colonialism created the very conditions and supplied the means that subsequently enabled the empire to strike back at the emperor. And, in its homeland, untrammeled capitalism created the conditions necessary for the emergence, introduction, and guided reception[82] of its most vitriolic competitor, Marxist socialism. That, in turn, stimulated not only the development of socially embedded capitalistic institutions on the continent and elsewhere,[83] but also the moral imagination of the late Victorians which, without abandoning its own liberal faith,[84] laid the foundations that quickened after the Second World War, and culminated in the welfare state.[85]

More pertinently, although there are national differences between and among Anglophone polities, a liberal core pervades them all, albeit in varied degrees.[86] (That is true of advanced democracies generally marked, as they are, by falling "confidence in hierarchical institutions".)[87] That core is not an empty one. Integral to it is disavowal of a hierarchical view of society, and the embrace of "the concept of the worth of persons within society as an end in itself, joined to the determination to shape social and political institutions to promote it."[88] It is not far-fetched to ascribe this to the spirit of the laws that permeates their "comprehensive ideological structure and systems of political belief."[89] For,

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than a 'thin veneer of western concepts', including national sovereignty, statehood, parliamentary institutions and the 'rule of law', all of which are intended to subdue ethnic, cultural and religious tensions in the effort to secure an order fit for economic growth and development . . .". Hence, "the Western powers, despite their good governance rhetoric, seem remarkably reluctant to take positive action in support of Third World democracy": Smith *Understanding Third World Politics: Theories of Political Change and Development* (1996) 16. On "low intensity democracy" and its cognates, see Robinson *Promoting Polyarchy: Globalization, US Intervention, and Hegemony* (1996); Marishane "The Religious Right and Low-Intensity Conflict in Southern Africa" in Nederveen-Pieterse (ed) *Christianity and Hegemony: Religion and Politics in the Frontiers of Social Change* (1992) 59–119; Gills *et al* (eds) *Low Intensity Democracy: Political Power in the New World Order* (1993); Hutchful "The Modern State and Violence: the Peripheral Situation" 1986 *International Journal of the Sociology of Law* 153; Klare & Kornbluh (ed) *Low Intensity Warfare* (1986).

82 See Willis "The Introduction and Critical Reception of Marxist Thought in Britain, 1850–1900" 1977 *Historical Journal* 417.

83 On the diversity of capitalism, see Streeck and Yamanura (eds) *The Origins of Nonliberal Capitalism: Germany and Japan in Comparison* (2001).

84 Haggard *The Persistence of Victorian Liberalism: The Politics of Social Reform in Britain, 1870–1900* (2001).

85 Ulam *Philosophical Foundation of English Socialism* (1951); Himmerfarb, *Poverty and Compassion: The Moral Imagination of the Late Victorians* (1991).

86 Nevitte & Gibbins *New Elites in Old States: Ideologies in the Anglo-American Democracies* (1990).

87 Inglehart *Modernization and Postmodernization: Culture, Economic, and Political Change in 43 Societies* (1997) 300.

88 Schwatz *In Search of Wealth and Power* (1964) 240.

89 Nevitte & Gibbins *New Elites in Old States: Ideologies in the Anglo-American Democracies*.

whatever might be the ideological, imperial, or hegemonic uses and content[90] of the common/civil laws,[91] as systems of justice, they counteract belief in a hierarchical universe supposedly reflected in the microcosm called political society. Any traces of such a belief that may be found in these legal traditions is attributable partly to the invidious influence of "the authority of Justinian in law and of Aristotle in philosophy",[92] and partly to the romantic "teachings of history".[93] The notion of hierarchy as a principle of political organization is simply one of the pernicious intellectual legacies of "the ancients" particularly and pre-modern thought generally.

The happy congruence between the spirit of common/civil laws and core liberal ideal suggests that these legal traditions possess critical potentials[94] awaiting *fresh* juridical exploration.[95] If they are shorn of divergent sociopolitical and economic visions that coagulate into constitutional ideologies, these legal traditions could effectively counteract cultural intellectualism. That would enable learners, especially "third-world" scholars, to see clearly that, just as the classical tradition equipped the West,[96] western juridical tradition can stimulate and sustain legal and political growth, progress, and stability anywhere, including the third world. Specifically, it could help unshackle law from politics, ethics from the stranglehold of economics, and political and legal theory from cultural intellectualism. Put differently, immersion in western juridical learning can enable learners see that legal and political scholars are not necessarily "state-kept schoolmen" who proffer theories of law, politics, and society that invariably "provide a show of argument for the *status quo*"[97] or who construct Panglossian interpretive political and legal theories.

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90 On "ideological use" and "ideological content" of traditions, see Schneiders "Does the Bible Have a Postmodern Message?" in Burnham (ed) *Postmodern Theology: Christian Faith in a Pluralist World* (1989) 64–66.

91 For the different senses "the common law" can assume, see Cohen "The Common Law in the American Legal System: The Challenge of Conceptual Research" 1989 *Law Library Journal* 13.

92 Pound *The Spirit of the Common Law* (1931) 87. But see Boas "Some Assumptions of Aristotle" 1959 *Transactions of the American Philosophical Society* 85ff. Or, we might say that it is "the vanity of the philosopher" that makes scholars theorize that political society is necessarily hierarchical or that hierarchy is typical and natural to political organization. The phrase "the vanity of the philosopher" is from Smith *The Wealth of Nations* ed Cannan (1937) 16. On "hierarchy" as a necessary principle of political society, see, for instance, Renfrew "Space, Time, and Polity" in Friedman & Rowlands (eds) *The Evolution of Social System* (1977) 89 101–107; Fukuyama *The Great Disruption: Human Nature and the Reconstitution of Social Order* (1999).

93 Hearn *The Government of England: Its Structure and its Development* 2 ed (1886) 442: "The history of the countries of Western Europe . . . knows nothing of a time in which there were no nobles as well as freemen and serfs . . . The more minutely the institutions of these countries are examined, the more strongly do they confirm the teachings of history."

94 Cf Frankford "The Critical Potential of the Common Law Tradition" 1994 *Columbia LR* 1076.

95 It has been pointed out that the common law is yet to have its own jurists. Stein "The Quest for a Systematic Civil Law" 1995 *Proceedings of the British Academy* 147 161.

96 Highet *The Classical Tradition: Greek and Roman Influences on Western Literature* (1949) 375.

97 The phrases are from Clark "Slaves and Citizen" 1985 *Philosophy* 27.

The point here is not that the common/civil laws are perfect systems of justice from which one could extract a perfect political and legal theory. Rather, the point is the simple and different one that, as they were developed by or for *free* polities/peoples, the intellectual force of these systems of laws might point to *right* principles of political and legal *practice*. The common/civil laws have been aptly characterized as "laws of liberty".[98] By looking into the western legal tradition which, though shaped, among others, by religion/religious revolutions,[99] claim no divine, heavenly, or natural origin or status, learners might be able to dream dreams and see visions that could make them take liberal theory more seriously than cultural intellectualism seems to allow.

4 JURIDICAL SCHOLARSHIP BEYOND POSTMODERNISM

Postmodernism self-consciously deregulated the market for liberal discourse when it ingeniously characterized all claims to truth or objectivity as dissimulation. It thereby effectively makes a plea for and reestablishes the liberty of examination – a liberty which, until the modern period, was last exercised in classical Greece. However, postmodernism seemingly achieved that feat at the enormous price of leaving everything up for grabs. Having denied the truth of the modern claim to possessing true, objective, and universal knowledge, postmodernism sees but is alarmed to embrace only itself. This is not due to a failure of nerves. Rather, it is due to the fact that the real target of the postmodern attack is the quest for icy certainty, the claim to *absolute* knowing. Unlike romanticism, which uncompromisingly annihilated the very concept of truth,[100] postmodernism does not appear to dispute the existence or the possibility of the existence of objective knowledge as such. In short, the context of the postmodern attack on truth suggests that it is only a surrogate for anti-foundationalism.

Contemporary hermeneutics rushes in where postmodernism fears to thread. It attempts to fill the void created by postmodernism. It denies that everything is really up for grabs, and raises high cultures, ancient or modern, up for the admiration of the intellect. Unfortunately, even contemporary hermeneutics bears the signs of its pedigree, for it leads to and "encourages *relativistic* points of view"[101] that are indistinguishable from *subjectiv*ism and/or *conventional*ism – the twin bogeys of sophism so valiantly assailed by "the ancients". CS Lewis[102] once pointed out that "it is usually theologians, philosophers and politicians who become historicists". Now, autonomous science, professional learning, and "scientized human sciences"[103] are prone to wed themselves to the curious hybrid called "empirical metaphysics" and to translate empiricism, an epistemological standpoint, into historicism, a European humanistic ontological creed; and

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98 Glenn *Legal Traditions of the World* (2000) 323.

99 See Berman *Law and Revolution: The Formation of the Western Legal Tradition* (1983); *Law and Revolution II*: *The Impact of the Protestant Reformation on the Western Legal Tradition* (2003)

100 Berlin *The Roots of Romanticism* 170.

101 The phrase is from Von Wright *The Tree of Knowledge and Other Essays* (1993) 46. (Emphasis in original).

102 Lewis "Historicism" in MacIntire (ed) *God, History and Historians* (1977). See further Howard *Religion and the Rise of Historicism: WM.L de Wette, Jacob Burchkhardt, and the Theological Origins of Nineteenth Century Historical Consciousness* (2000).

103 McDonald "Introduction" in *The Historic Turn in the Human Sciences* (1996) 5.

to go all the way down the line by translating historicism into relativism and relativism into positivism, and possibly positivism into nihilism. That declension has always been the Achilles heel of historicized empiricism and, as Kuhn[104] famously showed, fundamental changes in institutional practice have always had to be preceded by mammoth intellectual upheaval. It is not an accident that the classic social contract theorists, namely, Locke, Rousseau, and Kant, avoided the historicist trap.

Assuredly, there is much to learn from histories, traditions, and cultures, high or low, global or local, but historicism, traditionalism, and cultural intellectualism, whether by contemporary "ancients" or "moderns", and the species of skepticism that denies the existence or possibility of the existence of objective knowledge and universal norms are detrimental to learning. Postmodernism re-exposes the bigotry that makes scholars set up their understanding as the intellectual standard, the truth, the "objective".[105] Postmodernism thus opens up the way not merely for endlessly destabilizing intellectual ideologies, but, more importantly, for renewed and fresh attempts at understanding the concept of legal and political right through *global* hermeneutics.

By "global hermeneutics" I mean reflective philosophical analysis that is cognizant of the totality of human experience and that grapples with and strives to transcend the following. (1) The "tempered dogmatism" or rather "apologia for humanistic learning"[106] called philosophical hermeneutics. (2) The eurocentric historicism with its primordial binaries such as primitive/civilized, oral/literate culture, pre-logical/logical thought, scientific/mythic explanation, and which stipulates that "it is out of the *beliefs* and *judgments* only of the civilized that rational consensus is to be constructed".[107] (3) The neo-Wittgensteinian hermeneutic burr that somehow upholds a geopolitical world in which "the south" is matter and "the north" is spirit. (4) Rights-based theory, which substitutes liberal cultural ideologies for liberal theory, and whose empirical-metaphysics is apparently implicated in current national and international "experiment in the

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104 Kuhn *The Structure of Scientific Revolutions* 3 ed (1996).

105 Cf Frankford 1994 *Columbia LR* 1123: "When some standard, principle, norm, duty, or quality is set up as 'objective', it is then claimed that criticism has come to an end, for if the standard, principle, norm, duty, or quality is taken to be 'objective', then the need for conversation is over. We would know 'the answer'. Yet any such endpoint is inimical to the practice of criticism itself, for there remains the question whether that end has been realized in practice." As John Locke, who was epistemologically "a consistent empiricist" and intellectually "a conservative radical", emphatically put it, "it is undoubtedly a wrong use of *any* understanding to make it the rule and measure of another's man's; a use which it is neither fit for nor capable of". *Conduct of the Understanding* 2 ed (1882) 50. (Emphasis added). On Locke as a consistent empiricist and a conservative radical, see, Rogers "John Locke: Conservative Radical" in Lund (ed) *The Margins of Orthodoxy: Heterodox Writing and Cultural Response, 1660–1750* (1995) 97–116.

106 Sherman "Hermeneutics in Law" 1988 *MLR* 386 396; Bernstein *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (1983) 180.

107 MacIntyre *Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy, and Tradition* (1990) 177. Shils "The Antinomies of Liberalism" in *The Relevance of Liberalism* (1988) 134 194 pointedly reiterated this belief when he wrote that "the third world [is] backward rather than . . . the locus of major moral and political values . . .".

cosmetics of injustice".[108] (5) The allegedly incommensurable high cultures that foreclose common understanding or unity of meaning, and whose patriotic carriers hide their "inconvenient facts".[109] (6) Straussian intellectualism,[110] which regards the world as a big cave, and "the ancients" stalactites and stalagmites that had grown political and legal theory for all times and all climes, such that the function of every learner is to go back to his or her own polity and disseminate the truth. (7) Communitarian critics of liberalism, whose fine-grained bifocals implicitly divide the world and society into cultured, master nations/individuals and uncultured, slavish ethnic groups/classes. In short, a post-postmodern rights-based legal and political theory will engage the reason of human culture rather than the self-validating structures of historical reason, charters, and conventions.

Rights-based theory lost its aplomb when it placidly followed the cultural turn and construed theory as interpretation. Since interpretation is dependent on practice and practice is local or culture bound, rights-based theories increasingly came to reflect the immediate political and legal culture of its purveyors. That is both a source of strength and debility. It is the former because it makes rights pivotal; it is the latter because the cultural turn severed rights-based theorists irretrievably from the "distinguished source" of English, American, and

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108 The phrase is from Waldron "Homelessness and Community" 2000 *University of Toronto LJ* 371 388.

109 See Weber "On Science as a Vocation" in Truzzi (ed) *Sociology: The Classic Statements* (1971) 16, 22.

110 Straussians are intellectual *disciples* of Leo Strauss (1899–1973). Strauss was one of, if not the, outstanding German émigré political theorists who first explicitly broached, proposed, and energetically canvassed a return to "the ancients". In terms of contemporary polarities, Straussians are "republicans", not "democrats"; "neo-conservatives, not "neo-liberals"; "the new right", not "the new left." Like "the ancients" who lived in Athens but were rooted in the Greek hearth, Straussians live in modern democracies but are fascinated by ancient lore. Specifically, Straussians proffer readings of and draw legal and political wisdom from the capital texts of two ancient cities, Jerusalem and Athens, with the latter often playing the senior role. See, particularly, Bloom *The Closing of the American Mind* (1987); Kass *The Beginning of Wisdom: Reading Genesis* (2003); Pangle *Political Philosophy and the God of Abraham* (2003). For a succinct statement of the supposed indictment of "liberal democracy" that shapes the intellectual endeavours of Straussians generally, see the confession and avoidance by Dannhauser "The Problem of the Bourgeois" in Orwin & Tarcov (eds) *The Legacy of Rousseau* (1997) 3 15: "The charges against the bourgeois have not only continued but in some cases become more strident. Much of that stridency directs itself at the moderation liberal democracies recognize as the political virtue par excellence. In doing so, bourgeois democracy becomes part of the great tradition of Western civilization. It becomes the heir, perhaps the sole surviving heir, of both Jerusalem and Athens. It is one thing to say that liberal or bourgeois democracy is the corrupted heir of that tradition . . . it is another thing to say that it is the corrupt heir to a tradition that is itself corrupt because it is dominated by dead white European males, and because it was always defaced and disgraced by sexism, racism, homophobia, elitism, ethnocentrism, and other evils. That is the charge against the bourgeois today, a charge that must be refuted . . ." See also Shenfield "The Ideological War Against Western Society" in Barry (ed) *Limited Government, Individual Liberty, and the Rule of Law: Selected Works of Arthur Asher Shenfield* (1998) 321–340. For a concise articulation of the inherent dangers of a return to "the ancients", see Ferry *Political Philosophy Vol 1: Rights: The New Quarrel Between the Ancients and the Moderns* tr Phillip (1990) 20–21.

European liberalism, namely, the modern "natural rights school".[111] The result is that rights-based theories increasingly resemble cultural ideology than they do liberal theory. As culture is multi-facetted, cultural ideologies tend more to promote controversies among the professional scholars themselves than learned consensus that can instigate significantly positive change in institutional practice and planetary order particularly vis-à-vis perpetually "visible" minorities within liberal democracies, and "the south".

5 CONCLUSION

The challenge of juridical scholarship is to free rights-based theory from the cultural ideologues' cast. This requires, firstly, that we disinter liberal theory. That is, that we separate and keep apart liberal theory from its diverse historical/cultural expressions. Secondly, it requires a passionate commitment to continuous reform of institutional practice. Thirdly, it requires retention or non-violent transformation of inherited political institutions. Lastly, it requires a deep sense of history and tradition. The first two requirements are self-explanatory; the last two are not.

The retention of inherited political institutions is not aesthetic or mere prudence; rather, it is a practical necessity. We noted earlier that the liberal idea disavows hierarchical view of society and that it imbues humankind with the desire to shape institutions to promote the worth of persons within society. Now, changes in institutional practices suppose the existence of political society before, during, and after change. In brief, reformation is practical; the target of reform is not so much political form as "ill-legal" political institutional practice. As such the transition from the old to the new can be and ought to be effected without rupturing political society. Put differently, return to a state of nature – if there ever was such a thing – is not a practical necessity. The solution of practical problems requires, if at all, only a modicum of theoretical fiction.

One of the vocational characteristics of juridical scholars is consciousness of the presence of injustice or awareness of the existence of "ill-legal" institutional practices. A corollary is that juridical scholars have the will to investigate and expound "right" in normative rather than ideological or cultural form. This means that juridical scholars are conservatives, though conservatives of a judicial kind, for they scrupulously abstain from descending into the arena or becoming one of the parties to the fray. [112] The judicial spirit itself is underpinned by a deep sense of tradition[113] and history. But, because theirs is non-partisan scholarship, the juridical sense of tradition and history means primarily that juridical scholars

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111 The phrases are from Stromberg *European Intellectual History Since 1789* 6 ed (1994) 57.

112 Cf James "The Moral Philosopher and the Moral Life" in Castell (ed) *Essays in Pragmatism* (1948) 80–81: "The philosopher must be a conservative . . . [but] if the philosopher is to keep his judicial position, he must never become one of the parties to the fray . . . and in the construction of his casuistic scale must put the things most in accordance with the customs of the community on top. And yet if he be a true philosopher, he must see that there is nothing final in any actually given equilibrium of human ideals . . ."

113 Gordon "Legal Tradition with Particular Reference to Roman Law" in MacCormick & Birks (eds) *The Legal Mind: Essays for Tony Honore* (1986) 279 287: "A sense of tradition will be found in any legal system which owes its development to jurists."

follow the *tradition* and *history* of *learning* as *inquiry* rather than doctrinal exposition and system building. Legal theory is therefore neither the sum of its own history nor is it the history of schools or theories of law and their conceptions of legal theory. Rather, legal theory is always inquiry that utilizes traditional, historical, or cultural materials, but which frees itself from "the institutional weight of a hermeneutic enterprise".[114] In short, juridical scholarship is not necessarily traditionalist, historicist, or interpretive. Or, put differently, juridical scholars are not partisans of a particular constellation of social, political, and economic interests or culture. These characteristics permeate the work of the founders of juridical science, the classical Roman jurists. They are evident, as well, in the works of "the moderns", particularly John Locke. After Locke, the mantle of conservative but non-partisan scholarship fell on learners from "England's cultural provinces".[115] But those erstwhile cultural provinces themselves no less than the mother country now seem to slumber under the cover of the northern blanket. The result is vocal but traditionalist liberalism. Though an arch-positivist, Bentham once remarked[116] that the French were the flag bearers of the rights of man only because the English confined "rights" to a closet. It may be that traditionalist liberalism is well suited for the job of institutional *preservation* of rights in culturally liberal polities. But to stimulate intellectual conviction or instigate fundamental changes in *institutional* practice abroad, it is necessary to think pass the notion of "rights" as cultural things.[117] Undoubtedly, "rights" can be defined and represented as willed, native, or a unique cultural achievement or products of a familiar tradition of thought, but that is not the only context in which scholars could elaborate on rights. Specifically, learners need to resume the habit, which antedates and extends from "the ancients" to "the moderns", of looking at and seeing or imagining "rights" as the necessary, relatively stable things of political society and legal institutions. Of course, that does not entail any supposition that we possess indubitable knowledge of the number or nature of rights.[118]

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114 The phrase is from Boon *Other tribes, other scribes: Symbolic anthropology in the comparative study of cultures, histories, religions, and texts* (1982) 221.

115 Clive & Bailyn "England's Cultural Provinces: Scotland and America" 1954 *William and Mary Quarterly* (3rd Series) 200.

116 Bentham "Nonsense Upon Stilts" in Schofield *et al* (eds) *Rights, Representation and Reform: Nonsense Upon Stilts and Other Writings on the French Revolution* (2002).

117 Cf Aristotle *Nichomachean Ethics* 1177b31–34.

118 Locke *Essay Concerning Human Understanding* IV.iii.29.

Defending the constitutionality of the Land Bank's exclusion from the insolvency legislation

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1 INTRODUCTION

The Land and Agricultural Development Bank of South Africa[1] not only has a range of special statutory preferences,[2] it is also exempted from various pieces of legislation, such as the Banks Act,[3] the Insolvency Act,[4] the Usury Act,[5] the Long Term Insurance Act,[6] the Short Term Insurance Act,[7] and various other pieces of legislation relating to commercial banks and financial institutions.[8]

Of particular importance is s 90 of the Insolvency Act, which provides that the provisions of the Insolvency Act will not affect the provisions of any other law that confers powers and imposes duties upon the Land Bank in relation to any property belonging to an insolvent estate.[9] Therefore, the Insolvency Act acknowledges that the Land Bank is excluded from the Insolvency Act and thereby acknowledges the statutory preferential rights the Bank may have.

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1 I shall refer to the Land and Agricultural Development Bank of South Africa as "the Land Bank" or "the Bank".

2 For a full discussion of the Land Bank's statutory preferential rights see Kelly-Louw "Investigating the Statutory Preferential Rights the Land Bank Requires to Fulfil Its Developmental Role (Part I)" 2004 *SA Merc LJ* 211 and (Part II) 2004 *SA Merc LJ* 378.

3 See s 2 of the Banks Act 94 of 1990.

4 Act 24 of 1936 (hereafter "the Insolvency Act").

5 Act 73 of 1968.

6 Act 52 of 1998. See also s 26(4) of the Land and Agricultural Development Bank Act 15 of 2002 (this Act will be referred to as "the Land Bank Act" or "the present Land Bank Act" respectively).

7 Act 53 of 1998. See also s 26(4) of the Land Bank Act.

8 For instance, see the Inspection of Financial Institution Act 80 of 1998, the Financial Institutions (Protection of Funds) Act 28 of 2001 and the Financial Advisory an Intermediary Services Act 37 of 2002. See also s 2(4) of the Land Bank Act that provides that the Land Bank is exempted from the provisions of any other law specially governing banks or other financial institutions unless such other law expressly provides for its application to the Bank.

9 Also note that s 90 of the Insolvency Act, in terms of s 399 of the Companies Act 61 of 1973 applies *mutatis mutandis* to a company in liquidation and in terms of s 66 of the Close Corporations Act 69 of 1984 also to a close corporation in liquidation.

The Land Bank's statutory creditor privilege, which is set out in the Land Bank Act, overrides the creditor protection of many other creditors upon insolvency. It is therefore not surprising that various stakeholders, in particular commercial banks and trustees of insolvent estates, have already alleged that the Land Bank's exclusion from the insolvency legislation is unconstitutional.[10] The Banking Association of South Africa, which represents the private banking sector, has demanded that the Land Bank and the commercial banks should be treated equally before the law.[11] In particular, the Association has alleged that the sections of the Land Bank Act which provide for the Land Bank's exclusion from insolvency legislation, read together with s 90 of the Insolvency Act, are in direct conflict with the equality clause of the Constitution of the Republic of South Africa,[12] and also that these sections cannot be justified in terms of s 36 of the Constitution. The crux of their submission is that there is an extensive common law and statutory framework that governs the behaviour of debtors and creditors. The Land Bank should utilise this, as all other creditors are expected to do. Any special legislative preference for the Land Bank disturbs the competitive and regulatory environment. They also base their argument on the fact that none of the other governmental "development" banks or funds enjoy special statutory creditor preference, for example the Khula Finance for small and micro enterprise loans; the Development Bank of Southern Africa for infrastructure funding; the Industrial Development Corporation for industrial projects; and the National Housing Finance Corporation for housing loans.

This article sets out to defend the constitutionality of the legislative provisions which create the Land Bank's exclusion from the insolvency legislation in light of the special role that the Bank plays in societal development.

2 BACKGROUND

2 1 Legislation excluding the Land Bank from the insolvency legislation

Ss 34 and 55 of the previous Land Bank Act[13] granted remedies to the Land Bank against its defaulting debtors. These sections permitted the Land Bank to recover debts without recourse to a court and without having to follow ordinary legal procedures. These sections also conferred a statutory preference on the Land Bank that enabled it, under certain circumstances, to recover moneys from debtors to which other creditors would ordinarily have had a prior claim.[14] These aforementioned sections authorised the Land Bank to bring about attachments and sale of assets without any court process in so far as the Bank could merely attach any assets of a debtor if the relevant debtor was unable to fulfil its obligations to the Bank. Such attachment by the Land Bank was followed by a sale of the relevant assets in order to liquidate the debtor's indebtedness to the Bank.

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10 See for instance, the pending case of *Land and Agricultural Development Bank t/a Land Bank v The Master of the High Court (Free State Provincial Division), Venter NO* (Free State Provincial Division) Case no 2302/2004.

11 See Genis "Dieselfde reëls moet vir almal geld" *Landbouweekblad* 17 May 2002 73.

12 See s 9 of the Constitution, Act 108 of 1996.

13 Act 13 of 1944 (hereafter "the previous Land Bank Act").

14 For a full discussion of these remedies see Kelly-Louw 2004 *SA Merc LJ* 211.

However, in *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa; Sheard v Land and Agricultural Bank of South Africa*,[15] the Constitutional Court found that certain parts of ss 34 and 55 of the previous Land Bank Act were unconstitutional because they unjustifiably infringed s 34 of the Constitution. The declaration that certain parts of s 55 were invalid took effect immediately, but the declaration of invalidity of the relevant parts of s 34 was suspended for two years until 9 June 2002.[16] Subsequent to the decision of the Constitutional Court, it was decided to repeal the previous Land Bank Act as a whole because it had become outdated and did not allow the Land Bank to effectively pursue its developmental mandate. On 10 June 2002, the previous Land Bank Act was repealed and replaced by the present Land Bank Act.

The provisions of ss 34 and 55 of the previous Land Bank Act granted certain benefits and rights to the Land Bank, which, should it be read with s 90 of the Insolvency Act, were not affected by the insolvency of the relevant debtor. The effect of the above was that notwithstanding sequestration,[17] the Land Bank could nevertheless after the date of sequestration still bring about an attachment and sale of assets for its own account, without having to consult with the trustee of the insolvent estate.[18] In the same manner, should the attachment have taken place before date of sequestration, the Land Bank could merely continue with the sale of the relevant assets in attachment for its indebtedness, notwithstanding the fact that the debtor was sequestrated before the said sale in execution.[19] Therefore, the previous Land Bank Act contained various sections that confirmed the Land Bank's exclusion from the insolvency legislation.

In the present Land Bank Act, specific sections were again incorporated to ensure that the Land Bank remained excluded from the Insolvency Act. Since s 90 of the Insolvency Act acknowledges the exclusion of the Land Bank from the Act, and as there are no other specific provisions in the present Insolvency Act that stipulate that the Land Bank forms part of the insolvency proceedings, the Bank is deemed to be excluded from the insolvency legislation. In addition to s 90 of the Insolvency Act, certain sections, notably ss 33 and 34, of the Land Bank Act also exclude the Land Bank from the insolvency legislation. S 33 clearly sets out the steps the Land Bank must comply with if it desires to proceed against the recipient of an advance (its defaulting debtor). Sub-s 3 provides that the Land Bank may refuse to pay any portion of an advance which has been approved, but which has not been paid. Furthermore, this subsection also provides that where the advance was already made to the debtor, the Land Bank may – after the expiry of seven days after it has in writing made a demand for the repayment of the advance to the debtor and given notice to the holder of a preferent or similar security in respect of the property of the debtor and also, if

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15 2000 3 SA 626 (CC). For a full discussion of this case, see Kelly "Constitutionality of Executions by Agricultural Banks without Debtors having Recourse to a Court" 2000 *Juta's Business Law* 167; and Kelly-Louw 2004 *SA Merc LJ* 227–230.

16 See GN R637 in *Government Gazette* 21313 of 30 June 2000.

17 All references to the "sequestration of an insolvent estate" also include references to the "liquidation of a company and a close corporation", unless otherwise indicated.

18 All references to a "trustee of an insolvent estate" in this text also include references to a "liquidator of a company or a close corporation", unless otherwise indicated.

19 De la Rey *Mars The Law of Insolvency in South Africa* 8ed (1988) paras 11.2 198 and 20.13–20.16.

appropriate, to the Registrar of Deeds – apply to a court of law for an order contemplated in subsec 4. S 33(4) makes provision for a specific court process by which the Land Bank will be able to attach and sell a defaulting debtor's property to satisfy the outstanding amount owed to the Bank. S 33(2) of the Land Bank Act lists the circumstances under which the board of directors of the Land Bank may take action against its defaulting debtor in terms of s 33. For example, if the debtor becomes insolvent, commits any act of insolvency in terms of the Insolvency Act or is sequestrated by virtue of a court order, the Land Bank may proceed against the debtor in the manner provided for in s 33. Therefore, the sequestration of a debtor's estate does not create any limitation of the Land Bank's capacity to attach and sell the debtor's property in terms of s 33.

The Land Bank Act also provides that even if the property of a debtor vests in the trustee of the debtor's estate, the Land Bank will still have the right to attach and sell the property of the debtor. This is so because s 33(10) provides that the sequestration of the debtor's estate does not limit the Land Bank's right to apply to a court for an order in terms of subsec 4 or its right to deal with the debtor's property in terms of ss 33 and 34, despite any law which provides that the property of the debtor vests in his trustee in the event of his sequestration. The purpose of this subsection is not to divest the trustee of the debtor's estate, but to merely give the Land Bank the option of acting in terms of s 33 of the Land Bank Act, should it decide to do so. Even if the Land Bank decides rather to act in terms of s 33 than to join in the insolvency proceedings, the rights of other creditors, the secured creditors in particular, would not be adversely affected, as the manner of distribution of the proceeds of the sale of the insolvent's property is regulated by s 34.

In practical terms, the Land Bank may, on application to court, prevent certain property of an insolvent debtor from vesting in the trustee and may also "remove" such property after it vested in the liquidator. The procedures set down in the Insolvency Act therefore need not be followed by the Land Bank in relation to the realisation of a debtor's property. In the event that the court does not grant an order allowing the Land Bank to enforce its rights under s 33(10), or in the event that the Bank, at its discretion, decides not to invoke the said provisions, the Bank's fallback position would be governed by the principles of the Insolvency Act. Under those circumstances the Land Bank would have to follow the procedures set forth in the Insolvency Act, as do all other creditors.

To a large extent, s 33(10) mirrors the position under the previous Land Bank Act.[20] The Court in *Land- en Landboubank van Suid-Afrika v Joubert NO*[21] held that if one of the circumstances contemplated in s 34(2) of the previous Land Bank Act arose – for example where a debtor became insolvent, and the Land Bank decided to act in accordance with s 34(3)(b) of the previous Land Bank Act – the Bank obtained a preferent claim over the claims of ordinary creditors to the proceeds of the debtor's property. Also, the sequestration of a debtor's estate did not create any limitation on the Land Bank's capacity to attach and sell the debtor's property in terms of s 34 of the previous Land Bank Act. The Court found that even if the debtor's movable property vested in the trustee of the

20 See ss 34 and 55 of the previous Land Bank Act.
21 1982 3 SA 643 (C).

debtor's estate, the Land Bank would still have the right to attach and sell the property in terms of s 34 of the previous Land Bank Act. If there was any balance left after the amount owed to the Land Bank had been paid, it had to be paid over to the trustee.[22] S 33(11) of the Land Bank Act also clearly provides that the trustee of an insolvent debtor is not allowed to sell property mortgaged to the Land Bank to secure advances by the Bank, unless the Bank agrees in writing to that sale or has failed to sell that property within three months after receipt of a written notice from that person requesting the Bank to sell that property.

The Land Bank's exclusion from the Insolvency Act is also further indicated by s 34, which regulates the manner and the order in which the proceeds of a sale of the property of a defaulting debtor should be distributed. S 34 is aimed at regulating the order of preference of creditors in the event of the Land Bank deciding to exercise its rights to avoid the provisions of the Insolvency Act. S 34(1) stipulates that if the Land Bank has realised property or rights in accordance with s 33, the surplus of the proceeds of the realisation, if any, must, after payment of all costs incurred by the Bank in connection with the attachment and sale, be applied firstly towards reducing or liquidating any amount owing in terms of any bond or other real right which ranks prior to the Bank's bond or real right, and secondly the surplus, if any, must be applied towards reducing or liquidating the amount owed to the Bank in respect of the advance, together with interest and costs in respect thereof. Thereafter, if any balance remains, s 34(3) provides that it must be paid to the debtor, but if there is any other person who in law is entitled to payment, for example a trustee of an insolvent estate, the amount that he is entitled to must be paid to him, and the remainder of that surplus, if any, must then be paid to the debtor. It is therefore clear that sub-s 3 specifically indicates that the Land Bank is excluded from the Insolvency Act.

However, in addition to this, s 34(2) of the Land Bank Act also determines that any other creditor who holds a statutory preferential right over property of the debtor in terms of any other law ranks after the Land Bank's preferential rights in terms of this Act. This means that the statutory preferential rights of the Land Bank will outrank statutory preferences over a debtor's property, such as those granted in law to local authorities, co-operatives, and water boards. This appears to have the effect of elevating the Land Bank as an unsecured creditor not only above the concurrent creditors,[23] but also above the statutory-preferent creditors of an insolvent estate,[24] with the exception, that is, of the secured creditors ranking above the Bank.

However, there is a usage in practice whereby the Land Bank sometimes agrees to be subject to the insolvency procedure, provided that certain conditions set by the Bank are met. When the estate of a debtor is sequestrated, the Land Bank often decides, due to the high legal cost involved and other difficulties in obtaining a court order in terms of s 33(4) of the Land Bank Act, rather to allow the trustee to sell the debtor's property on its behalf, provided the trustee gives it an undertaking that the Bank's statutory preferences in terms of the Land Bank Act will be acknowledged. Usually the Land Bank also specifically states that by

22 652B–F.
23 See s 103 of the Insolvency Act.
24 See ss 96–102 of the Insolvency Act.

allowing this, it does not consent to being subject to the provisions of the Insolvency Act, in particular the provisions dealing with the order of distribution of the free residue of the insolvent estate. One of the conditions normally laid down by the Land Bank in these instances is that the Bank does not allow the trustee to charge his fees as set out in the Insolvency Act, and the Bank usually arranges a set fee for the selling of the insolvent's property.[25] However, there also appear to be a few cases in practice where the Land Bank neglected to do all of this, and merely proceeded to prove its claim against the insolvent estate, in which case it would appear that the Bank by way of its action tacitly agreed to be subject to the provisions of the Insolvency Act.[26]

2 1 1 Concerns raised regarding the Land Bank's exclusion from insolvency legislation

In 1995 the South African Law Reform Commission published a Working Paper,[27] which forms part of the Commission's project to review the law of insolvency.[28] This Working Paper investigated whether or not the special statutory preferential rights held by certain creditors, including the Land Bank, were justified. The Commission also referred to the Report on the Giving of Security,[29] where reference was made to various textbooks and court cases submitting that the Land Bank may be regarded as a vital cog in the agricultural industry and that it was in the interests of the community at large that the Bank be protected, even to the detriment of *bona fide* third parties. Furthermore, the Land Bank was not a commercial concern operating for its own profit, but a statutory body entrusted with public funds and charged with the duty of using it in the national interest by fostering agriculture in South Africa. A substantial number of comments, which criticise the special priority conferred on the Land Bank, were also noted.

Various comments regarding the preferential rights of the Land Bank were also made in the Commission's latest Report dealing with the review of insolvency law.[30] It was submitted that statutory provisions that prefer creditors above each other were undesirable and could not be justified merely because revenue was utilised for the benefit of the public or because the State or State assisted bodies were involved. There were complaints that the Land Bank's discretion to decide whether property mortgaged to it should fall in the insolvent estate prejudiced creditors generally and that creditors suffered losses because the Bank did

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25 See Cloete "Statutory Preference to Proceeds of Free Residue in Favour of Land Bank" *The Newsletter of the Association of Insolvency Practitioners of South Africa* (April 2005) 2.

26 See also Kelly-Louw "The Land Bank's Decision Whether or Not to Join in the Insolvency Proceedings" 2004 *Speculum Juris* 281.

27 South African Law Reform Commission *The Statutory Provisions that Benefit Creditors* Working Paper 61 (1995) (hereafter "the Working Paper").

28 South African Law Reform Commission *The Review of the Insolvency Law* Project 63.

29 South African Law Reform Commission *Report on the Giving of Security by Means of Movable Property* Project 46 (February 1991) (hereafter "the Report on the Giving of Security").

30 South African Law Reform Commission *Report on the Review of Insolvency Law* Project 63 Vol I (Explanatory Memorandum) and Vol II (Draft Insolvency Bill) (February 2000). These documents will be referred to as the "Explanatory Memorandum" and the "Draft Insolvency Bill" respectively.

not take proper care of assets subject to its mortgage bonds. As a basic premise it was submitted that creditors who enjoy special statutory protection should have the same rights as common-law secured creditors. It was therefore suggested that the Land Bank should be treated in the same way as other creditors and should be bound by all the provisions of the Insolvency Act.

S 90 of the Insolvency Act, which excludes the Land Bank from the Insolvency Act, is a particularly contentious provision. In the commentary on its Working Paper, the Commission indicated that the Land Bank had decided to pass legislation during 1996 that would replace the previous Land Bank Act. The Land Bank indicated that the envisaged legislation would also provide for the repeal of s 90 of the Insolvency Act. The manager of the Land Bank, at the time, was satisfied that the new legislation would be in line with the recommendations contained in the Working Paper and would therefore contribute in a constructive way to eliminating any disparity which might exist in the area of agricultural finance. However, according to an official at the Land Bank in 2000 the proposed reforms were never carried out, and there were no plans to proceed with such reforms at that time.[31]

It is important to take note of these undertakings that were given by the Land Bank, as the Bank did not keep to these undertakings when it drafted the present Land Bank of 2002. As already mentioned, the present Land Bank Act still provides for the Land Bank's exclusion from insolvency legislation. The reasons for the Land Bank's neglect could be that when the Bank gave these undertakings in 1995, the Strauss Commission[32] had not yet finalised their report and the Bank was not expected to play such an important developmental role yet. However, since these undertakings were given, the Land Bank has been transformed substantially to enable it to act in terms of its developmental mandate. It is therefore assumed that at the time that the Land Bank had given these undertakings it probably believed, in good faith, that it would be in a position to comply with them.

2 1 2 Current developments in the law of insolvency

The Draft Insolvency Bill, published in 2000, suggested the deletion of s 90 of the Insolvency Act. The Draft Insolvency Bill aimed to include the Land Bank in the distribution order of an insolvent estate and to either treat the Bank as a secured or a preferent creditor during insolvency proceedings. If such a Bill were to be accepted, the effect of it would be that the Land Bank would have to prove its claim against the insolvent estate of its debtor and the Bank would also have to comply with all the other provisions as set out in the Insolvency Act. However, since the publication of the 2000 Draft Insolvency Bill, Cabinet accepted the unified version of a new proposed Insolvency Act during March 2003. The proposed legislation has been submitted to the State Law Advisers under the title "Draft Insolvency and Business Recovery Bill". In this Draft Insolvency and Business Recovery Bill s 90 of the Insolvency Act has once again been included into the Bill in the form of clause 77A. Clause 77A provides that the provisions

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31 See the Explanatory Memorandum item 7.7 at 24.

32 The Final Report of the South African Law Reform Commission: *Inquiry into the Provisions of Rural Financial Services* RP 108/96 (18 September 1996) (hereafter "the Strauss Commission").

that the provisions of the Insolvency Act will not affect the provisions of any other law which confer powers and impose duties upon the Land Bank in relation to any property belonging to an insolvent estate. Therefore, it seems that in the latest Insolvency Bill the Land Bank's exclusion from insolvency legislation has again been acknowledged. However, we shall have to wait and see what the final position will be when the proposed legislation is finalised.

2 2 The special role that the Land Bank plays in societal development

For purposes of this article it is also important to take the special role that the Land Bank plays in agriculture into consideration. It is also necessary to explain where the Land Bank fits into the broad overall Government policy. The Land Bank is a statutory body that was established in 1912. The Land Bank is the premier Government development institution that specialises in the provision of rural and agricultural financial services in the country. In the past, the Land Bank was funded by public moneys that it had received from the Government, its only shareholder. For the last couple of years the Land Bank has received no grants or subsidies from the Government. It therefore has to raise its funds on the local and international money markets, which it then on-lend to clients at market related interest rates.[33] However, the fact that the Land Bank does not have to pay tax or dividends to Government also allows the Bank to plough its profits back into financing.

Initially, the Land Bank had a mandate from the Government to support the development of the agricultural sector as a whole. Later the Land Bank's mandate was expanded, so that the Bank also had to implement the constitutional and policy imperatives of Government to promote, support and facilitate land redistribution, food security, agricultural growth and development. The Strauss Commission reiterated this perspective during 1996 by broadening the mandate of the Land Bank to include the function of facilitating, supporting and promoting the development of the rural and agricultural financial services system. On 6 August 1997, Cabinet approved the recommendations of the Strauss Commission's Report on the provision of rural financial services, including a recommendation that the role of the Land Bank was to be extended, and that legislative changes would have to be effected to the previous Land Bank Act to enable the Bank to take on the new role as envisaged in the Strauss Commission's Report.

Government policy requires the Land Bank to encourage the participation of commercial banks in agriculture, rather than to crowd them out. The Land Bank is thus required to play a leading and supporting role to the financial institutions. It is supposed to provide the necessary and supportive linkage to these institutions in such a manner that will mutually benefit the Land Bank and these financial institutions in providing their respective clients with financial services. Therefore, the Land Bank is not expected competitively to increase its market share to the disadvantage of the commercial banks. That is not its mandate. The Land Bank's mandate is in line with the three strategic objectives of the Strategic Plan for South African Agriculture, which are: increased access and participation

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33 See also *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa* 2000 6 BCLR 586 (O) 593A–C.

in agriculture; enhanced profitability and competitiveness; and improved sustainability in agriculture.[34]

S 3 of the Land Bank Act lists the objects of the Land Bank, and provides for the activities to achieve those objects. The objects among others include a focus on agrarian reform and land distribution, the equitable ownership of land, food security, access to land for agricultural purposes, agricultural entrepreneurship, the removal of the legacy of past racial and gender discrimination in the agricultural sector and the enhancement of productivity, profitability, investment and innovation in the agricultural and rural financial systems. In addition to the Land Bank's core activities in agricultural financing, the Act also focuses on the developmental role of the Land Bank, enabling it to support other government programmes concerned with land reform, agrarian development and the eradication of inequalities. The Land Bank provides a comprehensive range of retail and wholesale financial products and services designed to meet the needs of commercial and developing farmers and agriculture-related businesses.[35] The Land Bank also plays a role in respect of the Government's Integrated Sustainable Rural Development Strategy. The central aim of the Integrated Sustainable Rural Development Strategy is to conduct a sustained campaign against rural and urban poverty and underdevelopment, and to support more rapid and equitable rural development in the country. The purpose of this strategy is to improve opportunities for, and promote the well-being of, the rural poor, and to develop unified and secure rural communities with feasible institutions and sustainable economies.

Following the Strauss Commission's Report, the Land Bank has the mandate of deracialising the agricultural sector and ensuring that resource poor farmers are active participants in this previously exclusive sector. The Land Bank must also make access to finance available to the resource poor farmers. Additionally, the Land Bank's role in rural finance is crucial in attaining the Government's ideal of a sustainable rural development. Therefore the Land Bank developed the Development Finance Model that enables the Bank to make finance available to resource poor or emerging farmers. The Land Bank has also approved a Capacity Building Development Fund, the main objective of which is to contribute to capacity building and skills development of emerging farmers.

The Land Redistribution for Agricultural Development Programme[36] was officially launched in August 2001. Through the LRAD programme, the Land Bank, acting as an agent of the Department of Land Affairs, aims to fast track peaceful and orderly land redistribution. Beneficiaries are able to access grants to purchase land and loans to start agricultural or agriculturally-related businesses on their newly acquired land. Primarily the LRAD programme aims to improve land tenure security and to extend property ownership and access to productive resources to Black South African citizens who were previously excluded from the agricultural sector. The LRAD programme is part of a broader plan to ensure that in the next fifteen years, thirty per cent of the country's agricultural land is

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34 The Strategic Plan for South African Agriculture is available at: http://www.nda.agric.za (accessed 06-09-2005).

35 For a full discussion see the Land Bank's Brochure "Making Development a Way of Life" 3ed (2001) (hereafter "the *Brochure*").

36 Hereafter "the LRAD programme".

in the hands of previously disadvantaged individuals. It is also one of the Land Bank's means of delivering on its mandate of developing black emerging farmers. It also seeks to improve nutrition and income amongst the rural poor. The LRAD programme forms part of the Government's Integrated Sustainable Rural Development Strategy as it seeks to not only develop but also sustain the rural poor and ensure that they have livelihoods and access to finance. Since the mandate of the Land Bank has been expanded, the Bank has also allocated various funds towards the Corporate Social Investment Programme to contribute towards development.[37]

3 SECTIONS 9 AND 36 OF THE CONSTITUTION

It has been alleged that s 33(10) of the Land Bank Act and s 90 of the Insolvency Act conflict with s 9 of the Constitution on the basis that the Land Bank is treated differently from other creditors. Accordingly, it has been suggested that the Land Bank should be treated in the same way as other creditors in an insolvent estate. Unlike in the past, under the new Constitutional dispensation everyone is equal before the law. The right to equality is enshrined in s 9 of the Constitution. S 9(1) of the Constitution states that everyone is equal before the law and has the right to equal protection and benefit of the law. Furthermore, s 9(3) provides that the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Lastly, s 9(5) provides that discrimination on one or more of the grounds listed in subsec 3 is unfair unless it is established that the discrimination is fair.

Although the Land Bank and the commercial banks operate in the same market, they do not stand on the same footing, and therefore cannot be treated equally. Commercial banks do not have a developmental mandate to carry out and they can therefore concentrate solely on the financially viable farmers. The commercial banks also have a large range of financial products they can offer to the public. The Land Bank is solely reliant on agriculture and it cannot spread its risk profile in the manner of commercial banks.

3 1 The legislative purpose of the Land Bank Act

S 33(10) of the Land Bank Act and s 90 of the Insolvency Act must be interpreted and applied in terms of a balance that has to be struck between the protection of individual rights and the promotion of social and public responsibilities and duties.[38] An evaluation of competing individual and wider societal interests is central to any constitutional analysis. The two identified sections, to the extent that they infringe s 9 of the Constitution, will therefore have to be weighed against the wider public interest. It is accordingly appropriate, at this stage, to provide an overview of the legislative purpose of the Land Bank Act. In order to do so, reference should be made to the previous Land Bank Act, which was repealed and replaced by the present Land Bank Act.

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37 For a full list of the projects that received funding in 2001 see the *Brochure* 16.

38 See Van der Walt *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 19.

In *Land and Agricultural Bank of SA v Sentraal Westelike Koöperatiewe Maatskappy Bpk*,[39] the Court referred to the provisions of s 34 of the previous Land Bank Act.[40] The Court confirmed that the previous Land Bank Act equipped the Land Bank with singular powers that no ordinary creditor enjoyed, and which encroached deeply on the normal rights of its debtors and other creditors in regard to movable and immovable property. The Land Bank's exercise of its powers under the Act resulted in it acquiring statutory rights that took precedence over the rights of all ordinary creditors, even those armed with writs.

In *Lesapo v North West Agricultural Bank*,[41] the Court considered the constitutionality of s 38(2) of the North West Agricultural Bank Act[42] that gave the North West Agricultural Bank the right, without recourse to a court of law, to instruct a sheriff to attach and sell its defaulting debtor's property. The Court considered the reasons for the enactment of s 38(2). The Court stated that this provision was similar to s 55(2) of the previous Land Bank Act and therefore that the reasons for their enactment were identical. The Court[43] referred to the reasons for the enactment of s 55 as articulated in *Land and Agricultural Bank v Sentraal Westelike Koöperatiewe Maatskappy*[44] and in *Strydom v Die Land en Landboubank van Suid-Afrika*:

> "There is, of course, good reason for all this. The applicant is not a commercial concern which does business for its own profit and may fairly be expected to take the rough with the smooth. It is a statutory body, entrusted with public funds and charged with the duty of using them in the national interest by fostering agriculture in South Africa."[45]

The Court[46] also referred to *Ixopo Irrigation Board v Land and Agricultural Bank of South Africa*, where that Court had elaborated further on the motivation for the enactment of s 55(2) of the previous Land Bank Act:

> "The overwhelming impression one gains from a reading of ss 55 and 56 of the Land Bank Act in particular is that the Legislature is intent upon giving the Bank's funds the greatest possible protection. This is no doubt being because the Land Bank is funded by public monies. In authorising the bank to attach and sell land without court intervention the object must surely have been to raise the greatest possible amount on the Bank's security with the least possible protection cost or delay."[47]

The Court in *Lesapo v North West Agricultural Bank* then confirmed that the motivation behind the enactment of s 38(2) of the North West Agricultural Bank Act, as with s 55(2) of the previous Land Bank Act, was to give the Agricultural

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39 1979 2 SA 346 (N) 346C–D.

40 Section 34 of the previous Land Bank Act provided, *inter alia*, for the net proceeds of the realisation of any of the debtor's assets to be paid in their entirety to the Land Bank, unless they exceeded the amount of its claim. Only the balance, which exceeded the claim of the Land Bank went to the debtor, whose other creditors could then have recourse to it.

41 1999 10 BCLR 1195 (B).

42 Act 14 of 1981. This Act was previously called the Agricultural Bank of Bophuthatswana Act 14 of 1981, but its title was amended in 1995.

43 1199F–H.

44 349.

45 1972 1 SA 801 (A) 814F–G.

46 *Lesapo*'s case 1199H–J.

47 *Ixopo Irrigation Board v Land and Agricultural Bank of SA* 1991 3 SA 233 (N) 237J–238B.

Banks' funds the greatest possible protection, since public money funded the banks. The object of executing without recourse to a court was to grant the banks security with the least possible cost or delay.[48] The Judge conceded that Parliament was driven by the common good – the welfare of the banks, as well as the farmers who benefit from the services of these banks – to pass these pieces of legislation. He noted that the need to protect these banks' interests was even more pronounced today, given that the banks cater for all farmers across the racial and economic divide. Even subsistence farmers, with limited resources and assets to which recourse could be had to satisfy a debt, were the beneficiaries of the services rendered by the North West Agricultural Bank and by the Land Bank. The Court acknowledged the important role these banks played in agriculture, the risks they were exposed to and the need for the banks to be vigilant and to take appropriate preventative measures.[49]

Scott explains that the reason for granting protection to the Land Bank seems to be of a policy nature.[50] The Land Bank is regarded as being a vital cog in the agricultural production process and it is therefore in the benefit of the community at large that the Bank is protected, even to the detriment of *bona fide* third parties. Although the Commission recommended in its Working Paper that the legislative provisions designed to provide preferential creditor status to the Land Bank should be reviewed, it specifically recognised the need for the protection of farming related security interests. It is also important to remember that in the end it was decided to repeal the previous Land Bank Act as a whole because it had become outdated and did not allow the Land Bank effectively to pursue its developmental mandate. Although the Land Bank is no longer funded by public money, the Bank is still expected to fulfil its developmental mandate. Therefore, if the Land Bank loses its statutory protection, it will have the effect that Government will again have to subsidise the Bank with public money to enable the Bank to fulfil its developmental mandate.

3 2 The difference between discrimination and "mere differentiation"

The Constitutional Court has already developed substantial equality jurisprudence in various cases.[51] In these cases, the Constitutional Court has consistently

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48 *Lesapo*'s case 1199F–J.

49 *Lesapo*'s case 1200A–C.

50 See Scott and Scott *Wille's Law of Mortgage and Pledge in South Africa* 3ed (1987) 108.

51 See *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC); *Harksen v Lane NO* 1998 (1) SA 300 (CC); *Jooste v Score Supermarket Trading (Pty) Limited (Minister of Labour intervening)* 1999 2 SA 1 (CC); *East Zulu Motors (Pty) Limited v Empangeni/Ngwelezane Transitional Local Council* 1998 2 SA 61 (CC); and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC). It should also be noted that most of the Court's equality jurisprudence deals with s 8 of the Constitution of the Republic of South Africa Act 200 of 1993 (hereafter "the interim Constitution"), the predecessor of s 9 of the final Constitution of 1996. However, the two rights are similar enough for the courts' interpretation of s 8 of the interim Constitution to apply to s 9 of the final Constitution. For a full discussion of the equality clause see Currie and De Waal *The Bill of Rights Handbook* (2005) ch 9; Chaskalson *et al Constitutional Law of South Africa* (Revision Service 5, 1999) Kentridge "Equality" Chapter 14.

distinguished between two types of differentiation between persons or groups, that is, unfair discrimination and "mere differentiation".

Goldstone J, on behalf of the Constitutional Court in *Harksen v Lane*,[52] tabulated the stages of an enquiry into a violation of the equality clause as follows:

- 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 the equality clause. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

Goldstone J continued and stated that deciding whether a particular form of differentiation amounts to unfair discrimination requires a two stage analysis:

- Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground,[53] 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.
- If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to be 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 situation.

The differentiation which is caused by s 33(10) of the Land Bank Act and s 90 of the Insolvency Act is not on one of the grounds specified in s 9(3) of the Constitution. Furthermore, this differentiation is not "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". Therefore, it is my view that the differentiation occasioned by s 33(10) of the Land Bank Act and s 90 of the Insolvency Act does not amount to discrimination. The differentiation between the Land Bank and other creditors occasioned by these sections therefore amounts to "mere differentiation".

3 3 The constitutional test for mere differentiation

The test for compliance with the Constitution is far less stringent for "mere differentiation" than it is in relation to "discrimination". Mere differentiation must be consistent with s 9(1) of the Constitution which, as mentioned, provides that "everyone is equal before the law and has the rights to equal protection and benefit of the law". It then becomes necessary to consider whether the Governmental purpose of the section is a legitimate one and, if so, whether the differentiation does have a rational connection to that purpose.[54] A law that results in mere differentiation will be upheld if there is a rational relationship between the

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52 Para 54.
53 See s 9(3) of the Constitution.
54 See *Harksen v Lane* para 56.

differentiation and the legitimate governmental purpose behind its enactment.[55] In *Prinsloo v Van der Linde*[56] the Constitutional Court stated that in cases of mere differentiation, the State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of this constitutional State. The purpose of this aspect of equality is to ensure that the State is bound to function in a rational manner. This encourages governmental action that promotes the public good, as well as enhancing the coherence and integrity of legislation. Accordingly, before it can be said that mere differentiation infringes the equality clause, it must be established that there is no rational relationship between the differentiation in question and the Government purpose which is proposed to invalidate it. In the absence of such rational relationship the differentiation would infringe the equality clause. In *East Zulu Motors v Empangeni/ Ngwelezane Transitional Local Council*,[57] O'Regan J briefly described the rationality review required by the equality clause. She stated that the question was not whether the Government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purposes. The test was simply whether there was a reason for the differentiation that was rationally connected to a legitimate government purpose.

3 4 Is there a rational relationship between the differentiation and the legitimate government purpose of the legislation?

As the differentiation occasioned by s 33(10) of the Land Bank Act and s 90 of the Insolvency Act amounts to mere differentiation, the threshold that these sections have to comply with is a relatively low one, namely a rationality review. The rationality review involved here is distinct from a proportionality review (and also from the extended rationality review that was laid down in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[58]), which involves a higher threshold: an investigation would need to be undertaken as to whether there are more effective means available to give effect to the Government's purpose. In other words, the proportionality review involves an investigation into whether the means used are proportionate to the legislative goal the Government seeks to achieve.

It can be argued that there is a rational link between the goal sought to be achieved and the means adopted in s 33(10) of the Land Bank Act and s 90 of the Insolvency Act. The "legitimate government purpose" behind the differentiation in the Land Bank Act relates to the Land Bank's role in rural finance and development. In furthering this public interest role, the Land Bank accepts the risks that would not be assumed by commercial banks. The Land Bank Act aims "to effect a change in the patterns of land ownership by promoting greater participation in the agricultural sector by historically disadvantaged persons and an increase in ownership of agricultural land by such persons through the provision of

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55 See, for example, *Harksen v Lane* and *Jooste v Score Supermarket Trading* 9–10.
56 Para 25.
57 73D.
58 2002 7 BCLR 702 (CC); 2002 4 SA 768 (CC).

appropriate financial services"; and "to promote sustainable agrarian reform and development of agricultural resources".[59] The purpose of the relevant provisions in the Land Bank Act, read together with s 90 of the Insolvency Act is also to ensure that the Land Bank's funds, earmarked for this legitimate purpose, are adequately secured in the event of its debtors' insolvency.[60]

The Land Bank Act aims to achieve objects that constitute legitimate government objectives. Plus, there is also a rational connection between favouring the Land Bank as a creditor, and achieving these aims. In the context of a rationality review, that is the extent of the investigation. It is not a question of whether the Government's objectives could be achieved in a more effective or efficient manner or whether the extent of the measures is justified.[61] This view is strengthened by the Constitutional Court's tendency to defer to the legislature in matters of socio-economic regulation.[62] The *Jooste v Score Supermarket Trading* case is particularly informative in this regard. In this case, the Constitutional Court considered the constitutionality of s 35(1) of the Compensation for Occupational Injuries and Diseases Act.[63] S 35(1) provides that employees cannot institute an action against their employers for damage in respect of any occupational injury or disease sustained or contracted in the course of their employment, but are rather confined to instituting proceedings in terms of the Compensation Act itself. It was argued that s 35(1) was contrary to the right to equality on the basis that employees, by being deprived of the common law right to claim damages from their employers, were placed at a disadvantage in relation to persons who were not employees and who retained that right. The Constitutional Court, per Yacoob J, held that while the Compensation Act did differentiate between employees injured in the course of their employment and other common law personal injury claimants, it did not do so in violation of s 9(1) of the Constitution. On the question of rationality review, his Lordship stated:[64]

> "It is clear that the only purpose of rationality review is an enquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this inquiry whether the scheme chosen by the legislature could be improved in one respect or another. Whether an employee ought to have retained the common law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy. It involves a policy choice which the Legislature and not a court must make. The contention represents an invitation to this Court to make a policy choice under the guise of rationality review; an invitation which is firmly declined."

From the discussion above, it is important to distinguish between iniquity as a matter of policy, and inequality that is offensive to the Constitution. Our courts have developed a judicial concept of constitutional equality that is, in some

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59 See the preamble to the Land Bank Act.

60 For a discussion of the advantages that the Land Bank obtains if it decides not to form part of the insolvent estate and abide by the insolvency legislation see Kelly-Louw 2004 *Speculum Juris* 307–310.

61 See the Working Paper para 5.5.1 and n59.

62 See, for example, *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC); 1997 10 BCLR 1348 (CC).

63 Act 130 of 1993 (hereafter "the Compensation Act").

64 *Jooste*'s case para 17.

respects, restricted. For this reason, it is my view that s 33(10) of the Land Bank Act and s 90 of the Insolvency Act are not unconstitutional despite the fact that it might operate unfairly in certain circumstances. In my view there would not be a realistic chance of a court challenge to the provisions of the Land Bank Act succeeding on the grounds of inequality. In the premise, I therefore submit that s 33(10) of the Land Bank Act and s 90 of the Insolvency Act do not contravene s 9 of the Constitution.

However, if a court were to reach a different conclusion and were to find that there has been a violation of the Bill of Rights, then I submit, based on the above reasons, that any violation will nevertheless be justifiable in terms of s 36(1) of the Constitution. S 36(1) of the Constitution, provides that entrenched 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: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

The judge in *Chief Lesapo v North West Agricultural Bank*[65] stated that the application of the s 36(1) limitation clause in the Constitution involves a process as set out in *S v Makwanyane*:[66] the court must weigh up competing values, balance different interests, and ultimately make its assessment on grounds of proportionality. In the process undertaking its proportionality evaluation, the court is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose. The court added: "that the limitations inquiry and the requirements that must be considered aim to 'strike the appropriate balance of proportionality between means and end.' "[67]

As mentioned, s 36(1) of the Constitution requires the court to have regard to the "importance of the purpose of the limitation".[68] As indicated above, the legitimate government purpose behind the differentiation contained in the Land Bank Act and s 90 of the Insolvency Act relates to the Land Bank's role in rural finance and development. This is a purpose of considerable public importance. In the context of furthering this public role, the Land Bank accepts risks that would not be assumed by a commercial bank. Furthermore, s 36(1) of the Constitution also requires the court to have regard to "the relationship between the limitation and its purpose", as well as "less restrictive means to achieve the purpose".[69] I respectfully submit that there is a proportional relationship between the purpose which is sought to be achieved by s 33(10) of the Land Bank Act and the legislative means which have been chosen to give effect to that purpose.

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65 1999 12 BCLR 1420; 2000 1 SA 409 (CC).
66 1995 3 SA 391 (CC) para 104.
67 See *Chief Lesapo v North West Agricultural Bank* para 29 421E–H.
68 See s 36(1)(b) of the Constitution.
69 See s 36(1)(d) and (e) of the Constitution.

4 CLOSING COMMENTS

In view of the above reasons, I respectfully submit that s 33(10) of the Land Bank Act and s 90 of the Insolvency Act are constitutional. However, it is important to remember that the assessment of these sections is based on an evaluation of competing public and individual interests. This evaluation again depends on the application of rather subjective social policy considerations, the content of which are subject to change over time. Therefore, the outcome of such an assessment is very unpredictable, and it is accordingly possible that a court, assessing the constitutionality of the mentioned sections, could reach a different conclusion.

However, while the provisions, as they stand, pass constitutional muster, they are nevertheless undesirable for practical reasons, and therefore it would be preferable if the law were different. For reasons of encouraging uniformity in the law of insolvency, the drafters of the proposed insolvency legislation should seriously consider the deletion of s 90 of the Insolvency Act and the relevant parts of s 33 of the Land Bank Act, so that the Land Bank can also be included in the proposed insolvency legislation. However, the drafters should also take cognisance of the fact that the Land Bank needs special statutory privileges if it is to fulfil its developmental role. It is therefore suggested that a special ranking position should be created for the Land Bank, where it is a creditor of an insolvent estate. Special provisions should also be included that would make provision for the Land Bank to be excluded from some of the normal sequestration costs that would apply to the other creditors of an insolvent estate. One possibility would be to provide that set trustee fees would apply where the Land Bank is a creditor, and another would be to provide that the Bank would not have to pay any contributions for its unsecured claims. The time is ripe for new insolvency legislation to be drafted that could provide a legal environment within which the Land Bank could focus on its developmental mandate, while being adequately protected if its debtors' estates were to be sequestrated.

The Constitution, the Bill of Rights, and the law of succession (1)

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1 INTRODUCTION

After many years of minimal legislative activity in customary law and few cases before the courts, there have now been a number of important cases in the Constitutional Court. The result of three of them, heard together, has made fundamental changes in the law of succession and given rise to an expectation of wide-ranging legislative action. This, then, is an appropriate time to review the situation as it is after the changes made by the Constitutional Court and to make recommendations for the immediate future. The enquiry comments in addition on the Constitutional Court's review of the history of the subject and of the need for care in some areas of legislative difficulty. It will be pointed out that the decisions raise numerous questions and affect more fields of law than the court seems to have thought.

2 GENDER EQUALITY AND EQUAL SHARES FOR ALL CHILDREN

The enforcement in *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*[1] of gender equality and equal shares for all children in intestate succession is to be welcomed. All three cases were concerned with the customary law of succession. Because equality is one of the primary values in the Constitution,[2] and the Bill of Rights[3] "enshrines the rights of all people in our country",[4] what has been decided must be considered as binding if similar problems arise in connection with any of the other systems of law in South Africa.

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* This is part one of a two-part article. The second part will be published in the 2006(1) edition of *Speculum Juris*.

1 2005 1 SA 580 (CC); 2005 1 BCLR 1 (CC). The titles "the *Bhe* trilogy of cases" and "the *Bhe* case" refer to these three cases.

2 Section 1(a) of the Constitution of the Republic of South Africa, 108 of 1996.

3 Chapter 2 of the Constitution. The equality provision in the Bill of Rights is s 9 of the Constitution.

4 Section 7(1) of the Constitution.

3 TERRITORIAL AND PERSONAL SYSTEMS OF LAW

State law consists of the rules constitutive of the State and the rules having State authority.[5] A territorial system of law is one which applies to,[6] or is available to,[7] all inhabitants of the State. A personal system of law is one which applies to, or is available to, a group of people such as a tribe or group of tribes irrespective of where, geographically, those subject to, or entitled to take the benefit of, that personal system of law, may be.[8] For example, the Hlubi have a fixed number of *ikhazi* (the cattle paid over under a *lobola* contract)[9] while the Xhosa and Baca do not.[10] It is immaterial whether the person in a particular case is in a rural or urban area.[11]

4 THE NEED FOR CHOICE OF LAW RULES AND WHAT THEY WERE IN SUCCESSION

A State that has more systems of law than one within its boundaries has a choice. It may recognise[12] and enforce[13] only one of the systems, or it may recognise and enforce a number of systems or branches thereof. A recent example of the latter possibility is the recognition by the Constitutional Court of the law of the Nama people.[14] The Nama people, of whom the Richtersveld people are a subgroup,[15] "are generally considered by anthropologists to be a subgroup of the Khoi (also called Khoikhoi and, in former times, Hottentot) people. The Khoi are in turn seen as a subgroup within the larger category of Khoisan peoples, which include both Khoi and San (Bushmen)."[16]

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5 See Kerr *Law and Justice: A Christian Exposition* (1963) ch 1 and 2. This definition covers all systems of law within all States. It was framed independently of any problems concerning customary law, but covers customary law as well as South African common law and other systems of law.

6 For example, a State's criminal law applies to everyone within the State unless legislation provides otherwise.

7 Civil law and procedure is available in the sense indicated in Kerr *Law and Justice* 5–10. The branch of the law considered in this article, the law of succession, shows this clearly. One may choose to make a will or not at one's pleasure.

8 On the difference between territorial and personal systems of law see Forsyth *Private International Law* 4ed (2003) 28–31.

9 On these terms see *Family Law Service* para G29.

10 See Kerr "Roman-Dutch Law and the *lobola* contract" 1960 *Acta Juridica* 334 and the subsequent article "Implied *lobola* contracts ancillary to Roman-Dutch law marriages" 1963 *Acta Juridica* 49.

11 This point needs to be remembered when it is said, incorrectly, as it sometimes is, that customary law applies only in rural areas.

12 It is important to note that when a body of customary law is recognised for the first time, the body recognising it (whether the legislature or a court) does not create the respective rules of the law in question: it recognises rules that have previously been applicable to the persons in question or in the area in question.

13 *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) and, on appeal, *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 460 (CC). (The title "the *Richtersveld Community* case" and "the *Alexkor Ltd* case" refer to the same case in different courts. In the *Bhe* case the majority referred to the earlier decision in the CC as *Richtersveld* (see *Bhe* para 81), while the minority referred to it as *Alexkor* (see *Bhe* paras 151 and 152 but note that the reference in para 151fn14 is not correct.) In this article the practice of the majority will be followed).

14 *Ibid.*

15 The *Richtersveld Community* case in the SCA para 16.

16 *Idem*, per Vivier ADP.

The facts and decision of the *Richtersveld Community* case[17] show the importance of distinguishing between different systems of law. The Richtersveld community claimed restitution, in terms of the Restitution of Land Rights Act 22 of 1994, of "a narrow strip of land along the west coast [of South Africa] from the Gariep (Orange) River in the north to just below Port Nolloth in the south."[18] The land was registered in the name of Alexkor Ltd[19] so if South African common law had been the only system of law applicable the community would have lost the case. As it was, in a unanimous opinion the Court, recognising Nama law, said (emphasis added): "we . . . conclude . . . that *ownership* of the minerals and precious stones vested in the community *under indigenous law*;"[20] "the Richterveld community was the *indigenous law owner* of the Richtersveld,"[21] and "*indigenous law ownership* is the way in which black communities have held land in South Africa since time immemorial."[22] (The terms "customary law" and "indigenous law" are synonymous.[23]) It is to be noted that in the last of those quotations the Court referred to "black" communities and later in the same paragraph referred to "black" people. Because neither the Khoi nor the San are of the same race as the Bantu speaking tribes presumably the court was using the word "black" in an extended sense to mean everyone other than whites. The point is important because, in the absence of research into Khoi and San law, one cannot assume that their laws are the same in details such as those of the *lobola* contracts of the Xhosa, Thembu, Gcaleka, Pondo or other tribes. The fact that one cannot assume such identity of rules does not affect the present discussion, which is concerned with choice of law rules which, on the point in issue, are the same for all tribes.

The Court made the following order:

> "It is declared that, subject to the issues that stand over for later determination, the first plaintiff [the Richtersveld Community] is entitled in terms of s 2(1) of the Restitution of Lands Rights Act 22 of 1994 to restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof."[24]

This decision gives the highest Court's authority to the recognition of more than one system of law. Such recognition is not new: the principle in the *Richtersveld Community* case is the same as that in *Dodo v Sabasaba*;[25] *Umvomvo v Umvovo*[26] and *Moloto v Moloto.*[27] These cases are discussed in Kerr *Customary Law*.[28] In each of them the extent of land was only one farm or a part of a farm.

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17 2004 5 SA 460 (CC).
18 Para 5 per Curiam.
19 Para 5. Alexkor was wholly owned by the Government: see para 15.
20 Para 64.
21 Para 74.
22 Para 96.
23 See fn 8 to para 7 and below in Section 5 of this article.
24 Para 103.
25 1945 NAC 62 (C&O) 63. (NAC means Native Appeal Court. For different methods of reference over the years to these courts and their successors see Kerr *Customary Law* 199 *sv* ACCC.)
26 1952 NAC 80 (S) 83.
27 1953 NAC 91 (NE) 92.
28 At 69–70. See also Bekker (ed) *Seymour's Customary Law in Southern Africa* 5ed (1989) 50n43 and Olivier *et al Die Privaatreg van die Suid-Afrikaanse Bantoesprekendes* 3ed (1989) 623–624.

The fact that there is now the highest case law authority for the principle means that the statement in *Godongwana v Mpisana*[29] that the holder of a kraal site certificate in Transkei "does not acquire a real right in the property but . . . only a *jus in personam*"[30] must be considered erroneous.[31] This has to be borne in mind if *Godongwana*'s case is cited in argument as it was in *Reddy v Decro Investments CC t/a Cars for Africa*.[32] It is important to note that in the *Richtersveld Community* case there were no written documents, whether title deeds or certificates, in favour of the applicants and yet their rights prevailed against those of the holder of a title deed.

If a State adopts the approach of recognising and enforcing more systems of law than one, or more branches of such systems than one, as South Africa does, it needs rules for the choice of law. Such rules do not themselves prescribe the substantive rules on the different branches of the law: they prescribe which system of law is to be applied to solve the problem under consideration.

There is a clearer illustration of the role of choice of law rules in inter-territorial choice of law rules than in inter-personal ones. Suppose that South Africa has a choice of law rule that indicates the *lex causae* as the appropriate law for a particular problem and that this gives a satisfactory result overall (ie by a combination of the choice of law rule and the substantive rule of the country in question) when the cause of action arises in countries A, B and C but that the result is totally unsatisfactory when it arises in country D. It is possible for our courts to refuse to apply the law of country D but to retain the choice of law rule unchanged or improved. An illustration in connection with the present customary law problem is the given below[33] where it is pointed out that subsecs 23(1), part of (2) and (3) led to an unsatisfactory result concerning who should succeed, but to a satisfactory result concerning oral dispositions made in expectation of death.

Choice of law rules may be laid down in statutes or precedents or in proven custom. South African law used to have inter-personal choice of law rules in succession in subsecs 23(1), part of (2)[34] and (3) of the Black Administration Act 38 of 1927 and Regulation 2 of the Regulations for the administration and distribution of estates of deceased blacks, GN R200 of 6 February 1987.[35] References below to "the Black Administration Act" or to "the Act" or to "sections" without further identification, or to "Regulation 2" are references to these statutes. Subsections 23(1), (2) and (3) laid down that

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29 1982 4 SA 814 (Tk).

30 816C.

31 On this see Kerr "Under which system of law, and in which branch of that law, are kraal sites held in Transkei and elsewhere?" 1983 *SALJ* 413–414.

32 2004 1 SA 618 (D) 625D–627A.

33 In Section 6.3 of this article.

34 The part of subsec 23(2) quoted in the next paragraph that was a choice of law rule was the part separating land in tribal settlements from the property which subsec 23(3) said could be left by will. The part that referred to "one male person" prescribed who should succeed and so was not a choice of law proposition.

35 For the South African inter-territorial choice of law rules in general see Forsyth *Private International Law* and, in addition, in succession see Ellison Kahn in Corbett *et al The Law of Succession in South Africa* 2ed (2001) 591ff.

(1) All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.

(2) All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon one male person, to be determined in accordance with tables of succession to be prescribed under subsec 10.

(3) All other property of whatsoever kind belonging to a Black shall be capable of being devised by will.

Originally there was a second sentence in subsec 3 which read "Any such property not so devised shall devolve and be administered according to Native law and custom." It was deleted by s 7(a) of Act 9 of 1929 and the precursor of Regulation 2 was issued to deal with that aspect of the subject. At the time when the *Bhe* trilogy of cases came before the Court, Regulation 2 read:

2. If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the Act shall be distributed in the manner following:

   (a) . . .

   (b) If the deceased was at the time of his death the holder of a letter of exemption issued under the provisions of section 31 of the Act, exempting him from the operation of the Code of Zulu Law, the property shall devolve as if he had been a European.

   (c) If the deceased, at the time of his death was —

      (i) a partner in a marriage in community of property or under antenuptual contract; or

      (ii) a widower, widow or divorcee, as the case may be, of a marriage in community of property or under antenuptual contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, the property shall devolve as if the deceased had been a European.

   (d) When any deceased Black is survived by any partner—

      (i) with whom he had contracted a marriage which, in terms of subsection (6) of section 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 partner, 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.

   (e) If the deceased does not fall into any of the classes described in paragraphs (b), (c) and (d), the property shall be distributed according to Black law and custom.

5 TERMINOLOGY IN GENERAL

Both the legislature[36] and the courts[37] use the terms "customary law" and "indigenous law" as interchangeable. "Customary law" has the advantage that it is used in the Constitution[38] and does not have any reference to race. "Indigenous law" does have such reference, and, strictly speaking, should only be used of San law, and perhaps of Khoi law as well, about which very little is known.[39] Until more is known it is not possible to compare San law and Khoi law with each other and with "customary law" as that term has been understood up to the present (ie what the 1883 Commission[40] called "Native Law and Customs"). It is likely that there will be considerable differences so, notwithstanding the fact that in the *Richtersveld Community* case the court recognised Nama law as "customary law", it does not follow that it (Nama law) must necessarily be considered to be part of what has up to the present been called "customary law". In other words, one of the meanings of the word "custom" refers to the method by which a particular institution or a system of law may be recognised. San law and Khoi law may or may not be independent of other systems of law in South Africa.

There are many occasions in which reference needs to be made to the law particular to a certain tribe "Tembu law", "Xhosa law", "Pondo law", "Zulu law" etc.[41] There are also occasions when the phrases "statutory customary law", and "non-statutory customary law" are appropriate.[42] "Custom" in the legal sense needs to be distinguished from "custom" used to describe what is habitually done.[43] In the legal sense the phrase "law and custom" was at one time in general use. In it "law" means "*lex*", "custom" means "*consuetude*", and "*lex et consuetudo*" means "*ius*".[44]

One general point needs to be made. In the *Richtersveld Community* case and in the *Bhe* trilogy of cases there are warnings that one should not view customary law "through the prism of legal conceptions that are foreign to it."[45] However,

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36 For example, the Recognition of Customary Marriages Act 120 of 1998 ss 9 and 12 refer to "customary law" but in the same year the phrase "indigenous law" was used in the Law of Evidence Amendment Act 45 of 1988 s 1.

37 For example "indigenous law" in paras 50 and 64 of the CC report of the *Richtersveld Community* case, and "indigenous Nama law" in para 58. In the *Bhe* case "customary law" is used in the majority opinion (see eg paras 2, 3, 41ff per Langa DCJ with whom Chaskalson CJ, Madala J, Mokgoro J, Moseneke J, O'Regan J, Sacks J, Skweyiya J, Van der Westhuizen J and Yacoob J concurred) and "indigenous law" in the minority one (see eg para 137ff per Ngcobo J). In what follows quotations from the majority opinion are always to be read as per Langa DCJ and those from the minority opinion as per Ngcobo J.

38 Sections 39(2) and (3); 211(1), (2) and (3).

39 See generally the *Richtersveld Community* case.

40 The Report and Proceedings, with Appendices, of the Government Commission on Native Law and Customs, 1883 (Cape) (G4 of 1883).

41 Kerr *The Customary Law of Immovable Property and of Succession* 3ed (1990) 8.

42 Kerr *Customary Law* 7, 70–71.

43 Kerr *Customary Law* 16–17.

44 Kerr *Customary Law* 7, and "The Application of Native Law in the Supreme Court" 1957 *SALJ* 313 316–317.

45 The *Richtersveld Community* case in the CC para 54. See also para 55 *in fine*. This is repeated in the *Bhe* case in the majority opinion para 43 and in the minority dissenting one para 148.

some concepts are so fundamental that one can expect to find them in virtually all systems of law. Thus it is correct to refer to "ownership" in customary law if one adopts Paton's statement that "[i]n every system there is one method of enjoyment of property which is more extensive than the others, and to this relationship the term 'ownership' is normally applied."[46] This is in accord with repeated references in the *Richtersveld Community* case to the ownership of their land.[47] The same principle holds for rights other than ownership such as the "widow's servitude" in customary law, a right which should not be referred to as a "*usufruct*", "*usus*" or "*habitatio*".[48]

6 THE BHE, SHIBI AND SOUTH AFRICAN HUMAN RIGHTS COMMISSION CASES

6 1 The facts and the decisions

In the *Bhe* case, Ms Bhe and two others brought an application on behalf of Ms Bhe's two minor daughters, Nonkululeko and Anelisa, whose father was Mr Vuyo Elius Mgolombane (the deceased).[49] He had had no other children.[50] He was survived by his father who claimed to be the heir.[51] The main asset in the estate was a temporary informal shelter and the property on which it stood.[52] Until his death the deceased supported Ms Bhe and the two children who were dependent on him.[53] The decision in this case was that

(i) it is declared that Nonkululeko Bhe and Anelisa Bhe are the sole heirs of the deceased estate of Vuyo Elius Mgolombane, registered at Khayelitsha Magistrate's Court under reference no 7/1/2-484/2002;

(ii) Maboyisi Nelson Mgolombane is ordered to sign all documents and to take all the other steps reasonably required of him to transfer the entire residue of the said estate to Nonkululeko Bhe and Anelisa Bhe in equal shares;

(iii) The Magistrate, Khayelitsha, is ordered to do everything required to give effect to the provisions of this judgment.[54]

In the *Shibi* case Charlotte Shibi (Ms Shibi) had had a brother, Daniel Solomon Sithole, who died intestate, and who had had neither a wife nor children and was not survived by a parent or grandparent. His nearest male relatives were his two cousins, Mantubani Sithole and Jerry Sithole.[55] The assets in the estate are said in one paragraph to be R11,468.02[56] but the final order[57] includes a reference to an additional amount of R11,505.50.

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46 Kerr *Customary Law* 9–10, ch 8 esp at 62.
47 See paras 64, 74, 96.
48 Kerr *Customary Law* 90–94.
49 Para 10.
50 This fact is not stated in either the majority or minority opinions but can reasonably be inferred.
51 Para 18.
52 Para 14.
53 *Ibid.*
54 Para 136 11(a).
55 Para 21.
56 Para 24.
57 Para 136 11(b).

The decision in this case was that

(i) it is declared that Charlotte Shibi is the sole heir of the deceased estate of Daniel Solomon Sithole registered at Pretoria North Magistrate District of Wonderboom under the reference no 7/1/2-410/95;

(ii) Mantabeni Freddy Sithole is ordered to pay Charlotte Shibi the sum of R11,505.50;

(iii) Jerry Sithole is ordered to pay Charlotte Shibi the sum of R11,468.02.[58]

In the *South African Human Rights Commission* case, the Commission and the Women's Legal Centre Trust brought an application claiming[59] that the whole of s 23 of the Act, alternatively subsections (1), (2) and (6) of s 23, should be declared unconstitutional and invalid because of their inconsistency with the Constitution's equality provisions (s 9), the right to human dignity (s 10) and the rights of children under s 28 of the Constitution.

The relevant part of the Court's order reads:

1. Section 23 of the Black Administration Act 38 of 1927 is declared to be inconsistent with the Constitution and invalid.
2. The Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R200) published in Government Gazette No. 10601 dated 6 February 1987, as amended, are declared to be invalid.
3. The rule of male primogeniture[60] as it applied in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.
4. Section 1(4)(b) of the Intestate Succession Act 81 of 1987 is declared to be inconsistent with the Constitution and invalid.
5. Subject to paragraph 7 of this order, s 1 of the Intestate Succession Act 81 of 1987 applies to the intestate deceased estates that would formerly have been governed by s 23 of the Black Administration Act 38 of 1927.
7. In the application of ss 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 81 of 1987 to the estate of a deceased person who is survived by more than one spouse:
   (a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased,
   (b) Each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and

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58 *Ibid.*

59 Para 31, footnotes omitted.

60 For a detailed study of relevant court cases on the customary law rule of male primogeniture and an extensive survey of the various Papers on the subject published by the South African Law Reform Commission see Knoetze "Geskiedenis van die manlike eersgeboorteregsreël in die inheemse reg" 2003 *Obiter* 344; 2004 *Obiter* 1, 308. See further Knoetze "Customary Law of Succession in a dualistic system" 2005 *TSAR* 137 and Venter & Nel "African customary law of intestate succession and gender (in)equality" 2005 *TSAR* 86.

(c) Notwithstanding the provisions of sub-para (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.[61]

8. In terms of s 172(1)(b) of the Constitution, the orders in paras 2, 3, 4, 5 and 6 of this order, shall not invalidate the transfer of ownership prior to the date of this order of any property pursuant to the distribution of an estate in terms of s 23 of the Black Administration Act 38 of 1927 and its regulations, unless it is established that when such transfer was taken, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicants brought challenges in this case.
9. In terms of s 172(1)(b) of the Constitution, it is declared that any estate that is currently being administered in terms of s 23 of the Black Administration Act 38 of 1927 and its regulations shall continue to be so administered, despite the provisions of paras 2 and 3 of this order, but subject to paras 4, 5 and 6 of this order, until it is finally wound up.
10. Any interested person may approach this Court for a variation of this order in the event of serious administrative or practical problems being experienced.

6 2 The Court's two chief reasons

The two chief reasons advanced by the court were:

(1) "section 23 of the Act and its regulations are manifestly discriminatory and in breach of s 9(3) of our Constitution",[62] and
(2) "the official[63] system of customary law of succession is incompatible with the Bill of Rights."[64]

6 3 The treatment by the Court of the choice of law rules

With respect, the first reason referred to above does not distinguish sufficiently clearly between the rules for the choice of law (subsecs 23(1), part of (2), and (3) and Regulation 2) on the one hand and rules on the administration of estates[65] and the selection of the heir or heirs on the other hand. The court knew that subsecs 23(1), part of (2), and (3) and Regulation 2 were choice of law rules.[66] Such rules should not be branded as inequitable and/or unjust if some of the rules to the application of which they lead are inequitable or unjust while other rules to the application of which they also lead are equitable, just and in accordance with *ubuntu*. The latter is the case with the customary law rules on oral dispositions in expectation of death, sometimes referred to as death-bed dispositions, but it is not necessary that the person concerned has to be literally on his death-bed.[67]

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61 Para 136. 2, 3, 4, 5, 6, and 7.
62 Para 68.
63 The word "official" will be discussed below in section 6.5.1.
64 Para 97.
65 The decision in *Moseneke v The Master* 2001 (2) BCLR 103 (CC); 2001 (2) SA 18 (CC) is on the rules on the administration of estates only: see Kerr "Customary law at the beginning of the twenty-first century: more systems of law than one in a single court structure" 2002 *Speculum Juris* 1 17–24.
66 In the majority opinion see para 66 line 8. In the minority opinion see para 142.
67 On these dispositions see Kerr *Customary Law* 113–118. On the possibility of continuing choice of law rules if the overall result is satisfactory in some cases, even though overall result is unsatisfactory in other cases, see section 4 of this article above. This possibility was not considered by the court. The result was that the whole of section 23 was declared invalid.

Oral dispositions in expectation of death are the customary law equivalents of written testaments in other systems of law.[68] Now that s 23 has been declared invalid the authority to apply customary law is section 211(3) of the Constitution and para 41 of the majority opinion. On this authority the option to make oral dispositions continues to exist.

The reasons given by the majority in their paras 60 and 61 for declaring the whole of s 23 invalid were that

(1) s 23 was "a racist provision which is fundamentally incompatible with the Constitution"; and

(2) "[s] 23 cannot escape the context in which it was conceived. It is part of an Act that was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of 'European' descent. The Act was part of a comprehensive exclusionary system of administration imposed on Africans . . .".

With respect, in so far as the choice of law rules in s 23 were concerned, the arguments in paras 60 and 61 do not appear to be correct. There were two provisions on the choice of law in the Act in 1927:

(1) subsec 11(1), a general rule for cases in Native Commissioners' Courts (as they were then called) where both parties were Natives (as they were then called) and questions of customs followed by them were involved; and

(2) subsecs 23(1), part of (2), and (3) on the choice of law in succession.[69]

In 1988, section 11(1) was repealed and was succeeded by those parts of subsec 1(1) of the Law of Evidence Amendment Act 1988, which dealt with customary law ("indigenous law" in the terminology of that Act). It is anomalous to have rules of customary law in an Act about foreign law.[70] But if, as para 61 claims, any provision that was conceived as part of Act 38 of 1927 leads inevitably to a declaration of invalidity those parts of subsec 1(1) of the Law of Evidence Amendment Act which deal with customary law would have to be declared invalid. However, the majority[71] "emphasised" that "this judgment is concerned with intestate deceased estates which were governed by section 23 of the Act *only*".[72] Hence I suggest that subsec 1(1) of the Law of Evidence Amendment Act remains in force until a new Act dealing with the application of customary law is passed. (At the time of writing the South African Law Reform Commission is considering such a project.) It follows, with respect, that the approach in para 61 cannot be considered to be correct.

There is a further point. If the argument in paras 60 and 61 is correct, the whole of the Natal Code of Zulu Law[73] is incompatible with the Constitution – even those parts of it that deal with chiefs, personal status, and family law –

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68 Kerr *Customary Law* 113–118.

69 Note that the second sentence of subsec 23(3) as enacted in 1927 was deleted in 1929, and the earliest predecessor of Regulation 2 was issued to allow more scope than before for estates to devolve under South African common law.

70 See Kerr "Customary Law in Magistrates' Courts and in the Supreme Court" 1986 *SALJ* 526 537–538; and "Judicial notice of foreign law and of customary law" 1994 *SALJ* 577 592. See also Olivier in Sanders (ed) *The Internal Conflict of Laws in South Africa* (1990) 51.

71 Para 131.

72 Emphasis added.

73 Proclamation R 151 of 1987.

because it was brought into force by powers given in terms of another section of the Act (s 24). As indicated above, in my view the argument in paras 60 and 61 is not correct; but if it is this view which is not correct, and the arguments in paras 60 and 61 are correct, the clear logical consequence is that those portions of s 1(1) of the Law of Evidence Amendment Act which deal with customary law, as well as the whole of the Natal Code of Zulu Law, are incompatible with the Constitution.

6 4 The history of the problem

Another point about para 61 needs to be mentioned. The majority's view of history is open to criticism. It (the majority) alleges in the last three words of para 61 that s 23 "created" what it described in the second sentence of that paragraph as "a comprehensive exclusionary system of administration." With respect, this does not seem to be correct. What subsecs 23(1), part of (2) and (3) and Regulation 2 did was to continue the approach concerning the choice of law begun more than 60 years before, when the Cape Native Successions Act 18 of 1864 and the British Kaffrarian Ordinance 10 of 1864 were promulgated. These statutes laid down that the customary law of intestate succession was to be applied in the circumstances they described. As in the case of subsecs 23(1), and (3) and Regulation 2 the 1864 statutes made no mention of what the rules of succession, as distinct from the choice of law rules, were. In the 1880s, after three years devoted to investigating the question (and other questions also), the 1883 Commission in its Report[74] found that those within the compass of customary law appreciated highly, and were strongly attached to, their system of succession.

After their law was recognised, something needed to be done to inform magistrates and others involved with customary law what its provisions, including the rules of succession, were. The Cape chose the way of precedent and textbooks, while Natal chose codification.[75]

With respect, those who consider the history of customary law without referring to the early statutes and the 1883 and 1903 Commission[76] Reports deprive themselves of the best means of gaining an understanding of the subject.

6 5 How many kinds of customary law are there?

In different places in the opinions mention is made of "official customary law"[77] and "the official rules of customary law";[78] of "true customary law";[79] and the "true content of customary law";[80] of "living customary law";[81] of "the real rules

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74 See the Report 38 para 101.
75 See Kerr "The reception and codification of systems of law in Southern Africa" 1958 *Journal of African Law* 82 89–100.
76 The Report of the South African Native Affairs Commission 1903–1905 with Minutes of Evidence and Appendices.
77 Paras 86, 87, 97, 151.
78 Para 84.
79 Para 86.
80 Para 109.
81 Para 87, 154, 219.

of customary law";[82] and of "academic law".[83] In one paragraph it is said that "indigenous law is not written".[84]

6 5 1 State (or "official") customary law

The phrase "official rules" is defined as meaning "the rules of customary law set in statute, case law and various writings".[85] "Case law" includes cases such as the *Richtersveld Community* one, where the Court recognised the Nama people's rights originating in their custom(s). That recognition brought those rules within customary "law" because, in the context of courts enforcing rules, "law" means State law. The reason is, as I have pointed out elsewhere,[86] that State law consists of the rules constitutive of the State and the rules having State authority. "Official customary law", then, consists of those rules of customary law that have State authority. Those rules (ie rules of State customary law) may be found in statutes such as the Natal and KwaZulu codes, or in precedents, ie decisions of State courts, including reports of the Native Appeal Courts and their successors, even if those decisions are contrary to what the law used to be, or are based on the opinions of Commissions, or of witnesses before the courts or before Commissions, or of text writers.[87] Once having become part of State law by promulgation in a statute or adoption in a precedent (whether the court has discovered its content in earlier precedents or a custom has been proved by evidence before the court), changes may only be made by state procedures (eg the amendment of a statute or modification by a later court case, which could include proof by evidence of a change adopted by the people themselves).[88] This means that, generally speaking, State customary law takes a longer time to change than do customs that have not been recognised by the State.

6 5 2 Flexible, unwritten, customary law

In circumstances in which there is no *written* record of rules and precedents rules continue to be effective as long as they are followed by the people concerned. If they cease to be followed they will quickly cease to exist by being abrogated by disuse[89] and will soon be forgotten. This contributes to the "flexibility" often claimed for customary law.[90] However, in modern circumstances, a return to the position where there was no *written* record of the customary law of most tribes is not possible. Hence, with respect, I suggest that except in a few instances it is not accurate to say, as in the minority opinion in para 153, quoting para 53 of the Constitutional Court's opinion in the *Richtersveld Community* case, that customary law "is not written". The two cases are distinguishable. In the *Richtersveld Community* case the Court had before it one of the few instances when a modern

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82 Para 112.
83 Paras 151 and 152.
84 Para 153, quoting para 53 of the decision in the *Richtersveld Community* case in the CC.
85 Para 84n103. Note that the phrase "various writings" is considered by Ngcobo J in para 154 to include textbooks.
86 Kerr *Law and Justice* ch 2.
87 Kerr *Customary Law* ch 3 and 4. The role of text writers is dealt with at greater length below.
88 *Ibid*. See also section 6.5.3 below.
89 *Ibid* and para 81.
90 Paras 45, 110. See also para 81.

court has been asked to recognise for the first time a body of customary law not previously adjudicated upon and of which there was very little, certainly insufficient, *written* record,[91] whereas in the *Bhe* trilogy of cases the Court was dealing with a branch of customary law on which there had been legislation,[92] Commission reports, and reports of court decisions for more than 100 years. If the proposition that customary law "is unwritten" were to be adopted as a correct description of modern customary law, all courts up to and including the Constitutional Court would have to disregard entirely both Codes of Zulu Law, all the reports of customary law cases and all the records of Commission reports and textbooks. This they cannot do, because subsec 211(3) of the Constitution clearly envisages written sources being applied. It refers to "any legislation that specifically deals with customary law." If legislation is recognised as an appropriate type of customary law, so must other written sources be.

6 5 3 Requirements for the proof of customs

Before leaving this topic it is advisable to mention that if a court is asked to receive evidence of a custom hitherto not recognised by the State there are rules to be followed. Here again a distinction needs to be drawn. Is the court being asked to recognise a body of law such as the law of the Nama people in the *Richtersveld Community* case, or is it being asked to accept a single alleged new rule that is different from an existing customary law rule? In the former case, where a body of law is recognised it does not have to be proved that each and every part of it has been in existence for a long period of time. Suppose, for example that there had been a change in one of the rules of the Nama people not many years before the case. The rule as changed would be recognised as part of the system of law at the time recognition was given. The *Bhe* trilogy of cases adds another requirement: the court should test the customs being recognised against the Bill of Rights.[93] At the same time the court cautioned against granting recognition on "insufficient evidence and material".[94] In the latter case, that in which the court is being asked to recognise a rule contrary to, or varying, existing recognised requirements, the court "must be satisfied that this variation has been freely, frequently and consistently observed over a long period, and is just and reasonable."[95] The reason is that it would not be fair for the State to enforce a rule against a litigant who is ignorant if it unless he had had every opportunity of knowing of it and ought to have known of it.[96]

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91 Cf para 109.

92 On the point that there is a body of statutory customary law, and for examples of statutes within it, see Kerr *Customary Law* 13, 15–16, 70–76, 159.

93 The latter part of para 109. This requirement fulfils the same purpose, but is more far-reaching than, the first proviso to subsec 1(1) of the Law of Evidence Amendment Act.

94 Para 109 *in medio*. Cf Schoeman "Custom and Usage" *LAWSA* Vol 5(2) First Reissue paras 373–377.

95 *Sikwikwikwi v Ntwakumba* 1948 1 NAC 23 (S) 24 per Sleigh P. Note that *Van Breda v Jacobs* 1921 AD 330 334 which has similar requirements was referred to with approval in the *Richtersveld Community* case para 27. Note also the latter part of para 109 in the *Bhe* case.

96 See Kerr "Trade Usage and Custom" 1970 *SALJ* 403 406–407 and the citation with apparent, but not express, approval in the *Bhe* case para 109n131. See further Schoeman *LAWSA* Vol 5(2) paras 375–376.

6 5 4 Academic "law"?

In para 152 in *Bhe*, Ngcobo J, dissenting, citing footnote 51 to para 52 of the unanimous opinion in the Constitutional Court in the *Richtersveld Community* case and other sources, says (emphasis added):

> *"It is now generally accepted* that there are three forms of indigenous law: (a) that practised in the community; (b) that found in statutes, case law or textbooks on indigenous law (official); and (c) academic law that is used for teaching purposes. *All of them differ . . .*"

Broadly speaking, State law as defined above[97] consists of rules, so if this statement is correct, there must somewhere be a body of rules used for teaching purposes which differs from the rules of State ("official") customary law.[98] To give a hypothetical example, if the statement in para 152 quoted above were to be correct there would be some academic lawyers who in teaching their classes would say to their students:

> "The Constitutional Court in the *Richtersveld Community* case says that the Nama people have customary law ownership of the land in question.[99] I have been doing research in the field and now tell you that that is wrong. If any of you say in your examination that the Court is correct you will fail."

I know of no academic lawyer who would make such a statement. Nor do I know of any body of rules such as that referred to above. Academic lawyers of course are entitled to criticise courts,[100] so it would be in order for an academic lawyer faced with research which casts doubts on statements by a court to say to the class:

> "I have found in my research that the people in question consider their law to be something other than that which the Court says it is. It is to be hoped that the next time the matter comes before the Court the earlier Court statements will be reconsidered or that the legislature will make a new statutory rule."[101]

Leaving hypothetical examples behind, in discussing the learned Justice's statement in *Bhe* para 152 one has to ask three questions,

(1) What did Professor Bennett say; and what did he mean?

(2) What did the Constitutional Court in the *Richtersveld Community* case in para 52n51 understand the passage to mean; and was it correct in so understanding it?

(3) Do the views put forward in *Bhe* para 152 differ in any way from those in *Richtersveld Community* case in para 52; and is there "general acceptance" of that formulation?

Each of these will be discussed in turn.

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97 See section 3.

98 Note that rules in textbooks are excluded from "academic law" as they are said by the learned Justice to be part of State ("official") law.

99 See paras 64, 74, 96.

100 See Kerr "Judges and academic lawyers on the relative values of justice and certainty, should the two conflict, and on the hierarchy of authority" 1985 *SALJ* 403–406. See also the following footnote.

101 I consider that the Court in the *Richtersveld Community* case was right on the point of ownership but other academic lawyers are at liberty to differ if they so wish. In the *Bhe* trilogy of cases, the majority contemplated future legislation by the legislature (para 117) so presumably does not object to, indeed encourages, academic lawyers to suggest improvements not only to existing legislation but also to existing case law.

6 5 4 1 Professor Bennett's statement

In the Preface to his *Sourcebook*[102] at vi cited in the unanimous opinion in the *Richtersveld Community* case in para 52n51 Bennett says:

> "The inverted commas now regularly flanking the term 'customary law' signify the skepticism felt about its authenticity. Three quite different meanings of this term must be distinguished: the official body of law employed in the courts and by the administration (this diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually lived by the people. Our knowledge of customary law in the last sense is, for want of up-to-date empirical studies, necessarily a matter of conjecture."

The "skepticism felt about its authenticity" is discussed at length in his first chapter,[103] where the learned author shows that it arose in the minds of those who were trying to formulate a *theory* of law rather than a body of detailed rules. At the end of that chapter he says:

> "The modern legal order is now openly acknowledged to be a pluralistic one, a series of interrelated normative spheres. It includes the formal legal code, containing a written version of customary law, and of course the common law [*sc* non-statutory customary law[104]], both of which are regularly applied in the official courts and in the state bureaucracy. Then there is a version of customary law that has been recorded by anthropologists and lawyers. This is used in more informal contexts and for teaching purposes. And finally there is the customary law that is actually lived out by the people and applied in various traditional and informal tribunals."[105]

There is an important difference between the above two statements. In the first the learned author says that one of the meanings of the term "customary law" is "the law used by academics for teaching purposes" which suggests that "the law used by academics" is a separate *system of law* with its own institutions which differs from official customary law and from "the law actually lived by the people." In the second, he says that "there is a version of customary law that has been recorded by anthropologists and lawyers" and "is used . . . for teaching purposes." Being only a "version" of customary law the suggestion is that teachers of law use records compiled by anthropologists and lawyers more frequently than do the courts, and that the records are being used to amplify the "official" system of law, not to set up a separate system of law. In so saying the learned author is following the standard view of persuasive authority in the courts and in the minds of writers on customary law. Thus the court in *Sibasa v Ratsalingwa and Hartman NO*[106] referred to the work of the distinguished anthropologist Professor Schapera who wrote three books on Tswana law. The conclusion is clear: Bennett includes the published researches of those with knowledge of the subject as a persuasive source if there is an action in court and as worthy of consideration when an academic lawyer teaches a class; but when there are binding sources of law (legislation, precedent or customs already proven in Court), these

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102 Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991).

103 *Sourcebook* 1–50.

104 Now that customary law cases are coming more frequently before the courts the courts are tending to use the phrase "the common law" to mean "South African common law" but that does not appear to be the meaning here. Presumably the learned author intended case law to fall within the phrase.

105 Bennett *Sourcebook* 49–50 (footnotes omitted).

106 1947 4 SA 369 (T) 386–390.

latter prevail until altered in one of the ways recognised by the courts. This is my approach also.[107] There is no separate system of law called "academic law".

6 5 4 2 The *Richtersveld Community* case

To turn to the second question above: in the *Richtersveld Community* case what did the Court (it was a unanimous opinion) understand the passage to mean? The answer is in its para 52 with its footnote 51. The paragraph is concerned with ascertaining customary law "readily and with sufficient certainty", as laid down in the Law of Evidence Amendment Act. Bennett's statement in his Preface was cited, as footnote 51 says, to remind those involved of "the need for caution in this respect." After referring to textbooks and to precedents the Court said:

> "Bennett points out that, although customary law is supposed to develop spontaneously in a given rural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term 'customary law' emerged with three quite different meanings: the official body of law employed by the courts and by the administration (which, he points out, diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually lived by the people."

It is regrettable that the Court did not consider what the learned author said at the end of his first chapter quoted above.[108] With respect, it is also regrettable that the Court did not test the theory, as it thought the theory to be, against the subject matter before it. The Court in that case was considering the question whether or not the Richtersveld community owned the area of land in customary law, a subject that did not require any investigation into what academic lawyers taught their classes about ownership of land in Nama law, there being, so far as one can discover, no teaching on the subject. Hence, with respect, on the last mentioned subject anything the Court said was said *obiter*. Further, because Bennett is to be taken to have meant what he said on p vi to be in line with what he said at the end of chapter 1, with respect, the Court does not appear to have been correct in what it considered the learned author's position to be.

6 5 4 3 The *Bhe* trilogy of cases

The statement in the minority opinion in *Bhe* is quoted above at the beginning of this section on "Academic 'law'?" It differs from the statement in the *Ritchtersveld Community* case in two respects, first, that in the statement in para 152 of *Bhe* all three of the forms are said to differ, and secondly, that it claims that the formulation proposed "is now generally accepted." With respect, if there were such a form as "academic law" separate from State ("official") customary law, it would not differ on the question of the customary law of the Nama people on ownership of the land in question. The reason why there would not be the alleged difference is that all the academic textbooks and other "writings" would be part

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107 See the entries in Kerr *Customary Law* 199–204 where anthropologists and various authors of different backgrounds are mentioned as worthy of consideration. Professor Bennett's approach is the same – his books abound with such references: the bibliography in his *Sourcebook* (the one cited by the Constitutional Court in the *Richtersveld Community* case in its para 52n51) is 19 pages long and in his latest one, *Customary Law in South Africa* (2004), the bibliography takes up 16 pages in small print.

108 Bennett *Sourcebook* 49–50.

of the State ("official") customary law. Ngcobo J himself puts the textbooks in that category;[109] and the majority opinion in footnote 103 to para 84 says that "[f]or the purposes of this judgment, 'official rules' refers to rules of customary law set in statute, case law and various writings".

It is clear from what is said above at the beginning of this section on "Academic 'law'" that I am unaware of any academic lawyer who would accept the statement after giving it detailed consideration. If there are such academic lawyers I would be critical of their standpoint. One has already expressed an opinion which does not support the statement although the article is claimed in footnote 16 to para 154 to be authority for it. The article entitled "Male primogeniture in African customary law – are some now more equal than others"[110] is said in the footnote citing it to be by Bekker and De Kock but the Journal says that the author is De Koker. She says[111] that "'Academic' African customary law is . . . a flawed mixture of 'official' and 'non-official' African customary law that is presented to students in order to introduce them to the dichotomy of modern African customary law." (Readers will presumably be aware of the fact that "dichotomy" refers to division into two, not into three.) If there were a system of law called "Academic law", it would have been mentioned by Bekker and Maithufi in "The dichotomy between 'official customary law' and 'non-official customary law'"[112] but there is no mention of it.[113] There is also no mention of it in Bekker *et al Introduction to Legal Pluralism* where, if it existed, it would have been mentioned in ch 1 by Professor Van Niekerk and in ch 2 by Professor Bennett.

The third and last authority mentioned in *Bhe* para 152n16 as supporting the minority opinion is *Mabena v Letsoalo*.[114] With respect, this decision does not provide any support for those who wish to recognise "academic law" as a separate system of law different from State ("official") customary law. Bennett refers to the case in his ch 2 of Bekker *et al*[115] for a proposition that flows from the normal approach of academic lawyers' comments on decided cases and does not seem to have any relevance to the theory that academic lawyers teach a separate system of law. What academic lawyers teach is the system of law, or systems of law, when, as in South Africa, there are more systems than one, recognised by the Constitution, parliament and the courts.

In conclusion I suggest, with respect, that there is no separate system of law called "academic law". Professor Richman Mqeke is of the same opinion.[116]

6 6 Responsibility for the previous position

Under the Constitution the body primarily responsible for changes in law is the legislature. Hence it is primarily responsible for the fact that there was no large-scale reform of customary law before the decision in the *Bhe* trilogy of cases.

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109 See his statement in para 152(b) quoted above at the beginning of this section.
110 1998 *Journal for Juridical Science* 99.
111 113.
112 1992 *Journal for Judicial Science* 47.
113 See esp 58–59 where it would have been mentioned had it existed.
114 1998 2 SA 1068 (T) 1074–1075.
115 *Introduction to Legal Pluralism* 23.
116 See Mqeke "Legal Pluralism in the Eastern Cape from a Historical and Contemporary Perspective" 2004 *Speculum Juris* 318 322n24.

With respect, there seems to be a marked lack of interest in customary law in the legislature. Six years before the cases came before the courts the South African Law Reform Commission began to submit to the legislature a series of proposals.[117] Not only has there been no legislation, but the responsible Minister was unable to inform the Court when the first Act would appear on the statute book.[118] In 1994, a recommendation was put forward that a special Commission like the 1883 one should be set up to pursue reform in customary law.[119] An offprint of the article in which the recommendation was made was sent to each of the principal political parties without result. The recommendation was published again in 1997,[120] again with no result. Attention was drawn for the third time to the desirability of a special Commission in 2001,[121] and for a fourth time in 2002,[122] again with no result. Had a Commission been set up when it was first recommended and had it worked as speedily as the 1883 one, its work would now have been completed.[123] It must also be remembered that now we have the Bill of Rights it is not possible to go back to the old system as it was.

A contributory causal factor of the lack of legislative activity concerning customary law has been the absence of requests for reform from those in authoritative positions amongst persons subject to customary law. Why the National House of Traditional Leaders did not make any submissions when they were requested by the Court to do so was not known to the Court.[124] As regards the early history it must be remembered that those subject to the customary law of succession who made their wishes known were given what they desired: the recognition of their rules on succession in the 1864 statutes referred to above.[125]

6 7 Who is subject to, or entitled to take the benefits of, customary law?

The opinions in *Bhe* are very critical about s 23. The majority opinion speaks, clearly with approval, of a submission concerning "its blatant discrimination on grounds of race, colour and ethnic origin"[126] and says that it "was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of 'European' descent."[127] The minority says that it "put in place a succession scheme which discriminates on the basis of race and colour applying only to African people."[128]

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117 Para 114.
118 *Ibid*.
119 See Kerr "Customary Law, Fundamental Rights, and the Constitution" 1994 *SALJ* 720 732–735.
120 See Kerr "The Bill of Rights in the new Constitution and Customary Law" 1997 *SALJ* 346 352–353.
121 See Kerr "Issues arising from a challenge to the constitutionality of the customary law of intestate succession" 2001 *THRHR* 320 328–329.
122 See Kerr 2002 *Speculum Juris* 1 20–21.
123 The 1883 Commission took only three years to complete its task. Allowing two years for debates in the legislature, new legislation would already have been passed.
124 See paras 4 and 106.
125 In Section 6.4 of this article. On the point that the 1864 statutes were the first statutes see also Van Niekerk in Bekker *et al Introduction to Legal Pluralism in South Africa* (2002) 8.
126 Para 60.
127 Para 61.
128 Para 143.

With respect, it appears that the Court did not give sufficient attention to the fundamental difficulty. That difficulty is that South African common law is territorial in extent, bringing within its scope (subject to its choice of law rules) all those within the geographical boundaries of the State, whereas customary law is personal in extent and so pertains to some only of the inhabitants.[129] It follows that there is, as in 1927 there was, no need to add further identification to describe those subject to South African common law; but there is a need to identify those subject to, or entitled to take the benefit of, the system of law that is personal in extent, namely customary law, a need that continues to exist in other branches of the law.[130] How then are the people within its scope to be identified?

The answer to the above question favoured by the Court appears to be: "Describe them as 'Africans.'"[131] But who are "Africans"? The primary meaning of the word is anyone living on the continent of Africa. This includes people of any origin so would include everyone who, or whose ancestors, came from anywhere else in the world. Clearly, the primary meaning would not be correct in the present context. Nor would the secondary meaning be, namely everyone born in Africa, or even in South Africa, because that would include children born in South Africa of parents who, or whose ancestors, came from anywhere else in the world. Presumably a third meaning is intended by the Court, namely those whose ancestral original origins were in Africa,[132] excluding the San and Khoi, who were the original inhabitants.[133] The opinions are silent on the reasons for the Courts preference for the word "Africans". It might be considered that the reason, or a reason, was a desire to avoid referring to ancestry or origins because subsec 9(3) of the Bill of Rights outlaws unfair discrimination on, *inter alia*, grounds of "race" or "ethnic or social origin." This is unlikely to be a correct deduction because it is only *unfair* discrimination that subsec 9(3) of the Bill of Rights prohibits and it is not *ipso facto* "unfair" to refer to one's, or someone else's, ancestry. An example will make this clear. Some tribes have a fixed number of *ikhazi* (the cattle transferred under a *lobola* contract)[134] while others do not.[135] If there is a *lobola* contract referring to a marriage (whether the marriage be by South African common law or customary law) the courts will allow an action for the fixed amount even though the number is not expressly mentioned in the contract, provided that the tribe is one of those with a fixed number.[136] If the Court were to require proof of membership of the tribe in question the only way it could be proved would be to lead evidence of ethnic origin of the persons

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129 See Section 3 of this article above.
130 For example Persons, Contract, Delict.
131 See eg paras 32, 61 and 66 in the majority opinion and paras 142, 162 and 163 in the minority one.
132 Note "Africa", not "South Africa", because they also migrated into South Africa.
133 See above, the first two paragraphs of section 4 of this article, on the point that so little is known about San law and Khoi law that one cannot assume that their laws, although customary in origin, are the same as what is at present referred to as "customary law". In other words, there could be "San customary law", "Khoi customary law," and "customary law" as at present understood.
134 See section 3 of this article above.
135 *Ibid*.
136 *Ibid*.

involved.[137] Proving the ethnic origin in such circumstances would not be incompatible with s 9(3) of the Bill of Rights because there would be no element of unfairness. Hence, as the majority will have been well aware, there are circumstances in which mentioning racial or ethnic origin[138] is in order, ie not incompatible with subsec 9(3) of the Bill of Rights. In the result there appears to be no way of discovering why the majority in their para 61 condemned the use of the word "European" by putting it within inverted commas. (They did not do this with the word "African".) "Europe" is a geographical term just as "Africa" is. What the framers of Reg 2 were doing when they used the word "European" was indicating that in certain circumstances estates were to devolve under South African common law. (This statement is not to be interpreted as approval of Reg 2 as a whole. I have criticised it,[139] and so have others.)

The above example shows that, with respect, the choice of law rules in sec 23 ought not to have been described in the words approved by the majority in para 60, namely

> "a racist provision . . . inconsistent with ss 9 and 10 of the Constitution because of its [s 23's] blatant discrimination on grounds of race, colour/and ethnic origin and its harmful effects on the dignity of persons affected by it."

In the context of paras [60] and [61] it is clear that the majority intended the use of the word "discrimination" to mean "unfair discrimination." (That is the kind of discrimination described in subsec 9 (3) of the Constitution where the word "unfairly" is used.) When the system of law is a personal one and the people to whom it applies are members of a tribe or race and when the rule leads to the application of good law, arguably better law than that in the law common to everyone within the State's territory,[140] it is not unfair to have a choice of law rule which includes a reference to the ethnic origin or race of the persons in question.

6 8 Subsection 23(2)

Subsection 23(2) was partly a choice of law rule and partly a rule determining whom the beneficiary was to be. It was enacted to avoid "having to sell, subdivide or transfer shares in these small allotments."[141] Thus Whitfield numbered among the "recommendations" of the then system that "the subdivision of land and property [were] provided against, and that upon the kraal head's decease there [was] no interruption of the uses to which his property was devoted during his lifetime . . .".[142]

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137 Assuming that there are no inter-tribal choice of law problems the ethnic origin of both parties would be relevant: If there were to be an inter-tribal choice of law problem the ethnic origin of the person (singular) would need to be enquired into.

138 Section 9(3) of the Bill of Rights mentions "race" and "ethnic . . . origin" separately but their meanings overlap to a great extent. A common usage is that "race" refers to a larger and more important group than one designated as having the same "ethnic origin".

139 See Kerr *Customary Law* 167ff. As the Regulation as a whole has been declared invalid, there is no need to discuss its details.

140 See subsections 7.2 and 7.3 and section 8 of this article.

141 Per Curiam in *Ndema v Ndema* 1936 NAC 15 (C&D) 18 (a quotation from the reasons given by the court *a quo* approved at 19). The small size was normally four morgen of arable land and one half acre of residential land: see Kerr *Customary Law* 158.

142 Whitfield *South African Native Law* (1948) 314.

6 9 Summary

The orders the Court issued in favour of gender equality and equal treatment of children did not require condemnation of the choice of law rules in subsecs 23(1) part of (2), and (3). The orders could have been issued after consideration of the narrower subject of the customary law rule on male primogeniture plus the rule on universal succession. However, the Court's powers were not limited and it declared invalid also the whole of s 23 and the Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R200 of 6 February 1987 as amended). These therefore are no longer part of the law. One of the consequences is that the Act no longer contains any choice of law rules.

Although the subject of the administration of estates does not figure in the order made in para 136. statements by the majority in paras 131 to 133 make it clear that apart from some transitional cases "[a]ll estates that fall to be wound up after the date of this judgment [15 October 2004] shall be dealt with in terms of the provisions of the Administration of Estates Act."[143]

In the second part of this article, I shall turn to examine the present position.

143 Para 133.

Gender discrimination in South African jurisprudence: An exercise in confusion

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1 INTRODUCTION

One is not born, but rather becomes a woman. No biological, psychological, or economic fate determines the figure that the human female presents in society: it is civilisation as a whole that produces this creature intermediate between male and eunuch.[1]

In the founding provisions of the South African Constitution, non-sexism is listed as one of the values on which the new, democratic state is to be founded.[2] And in the last few years much has indeed been done in the legislative arena to improve the status and equality of women.[3] To what extent these efforts have been successful in making equality a reality in women's lives, is not quite as clear. However, the purpose of this article is not to discuss that problem.

One of the perennial problems facing feminist theory is the question of "sameness" and "difference". This debate has tended to determine much of feminist theory, and feminist legal theory is no exception. Some argue that women are essentially the same as men and that this provides the basis for equality. Others argue that women are essentially different from men and that this is why women must be treated differently from men.[4] But, in a sense, this debate is futile because it disregards the underlying question, namely: on what basis do we decide that women are either the same as, or different from, men? Is it because of biological factors or cultural factors?

At the most basic level, these questions have to do with the relationship between sex and gender. Generally speaking, *sex* refers to the biological factors that determine whether a person is male or female. Determining sex therefore relies on features like chromosomes and hormones. "Sameness" feminists use the biological similarities between male and female as the basis for arguing that they

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1 De Beauvoir *The Second Sex* (1949) 33.

2 Section 1(b) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

3 Examples include the Choice on Termination of Pregnancy Act 92 of 1996; the Domestic Violence Act 116 of 1998; the Employment Equity Act 55 of 1998; the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

4 Eisenstein *The Female Body and the Law* (1988) 32 defines "difference" feminism as "homogeneity, meaning women are different, all in the same way, from men".

are the same. On the other hand, "difference" feminists also use these biological differences as the basis for their arguments. *Gender*, however, refers to cultural factors. It is the expectations of a society or group that determine who is regarded as a man and a woman respectively. Once again, both "sameness" and "difference" feminists use the similarities and differences in this regard to ground their arguments. The important point is that questions regarding the relationship between sex and gender are fundamental to the way in which theorists view equality.

This paper looks at these questions within the context of South African constitutional jurisprudence. In the first part of the paper, various feminist analyses of the relationship between sex and gender are discussed and analysed. The three approaches discussed are representative of three ways in which contemporary feminist legal scholars view the relationship between sex and gender. In the second part, a number of South African cases dealing with sex and/or gender will be analysed. This collection of cases is intended to illustrate the problems inherent in the various possibilities for dealing with the question of sex and gender. In the third part the insights gained from feminist legal theory (and specifically postmodern theory) will be applied to see what difference, if any, this might have made to the way in which these cases were decided.

2 TALKING ABOUT GENDER

Language is also not neutral. It is always embedded in discourse. It constructs meaning at the same time that it reflects meaning. It sets limits to what we can see and in some sense think.[5]

The Constitution prohibits discrimination on the basis of both sex and gender.[6] It is a basic presumption of interpretation of statutes that, if a statute contains two different words, they mean two different things. Consequently, the terms "sex" and "gender" presumably do not mean the same thing, but refer to two different grounds on which discrimination is prohibited. But it is not so clear exactly what those different grounds are. Cheadle, Davis and Haysom seem to suggest that this is in fact an easy question to answer. They state: "The distinction between sex and gender is well known. Whereas sex refers to biological characteristics, such as reproductive capacity, gender refers to the social attributes that are aligned with, but not dependent upon, sex." [7]

Meyerson better expresses the complexity of the distinction when she states:

> "Sexual discrimination is a matter of withholding a benefit from someone on the grounds that they are a woman, or a man . . . Discrimination on the grounds of gender, by contrast, involves withholding a benefit from someone on the grounds of a psychological characteristic they possess which social forces have caused to be correlated with their being a woman, or a man."[8]

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5 Eisenstein *The Female Body and the Law* 9–10.

6 See ss 9(2) and 9(4) of the Constitution.

7 Cheadle, Davis and Haysom *South African Constitutional Law: the Bill of Rights* (2002) 90.

8 See Meyerson "Sex and Gender in the South African Law Commission's Proposed Bill of Rights, the ANC's Draft Bill of Rights, and the Government's Proposals on a Charter of Fundamental Rights" 1993 *SAJHR* 291 293. Unfortunately, Meyerson also states that ". . . a non-sexist society would be a society in which there are no differences of gender." This tends to undermine her distinction.

These are fairly standard and traditional descriptions of the distinction between sex and gender.[9] But feminist theorists have always been more ambivalent about the distinction. On the one hand, they have insisted that biology (sex) is not destiny. In other words, the mere fact of being female should not disqualify women or legitimate discrimination against women. On the other hand, even when speaking about gender, they often express this in terms that are basically biological, in that they use the term "woman" as a synonym for female. That means that feminists do not necessarily always maintain the distinction between sex and gender. For example, feminists have tried to remedy the employment disadvantages suffered by child-minders by advocating that rights should be granted to all women. In other words, the inequalities created by *gender* (that is, the idea that women look after children) are solved by reference to *sex* (all women are advantaged). And, by an ironic twist, this serves to strengthen the stereotypes these feminists were trying to undermine in the first place.

The reason for this confusion is the traditional, modern or liberal feminist insistence on an essentialist approach. On this approach, essential characteristics are ascribed to all women, sometimes as being the same as those of men but most often as different from men. This idea that the concept "woman" corresponds to the essential nature of all females is an epistemological stance that is typical of modernist thinking. Like all modernist epistemologies, it has been attacked from post-modern perspectives.

In post-modern feminist theory, the epistemological question becomes more complex. If the essentialist and modernist approach is abandoned, it becomes virtually impossible to use the category "woman". If the concept "woman" refers to a multitude of contingent and shifting meanings, how can one legitimately use the term as if it had only one meaning? And if this concept can no longer be used, how is the feminist goal of equality to be achieved? Patterson states the problem in the following way:

> "If the modernist project of truth, right representation, legitimation, correspondence, and critique is abandoned, will feminist jurisprudence be left with tools adequate for the task of criticism and transformation?"[10]

This question addresses the epistemological basis of feminist jurisprudence. On the one hand, an essentialist understanding of "woman" will almost inevitably lead to equating sex and gender. On the other hand, a non-essentialist approach makes it impossible to speak of "woman" as a unitary construct. Various contemporary feminist legal thinkers approach this dilemma in different ways. In this article, the approaches of three contemporary feminist legal thinkers, Robin West, Joan Williams and Zillah Eisenstein, will be discussed. Their views are discussed to illustrate three ways of approaching the distinction between sex and gender in order to exemplify the problem rather than to supply solutions.

Robin West argues that modern legal theorists work with a basic "separation thesis" – the idea that the essence of being human lies in being separate from other human beings.[11] She regards this as a theory that is "essentially and

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9 I will not be using "gender" in its medical meaning here but will, instead, focus on the philosophical and (specifically) feminist distinction.

10 Patterson "Postmodernism/feminism/law" 1992 *Cornell LR* 254 279.

11 West "Jurisprudence and Gender" in Bartlett and Kennedy (eds) *Feminist Legal Theory: Readings in Law and Gender* (1991) 201.

irretrievably masculine" and "patently untrue" for women.[12] Women are always essentially connected to life and to other humans due to their experiences, particularly pregnancy, sex, menstruation and breastfeeding.[13] This leads to what she regards as the underlying idea of both cultural and radical feminism,[14] namely the "connection thesis" – the idea that "women are actually or potentially connected to other human life."[15]

In legal theory, this "connection thesis" is established differently by cultural and radical feminists respectively, particularly in regard to their views on morality. *Cultural feminists*, inspired by the work of Carol Gilligan,[16] are of the opinion that women view morality in terms of responsibility for others, while men view it in terms of rights and autonomy. This translates into a feminist legal theory that values connection with the "other" rather than fear of and separation from the "other" as is the case in masculine theory. This, in turn, leads to an emphasis on the feminist "ethic of care" as opposed to the masculine, liberal emphasis on an "ethic of justice". *Radical feminism*, on the other hand, tells the story of women's invaded, violated lives.[17] For them, the existential connection women have with other people is invasive, oppressive and destructive. This means that arguments regarding, for example, reproductive freedom, are not based on rights of any kind. Instead, they are based on the insight that pregnancy "is an injury and ought to be treated as such",[18] just as intimacy is intrusive for women in a way it can never be for men.[19]

Based on these two approaches, West argues that modern jurisprudence is masculine in two senses. In the first place, it does not reflect the values, dangers and fundamental contradiction[20] of women's lives.[21] For example, the Rule of Law values autonomy, but, at the same time, takes no notice of the danger of invasion prevalent in women's lives. In the second place, modern jurisprudence is masculine because it is about men and not about women.[22] The task of feminist jurisprudence should therefore be to unmask patriarchal jurisprudence and, at the same time, to reconstruct jurisprudence to include the ethic of care. West concludes by stating:

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12 West in Bartlett and Kennedy *Feminist Legal Theory* 202.

13 This idea is criticised by Mary Joe Frug as the "maternalisation" of the female body. See Frug "A postmodern feminist legal manifesto" in *Postmodern Legal Feminism* (1992) 125 129ff.

14 Cultural feminism, West states, is the idea that the difference between men and women is that women raise children and men do not. Radical feminism thinks that the difference lies in the fact that "women get fucked and men fuck". See Bartlett and Kennedy *Feminist Legal Theory* 206.

15 West in Bartlett and Kennedy *Feminist Legal Theory* 207.

16 See Carol Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1982).

17 West in Bartlett and Kennedy *Feminist Legal Theory* 213.

18 West in Bartlett and Kennedy *Feminist Legal Theory* 214. West is here concerned with the work of Shulamith Firestone *The Dialectic of Sex* (1970).

19 Andrea Dworkin *Intercourse* (1987) 147–167.

20 For West, the fundamental contradiction in women's lives has to do with the simultaneous desire for and rejection of both connection and individuation. See Bartlett and Kennedy *Feminist Legal Theory* 223–229.

21 West in Bartlett and Kennedy *Feminist Legal Theory* 230.

22 West in Bartlett and Kennedy *Feminist Legal Theory* 231.

> "Surely one of the most important insights of feminism has been that biology is indeed destiny when we are unaware of the extent to which biology is narrowing our fate, but that *biology is destiny only to the extent of our ignorance*."[23]

The problem with West's theory is the same problem prevalent in all essentialist feminist theory. She sees the category of "woman" as a single, unitary construct – as something that exists prior to legal discourse.[24] In essence, this is a modernist approach where "the truth" of what a woman is can be assessed from outside the discourse about women. Being a woman is the same as being female, and specific female experiences are ascribed to all women. This makes it possible to solve problems created by gender constructs by using a biological category. In other words, sex and gender are simply equated with one another. For her, feminist jurisprudence is impossible without the tools and assumptions of modernism. As a result, West's theory is an example of the problems created by a modernist approach.

Joan Williams's view is based on her rejection of modernist epistemology. She rejects the view that truth is the accurate representation of something ("woman") by means of language.[25] Instead, using the later work of Wittgenstein, she seeks to replace this view with what she calls "assertability conditions". This means that critique is not based on something outside language or discourse, but comes from within the borders of practice.

Based on this epistemology, it is not surprising that Williams is more ambivalent about the difference between sex and gender. On the one hand, she criticises the cultural feminist jurisprudence based on Gilligan's "different voice", because it can be turned against women.[26] After all, if women are so different from men, maybe they ought to be treated differently.[27] On the other hand, she also criticises Catharine MacKinnon's radical feminist theory because the "insistence on gender-neutrality by definition precludes protection for women victimized by gender".[28] For Williams, the answer lies in the idea that legal rules should be sex-neutral but not gender-neutral. People disadvantaged by gender must be protected by properly naming the group to be protected.

> "The traditional goal is misstated by the term 'gender neutrality'. The core feminist goal is not one of pretending gender does not exist. Instead, it is to deinstitutionalize the gendered structure of our society. There is no reason why people disadvantaged by gender need to be suddenly disowned. The deconstruction of gender allows us to protect them by reference to their social roles instead of their genitals."[29]

Her solution is based on Gramsci's notion of "cultural hegemony".[30] She demonstrates that, although women believe they are making choices, in reality

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23 West in Bartlett and Kennedy *Feminist Legal Theory* 232.

24 Patterson 1992 *Cornell LR* 285.

25 Williams "Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells" 1987 *New York Univ LR* 429 444ff.

26 Williams "Deconstructing gender" in Bartlett and Kennedy *Feminist Legal Theory* (1991) 95 102: "Gilligan's inconsistent signals . . . have left relational feminism with the potential to be used against women."

27 Patterson 1992 *Cornell LR* 291.

28 Williams in Bartlett and Kennedy *Feminist Legal Theory* 111.

29 Williams in Bartlett and Kennedy *Feminist Legal Theory* 112.

30 See Gramsci "Hegemony" in Rivkin and Ryan (eds) *Literary Theory: An Anthology* (1988) 277.

women "may be unwitting accomplices in the maintenance of existing inequalities".[31] To solve this problem, she argues that the "language of domesticity" that is inherent in cultural feminism needs to be decoded. It is important to note here that Williams seems to be returning to the modernist epistemology she earlier rejected. By speaking of the "language of domesticity" as a form of truth representation as opposed to a cultural practice, she undermines her own postmodern stance. Language can only be "decoded" if one assumes there is a code that exists outside the practice of that language.

As a result, Williams occupies a middle position between modernist and postmodernist feminism. She is aware of the problems of modernist feminism and criticises both cultural and radical feminism. However, while she focuses on power relations, her understanding of gender is limited by her unwillingness to let go of the constructs and tools of modernism. Her use of concepts like "woman" and "hegemony", and her view of language, as something outside the discourse that can be decoded, indicate this.[32]

Zillah Eisenstein introduces her position with the statement: "There is no one body, only bodies, only differences, as well as pluralized conceptions of equality."[33] When differences between the sexes are regarded as natural, instead of cultural, the distinction between sex and gender is ignored. Furthermore, a mere insistence on sex difference "leads to an unconcern about the specificity of differences" within and between the sexes.[34] She states:

> "Sex and gender differences exist, but their significance must remain open-textured while we try to sort through a meaningful notion of equality that does not preclude differences and is not simply based in sameness. We need to work from a position on differences that presumes a radical pluralism while it recognizes the power of discourse that establishes (already) engendered unities. Women differ among themselves, and they are also similarly different."[35]

For her, gender and sex are both irrelevant to equality and, at the same time, determinative of inequality. It is not about the truth of gender, but about the power relationships constructed by discourse.[36] The question is, if we give up the totalising constructs and structures of modernism, what are our alternatives? If we can no longer legitimately speak of "woman", what is the basis for critique and transformation?

Eisenstein answers these questions by using pornography as an example.[37] For Eisenstein, pornography is never just one thing or about one thing. It can be about both subjugation and liberation of women and everything in-between. Prohibiting pornography might be more about protecting women than about empowering them.[38] The point is that holding to modernist categories like "woman" (and how she should or should not be and act) contributes to the further denial of

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31 Williams in Bartlett and Kennedy *Feminist Legal Theory* 108.
32 Patterson 1992 *Cornell LR* 294–295.
33 Eisenstein *The Female Body and the Law* 5.
34 Eisenstein *The Female Body and the Law* 32. Eisenstein is here quoting Luce Irigaray.
35 Eisenstein *The Female Body and the Law* 35.
36 Patterson 1992 *Cornell LR* 295.
37 Eisenstein is here reacting to the campaign of Catharine MacKinnon and Andrea Dworkin in support of anti-pornography statutes.
38 See Naomi Wolf's deconstruction of what she calls "victim feminism" in Wolf *Fire with Fire* (1993) 156–229.

freedom and equality for women.[39] It is a view that can only survive if women are seen exclusively as victims who must be protected. If, on the other hand, one accepts that pornography might empower at least some women, the feminist response needs to be re-examined. Then it becomes clear that it is not about "women" – it is about the social construction of what is appropriate behaviour for women, and that is gender.

Therefore the use of categories like "woman" must be seen as part of a discourse that is never neutral or innocent. In fact, we also "need to recognize that even what is thought of as raw biology is socially constructed".[40] It prescribes how women should be and act, how they should dress, how they should express their sexuality and how they will always be victims. It is constitutive of the hyper-reality that underlies the law's conception of appropriate behaviour for women.

In conclusion, it seems that the dilemma of the relationship between sex and gender is even more complex than it at first appeared. What seems clear is that particular views of the relationship depend on particular epistemologies. An essentialist epistemology, like that of West, almost inevitably leads to equating sex with gender. On the other hand, a non-essentialist epistemology creates new problems. It implies that feminist theorists can no longer legitimately use sex to solve gender problems. And this is the dilemma that both Williams and Eisenstein struggle with. However, both point to the role of power in establishing gender constructs that determine the rules of women's behaviour.

It seems, therefore, that feminist theory does not give a definitive and determinate solution to the dilemma of sex and gender. The most important contribution of post-modern feminist theory is the emphasis that is placed on the role of power. In the next section the way in which the distinction has been understood (or misunderstood) in South African case law will be studied.

3 GENDER DISCRIMINATION IN CASE LAW[41]

Subtlety, ambiguity, and relatedness are denied, and in the process differences become inequalities.[42]

The issue of gender discrimination has arisen in a number of recent cases. This section of the article will consist of a brief discussion of three cases and reference to some others. It should, however, be stated at the outset that South African courts have very seldom dealt with gender discrimination, even when they have claimed to be doing just that. The discussion that follows is an illustration of this

The first case under discussion is the *Hugo* case.[43] This case arose out of the situation surrounding the inauguration of President Mandela. As part of the festivities, the President exercised his prerogative and freed 440 female prisoners who were mothers of children younger than 12. Hugo's complaint was that he fell into this category, except that he was a father instead of a mother. This, he alleged, was discrimination on the basis of sex or gender.

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39 Patterson 1992 *Cornell LR* 300–301.
40 Eisenstein *The Female Body and the Law* 81.
41 For purposes of this article, only majority decisions will be taken into consideration.
42 Eisenstein *The Female Body and the Law* 35.
43 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

In the first place, it should be noted that the *Hugo* case was not about gender discrimination. The court stated explicitly that the case was about sex discrimination,[44] despite the fact that the court recognised that the remission of sentences by the President "in fact, discriminates on a combined basis, sex coupled with parenthood of children below the age of 12. Only women who [were] parents of such children [were] released: women without children were not."[45] In the minority decisions, the terms "sex" and "gender" are used as synonyms,[46] except for the judgment of O'Regan J, who consistently refers to sex discrimination.[47] Although the case is about an advantage given to women-who-are-child-minders, the court persisted in seeing this as sex discrimination.

The court held that it was common cause that mothers bear more of a burden in raising children than fathers do. However, that would not ordinarily render the discrimination *fair*. In fact, their heavier burden regarding children is "one of the root causes of women's inequality in our society." [48] It would be unfair to use the generalisation about women's role as a reason to deprive women of benefits or advantages or to impose disadvantages on them. Instead, the court stated that we need to develop a concept of unfair discrimination that does not insist on identical treatment in each case. Therefore the advantage afforded to women was not unfair towards fathers of minor children as it had not "fundamentally impaired their rights of dignity and sense of equal worth".[49] Therefore, the discrimination was not unfair and there was no infringement of s 8(2) of the interim Constitution.[50]

The *Hugo* case should never have been decided on the basis of sex discrimination, since it was very much about gender. What Hugo was complaining about was the idea that women, and women only, should be regarded as child-minders. The case was about the law's acceptance of societal views regarding appropriate roles for men and women when it comes to children. The court, for all its noble intentions regarding children, relied on the stereotype and in so doing confirmed the stereotype. The Presidential Act (as the court called it) did not benefit women or parents. It benefited 440 women who happened to have children younger than 12. It accepted that only women are, and can be, child-minders. As such, the act amounted to gender discrimination.

Moreover, the "careless generalisation" that the court indulges in should be unmasked as a modernist strategy. "[T]he problem with careless generalization is that it 'not only ignores the specific voices of *particular political sites, it effectively works to stop these specific voices being heard*' ".[51] The argument is only effective because it carefully uses a generality within a finite context. And,

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44 Para 33.
45 Para 33.
46 Paras 64, 73, 76, 80, 85, 86, 87 speak of discrimination based on "sex or gender", while paras 68, 72, 75 and 87 use the term "sex/gender". In all cases the implication appears to be that the terms mean the same thing.
47 Para 108.
48 Para 38.
49 Para 47.
50 The Interim Constitution of the Republic of South Africa, Act 200 of 1993.
51 Patterson 1992 *Cornell LR* 303, quoting Wickham "The Political Possibilities of Postmodernism" 1990 *Economy and Society* 132.

in the end, the case served to establish a trend regarding gender discrimination because, in subsequent cases, the tendency to conflate sex and gender persisted. In three cases dealing with security the court stated that "gender discrimination is inherent in violence against women" (or words to that effect) and that the state has a duty to prevent gender discrimination.[52] It is also present in the *Fraser* case, where the court stated:

> "Sometimes the basic assumption of the attack on the impugned section based on gender discrimination is that the only difference between the mother and the father . . . is the difference in their genders."[53]

In the *Phillips* case,[54] the court cited the decision in *Washington v Wilbur and Others*[55] with approval. In that case, the American court stated that the prohibition of prostitution does not violate the equality provision, as it "applies to proscribed acts between persons without regard to their *sex*; as such it is *gender*-neutral".[56] The confusion between sex and gender in this case is obvious.

The case that most obviously should have been about gender, the *Jordan* case, is also the most disappointing. The case dealt with the question whether the prohibition of prostitution "discriminates unfairly against women?"[57] Although the court frequently uses the terms "gender" and "gender discrimination", the language used makes it clear that the court dealt with this as an example of sex discrimination. In the majority judgment, Ngcobo J states:

> "Penalising the recipient of the reward only does not constitute unfair discrimination on the grounds of gender. The section penalises 'any person' who engages in sex for reward. The section clearly applies to *male* prostitutes as well as *female* prostitutes. The section is therefore *gender-neutral*. Penalising the prostitute only does not therefore amount to direct discrimination."[58]

The court's argument is therefore quite simply that, since the act uses sex-neutral terminology (any person), that also makes the act gender-neutral. As a result, the act does not discriminate on the basis of gender.

There are two problems with this decision. In the first place, the point is not that both men and women can be (and are) prostitutes, nor is it really relevant that most prostitutes are women.[59] The point is that the prohibition of prostitution serves to keep gender hierarchies in place. Prostitutes, whether male or female, are all subject to the sexualisation and terrorisation about which Mary Joe Frug writes.[60] As such, all prostitutes, whether male or female, play a social role usually associated with women. (It might even be, as Germaine Greer maintains,

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52 *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) para 15; *Saaiman v Minister of Safety and Security* 2003 3 SA 496 (O) para 23; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

53 *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 25.

54 *National Director of Public Prosecutions v Phillips* 2002 4 SA 60 (W).

55 *Washington v Wilbur* 749 P 2d 1295 as quoted in *National Director of Public Prosecutions v Phillips* 2002 4 SA 60 (W) para 64.

56 Para 64 (my emphasis). In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para13 the court makes the confusion between sex and gender explicit by referring to discrimination based on "sex (gender)".

57 *S v Jordan* 2002 6 SA (CC) 642 at the heading preceding para 8.

58 Para 9 (my emphasis).

59 See Frug in *Postmodern Legal Feminism* 129ff for a contrary point of view.

60 *Ibid*.

that the purpose of prostitution is to make woman's position in marriage appear noble and acceptable.[61])

In the second place, it is of course true that s 20 of the Sexual Offences Act[62] is sex-neutral. Most Acts are. But it is not gender-neutral. It is part of an effort to keep a certain morality in place – a morality that is unquestionably foundational to the traditional gender hierarchy. But the picture changes when we regard prostitution as just one more (legitimate) expression of women's sexuality. As Olsen states: "Sexuality is socially constructed."[63] More importantly, "there is no (one) such thing as 'female sexuality' ".[64] To reduce female sexuality to that which is associated with marriage or associated with "life-affirming decisions about birth, marriage or family" [65] is to deny the multifarious nature of female sexuality. When that happens, we are reduced to dancing across a universe of empty abstractions.

Whichever way one looks at it, it seems self-evident that the court was correct in holding that the prohibition of prostitution is not sex discrimination. But an exploration of gender discrimination might have lead to a different result. If prostitution is seen as a gender construct, then its prohibition can be regarded as gender discrimination in much the same way as we regard discrimination against pregnant women.

In the recent *Ferreira* case, the conviction and sentencing of a woman who killed her partner was commuted because of the abuse she had suffered. The court stated:

> "Her decision to kill and to hire others for that purpose is explained by the expert witnesses as fully in keeping with what experience and research has shown that abused women do. It is something which has to be judicially evaluated not from a *male* perspective or an objective perspective but by the court's placing itself as far as it can in the position of the *woman* concerned, with a fully detailed account of the abusive relationship and the assistance of expert evidence such as that given here. Only by judging the case on that basis can the offender's equality right under s 9(1) of the Constitution be given proper effect. It means treating an abused woman accused with due regard for *gender* difference in order to achieve equality of judicial treatment."[66]

In one sense, this decision is a triumph for those feminists who advocate a "different voice" for women in law.[67] But, from another perspective, it is deeply disturbing. In the first place, as the minority judgement points out, it implies that male judges will never be able to do justice to women who are abused.[68] This sounds a lot like saying that only those who have been raped can judge rapists,

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61 Greer *The Female Eunuch* (1981) 221: "Romance sanctions drudgery, physical incompetence and prostitution."

62 The case dealt with the constitutionality of s 20(1)(aA) of the Sexual Offences Act 23 of 1957.

63 Olsen "Statutory Rape: A Feminist Critique of Rights Analysis" in Bartlett and Kennedy *Feminist Legal Theory* 305 314.

64 Patterson 1992 *Cornell LR* 301.

65 *Jordan*'s case para 83, in the minority opinion.

66 *Ferreira v State* 2004 4 All SA 373 (SCA) para 40 (my emphasis).

67 See, for example, the discussion by West in Bartlett and Kennedy *Feminist Legal Theory* and above in section 2.

68 *Ferreira*'s case para 60.

and only those who have been victims of theft can judge thieves. (This is, of course, an argument that breaks down when one questions who should then judge murderers, but that is a question for another time.)

But there are more reasons not to agree with the sentiments of the majority. In a very real sense it tends to confirm stereotypes of abused women as powerless victims. It also completely ignores men who might be in similar positions in both homosexual and heterosexual relationships. Would the court be equally lenient if the accused were a man claiming that he had killed because of abuse? Or is the court operating with the narrative of women as helpless victims, while men can never be that? In this regard, the comments by the minority in the case are instructive in that they illustrate a different way of looking at the victim:

> "There were many ways in which she herself could have brought about his end. She was relatively young and able-bodied. She had access to a gun. The deceased was often in a physically vulnerable state by reason of intoxication. On the night in question he was stuporose. She had succeeded in the past in adding a potion to a beverage which he drank. She was not so squeamish that she was unable to bear to assist in dumping his body in the boot of his car."[69]

It turns out that the three cases discussed above all operate with some kind of totalising construct. In the *Hugo* case it was mothers, in *Jordan* it was bad women and in *Ferreira*, abused women. In all cases, the court seemed to operate with some kind of idea about what a mother/prostitute/abused woman is, or should be. In some cases, like *Hugo* and *Ferreira*, this turned out pretty well for the individual women concerned. But it is bad news for all women and men who do not fit the mould.

4 CONCLUSION

[T]he distinction I want to make is largely analytical, to sort out some of the issues and not keep reducing sex issues to gender ones, or deriving sex from gender.[70]

This paper started with the statement that sex is biological and gender is cultural. The discussion of both feminist theory and the case law shows that this is not as simple and straightforward as first meets the eye. In the case of the court decisions, this is partly due to the fact that courts tend not to be interested in these kinds of distinctions. But it is also due to the fact that biology is, in part, gendered (that is, determined by culture) and, in turn, gender is in part biological. The real problem starts when either the sex or the gender construct is understood in a modernist, essentialist way. That is when courts start to assume that all child-minders are or should be mothers; to assume if a statute is sex-neutral it is also gender-neutral; to assume that only women can understand abuse.

And these assumptions are neither neutral nor innocent. In fact, they are both pernicious and dangerous, because they serve to keep gender hierarchies in place. These hierarchies can only be undermined (and one assumes that is the point of prohibiting gender discrimination) if the focus is on the specificity of differences. This might mean a blurring of sex and gender lines and an emphasis on subtlety, ambiguity and relatedness.

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69 *Ferreira*'s case para 69.
70 Eisenstein *The Female Body and the Law* 81.

It also seems that feminist jurisprudence can only succeed if it questions the vocabularies through which gender relationships are understood.[71] While it is virtually impossible to speak of gender discrimination without using the category of "woman", it must, at the same time, be problematised. Wearing the modernist dress to the post-modern ball is like being dressed up with nowhere to go. The deconstruction of modernist constructs like "woman" can lead to a pluralist conception of equality in law where gender differences are respected without forcing either men or women to analogise their experience to some mythical man or woman.[72] Gender equality can only be achieved by undermining the power of gender stereotypes embedded within the gender hierarchy.

It might very well be, as Duncan Kennedy argues, that "it is in the interest of men that women should have traditional identities, and that abuse is the mechanism by which men bring those identities about." [73] It might even be that the law is complicit in this endeavour. But that does not mean that feminists legal theorists should revert to a modernist grand-narrative of how women should be and act, nor should they allow courts to get away with it. As Colette Guillaumin states: "We are in fact different. But we are not as different FROM men (as false consciousness claims) as we are different FROM THAT WHICH men claim that we are." [74]

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71 Patterson 1992 *Cornell LR* 309.

72 Minda *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (1995) 144.

73 Kennedy *Sexy dressing etc.* (1993) 150.

74 Guillaumin "The Question of Difference" 1982 *Feminist Issues* 43.

The Truth and Reconciliation Commission's concept of restorative justice, *ubuntu*, forgiveness and reconciliation

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1 INTRODUCTION

A close look at the operation of the South African Truth and Reconciliation Commission reveals a *modus operandi* that drew heavily on a combination of certain human rights values and indigenous values in an attempt to forge a collective memory and achieve national reconciliation. The strategies of retribution, accountability and *ubuntu*[1] (as expressed in the Truth and Reconciliation Commission's goals of "restorative justice"), played a significant role in searching for a new morality that recognises human dignity, compassion and the need for societal harmony above

This paper will explore the relevance and legitimacy of the Commission's concept of "restorative justice", a distinctive type of justice shaped by human rights values, as well as the value of *ubuntu*. In doing so, the question whether the sacrifice of criminal justice for the greater moral justice of "enduring societal harmony"[2] arises. The Truth and Reconciliation Commission's emphasis on certain values, including *ubuntu*, to the exclusion of others in order to achieve its objectives, advocates a "new" kind of morality or "consensus morality",[3] believed to be shared across all cultural, linguistic, and other barriers in our society. In freeing ourselves from a past system in which certain values, be they religious or political, were imposed as a pattern for all, South Africans need to be vigilant and cautious not to invoke a new set of so-called "common values" as the basis

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1 Kroeze "Doing things with values II: The case of *ubuntu*" 2002 *Stellenbosch LR* 252 260–261. Kroeze *inter alia* questions the manner in which *ubuntu* has become manipulated as a result of judicial interpretation, which tends to see *ubuntu* as communitarian, as opposed to liberalism which is inherently individualistic. Defining *ubuntu* is no easy task either: *ubuntu* is said to include the following values: communality, respect, dignity, acceptance, sharing, co-responsibility, humanness, social justice, fairness, personhood, morality, group solidarity, compassion, joy, love fulfilment, conciliation and so on. Kroeze states that the problem with this kind of "bloated" concept is that it tries to do too much, and as a result may very well collapse under the weight of expectations.

2 Rotberg & Thompson (eds) *Truth v Justice: The Morality of Truth Commissions* (2000) 9.

3 Warnock *The Uses of Philosophy* (1992) 85.

for a new post-apartheid moral order. Easy rhetoric about shared values camouflages the harsh reality of racism and mutual suspicion that still exists in the South African society, despite various efforts to promote reconciliation. This may lead to an ever-increasing gap between rhetoric and reality.

2 THE TRUTH AND RECONCILIATION COMMISSION'S TASK AND OBJECTIVES

In South Africa, the Promotion of National Unity and Reconciliation Act[4] charged the Truth and Reconciliation Commission with investigating and documenting gross human rights violations committed within or outside South Africa in the period 1960–1994. The Commission was to provide "as complete a picture as possible of the nature, causes and extent of gross violations of human rights" by listening to the stories of survivors or the families of victims of these abuses, as well as to those who wronged them. Apart from hearing the accounts of both victims and perpetrators, the Commission was authorised to grant indemnity from prosecution to those perpetrators who gave a full confession of their actions or those which were authorised by them.[5]

Part of the Commission's mandate was "to restore the human and civil dignity of the victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims".[6] In this regard, the South African Truth Commission differs greatly from others elsewhere, in that the bulk of the testimony of perpetrators and victims was heard publicly.[7] As its name suggests, the Truth and Reconciliation Commission hoped to achieve a synthesis between the concepts of justice, amnesty and reconciliation.

Reconciliation inevitably suggests forgiveness, which, for many of the apartheid system's victims, may not be possible, as one of the victims to the testimony of her husband's killer explained: "No government can forgive." (Pause.) "No commission can forgive." (Pause.) "Only I can forgive." (Pause.) "And I am not ready to forgive."[8]

The Commission's understanding of restorative justice – which introduces a whole new vocabulary of justice and truth – is politically and spiritually significant, as it aspires to close the ledger book of apartheid, and at the same time announces what Kadir Asmal[9] regards as a "revival of the South African conscience".

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4 Act 34 of 1995.

5 Section 20.

6 Section 3(c).

7 The Human Rights Violations Committee of the TRC held five different types of hearings, namely victim hearings; event hearings; special hearings; institutional hearings; and political party hearings. See *Truth and Reconciliation Commission Report* Vol 1 (1998) 145–149 (hereafter *TRC Report*). The TRC consisted of three sub-committees: the Human Rights Violations Committee; the Amnesty Committee; and the Reparation and Rehabilitation Committee. On the contradictory aims of these separately functioning committees, see the *TRC Report* Vol 1 105. The TRC report consists of five volumes.

8 Ash "True Confessions" *New York Review of Books* (17 July 1997) 36–37, cited in Rotberg & Thompson *Truth v Justice* 31.

9 Asmal, Asmal & Suresh Roberts *Reconciliation through Truth: A Reckoning with Apartheid's Criminal Governance* (1997) 47.

Restorative justice is closely intertwined with the idea of reconciliation. The word "reconciliation" stems from the Latin *conscientia*, meaning "joint knowledge". As for the Commission's work, this "joint knowledge" involved a two-fold process: the accumulation of *knowledge* through public hearings, followed in many instances by *acknowledgement* of guilt. To reconcile could also mean to restore, to return to a previous state, which in the South African context is evidently problematic, as such transition must lead to a just society which has never existed before.

A few remarks on justice in a broad sense need to be made before the Commission's ideal of restorative justice can be examined more closely.

3 JUSTICE

In researching this present paper, I was struck by an overwhelming range of definitions of "justice" coined by various authors commenting on the Truth and Reconciliation Commission's work. These ranged from "transitional justice" to "justice-as-recognition", "retributive justice", "political restorative justice", "victim-centred justice", "victor justice", "systemic justice", "social justice", "[a] general conception of justice", and "[a] special conception of justice".[10] A similar range of frustrating "truth" conceptions emerged from the Commission's investigations and final report,[11] which serves only to compound the real issues at stake.

Given the broad scope and manifold understandings of "justice", which may differ from one setting to another, one must accept that a single conception of justice would neither be possible, nor desirable. As with man's preoccupation with truth, most people commonly share a desire for justice, despite the fact that there is no general agreement on how justice can be attained. (This, in the South African context, is all too clear from the urgent and emotional calls for the re-introduction of the death penalty.) The idea that justice is rooted in the emotional reactions of individuals or groups to the demands of positive law corresponds with Hans Kelsen's[12] belief that the concept of justice has no rational foundation. At the heart of man's search for justice lies the need to create order and certainty.

Since the earliest times of Greek philosophy, the notion of justice has centred on the concept of the "common good". William Galston[13] rightly notes that while justice may lead to the greater common good, such an endeavour invariably requires certain individuals to make greater sacrifices than others, whilst at the same time there may be no indication as to how the benefits gained are subsequently to be divided amongst the society. There is no "science of justice", but merely "an ability to surmise what is possible or probable within a given situation", based upon a thorough knowledge of the facts of a specific situation, as well as a sense for human ethics and morality.[14] This signals a minimalist and relativistic understanding of justice, as opposed to a conception of justice that

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10 See Rotberg & Thompson *Truth v Justice* 102 47, 73, 102, 124, 137, 138, 164, 166, 209n57.

11 Slabbert "In search of truth: The Truth and Reconciliation Commission's notion of narrative truth and a victimary hypothesis" 2004 *Stellenbosch Law Review* 103 107–110.

12 Kelsen *General Theory of Law and State* (1961) 56.

13 Galston *Justice and the Common Good* (1980) 34.

14 *Ibid* 282–283.

consists of timeless and universal truths. As was stated in the Commission's Report: "We've heard the truth. There is even talk about reconciliation. But where's the justice?"[15]

As a common refrain among critics of the Truth and Reconciliation Commission's work, this illustrates the victims' frustration with the amnesty provisions of the Commission, in terms of which those who had committed gross human rights violations for political reasons, and who made a full public disclosure of their crimes, escaped criminal prosecution. [16]

The amnesty provisions were seen as crucial in facilitating a successful transition from an unjust regime to a democratic one. The Commission itself acknowledges that it failed to provide *retributive* justice, but asserted that it had instead promoted a different kind of justice – *restorative* justice – which is concerned "not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation".[17] In its Final Report, the Commission stated that the strengthening of the dimensions of restorative justice was crucial to its efforts to fulfil its constitutional mandate to help build a bridge between "the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".[18]

In an earlier paper[19] on the Truth and Reconciliation Commission's notions of truth as expressed in the Final Report, I argued that the Commission's category of "narrative" or "personal truth" fails to capture the only relevant truth, namely that of the thousands of faceless apartheid victims (not individual activists) whose sufferings on a daily basis were not recorded as gross violations. "Restorative justice", similarly, is an opaque and high-flown value, a tautology, indefinable and easily proclaimed. One does not need to be reminded that high-sounding, aspirational language only serves to widen the gap between rhetoric and reality, leading to possible disillusionment. Morally over-ambitious calls, for example that our challenge is "to get yesterday's conquerers to see the light and to be reborn as political equals", and to "arrive at a form of transition that leads not to political divorce, but to a political community of consenting adults",[20] are naïve and should be avoided. Instead, more realistic and narrowly defined objectives should be stated. Disillusionment with unfulfilled (and unattainable) objectives may have a very negative effect on the creation of a new post-apartheid society.

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15 TRC *Report* Vol 1 ch 5 para 3.

16 That the Commission's amnesty extinguished civil as well as criminal liability was affirmed by the Constitutional Court when it rejected a lawsuit filed by the families of murdered activists Steve Biko, Griffith Mxenge and others, who had claimed that their rights to seek other judicial redress had been infringed. See *Azanian Peoples Organisation v President of RSA* 1996 8 BCLR 1015 (CC). Martha Minow discusses this case in her book *Between Vengeance and Forgiveness* (1998) 56.

17 *TRC Report* Vol 1 ch 5 para 70 and ch 1 para 36.

18 *TRC Report* Vol 1 ch 5 paras 82–85.

19 Slabbert 2004 *Stellenbosch LR* 116–118.

20 Mamdani "The truth according to the TRC" in Amadiume & An-Na'im *The Politics of Memory: Truth, Healing & Social Justice* (2000) 182–183.

Elizabeth Kiss asserts that by privileging reconciliation over punishment, restorative justice seeks to "transcend the traditional dichotomy between justice and mercy, incorporating dimensions of mercy into justice". [21] Closely linked with this idea is the Commission's belief that severing the "deed and the doer" from each other is an integral part of restorative justice, part of the spirit of *ubuntu*, and also part of the restoration of an (Aristotelian) vision of the "organism that is our nation – South Africa".[22]

Restorative justice depends on forgiveness,[23] prefers reconciliation over punishment, emphasises the humanity of both victim and offender, and prioritises personal and institutional transformation over retribution.[24] These ideals are echoed in the concept of *ubuntu*, envisaged in the postamble to the Interim Constitution, in which it was stated that there is "[a] need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation".[25]

Apartheid as a crime against humanity[26] resulted in severe human rights abuses on a large scale, leaving indelible imprints on the collective psyche and sense of identity of black South Africans. These cultural and spiritual violations go back a long way.[27] A thorny question arising when one contemplates the manner in which justice can be *restored* is how far into the past memory should reach. This is indeed also a question that the acclaimed African playwright and political activist, Wole Soyinka, asks in a collection of essays entitled *The Burden of Memory and the Muse of Forgiveness*.[28] Incidently, Soyinka also writes in his prison notes that "justice is the first condition of humanity",[29] an idea also appearing in Mandela's autobiography *Long Walk to Freedom*, where he states that "the oppressed and the oppressor alike are robbed of their humanity".[30]

From the above, it is clear that the ideal of restorative justice alludes to three things: (1) restoring the civil dignity of both victims and the perpetrators of violence; (2) public acknowledgement of the abuse and hardship suffered by victims, as well as public exposure of the perpetrators' abuses as a necessary step in achieving (1); and finally, (3) the creation of social conditions which will assist in the transition to a new social and public morality. It is submitted that point (3) is a concrete objective that should have been the starting point in achieving justice that will ensure that previous inequalities be rectified.

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21 Kiss "Moral Ambition within and beyond Political Constraints: Reflections on Restorative Justice" in Rotberg & Thompson *Truth v Justice* 82.
22 *TRC Report* Vol 5 ch 5 para 35.
23 Forgiveness is, of course, not always possible, as I intend to show in section 4 below.
24 Minow *Between Vengeance and Forgiveness* 92.
25 Act 200 of 1993.
26 *TRC Report* Vol 1 ch 1.
27 *TRC Report* Vol 5 ch 5 para 40 (minority position submitted by Wynand Malan).
28 Soyinka "Memory, Truth and Healing" in Amadiume & An-Na'im (eds) *The Politics of Memory* (2000) 21. See also Soyinka *The Burden of Memory: The Muse of Forgiveness* (1999).
29 Soyinka *The Man Died: Prison Notes of Wole Soyinka* (1975) 96.
30 Mandela *Long Walk to Freedom: The Autobiography of Nelson Mandela* (1994) 544.

4 FORGIVENESS, RECONCILIATION AND *UBUNTU*

Not everyone felt comfortable with the Commission's ambitious moral undertaking, and some suggested that the only viable vision of reconciliation was one that promoted a more limited notion of peaceful co-existence and mutual tolerance.[31] No one can be forced to forgive or demand to be forgiven. Forgiveness, as Derrida[32] tells us, is the discretion of the victim. No public institution can forgive, nor does it have the right or power to do so, as one of the apartheid victims so passionately expressed in testimony before the Commission quoted above. The relevance of forgiveness is limited to the personal and private sphere, and is irrelevant to the political and the public.[33] Hanna Arendt[34] writes that "only love has the power to forgive", but that love, by its very nature, "is unworldly, and it is for this reason rather than its rarity that it is not only apolitical but antipolitical". Forgiveness must be aimed at *someone* and not *something*. Hence, one cannot forgive the murder or the assault, but only the murderer or the offender.[35] Mercy therefore, unlike justice, emphasises inequality.[36] In the larger domain of human affairs, *respect* as a civic acknowledgement appears to be the appropriate vehicle to promote reconciliation.

Forgiveness does not, and should never amount to, a therapy of reconciliation.[37] At the heart of the "generous gesture" of those offering reconciliation or amnesty lies a strategic or political calculation,[38] which cannot be tempered by the pious language of repentance and forgiveness introduced by Archbishop Desmond Tutu. Archbishop Tutu has emphasised Christian forgiveness as the great value of the Commission's proceedings, and has connected this Christian idea to the secular goal of the Commission, namely reconciliation. The Commission's rhetoric of forgiveness and reconciliation undoubtedly has a Christian basis, which could be perceived as insensitive and inappropriate as it would impose one minority religious view on a diverse society.[39] Furthermore, legally prescribing forgiveness when people are unwilling to forgive would compromise the moral autonomy of both victims and perpetrators.

Restorative justice, as was suggested above, is not exclusively drawn from Judaeo-Christian values, but is also underscored by the traditional African value of *ubuntu*.[40] In this regard, the correspondence between human rights values

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31 Ash "True Confessions" *New York Review of Books* (1997).

32 Derrida *On Cosmopolitanism and Forgiveness* (translated by Dooley & Hughes) (2001) 43. For an opposite view, see Gutmann & Thompson "The Moral Foundations of Truth Commissions" in Rotberg & Thompson *Truth v Justice* 31.

33 Jones *Embodying Forgiveness: A Theological Analysis* (1995) 267.

34 Arendt *The Human Condition* (1959) 217–218.

35 Kristeva *Hanna Arendt* (translated by Guberman) (2001) 232–233.

36 Arendt *Men in Dark Times* (1971) 248.

37 Derrida *On Cosmopolitanism* 41.

38 Derrida *On Cosmopolitanism* 40.

39 The TRC recognises this. See *TRC Report* Vol 1 ch 5 paras 84–85.

40 Langa J describes *ubuntu* in *S v Makwanyane* 1995 3 SA 391 (CC) para 224 as follows: "It is a culture that places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member

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supporting restorative justice and the local value of *ubuntu* serves to reinforce the legitimacy of the concept of restorative justice. The description of *ubuntu* by Mokgoro J in *S v Makwanyane* adds that it "envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity", but primarily denotes "humanity and morality".[41] *Ubuntu*'s emphasis on human dignity marks a shift from confrontation to conciliation. Mokgoro J's conflation of *ubuntu* with morality is problematic, as it represents an unreflective assumption that all South Africans share a common morality and a common understanding of what dignity,[42] for example, entails. This criticism can be extended to apply to the moral goals of the Commission. Sacrificing retributive justice in order to serve a communally-oriented goal of restorative justice – in keeping with *ubuntu* – left many victims dissatisfied and frustrated. Although they may have agreed in principle with the morality on which restorative justice is founded, they might have preferred the accountability that is associated with conventional criminal justice. Testifying at the victim hearings, as well as identifying the offenders may have been valuable, but may not have been the equivalent of criminal punishment and civil liability for those who had been wronged. The primary importance of an individual's testimony was to serve the public objective of healing and restoring the nation as a whole. As such, it represents a preference for the "politics of the common good".[43] Public reparations do not recover from those who have been individually responsible for committing the wrongs, and, as such, will fail to offer the satisfaction that many victims seek. In any event, only those who applied to the Commission benefited from the interim reparations, leaving out millions of others who suffered severe poverty and harm as a result of apartheid, and will continue to do so. Many survivors or victims participated in the process that was established by the Commission, without necessarily ascribing to the Commission's aspirations of forgiveness and repentance.

The goal of reconciliation may also deprive people of the right and freedom of moral dissent, particularly if victims are forced, by others who were not victims themselves, to forgive and become reconciled with those who oppressed, harmed and abused them. The overarching goals of national reconciliation and the creation of a just, multiracial society appear to have outweighed individual preferences for retributive justice.

The tension between forgiveness, reconciliation and healing, on the one hand, and accountability and justice, on the other hand, caused by the operation of the Commission and its amnesty process, can only be accepted when the possible benefits of the Commission and its amnesty function outweigh the benefits that could be attained through the criminal process and civil liability. Measuring these potential benefits, however, is an impossible task. The Commission

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of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."

41 Para 308.

42 Kroeze 2002 *Stellenbosch LR* 256.

43 This description comes from Sandel "Morality and the Liberal Ideal" in *The New Republic* (7 May 1984) 17.

concedes that reconciliation is a process that requires time and persistence.[44] The benefits to which the Commission refers will only become visible in many years to come.

5 THE POLITICS OF THE "COMMON GOOD"

It is not uncommon for governments to perceive potential dangers or future political risks that do not exist, or which are exaggerated. Arguments about the alleged communist threat during the apartheid regime were accepted and internalised by the majority of whites during this period.[45] It comes as no surprise that leaders of previous regimes try to justify their actions by referring to serious national threats. It is therefore disturbing that those responsible for the facilitation of our political transition were prepared to sacrifice the possibility of achieving visible justice for victims in order to promote future benefits, which according to Kent Greenawalt creates "a disturbing continuity similar to the justifications of the old regime".[46] He rightly asks whether it would not perhaps have been better for the new regime to say: "We will not do injustice, even if that involves some risk to future social peace and justice".[47]

In her discussion of *ubuntu*, Kroeze[48] refers to Peter Schlag's "politics of form", which deals with the manner in which the *form* of legal discourse is treated as inconsequential and, as such, neutral.[49] He argues that this is a fantasy, as the form of legal discourse is a profoundly political act, "a manifestation of social power congealed in linguistic form".[50] The form of traditional legal thought systematically transforms new ideas into just another theory or technique, leaving the cognitive processes undisturbed, with the result that new ideas are distorted or neutralised by those practices.[51] In other words, the realm of possible social relations and the character of the community have already been established by the politics of form.[52] It is particularly normative legal thinking (norm-selection and norm-production) that is exercised under the pretence that form is irrelevant.[53] With regard to the Commission's construction of restorative justice, which flows naturally from liberal human rights values and *ubuntu*, the danger lies in assuming a majority perspective and consensus on the values underlying restorative justice and *ubuntu*. It is submitted that in the case of the Commission, the abstracted human rights and *ubuntu* discourse, which was profoundly political in nature, required that a kind of justice be sought which corresponds to its "politics of form". By emphasising future peace and stability as a

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44 *TRC Report* Vol 5 ch 9 para 144.

45 The idea of South Africa facing a dangerous communist onslaught of course legitimised the apartheid regime's actions against so-called "communist" political activists.

46 See Greenawalt "Amnesty's Justice" in Rotberg & Thompson *Truth v Justice* 192.

47 *Ibid*.

48 Kroeze 2002 *Stellenbosch LR* 259.

49 Schlag "'Le hors de texte c'est moi': the politics of form and the domestication of deconstruction" 1990 *Cardozo LR* 1631 1633.

50 *Ibid*.

51 Schlag 1990 *Cardozo LR* 1647.

52 Schlag 1990 *Cardozo LR* 1671.

53 See Schlag "Normative and Nowhere to Go" in *Laying Down the Law – Mysticism, Fetishism, and the American Legal Mind* (1996) 27–28, cited in Kroeze 2004 *Stellenbosch LR* 259.

consequence of restorative justice (ie the "politics of the common good") at the cost of conventional justice, a dichotomy in the Commission's *modus operandi* is revealed: the Commission pursued the welfare of the common good over the welfare of the individual, whilst at the same time appealing to individual victims and survivors to buy into its rhetoric of reconciliation, restoration and social justice.

6 CONCLUSION

Compared to the adversarial nature of the criminal justice system, which focuses primarily on the accused, the Truth and Reconciliation Commission is said to represent an alternative way of linking truth and justice that puts victims in the centre of a process which publicly acknowledges their pain and suffering. This process, which is inherently political in nature, as I have argued above, allegedly assists in the "restoration" of the civic and human dignity of the victims. From a legal viewpoint this is in itself erroneous, as no victim, however severe his or her suffering, *lost* his or her human dignity at any stage. In addition, no process, however compassionate, fair and just, can ever *restore* a person's dignity. No public institution can forgive those who have been wronged. It can at most recognise and acknowledge the victimhood of those who suffered, and publicly *affirm* their human dignity.

The pragmatist will argue that an attempt criminally to prosecute the large number of offenders who were identified would have been a futile exercise, in view of the strict procedural requirements relating to evidence (much of which was destroyed by the previous government), and the secrecy that surrounded most of these abuses. Even if one concedes that this may indeed have been the case, this still does not provide an answer to the fact that a vast majority of victims would find equally strong moral justification in seeking justice through the conventional channels.

The aim of this paper was not to state a preference for retributive justice over restorative justice. History has shown that societies adopt different methods in order to deal with the past. The transformation of post-communist countries, for example, was dominated by the logic of retribution.[54] In the South African political transition, retribution and punitive justice were (unjustly perhaps) viewed as factors that could destabilise and undermine the integration of a deeply divided post-apartheid society. However morally noble the aspirations and objectives of the Truth and Reconciliation Commission, one cannot but experience a sense of unease with the Commission's pragmatic and uncritical acceptance of a specific consensus- morality that deliberately ignores the possible benefits to be gained by an equally legitimate approach favouring retribution. Restorative justice should be the ultimate and proper aim of punishment, not an alternative to punishment.

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54 Přibáň & Van Marle "Recalling law, politics and justice in post-authoritarian societies" XLIV (2) *Codicillus* 32–48 at 48.

NOTES AND COMMENTS

NOLLE PROSEQUI! CORRUPTION IN THE POLITICAL SPHERE AND THE DECISION NOT TO PROSECUTE: A NOTE ON THE ARMS DEAL MATTER

1 Introduction

An international report on corruption, openness and accountability in 25 countries places South Africa sixth overall.[1] South Africa is the only developing country placed in the group of states with "strong" levels of public accountability. The global integrity report ranks a country's performance in terms of the twin key objectives of supporting public integrity and preventing corruption. A country's performance is assessed with reference to indicative criteria such as existence or otherwise of specific anti-corruption measures and respect for the rule of law. However, the positive score attained on account of the formal architecture of accountability of a country may be undercut by the qualitative assessments of its performance in practice. In that case the country in question is characterised as an "imperfect democracy", the unifying norm of such democracies being the tendency of political and business elites to abuse the system in order to enrich themselves. Arguably, South Africa is a case in point.

This emerges from comments from South African journalists and watch-dog NGO's such as the Eastern Cape's Public Service Accountability Monitor appended to South African assessment. A decade after transition to democratic rule, there are concerns about a number of developments, including the weakening of parliamentary oversight committees and increasing passivity of constitutional bodies such as the office of the public protector, "particularly in regard to cases of corruption and impropriety involving members of the executive".[2] This is so in spite of the fact that the safeguards to secure an open society are in place, guaranteed in law and, to a large extent, available in practice. Other corruption surveys paint a similar picture.

The Transparency International corruption index of 2005 castigates South Africa for its allegedly high corruption levels, rating the country 12 places below Botswana, which remains the highest ranked African country.[3] The methodology used by the survey, the National Integrity Systems research method, caters for comprehensive civil society assessments of corruption and efforts to fight corruption. It is seen as flawed by its detractors, including President Thabo Mbeki,

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1 "Corruption Knows no Boundaries" *Mail and Guardian* 30/04/2004 www.armsdeal-vpo.co.za/articles06/corruption 1 (accessed 17/05/2005).

2 "Corruption Knows no Boundaries" 2.

3 "Mbeki Slams 'Flawed' Corruption Survey" *Business Day* 23/03/2005 www.armsdeal-vpo.co.za/articles07/flawed 1 (accessed 18/052005/).

who posed the question "whether it is correct that important bodies such as Transparency International should rate corruption levels in any country, including ours, on the basis of the tools and surveys that are based on perceptions"[4] which do not necessarily reflect the actual experience of corruption in the country concerned. The premise that levels of corruption in South Africa are high needs to be tested. The report and its critics are agreed on this. But how this can be done in a methodologically secure way remains a moot point.

However that may be, it is common cause that corruption is inimical to development, constrains a country's ability to fight poverty, damages social values and undermines democracy and good governance.[5] The Framework Document of the New Partnership for Africa (NEPAD) and its Declaration on Democracy, Political, Economic and Corporate Governance identify, among others, democracy and good political governance as preconditions for sustainable development and the eradication of poverty. The overall objective of this initiative is to consolidate a constitutional political order which, *inter alia*, promotes:

- democracy,
- respect for human rights,
- the rule of law,
- the separation of powers, and
- an effective, responsive public service.

Such a political order is seen as an essential prerequisite for ensuring sustainable development and a peaceful and stable society. In order to safeguard Good Political Governance in terms of just, honest, transparent, accountable and participatory government and probity in public life, it is necessary to combat and eradicate corruption. Corruption both retards economic development and undermines the moral fabric of society. Its eradication is one of the essential conditions for sustainable development, alongside democracy and good governance, human rights, social development, protection of environment and sound economic management. Otherwise the NEPAD programme might remain a mere "wish list" for Africa's development.[6]

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4 *Ibid*.

5 *Ibid*.

6 See Bongmba "Reflections on Thabo Mbeki's African Renaissance" 2004 *J of Southern African Studies* 292 301. There are obvious points of convergence between the African Renaissance project and the Millennium Challenge Account (MCA). The legislation to create the MCA seems to have taken a clue from developments within the African Union which link good governance to development and give special attention to fighting corruption in the political sphere. See Nagan "Implementing the African Renaissance: Making African Human Rights Comprehensive for the New Millenium" 2004 *The University of Georgia Series on Globalization and Global Understanding* 14: "The specific performance indicators articulated in the MCA are specific measures which objectively indicate who will be eligible and not eligible for participating in the benefits of the MCA. In this sense, the performance assessment aspect of the process has a parallel with the peer group review mechanism indicated in the AU process. Both provide some form of objective appraisal relating to the standards or performance indicators for meeting either the MCA standards or the AU/NEPAD standards." The key objectives of the Democracy and Political Governance Initiative are:

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The key objectives of fighting corruption in the political sphere and of upholding the separation of powers have taken centre stage in South Africa's ongoing R40 billion arms deal saga, which is set to become a never-ending-story. It is a classic case of corruption in the political sphere that, due to lack of any decisive government action, will have to be dismantled "screw by screw" in the civil and criminal courts.[7] In 1999 the South African Government signed contracts totalling US$ 4,8 billion (R 30 billion at that time, but the real cost of the deal is now closer to R 43 billion partly due to the Rand's depreciation) to modernise its defence equipment. My analysis follows the thread of legal questions raised by this controversial arms deal with reference to corruption in the political sphere and the decision not to prosecute.

2 Corruption in the political sphere. The salient features of the arms deal matter include the following facts:

- "With every month evidence accrues that there was a feast of personal enrichment and an elaborate cover-up involving auditor-general Shauket Fakie, the public protector, the National Directorate of Public Prosecutions, and the Presidency itself. Key documents are the draft report by the Joint Investigating Team (JIT) and the very hygienic final report."
- "Credit for exposing the differences between the draft and the thoroughly sanitised final JIT report belongs to [Cape Town-based] CCII [Systems] managing director Richard Young. He fought a three-year battle in the courts to get Fakie, under threat of imprisonment, to hand over the draft and the supporting documents."
- Allegedly, "the report went to the Presidency on October 2001. Fakie met the president about October 16 and the report was sanitised between October 18 and 26 to exonerate the government and all its minions."
- "Young is suing the government for R150m for the loss of the electronic contract to Thales, a company associated with Schabir Shaik." Meanwhile Shaik went on trial for fraud and corruption. He was convicted in the Durban High Court on 2 June 2005 on two counts of corruption and one of fraud relating to irregular financial dealings with Deputy President Jacob Zuma. While Zuma was not on trial, the judge found that Shaik's relationship with him had

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- Prevent and reduce intra- and inter-country conflicts.
- Constitutional democracy, including periodic political competition and opportunity for choice, the rule of law, a Bill of Rights and the supremacy of the constitution are firmly established in the constitution.
- Promotion and protection of economic, social, cultural, civil and political rights as enshrined in all African and international human rights instruments.
- Uphold the separation of powers including the protection of the independence of the judiciary and of an effective Parliament.
- Ensure accountable, efficient and effective public office holders and civil servants.
- Fighting corruption in the political sphere.
- Promotion and protection of the rights of women.
- Promotion and protection of the rights of the child and young persons.
- Promotion and protection of the rights of vulnerable groups, including displaced persons and refugees.

7 Editorial *Daily Dispatch* 01/04/2005.

been "generally corrupt". Zuma was subsequently relieved of his duties as Deputy President. On 29 June 2005 he appeared in court to face charges on two counts of corruption.

- "Young has also launched four actions against government officials and rivals for allegedly defamatory comments."
- "The Human Rights Commission hopes the Promotion of Access to Information Act will force Armscor to release documents relating to part of the deal."
- "The major opposition parties have called for a judicial commission of inquiry into the whole arms deal."[8]

Given this complex set of circumstances, conventional wisdom in South Africa has it that all the issues are best dealt with, one by one, on an incremental case by case basis, in open court. In the meantime, President Mbeki decided to appoint a one-person commission of inquiry to probe the future of the Directorate of Special Operations (DSO), or the Scorpions, as they are more commonly known.[9] Some have questioned the constitutionality of the existence of the DSO under the National Prosecution Authority (NPA) or altogether. The ANC is reportedly divided on this issue:

- "The problem is that the camp in the ANC that wishes to see the Scorpions either closed down, or at least relocated to become part of the police service, is largely made up of those who feel aggrieved by the DSO's Zuma and Travelgate investigations."
- "This camp generally favours Zuma becoming the next ANC and national president."
- This faction argues "that the unit is a law unto itself, and that it overstepped the mark with its investigation of Deputy President Jacob Zuma".[10]

However that might be, the general unease about the immense power wielded by the National Director is well-documented. There is wide-spread dissatisfaction with the decision not to prosecute the deputy president. The decision to prosecute or not to prosecute is of primary importance since the majority of all crimes which are prosecuted result in a conviction. The conviction rate of prosecuted crimes is said to be about 80% in South Africa, whereas reported crimes go

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8 *Daily Dispatch* 01/04/2005. The Arms Deal Virtual Press Office provides further particulars of interest here, including the following news items: "Draft Reprots Ignite Smouldering Embers" Helen Suzman Foundation 02/03/2005; "Speculations in the Shadows of Shaik Case" *Business Day* 17/03/2005; "DA Asks Scopa to Reopen Investigation in Arms Deal" Sapa 30/03/2005; "Arms Deal Report Sanitised by State – DA" *Pretoria News* 31/03/2005; "Lekota Must Hand Over Arms Deal Documents" Sapa 15/04/2005 www.armsdeal-vpo.co.za (accessed 17/05/2005); "Shaik Timeline" *Daily Dispatch* 03/06/2005 4.

9 The High Court Judge appointed to investigate the future of the Scorpions is a former Deputy Director of Public Prosecutions and is said to be well-disposed to the unit. However, the appointee has been linked to an arms company that benefited handsomely from the arms deal. This has sparked fears of a conflict of interests. See *Sunday Times* 03/04/2005 1; "Scorpions at Bay" *The Natal Witness* 23/03/2005 www.armsdeal-vpo.co.za (accessed 18/05/2005).

10 *Sunday Times* 03/04/2005 1. See also *Financial Mail* 01/04/2005 20–21; "Embattled Scorpions Begin the Fight to Keep Their Sting" *Sunday Times* 20/03/2005.

largely unpunished.[11] The prosecution decides which crimes are prosecuted, and if it does so a high conviction rate is on the cards. The decision to prosecute therefore almost inevitably leads to a conviction. It thus is quasi-judicial by its very nature. However, such a decision is made by an organ of state that falls under the executive branch of government. But then, the decision to prosecute does not impinge on the doctrine of separation of power, since the judiciary has the final say in the matter. It decides whether or not a prosecution will result in a conviction. A decision not to prosecute is a different kettle of fish altogether. There is no input from another branch of government. It is free-standing and (to a large extent) unbridled. That can be problematic and troubling indeed, especially in situations where the key objective to fight corruption in the political sphere (f) and the key objective to uphold the separation of powers including the protection of the independence of the judiciary and of an effective Parliament (d) are at odds and need to be balanced.

3 The alleged abuse of the Prosecuting Authority

Those who feel aggrieved by the decision of the NPA not to prosecute the deputy president have reason to be concerned about the excessive concentration of power in one person or body that might lead to abuse of power. The Hefer Commission of Inquiry Report (Hefer Report) refers to the "immense power" wielded by the National Director of Public Prosecutions in terms of the Constitution[12] It characterises its "inquiry into allegations of the misuse of power" on the part of the first ever National Director, B T Ngcuka, as a matter of constitutional importance and public interest, and not "merely of interest to the ANC or of certain political groupings with the organisation".[13] By the same token, the Hefer Report repudiates the view held by certain commentators that the Commission was appointed to divert attention from the ongoing debate about the integrity of the so-called "arms deal". There was reportedly some debate in the Commission about the precise scope of the inquiry into the possible misuse of office. However, it was concluded that the commission had to determine two questions, namely

- "whether Mr Ngcuka had in fact been an agent of the pre-1994 security services, and, in the event of a positive finding,
- whether, because he had been such an agent, he had misused the prosecuting authority".[14]

In the event of a negative finding on the first question, the second question would fall away. This was indeed the final outcome of the inquiry reflected in the main findings of the Commission.[15] Nevertheless, the Commission dealt briefly with the alleged abuse of the prosecuting authority as a matter of public interest.

It is common knowledge that there were persistent reports about an investigation by Ngcuka's office against the Deputy President arising from his association

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11 Redpath *The Scorpions: Analysing the Directorate of Special Operations* ISS Monograph No 96 (March 2004) 70.
12 Hefer Report para 16.
13 Hefer Report paras 13–14.
14 Hefer Report para 3.
15 Hefer Report para 88.

with Schabir Shaik and the latter's suspected connection with the "arms deal". Ngcuka confirmed the investigation in a public interview held on 23 August 2003. According to a series of press and other public reports the Deputy President "was not pleased with the way in which Mr Ngcuka had dealt with an investigation into his possible involvement in transactions allegedly relating to the so-called "arms deal".[16] When invited to air his apparent grievance in the commission and to testify before it, Zuma declined to do so, advancing reasons which the Commission deemed "patently insufficient to justify a decision not to call him as a witness" and "not to issue a subpoena". Instead, he decided to take his complaint to the public protector.[17] The Commission accepted this decision on the ground that it was not for it "to persuade of compel him to use the commission as his forum".[18] However, the Commission, with disapproval, drew attention to the concluding remark in Zuma's facsimile of 25 November 2002 to the effect that he might not be averse to ignoring a subpoena. It reads: "Lastly, noting your last sentence that expresses your wish not to have to reach the point where you may have resort to a subpoena. I am in full support of this sentiment and indeed hope that we do not have to reach that point as I also would not want to reach the point where I would be forced not to respect your subpoena."[19] The Commission pointed out "that it would be a sad day if, for fear of incurring the wrath of a political organisation to which he belongs, the holder of one of the highest offices of State were to consider ignoring a subpoena issued by a commission appointed by the President under a power vested in him by the Constitution".[20] Is this a constitutional crisis in the making or just a spat between members of the judiciary and the executive?

However that might be, the Commission found it equally disturbing that constitutional rights violations have indeed occurred in the course of the investigation into the "arms deal" matter. The national director of public prosecutions allegedly abused his power and violated people's constitutional rights. The essence of the complaint is that the national director had leaked or condoned the leaking of information relating to the investigation in contravention of s 41(6)(a) of the National Prosecuting Authority Act.[21] Well-known persons, including the Deputy President, were investigated but not prosecuted and have been vilified in the public eye as a result of this. The Commission declared this wholly unacceptable in a country "where human dignity is a basic constitutional value and every person is presumed innocent until he or she is found guilty".[22] At the core of all this is the decision not to prosecute. It unleashes the contradictory dynamics underlying the "arms deal" matter.

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16 Hefer Report para 33.

17 Hefer Report paras 38 and 44. The Public Protector, Lawrence Mushwana, probed the allegations made by Zuma that Ngcuka abused his office. He concluded that Ngcuka's August 2003 statement on Zuma was "unfair and improper". The National Director of Public Prosecutions had announced that though there was *prima facie* evidence against Zuma, he would not be prosecuted as the case was not winnable (at that moment in time). See "Shaik Timeline" *Daily Dispatch* 03/06/2005 4.

18 Hefer Report para 44.

19 Hefer Report para 39.

20 Hefer Report para 44.

21 Act 32 of 1998. See Hefer Report para 73.

22 Hefer Report para 78.

It is widely acknowledged that the arms deal matter has thrown the powerful position of the National Director in the spotlight, while at the same time raising questions as to his independence from executive influence and his dependence on the president and parliament for tenure. The fact that he allowed an investigation into the Deputy President's role in the arms deal at all is seen by some as proof of his independence, casting him in opposition to the Deputy President and ANC loyalists in the matter. Others lament the fact that he did not use all the powers at his disposal in investigating the deputy president's role (including those of search and seizure). His decision not to prosecute after all, ostensibly for lack of evidence, is therefore seen as disingenuous.[23] In the final analysis the position of the national director is one of immense power. This is mainly due to the impact that a veto power has on the democratic principle of separation of powers. The source of the national director's power is the power of veto over all prosecutions conferred by the Constitution and confirmed by the Constitutional Court.[24]

4 The decision not to prosecute

In terms of the Constitution the Prosecuting Authority, headed by the National Director of Public Prosecutions, has the power to institute criminal proceedings on behalf of the state, including the power to carry out any necessary functions incidental thereto.[25] Arguably, this includes the further investigation of certain crimes to ensure successful prosecution. These powers must be exercised without fear, favour or prejudice. Section 179(4) provides that national legislation must ensure that this is the case. This amounts to a constitutional guarantee of prosecutorial independence since legislation which undermines the independence of the prosecuting authority may be tested against this provision.[26] The National Prosecution Authority Act does not provide for ministerial control of or intervention in the decisions of the national director. The absence of ministerial control and intervention stems from this piece of legislation, not from the relevant provisions of the Constitution. Section 174(6) merely states that "[t]he Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority". Subsection (7) refers all other matters concerning the prosecuting authority to national legislation. This, by necessary implication, includes the matter of ministerial control and intervention. There is, of course, a difference between ministerial responsibility and ministerial control and intervention. National legislation does not regulate the latter and thus blurs the distinction between the two issues. It has been noted that 'the legislative blurring of the distinction between ministerial responsibility over the prosecuting authority and the prosecutorial functions of the NDPP is problematic, but can be

23 Redpath 70–71.

24 Section 179(5)(d). *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) (*First Certification* judgment) para 140–146.

25 Section 179(2). See Redpath 67.

26 Section 179(10)(a) read with s 179(2) of the Constituion and s 20(1) of the National Prosecution Authority Act. See Currie and De Waal *The New Constitutional & Administrative Law* vol 1 (2001) 312; Schönteich *Lawyers for the People: The South African Prosecution Service* ISS Monograph 53 (March 2001) ch 2, 4 www.iss.co.za (accessed 17/05/2005/).

clarified on the basis of the *First Certification* decision of the Constitutional Court, referred to above.[27]

The prosecutorial discretion is wide, but it is not unfettered. Its proper exercise requires that a balance is struck between the public interest in the effective enforcement of the criminal law and the rights of accused persons to fair process. The 1999 policy manual of the National Prosecuting Authority provides the basis on which prosecutorial discretion has to be exercised. It recognises that the needs for prosecutorial discretion and fairness through consistency may conflict at times, and stresses that the guidelines contained in the manual are intended to be flexible enough not to stifle creativity. The prosecution policy sets out the way in which the prosecuting authority should exercise its discretion. The declared central purpose of the prosecution policy is to enhance public confidence in the prosecution system. It must therefore reflect what is best for South Africa.[28] That is a tall order indeed.

In deciding whether or not to institute criminal proceedings against an accused prosecutors are advised to apply the test of a reasonable prospect of a successful prosecution. In so doing, they are required to take into account a range of factors listed in the policy document, including:

- the strength of the state's case; and
- the extent to which the prosecution would be in the public interest.

The statutory code of conduct framed by the National Director of Public Prosecutions reiterates the essential need for prosecutors to be fair and effective and to act without fear, favour or prejudice, and thus to ensure public confidence in the integrity of the criminal justice process. It emphasises that the prosecutorial discretion should be exercised independently in accordance with the prosecution policy and free from undue political and judicial interference. Equally salient in this context are the United Nations guidelines on the role of prosecutors in criminal proceedings which stipulate that prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognised by international law. The National Director is under a statutory duty to promote respect for these principles.[29]

Decisions to institute or not to institute prosecutions may raise policy issues which are far from easy to determine where, as in the case of the "arms deal", the

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27 See d'Oliveira "The Prosecuting Authority: Seeking a Bridle for the Unicorn?" in Carpenter (ed) *Suprema Lex: Essays on the Constitution presented to Marinus Wiechers* (1998) 86; Joubert (ed) *Criminal Procedure Handbook* 6 ed (2003) 45–46.

28 See Schönteich ch 4, 2.

29 Section 22(4)(f) of the National Prosecution Authority Act incorporates the United Nations Guidelines on the Role of Prosecutors by reference into South African law. Schönteich ch 4, 2–5. Paragraph 4(c) of the policy issued by the National Director of Public Prosecutions validly makes the point that "[t]here is no rule of law which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted". See Joubert *Criminal Procedure Handbook* 60 and *passim*. However, a private prosecution on the basis of a certificate *nolle prosequi* in terms of s 7 of the South African Criminal Procedure Act 51 of 1977 is not ruled out either. A Director of Public Prosecutions must, at the request of a private prosecutor, grant a certificate of *nolle prosequi* in every case in which he or she has declined to prosecute.

events are already the subject matter of heated public debate. One of these issues turns on the controversial concept of "prosecution-led" investigations, which entails that prosecutors become involved in criminal investigations. Traditionally, the prosecutorial role is seen as distinct from the investigative role. Its overall objective is to serve the interests of justice, not to secure a conviction. The goal of a successful prosecution is a means to achieve this end.[30]

The decision not to prosecute is arguably administrative action and could be reviewed by a court, but then this is a power of review that has to be "sparingly exercised".[31] In terms of the Promotion of Administrative Justice Act (AJA) a decision to prosecute is not subject to judicial review. It is expressly excluded from the definition of administrative action.[32] However, the Act is silent about a decision not to prosecute. There may therefore be circumstances in which such a decision could be reviewed by a court.[33] In terms of the AJA a court or tribunal has the power to judicially review an administrative action if, for example, as alleged in the Hefer Report:

- the administrator (*in casu*, the Director of Public Prosecutions) is biased or reasonably suspected of bias;
- the action was taken for an ulterior purpose or motive, in bad faith, arbitrarily or capriciously; and not connected to the reasons given for it by the administrator (*in casu*, insufficient *prima facie* evidence for a successful prosecution) or otherwise unconstitutional or unlawful.

The aggrieved parties testifying before the Hefer Commission failed to establish a case in which such a judicial power should be exercised except with regard to the alleged constitutional rights violation (involving the right to dignity) which might be a ground of review in terms of the catch-all sub-section referring to "otherwise unconstitutional or unlawful action" or conduct. Furthermore, the courts so far seem to have adopted a similar approach in South Africa and elsewhere in being slow to interfere with decisions not to prosecute.[34] This accords with the separation of powers doctrine.

Thus, the failure to prosecute leaves only recourse to the legislature, to whom the prosecution is accountable. In terms of s 35(2) of the National Prosecution Authority Act, the National Director must annually submit a report to the Minister of Justice, which must be tabled in Parliament. Parliament can therefore call the prosecution authority to account for decisions to prosecute or not to prosecute, especially where the prosecution declines to pursue allegations of wrongdoing by members of the executive under which it is firmly positioned. Indeed, the line of command goes straight to the President. However, this is highly unlikely in a political system where the President is elected by the majority party in Parliament. The bottom line is this: "Parliament has yet to call the National Director to account for his failure to prosecute on any matter, including the arms

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30 Redpath 64–65.

31 See *Kaunda v The President of the Republic of South Africa* 2004 10 BCLR 1009 (CC) para 84 (per Chaskalson CJ), citing the English case of *R v Director of Public Prosecutions, ex parte C* [1995] 1 Cr App R 136 140.

32 Section 1(b)(ff).

33 *Kaunda* case para 84.

34 See *Kaunda* case para 84n64.

deal and the Deputy President's role in that matter.'[35] The democratic principle of separation of powers is of little avail under these circumstances. Conversely, the right to just administrative action that is part and parcel of the pan-African Democracy and Political Governance initiative is equally elusive.[36] How possible abuses by the prosecution in an emerging democracy can be effectively countered in terms of the theory of separation of powers remains to be seen. It is an open question.

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35 Redpath 71.
36 By necessary implication under key objective (b) (see note 6).

THE APPOINTMENT OF AN UNQUALIFIED PERSON AS A TEMPORARY MAGISTRATE IN TERMS OF SECTION 9(3) OF THE MAGISTRATES' COURTS ACT 32 OF 1944: *PIEDT v THE STATE* [2001] 2 All SA 415 (E)

1 Introduction

This case illustrates the dire consequences which ensue when an unqualified person is appointed as a temporary magistrate. The issue is now more relevant than ever due to the increasing efforts of the Department of Justice to reduce the backlog of cases in the Magistrates' Courts by appointing temporary and acting magistrates. Challenges to the constitutionality of the applicable provisions of the Magistrates' Courts Act[1] dealing with the appointment of temporary and acting magistrates, and the resultant statutory amendments, also require that the case in issue be subjected to closer scrutiny.

Following the case discussion, the issue of constitutionality of the applicable provisions of the MCA and whether they infringe judicial independence will be briefly discussed with reference to a recent decision of the Constitutional Court. Thereafter, the substantial amendments to the MCA resulting from the aforementioned Constitutional Court decision will be briefly evaluated. Reference will also be made to a Report of the United Nations Special Rapporteur on the Independence of Judges and Lawyers on the state of the judiciary and magistracy in South Africa.

2 Facts

The relevant facts are briefly as follows. Piedt (P) was convicted of robbery in the Port Elizabeth Regional Court on 18 August 1999 and sentenced to fifteen years' imprisonment with hard labour. The presiding officer was one R V Mankahla (M), appointed in terms of s 9(4) of the MCA to act temporarily as a Regional Magistrate for a period of some three months during 1999 in order to assist in dealing with the backlog of cases in the Port Elizabeth Regional Court. Following the conviction, an application for leave to appeal was brought before another magistrate, who forwarded the matter for special review. The basis for the special review was that the presiding officer's appointment might have been invalid due to him lacking the requisite qualifications for appointment. Although it is unclear which qualifications M held, it was common cause that he did not hold the LLB degree. The matter was enrolled for argument as both the special review Judge and the Director of Public Prosecutions questioned the validity of the presiding officer's appointment. The matter was proceeded with without M joining the proceedings, as all attempts to effect the service of papers upon him proved unsuccessful. In the words of the court, "he appears to have vanished like mist before the rising morning sun".[2]

The primary issue for determination by the court was whether M's appointment was valid. In making this determination, the Court had to consider whether

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1 Act 32 of 1944 (hereafter "the MCA").
2 At 417C.

a temporary regional magistrate appointed in terms of s 9(4) of the MCA had to comply with the minimum academic qualification requirement laid down by s 9(1)(b).

3 Relevant provisions

The relevant provisions of section 9 of the MCA considered by the court are as follows:

> "(1)(a) Subject to the Magistrates Act, 1993, and the provisions of paragraph (b) of this subsection and of section 10, the Minister may appoint for any district or subdistrict a magistrate, one or more additional magistrates or one of more assistant magistrates and for every regional division a magistrate or magistrates.
>
> (aA) The Minister may, in a particular case or generally and subject to such directions as he or she may deem fit, delegate the power conferred upon him or her by paragraph (a) to the Director-General of his or her department or another officer of that department with the rank of director or an equivalent or higher rank or a magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate.
>
> (b) No person shall be appointed as a magistrate of a regional division unless he or she has satisfied all the requirements for the degree of *baccalaureus legum* of a university in the Republic or has passed the Public Service Senior Law Examination or an examination deemed by the Minister to be equivalent or superior to the said examination, and the Magistrates Commission has informed the Minister that he or she is suitable for appointment as a magistrate of a regional division.
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> (c) . . .
>
> (d) . . .
>
> (2) . . .
>
> (3) Whenever by reason of absence or incapacity a magistrate . . . is unable to carry out the functions of his or her office or whenever such office becomes vacant, the Minister, or an officer in the Department of Justice or a magistrate at the head of a regional division or a person occupying the office of chief magistrate . . . may appoint any other competent person to act in the place of the absent or incapacitated magistrate . . . during such absence or incapacity or to act in the vacant office until the vacancy is filled: Provided that no person shall be appointed as an acting magistrate of a regional division unless he or she has satisfied all the requirements for the degree referred to in subsection (1)(b) or has passed an examination referred to in that subsection: Provided further that when any such vacancy has remained unfulfilled for a continuous period exceeding three months the fact shall be reported to the Magistrates Commission.
>
> (4) The Minister, or an officer in the Department of Justice or a magistrate at the head of a regional division or a person occupying the office of chief magistrate . . . may appoint temporarily any competent person to act either generally or in a particular matter as magistrate of a regional division in addition to any magistrate or acting magistrate of that division or as additional or assistant magistrate for any district or sub-district in addition to the magistrate or any other additional or assistant magistrate."

4 Evaluation of the judgment

Leach J, with whom Nepgen J concurred, delivered the judgment of the court.

1 The court determined that a person appointed in terms of s 9(4) as a temporary regional magistrate is a "magistrate" for purposes of the MCA. Section 1

provides that in the MCA, the term "magistrate" does not include an assistant magistrate. From this it follows that an assistant magistrate is excluded from the term "magistrate". This being the only exclusion, the court found that by necessary implication a person appointed in terms of either subsec (3) or (4), neither of which provides for the appointment of an assistant magistrate, should be regarded as a magistrate as defined for purposes of the MCA.[3] Any doubt is removed by s 12(1)(a), which provides that a regional court may only be held by a magistrate of a regional division.[4]

The MCA and the Magistrates Act[5] distinguish between a judicial officer and a magistrate. Section 1 of the MCA defines a judicial officer as a magistrate, an additional magistrate or an assistant magistrate. An assistant magistrate is therefore a judicial officer, but not a magistrate, for purposes of the MCA. Section 1 of the MA provides that the term "magistrate" for purposes of the MA means a judicial officer appointed under s 9 of the MCA, read with section 10 of the MA. An assistant magistrate is therefore a magistrate for purposes of the MA, but not the MCA.

2 The court concluded that a reference to "a magistrate of a regional division" in s 9(1)(b) encompasses a person appointed to act as a magistrate in the regional division under s 9(3) or 9(4).[6] Any person appointed as a regional magistrate in terms of either s 9(3) or 9(4) must therefore satisfy all the requirements for the degree of *baccalaureus legum* of a university in South Africa, or have passed the Public Service Senior Law Examination, or an examination deemed by the Minister of Justice to be equivalent or superior to this examination. The court based this conclusion on the common law presumption that same words and expressions must be given the same meaning wherever they appear in the statute unless there is a clear indication to the contrary or unless it would be repugnant to the clear intention of the legislature or would lend to an absurdity. In this case, M did not possess the requisite academic qualifications for appointment as a regional magistrate. In the result, the review succeeded, and the conviction and sentence was set aside.[7]

3 In reaching its decision, the court dismissed the interpretation proffered by the Regional Court President, Port Elizabeth, and the chief state law adviser in the office of the State Attorney. Their interpretation of the provisions was that a person appointed as a magistrate in a temporary capacity in terms of subsec (4) does not need to be the holder of an LLB degree or the equivalent qualifications stated in s (9)(1)(b).[8] The gist of their argument was this: s 9(3) contains a proviso whereby any person appointed in terms of that subsection must comply with the qualification requirements laid down in terms of s 9(1)(b), while s 9(4) does not contain a similar proviso; therefore, any person appointed in terms of subsec 4 does not need to comply with the qualification requirements laid down in s 9(1)(b). From this, they draw the

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3 419B.
4 419D.
5 Act 90 of 1993 (hereafter "the MA").
6 419E.
7 420I & 421A.
8 418D.

inference that it was not the intention of the legislature for a person appointed in terms of s 9(4) to possess these qualifications. They base their argument on the common law presumption that legislation does not contain any meaningless provisions and that no clause, sentence or word should be regarded as surplus, void or insignificant.[9]

The court justifiably dismissed their interpretation and characterized it as simplistic. Leach J criticised their interpretation as disregarding some basic canons of interpretation:

> "Firstly, legislation is presumed to be intended to promote the best interests of the public. This is particularly relevant where the legislation prescribes a particular level of skills and training to be acquired by persons before they may lawfully offer certain professional skills to the public . . . Secondly, when construing a statute, the same words and expressions must be given the same meaning where they occur in different parts of a statute unless there is a clear indication to the contrary or unless the same meaning in another provision in the enactment is repugnant to the clear intention of the lawgiver or would lend to an absurdity . . . In addition [thirdly], it is presumed that the legislature did not intend to create an absurdity . . . and [fourthly] in interpreting a section, the meaning of the words used should be determined in the context in which they are used, both in the immediate context of the section and in the general context of the Act . . ."[10]

Leach J continued that the court could not "see how the legislature's enactment of the first proviso to section 9(3) can render the clear provisions of section 9(4) at all ambiguous".[11] The court further stated that had the proviso to s 9(3) not been enacted, there could not have been any scope for any argument that either a s 9(3) or a s 9(4) appointee did not need to comply with the qualification requirements of s 9(1)(b).[12] Even if, for the sake of argument, the proviso to s 9(3) rendered s 9(4) ambiguous, reference to the intention of the legislature would resolve such ambiguity.[13] The court concluded as follows:

> "The legislature, for good reason and in an effort to ensure a minimum level of competence (possibly to avoid situations such as the present where Mankahla by the sentence he imposed showed an alarming lack of basic knowledge regarding the imposition of sentence) was clearly of the view that it was in the public interest for a person appointed to the position of regional magistrate to hold certain legal qualifications viz., those prescribed by section 9(1)(b). There is no reason to think that the legislature would have intended either an acting regional magistrate or a temporary additional regional magistrate, both of whom are charged with the same powers and duties of a permanent regional magistrate, to hold any lesser qualifications."[14]

And further:

> "Had there been a difference between the powers, jurisdiction and duties of regional magistrates appointed under either section 9(1), section 9(3) or

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9 418G.
10 418H–419A.
11 419F.
12 *Ibid.*
13 419G.
14 419I–420A.

> section 9(4), it may have been possible to infer that the legislature envisaged different qualifications. But where regional magistrates appointed under these three sections all have identical powers and duties, the inference is irresistible that the legislature intended them to have the same qualifications. Certainly no purpose would be served nor cause advanced by them having different qualifications, and counsel who appeared before us were unable to think of any reason why a person temporarily appointed to act under section 9(4) should have any lesser qualification than any other regional magistrate.
>
> Not only would it clearly be in the best interests of the public for an additional regional magistrate appointed to act temporarily under section 9(4) to have the same legal qualifications as a person appointed either permanently to that post or in an acting capacity under section 9(3), but it would be absurd if such temporary appointee was not so qualified. It was surely never the intention of the legislature to water down the standard of the administration of justice by allowing persons who could not be considered as candidates for permanent appointment as regional magistrates due to lack of qualifications, to be appointed to act as regional magistrates in additional posts, especially where acting magistrates appointed under section 9(3) due to the unavailability or incapacity of another regional magistrate are required to have the necessary qualification."[15]

4 It is submitted that the court made the correct finding. It can be agreed with the court that the appointment as a temporary magistrate of a person who lacks the formal academic qualifications that is required for appointment as a magistrate in a permanent position would be against public policy and would not instil confidence in the magistracy. The appointment of such unqualified persons would give credence to perceptions about an incompetent and unqualified magistracy.

I argue elsewhere that it is imperative that the South African magistracy gains the respect and acceptance of the population.[16] This is a prerequisite for the legitimacy of this institution, which hears an estimated 95% of all cases brought before the courts. It is clear that the appointment of unqualified individuals would not enhance the credibility and legitimacy of the magistracy. Magistrates must be qualified and competent to discharge their functions.

5 The court was not required, by virtue of the limited scope of the review, to deal with any other issues, including the constitutionality of the relevant provisions.

5 The Constitutionality of Sections 9(3) & (4): Do they infringe judicial independence?

5 1 The concept of judicial independence

As the late Mahomed CJ explained: "[T]he principle of an independent judiciary goes to the very heart of sustainable democracy based on the rule of law. Subvert it and you subvert the very foundations of the civilization which it protects."[17] In short, judicial independence allows judicial officers to perform the adjudicative

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15 420C–G.

16 Olivier "Is the South African magistracy legitimate?" 2001 *SALJ* 166.

17 Mahomed "The role of the judiciary in a constitutional state" 1998 *SALJ* 111 112.

function without any actual or perceived, direct or indirect interference from or dependence on any other person or institution.[18] The independence of the judiciary is safeguarded, in theory at least, in the Constitution.[19] Section 165(2) provides that the courts are independent and subject only to the Constitution and the law, which the courts must apply impartially and without fear, favour or prejudice. No person or organ is allowed to interfere with the functioning of the courts.[20] Organs of state must actively assist and protect the courts to ensure their independence.[21]

5 2 The Van Rooyen cases

In *Van Rooyen v The State*,[22] the applicants challenged the constitutionality of a range of legislative provisions, including ss 9(3) and 9(4) of the MCA. The general tenor of the applicant's arguments was that the affected provisions violated the principle of judicial independence as guaranteed in the Constitution. In the court *a quo*, Southwood J ruled in favour of the applicants and found that both subsecs (3) and (4) were unconstitutional. The judge criticised the provisions as follows:

> "In the case of acting and temporary magistrates not all of these safeguards [applicable to acting judges] are present. First, the Minister is not obliged to consult any other person before appointing the magistrate. Secondly, there is no security of tenure during the period of the appointment and the contract may be summarily cancelled in certain circumstances which have nothing to do with incompetence, incapacity or misconduct. Thirdly, in terms of s 9(4) the Minister has the power to appoint a temporary magistrate for a particular matter, which clearly enables the Minister to appointment a magistrate for a particular case."[23]

And further:

> "These provisions empower the Executive to select and appoint acting and temporary magistrates, to limit their tenure for reasons unrelated to capacity, competence or behaviour and to determine the cases to be heard. These provisions would give rise to a perception on the part of the reasonable, objective and informed person that acting and temporary magistrates are not independent."[24]

The matter was brought before the Constitutional Court some time later to confirm the order of unconstitutionality made by the Southwood J.[25] The court, per Chaskalson CJ, found that there could be no constitutional objection to the appointment of acting or temporary magistrates, as the Constitution recognises the need for the appointment of acting *judges*.[26] The court dismissed the criticism directed at s 9(3) by the trial judge and ruled that the provision was not inconsistent with judicial independence. The court stated that appointments made in terms of this section were for a determinate period, meaning that the acting

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18 *Ibid*.
19 The Constitution of the Republic of South Africa, 1996.
20 Section 165(3).
21 Section 165(4).
22 2001 4 SA 396 (T). This judgment will hereinafter be referred to as *Van Rooyen (1)*.
23 458H–J.
24 459E–F.
25 *Van Rooyen v The State (General Council of the Bar of South Africa intervening)* 2002 5 SA 246 (CC). This judgment will hereinafter be referred to as *Van Rooyen (2)*.
26 Para 243 (my emphasis).

magistrate has security of tenure during this period.[27] The appeal was therefore upheld.

With regard to subsec (4), the court confirmed the order of invalidity and the appeal was dismissed. Two grounds were cited. Firstly, the court found that appointments made in terms of this subsection were not for a fixed or determinate period, and that appointees lacked security of tenure.[28] Secondly, the court found that the appointment of a "competent person", who may not be a magistrate, and who does not have security of tenure, to act in a *particular* matter, as opposed to acting generally, is inconsistent with judicial independence and therefore unconstitutional.[29] The court observed that there could however be no objection against the appointment of a "competent person" to act *generally* in a particular court.[30]

6 The Judicial Officers (Amendment of Conditions of Service) Act 28 of 2003 (the JLACSA)

The Constitutional Court had suspended the order of invalidity for a period of 12 months in order to ensure that the structure and functioning of the courts were not affected.[31] Legislative intervention was therefore required within one year of the date of the order. However, the amendment Act was only promulgated in October 2003,[32] some four months after expiry of the one year period. In *De Kock v Van Rooyen*,[33] the Supreme Court of Appeal ruled that s 9(4) became invalid on the day following the expiry of the twelve month period of suspension. No temporary magistrates could therefore be appointed until the new provisions have come into effect.

6 1 The Amended Provisions

The amended subsecs of s 9 of the MA read as follows:

> "(3) Subject to subsections (4) and (5), the Minister, after consultation with the head of the court concerned, may appoint any appropriately qualified and fit and proper person to act–
>
> (a) in the place of any magistrate, additional magistrate or assistant magistrate who is not available; or
>
> (b) in any vacant office of magistrate; or
>
> (c) as a magistrate in addition to any magistrate of a regional division or a district.
>
> [Sub-s. (3) substituted by s. 3 *(b)* of Act 104 of 1996, by s. 3 *(c)* of Act 66 of 1998 and by s. 1 of Act 28 of 2003.]
>
> (4) (a) A magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate authorized thereto in writing by the Minister, may–

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27 Para 246.
28 Para 247.
29 Para 248.
30 *Ibid* (my emphasis).
31 Para 272. See also the order in para 273.
32 *Government Gazette* 25650 (13 October 2003).
33 2004 2 SACR 137 (SCA).

(i) whenever a magistrate, additional magistrate or assistant magistrate is for any reason unavailable to carry out the functions of his or her office; and

(ii) in consultation with the Minister or an officer in the Department of Justice and Constitutional Development designated by the Minister,

temporarily appoint any competent person in the place of the magistrate concerned.

(b) An appointment in terms of paragraph (a) remains valid for the duration of the unavailability of the magistrate in question, or for a period not exceeding five consecutive court days, whichever period is the shortest.

(c) Any person appointed in terms of paragraph (a) may–

(i) upon the expiry of the appointment in terms of paragraph (b); and

(ii) if the magistrate in whose place the appointment has been made, is still unavailable,

be reappointed once only in terms of paragraph (a) in the place of that magistrate.

[Sub-s. (4) substituted by s. 3 (b) of Act 104 of 1996, by s. 3 (c) of Act 66 of 1998 and by s. 1 of Act 28 of 2003.]

(5) (a) Any person appointed in terms of subsection (3)–

(i) holds that office for a period determined by the Minister at the time of the appointment, but the period so determined may not exceed three months; and

(ii) may be reappointed to that office in terms of subsection (3).

(b) The Minister must cause Parliament and the Magistrates Commission to be informed whenever any vacancy in the office of a magistrate has remained unfilled for a continuous period exceeding three months.

[Sub-s. (5) deleted by s. 2 of Act 34 of 1986, added by s. 3 (c) of Act 104 of 1996 and substituted by s. 1 of Act 28 of 2003.]

(6) Any person appointed in terms of subsection (3) or (4) is also deemed to have been so appointed in respect of any period during which he or she is necessarily engaged in connection with the disposal of any proceedings–

(a) in which he or she has participated as such a magistrate, including an application for leave to appeal in respect of such proceedings; and

(b) which have not yet been disposed of at the expiry of the period for which he or she was appointed.

[Sub-s. (6) added by s. 1 of Act 28 of 2003.]"

6 2 Differences Between the Old and New Provisions

The amended provisions distinguish between acting magistrates, and temporary magistrates. Sections 9(3) & 9(5) deal with the appointment of acting magistrates, while s 9(4) deals with the appointment of temporary magistrates. Section 9(6) applies to both categories, and provides that the appointment period also includes any period during which the appointee is necessarily engaged in connection with the disposal of the proceedings and which were not disposed of at the expiry of the initial period of appointment.

Some of the main differences between the old provisions and the amended provisions will be pointed out with brief commentary.

6 2 1 Acting Magistrates (ss 9(3) & 9(5))

- Previously, the appointment could be made by either the Minister, an officer in the department of Justice, a head of a regional division or a chief magistrate. Now, only the Minister of Justice may make such an appointment and

only after consultation with the head of the court.[34] Previously, no consultation was required.

The legislature appears to have taken note of the criticism directed by the High Court in *Van Rooyen (1)* against the absence of such consultation requirement, even though the Constitutional Court in *Van Rooyen (2)*[35] found that the absence of such a consultation requirement is not contrary to judicial independence. This amendment places the Magistrates' Courts in a similar position to the High Courts with regard to the consultation requirement in the Constitution.[36]

- Now, only an appropriately qualified and fit and proper person may be appointed. This is a repetition of the general requirement for appointment as a judicial officer contained in the Constitution.[37] Previously, the only requirement was the person must be "competent".
- Now, the appointment can be made in the place of a magistrate, additional magistrate or assistant magistrate who is not available; in any vacant office of magistrate; or as a magistrate in addition to any magistrate of a regional division or a district. Previously, an appointment could only be made in the event of a vacancy, or due to the absence or inability of a magistrate. A third category has therefore been added.
- The period of the appointment is determined by the Minister at the time of appointment, but may not exceed three months. Previously, no maximum period was stipulated.
- The Minister must cause Parliament and the Magistrates Commission (MC) to be informed whenever a vacancy has remained unfilled for a continuous period exceeding three months.
- It is possible to reappoint an acting magistrate. In theory, this means that an acting magistrate could be appointed every three months for an indefinite period either in the place of a magistrate who is not available, or in addition to any magistrate. With regard to a vacancy, even though the Minister must cause the MC to be informed when a vacancy has remained unfilled for a continuous period of more than three months, it does not follow that the vacancy will be filled immediately. It is therefore possible to re-appoint an acting magistrate in such a vacant office until the vacancy is filled.

6 2 2 Temporary Magistrates (s 9(4))

- The appointment can be made by either the head of a regional division, a chief magistrate, or an acting chief magistrate who has been authorised thereto in writing by the Minister of Justice. Previously, the appointment could be made by the Minister, an officer in the Department of Justice, the head of a regional division, or a chief magistrate.

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34 It is submitted that consultation does not mean that the concurrence of the head of court is required.

35 Para 245.

36 Section 175(2): "The cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve."

37 Section 174(1): "Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer . . ."

- The appointment must be made *in* consultation with the Minister of Justice or an officer in the Department of Justice and Constitutional Development designated by the Minister.[38] Previously, no consultation was required.
- Previously, a temporary appointment could be made for a person to act either generally or in a particular matter. Now, the appointment can only be made in the event of the absence of a magistrate, additional magistrate or assistant magistrate for whatever reason.
- The only requirement for appointment stipulated is that the person must be competent. There is no mention of a requirement that the person must be appropriately qualified and a fit and proper person. It is submitted that these requirements apply as they are the general constitutional requirements with which every judicial officer, permanent, temporary or acting, must comply.[39]
- The appointment of the temporary magistrate is for the duration of the unavailability of the magistrate in question, or for not longer than five consecutive court days, whichever period is the shortest. Previously, no time limit was specified, which resulted in the unconstitutionality of the provision.
- It is possible to reappoint the temporary magistrate for only one additional period as stipulated above in the event of the continued unavailability of the magistrate in question.[40]

7 The report of the United Nations special rapporteur on the independence of judges and lawyers [41]

In May 2000, a fact-finding mission, led by Dato' Param Cumaraswamy, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, visited South Africa.[42] The mission's report, although in general positive, identified specific entrenched practices, legislation and perceptions that are contrary to fundamental elements of judicial independence. Of particular relevance to this discussion, is the criticism directed at the practice of appointing judicial officers in an acting capacity. The report highlighted the following concerns about the appointment of acting judges which are equally applicable to magistrates:

- there is no security of tenure, which is an essential requirement for judicial independence;[43]

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38 This consultation requirement is more stringent than the one for the appointment of acting magistrates. It is submitted that the concurrence of the consulted party is required.

39 See s 174(1) of the Constitution. This is an issue which requires closer scrutiny. It will be dealt with extensively in a forthcoming contribution.

40 Compare with subsec (5), which does not appear to place a limit on the number of reappointments.

41 "Civil and Political rights, including questions of independence of the judiciary, administration of justice, impunity – Report of the Special Rapporteur on the independence of judges and lawyers, Dato' param Cumarawamy, submitted in accordance with Commission resolution 2000/42, Mission to South Africa" (2001) *United Nations Economic and Social Council.*

42 The mission was pursuant to a mandate contained in the United Nations Commission on Human Rights Resolution 1994/41 and renewed for a further three years by Resolution 2000/42.

43 Report paras 65, 99 & 100.

- these acting appointments bypass the formal procedure that applies to permanent appointments;[44]
- there is no maximum duration for an acting appointment. In theory, it could be for an unlimited period.[45]

The report concluded with a range of recommendations to bring South Africa in line with "ideal" international standards of judicial independence. *Prima facie*, based on the Report, it is not unreasonable to conclude that South Africa falls short of international standards of judicial independence.[46]

The concerns highlighted in the Report are valid. The *Van Rooyen* cases failed to address these concerns adequately. Although the courts in both cases based their respective declarations of invalidity on the absence of security of tenure, the bypass of the formal appointments procedure and the duration of the non-permanent appointments were not addressed in either judgment.

8 Conclusion

The decision under discussion highlights the need for the appointment of qualified and experienced judicial officers in the lower courts. It serves as a good example of an instance where justice was miscarried for the sake of expediency.

It is trite that the magistrates' courts are experiencing a huge backlog of cases. Any initiative to reduce the case backlog and to improve the efficiency with which our courts dispense justice should be welcomed. However, in the haste to deliver on these laudable objectives,[47] care should be taken to ensure that the initiatives do not have the opposite effect of what was intended, as has happened in the present case. Those charged with the onerous responsibility of appointing judicial officers should take adequate care to ensure that appointees are appropriately qualified and sufficiently experienced and competent to perform their job functions. Inexperienced and unqualified individuals should not be appointed as this will only serve to reinforce perceptions of a mediocre magistracy.

It would appear that the legislature has made an effort to address some of the concerns raised in the Report of the United Nations Special Rapporteur. It is encouraging to note that the amended provisions provide for a limitation on the duration of the period of appointment of both temporary and acting magistrates. The earlier criticism directed at these provisions should however be noted. In short, the recent amendments to the MA, although an improvement on the previous dispensation, still falls short of international standards of best practice, particularly with regard to the requirements for the appointment of temporary magistrates.

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44 Report para 64.
45 Report para 66.
46 See Olivier "Judicial independence in Southern Africa: a brief comment on aspects of the Report by the United Nations Special Rapporteur for Independence of Judges and Lawyers' mission to South Africa" unpublished paper, 2001.
47 At 459E–F.

RESEARCH AND PUBLISHING AT RHODES*

Mr Vice-Chancellor, Honoured Guests, Ladies and Gentlemen.

I have lived through an interesting period in the history of South African law. When I went to study law at Wits in 1946 there were few suitable textbooks to which we could turn to find out what South African law was. In contract, for example, there were only two, and neither were suitable. Wessels was too long and complicated and Wille and Millin was too short. De Wet and Yeats had not yet published the first edition of their *Kontraktereg en Handelsreg*. So the book that we used as a textbook was Cheshire and Fifoot's *The Law of Contracts*, then in its first edition, published in 1945. It was, and now in its fourteenth edition it still is, a good book; but of course we had to leave out parts of it as it is on English law.

After qualifying I joined the Public Service, served as a Clerk for some years, and then became Assistant Magistrate and Assistant Native Commissioner at Keiskammahoek in the Ciskei. Part of my duty was to deal with problems concerning the customary law of property. On this there were Proclamations and Government Notices, cases, and Commission reports; but very little in any of the books on customary law. So I wrote a book entitled *The Native Common Law of Immovable Property in South Africa*, which Butterworths published in 1953.

By publishing my first book Butterworths became my favourite publishers and have remained so. As I had done with the first two books, I typed the complete manuscript of the first edition of *Contract* myself without any prior agreement with any firm about publication. Mr. Andrew McAdam, the MD (CEO he would be called now), sent by ordinary mail an enthusiastic letter. In those days one did not use the telephone much because of the cost and because the time a letter took to arrive was not great. Nowadays of course e-mail gives almost instant communication. Not long ago I sent Mr. Theuns Viljoen an e-mail and got an answer back the next day saying: "I am in Nigeria at present but I have asked one of my staff in Durban to let you have an answer."

In 1954 I saw an advertisement for a Lecturer in Law at Rhodes and I decided to apply. In those days there were no interviews for such posts so applicants posted their applications and waited patiently for an answer. I was fortunate and received a letter from the Registrar stating that I was appointed from 1 January 1955.

There were only three full-time members of staff, Professor Robin McKerron and two lecturers, so we all lectured on many subjects and were grateful to Advocates down town who helped by giving part-time lectures. This combination of a few full-time and many part-time lecturers existed for many years. I am pleased this evening to be able to thank again Judge RJW Jones who helped

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* A speech delivered by Professor Emeritus AJ Kerr SC at the dinner held to mark the celebration of the centenary of the Rhodes University Law Faculty on 10 May 2005, and to honour Professor Kerr's 50 years as a member of the Faculty, and 53 years' association with LexisNexis Butterworths Publishers.

us in this way for many of those years. His father, Professor Bobby Jones, was the first to increase the number of full-time staff members to four. Having been an Attorney for many years he brought our Faculty qualities that we had not previously had. He was very interested in practical training long before the subject became as popular as it is now.

When one writes a book one usually reads all the available binding authorities. I, however, have had the experience of writing when some authorities were theoretically available but practically out of reach, I belong to the generation which passed Latin, but, unless one specialised in it, could only translate after taking much more time than one had if the preparation for lectures was to be adequate. So we were very pleased when Judge Gane's translation of Voet came out in 1955–1958. But when I wrote the first edition of my book on *The Principles of the Law of Contract* (published in 1967) there was no translation of Van der Keessel's *Praelectiones,* none of Molinaeus, and none of Groenewegen's *De Legibus Abrogatis.* When I brought out the second edition we did have Van der Keesel: but again not Molinaeus or Groenewegen. By the time of the third edition Professor Erasmus's translation of Molinaeus was available but Ben Beinart had only got as far as his second volume of Groenewegen. Similarly, I did not have access to Pothier on *Mandate* when I brought out the first edition of my book on *The Law of Agency* in 1972. I did have that access in time for the second edition in 1979 after Rogers and De Wet's translation became available. I, for one, am grateful to all translators.

In the early days we had many subjects to lecture on but few students. Ten to twelve lectures per week was the standard for full-timers and at one time I had fifteen lectures to give weekly. Nowadays our numerous staff have fewer subjects to lecture on and fewer lectures to give but many more students. I am pleased to note that, despite the burden of many students, publication of books, chapters in books and articles and notes has continued. I have been asked to give only a short speech so I have had to confine myself in what follows to books only. Had I included all publications, ie articles and notes as well as books, there would have been much more to say. I may say that the top quality students at present appear to one no longer lecturing to be equal to the top quality students we had. Those of our students who went to universities overseas after graduating were usually graded there in a way similar to our grading.

In my time the history concerning books by members of our Faculty is as follows. In the 1960s Professor Robin McKerron brought out the sixth edition of his *The Law of Delict.* (There was a seventh edition after he retired). I published my second book on customary law (*The Native Law of Succession in South Africa* (1961)), a short work on Jurisprudence entitled *Law and Justice: A Christian Exposition* (1963), the first edition of *The Principles of the Law of Contract* (1967), and the first edition of *The Law of Lease* (1969).

In the 1970s I brought out the first edition of my book on *The Law of Agency* (1972), its second edition in 1979, the second edition of *Contract* (1975) and the second editions of my two books on customary law combined in one volume entitled *The Customary Law of Immovable Property and of Succession* (1976).

In the 1980s Professor Ron Beuthin published the first edition of his book on *Basic Company Law*. (Since he retired it has gone into its second (1992) and third editions (2000) with SM Luiz as co-author.) Professor MA Lambiris published *Orders of Specific Performance and Restitutio in Integrum in South African*

Law (1989). I brought out the third (1980) and fourth (1989) editions of *Contract* and the first edition of *The Law of Sale and Lease* (1984), the section on Lease being brought up to date.

The number of books written by members of our Faculty increased markedly in the 1990s. Professor Rob Midgley published *Lawyers' Professional Liability* (1992) and was responsible for the second edition of Professor JC van der Walt's work on Delict entitled *Delict Principles and Cases* by Van der Walt and Midgley (1997). Professor Ivan Schäfer published *The Law of Access to Children* (1993) and, with his son Lawrence, wrote a chapter in JA Robinson's *The Law of Children and Young Persons* (1997). In addition he was the founding editor of the Butterworths *Family Law Service*. Professor John Grogan published *Collective Labour Law* (1993) and, with J Riekert, *Basic Employment Law* (1993). Later he combined these two books under the title *Workplace Law* published in 1996 which had new editions every year up to 2001 after which two years seems to be the interval between editions. Professor Brigitte Clark wrote five chapters in the second edition of *Boberg's Law of Persons and the Family* edited by Belinda van Heerden *et al* (1999) and took over the editorship of the *Family Law Service.* Professor Richman Mqeke published the first of his books on customary law, *Basic Principles to Problem Solving in Customary Law* (1997). In this decade I brought out the third edition of my book on customary law (1990), the third of *Agency* (1991), the second of *Sale and Lease* (1995) and the fifth of *Contract* (1998).

Since the year 2000 Professor Riekie Meintjes-Van der Walt has published *Expert Evidence in the Criminal Justice Process* (2001), Professor Richman Mqeke has published *Customary Law and the new Millennium* and has contributed to *LAWSA* First Reissue, vol 32 on Indigenous Law (2004). There is in the press a book entitled *Commercial Law X-Kit* being published by Pearson Educational of which Mr Dave Holness has written one third. In this period I have brought out the sixth edition of *Contract* (2002) and the third edition of *Sale and Lease* (2004).

Other members of staff are busy on research and have published articles and notes and/or are responsible for a division or divisions in the *Family Law Service* as I am. In addition Dr Graham Glover is involved in editorial duties in connection with *Speculum Juris* and has kindly consented to be the co-author of the next editions of both *Contract* and Sate *and Lease.* Doubtless the Faculty's history of publications will continue.

All in all, for the past fifty years Rhodes University has been a good place to be in for those interested in teaching and writing law.

AJ KERR
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PUNCHING BEYOND ITS WEIGHT – THE FIRST HUNDRED YEARS OF RHODES UNIVERSITY'S LAW FACULTY*

A centenary is a special event and marks a moment when one can reflect on one's origins and history, and take stock of where one is. The centenary of Rhodes University's Faculty of Law is an unusual one, however, for it co-incides with another remarkable event: the Golden Jubilee of Professor Alastair Kerr's association with the Law Faculty. Such co-incidence is surely most rare – and possibly as extraordinary as an alignment of the planets!

Rhodes University was established in 1904 and a year later, in 1905, the first Professor of Law and Jurisprudence was appointed to cater for the University's perceived need "for the scientific and philosophic teaching of law".[1] The Rhodes Law Faculty cannot claim to be the oldest law faculty in the country – that accolade belongs to two institutions further south[2] – but on taking up the Chair, Prof Macfadyen[3] became the first full-time professor of law in South Africa.[4] He was

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* This is an annotated and expanded version of the speech delivered on 10 May 2005 at a dinner to mark the centenary of legal education at Rhodes University. The dinner was sponsored by LexisNexis Butterworths Publishers. Invited guests included staff and students, members of the Faculty Board, the Vice-Chancellor of Rhodes University and Deans from most South African faculties of law.

1 The decision of Rhodes University College's Council to this effect is noted in Kerr "Legal Education at Rhodes University 1904–1996" 1996 *Consultus* 135. A more detailed, and updated, version of this article, "Legal Education at Rhodes University 1904–2000" (cited below as "Kerr (Website)") can be found on the Rhodes University Law Faculty Website http://www.ru.ac.za/academic/faculties/law/index.php3?body=history/history_index.html (accessed 30/10/2005). Much of the material upon which this article is based stems from these two sources, as well as on unpublished research by Dr Graham Glover. I also wish to thank Sarvani Morgan for her assistance in collecting other information.

2 The University of Cape Town and Stellenbosch established law faculties in 1918 (Cowan "The History of the Faculty of Law, University of Cape Town – A Chapter in the Growth of Roman-Dutch law in South Africa" 1959 *Acta Juridica* 1 18; Van Wyk "Die Stellenbosse Regsfakulteit: 1920–1989" 1989 *Consultus* 42; Visser "As durable as the mountain: The story of the Cape Town Law School since 1859" 1992 *Consultus* 32 33). The Rhodes Law Faculty was established in 1951. Until then, Rhodes was a constituent college of the University of South Africa.

3 Kerr (Website) notes: "Professor Macfadyen was a man of many talents. Before coming to Rhodes he taught English and Logic at the Staatsgymnasium in Pretoria; at Rhodes he taught law and, for a short period, became Chairman of Senate; after he left he lectured in Mathematics at Grey University College in Bloemfontein and then joined the staff at the Transvaal University College where he became Professor of Philosophy (including Psychology) and Economics and 'promoted librarianship, an extra-mural department, a faculty of music and hostels for students'."

4 Legal education in South Africa started in 1858 when the Cape Board of Examiners was established (Cowan "Taught law is tough law: The evolution of a South African law school" 1988 *THRHR* 4 6). The practice, until then, was that legal education was conducted by part-time lecturers who were also practitioners (Cowan 1988 *THRHR* 5–6; Kerr 1996 *Consultus* 141n3). According to Cowan and Kerr, similar appointments were made at UCT (Prof G Wille) and Stellenbosch (Prof H Fagan) in 1920, and Wits in 1926 (Prof R G McKerron). The first professorial appointment appears to be that of JH Brand, at UCT in 1859, who not long thereafter became President of the Orange Free State. See Cowan 1959 *Acta Juridica* 11.

not the only law lecturer, because right from the start liberal use was made of local practitioners to assist with the teaching – a practice that continued throughout the Faculty's first century.[5]

The BA and LLB degrees were offered from the outset.[6] The first law graduate on record is HG Rousseau, who graduated LLB in 1906, followed by H Sanders, RH Walker and AS Welsh in 1907, GN Cross and RL Ward in 1908, and FB van der Riet in 1909. Also among the first group of students were OVF Sampson (BA, 1907), C Newton-Thompson (BA, 1910) and FG Reynolds (LLB, 1910), all of whom were subsequently elevated to the Bench. HF Sampson, apparently also studied at Rhodes at the time and graduated in 1910.[7] In 1941 he became the first local product to be appointed permanently to the Faculty staff and in 1951 the first Dean of Law at Rhodes.

Prof Henry Lewis was the second professor, from 1911 to 1917. The First World War caused a decline in student numbers and the resultant financial strain led to the University Council deciding to abolish the Chair in Law.[8] So Prof Lewis left to practise at the Bar in Grahamstown – by all accounts with some distinction[9] – and was later elevated to the Bench in 1946. The full-time post remained vacant for a while, until 1923, when Adv Grant McKerron, who had carried the load as a part-time lecturer in the interim, was appointed full-time at lecturer level. He was promoted to Professor in 1928 and he occupied the Chair until his retirement at the end of 1944.[10]

A grand total of 9 students graduated LLB in the first decade of the Faculty's existence, followed by a decline to 6 in the next, which included the First World War years. Between the two world wars class sizes varied between 2 and 5, with 4 being the most common size. The third and fourth decades producing 21 and 19 graduates respectively. Rachel Teukolsky (1933) was the first woman LLB graduate. RW Jones, who subsequently joined the staff in 1961, graduated in 1934. Graduates from this era who were later elevated to the Bench were EWG Jarvis (BA, 1926), AG Jennett (1928), G Wynne (1931), JVR Lewis (BA, 1935), S Miller (BA, 1935), and JD Cloete (1939).

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5 In fact, Rhodes had only one full-time member of staff until 1941 and practitioners did most of the teaching all along.

6 As were, according to Kerr (Website), the Law Certificate, LLB and LLD degrees of the University of the Cape of Good Hope, the Civil Service Lower and Higher Law Examinations, the Law Certificate and Civil Service Lower and Higher Law Examinations for the Transvaal, the Orange River Colony and Natal.

7 Kerr (Website). I could not find official verification of this, however.

8 It is perhaps for this reason that commentators who assert that the first full-time professors were those at Stellenbosch and UCT failed to pick up that Rhodes had such a position for a while, between 1905 and 1917.

9 Kerr (Website), quotes from Mr Justice EF van der Riet's autobiography (*Favoured by Fortune* (unpublished) 93): "It was a great education to appear with Henry Lewis; he was a very sound lawyer, and his argument to the court at the end of a prolonged trial could not be surpassed."

10 Mr NK Kinkead-Weekes (1947), lectured in 1949, but I have no indication in what capacity. Interestingly, in 1954 Mr Kinkead-Weekes was a member of Council and its representative on Senate.

Prof Ben Beinart occupied the Chair from 1945 to 1949 before moving on to UCT.[11] While at Rhodes he was not only Head of Department, but also Dean of the Faculty of Law of the University of South Africa, of which Rhodes was a constituent college.[12] He was succeeded by Prof HF Sampson, who had been appointed to the staff in 1941.[13]

The Faculty of Law came into existence on 10 March 1951, on Rhodes becoming an independent university. Prof Sampson was the first Dean of Law. Adv KFJ Schwietering[14] joined the staff in 1951 and Sir Charles Cumings in 1953.[15] So by 1953 the permanent staff had grown to three.[16]

Immediately after the Second World War the average graduate class size was 4 (except in 1949, when there was a bit of a bubble – 10) and there was a sharp rise in graduate numbers in the fifth decade to 37. Those from this post-war group who later became judges included JB Pitman (BA, 1944), JCR Fieldsend (1946), NC Addleson (1947), TM Mullins (1948), FC Kirk-Cohen (1949), AJ Milne (BA, 1949), HJ Berker (1951), NW Zietzman (BA, 1952), CJ Waddington (1953), LS Melunsky (1954).

1955 saw a completely new team.[17] Prof Robin McKerron was appointed to the Chair and assumed the position of Dean, and Mr AJ Kerr and Adv JG Paterson joined the staff as lecturers.[18] After Adv Paterson resigned to join the

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11 To become the WP Schreiner Professor of Roman Law in 1950. Visser 1992 *Consultus* 35 writes of Beinart: "His prodigious and learned writing on Roman and Roman-Dutch law, his translations of the old authorities . . . as will as his many visiting professorships and attendance at overseas conferences, put the Faculty of Law at Cape Town on the map in the legal historical world. He founded *Acta Juridica*, he lectured with enthusiasm and he inspired both students and colleagues." Dean "Ben Beinart – A Personal Tribute" 1976 *Acta Juridica* xv wrote: "Ben Beinart does everything with gusto. He is a lover of good wine, good food and good cigars but he takes equal pleasure in intellectual activity. He is a delightful companion, quick to see the humour which is present in most human predicaments and yet totally without malice. He is an idealist who is a realist – a liberal in the true sense of that word. He is uncompromisingly honest, acting always in accordance with the highest standards of propriety and integrity in both his personal and academic life but always tolerant, ready to see both sides of any question and to respect the views of others, even those with whom he disagrees."

12 Dean 1976 *Acta Juridica* xix.

13 As noted earlier, Prof Sampson was the first Rhodes graduate to be appointed to the staff, having graduated, according to Kerr, in 1910.

14 He resigned at the end of 1954 to take up a position a Stellenbosch, and later occupied a Chair there. See Lubbe "Huldeblyk: Klaus Schwietering" 2000 *Stellenbosch LR* 322.

15 An alumnus from the mid-1950s, Pearce Rood, recalls that Sir Charles joined the law staff at the beginning of 1953 after a career in the British Colonial Service, where he ended up as Chief Justice and acting Governor-General of the Sudan. He had graduated BA in 1923 from Rhodes University, with distinctions in English and Economics and was thereafter a Rhodes Scholar. He left the Faculty staff at the end of 1954 to join the Anglo-American company in Rhodesia.

16 Mr GTB Bertram (BA, 1942) lectured for a year in 1952.

17 At the end of 1954, Prof Sampson retired and Sir Charles Cumings and Mr Schwietering resigned.

18 At the same time Prof Hugh Chapman, the first Dean of Students at Rhodes began lecturing Constitutional Law, which he continued to do until 1968.

Bar in Durban,[19] Adv LH Copeland QC[20] commenced duties in 1958.[21] Mr RW (Bobby) Jones joined the staff in 1961, bringing the total full-time staff to four.[22]

In 1956 the Faculty tried to improve the enrolment figures by seeking to relax the University rule that Latin 1, English 1 and Nederlands and Afrikaans 1 were necessary requirements for the LLB degree. Senate refused that request, however, and the class sizes remained low. The number of subsequent attempts to do so is uncertain, but by 1968 Latin was the only one of the three subjects to remain a degree requirement.[23] Its demise occurred only in 1989, but it remained a practice requirement for a few more years.

The sixth decade saw 53 graduates, of whom the following were elevated to the bench: JG Foxcroft (BA, 1960), SA Ritchie (1963), RJW Jones (1963), and AR Erasmus (1966).

Prof Ron Beuthin was appointed Dean and Head of Department of Law in 1968 and Mr Alastair Kerr was promoted to occupy a second Chair at the same time. A year later the staff increased to five, with the appointment of Mr WHB Dean as Senior Lecturer. Barry Dean left to become Professor of Public Law at UCT in 1973 – yet another Rhodes staff member to add value at another institution.[24] In the meantime, Adv Copeland retired, and in 1972 Mr ID

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19 At the end of 1957. Prof McKerron had also left Rhodes in 1959 and spent a year as Head of the Department of Comparative Law at the University of Aberdeen (*Rhodes Newsletter* November 1968). Towards the end of 1958 the University had approached Mr AM Honoré, Reader in Roman-Dutch law at Oxford University with an offer of the Chair at Rhodes. The offer was declined. Fortunately, the grass was not as green as Prof McKerron had anticipated and he returned to Rhodes in 1960. (Prof Ian Macdonald, former Dean of Humanities at Rhodes, came across the Senate decision to make the offer to Mr Honoré and Prof Kerr supplied the additional information.)

20 According Kerr (Website), Adv Copeland had studied at Rhodes (probably graduating BA in 1925, but I have not been able to verify this) and was awarded a Rhodes Scholarship in 1925. On his return from Oxford he practised as an attorney in Johannesburg and before being called to the Bar in Grahamstown in 1931.

21 1958 was also the year in which government terminated the affiliation between Rhodes and the University of Fort Hare.

22 He graduated LLB in 1934 and appears to have been the first Rhodes LLB graduate to have been appointed to the staff. Although Rhodes graduates, Prof Sampson, Sir Charles Cumings and Adv Copeland did not have Rhodes LLBs. Prof Jones retired in 1976 as an Associate Professor.

23 In 1972 students were required to complete a compulsory research project and attend at least one civil trial. The Research project fell away in 1975 and the compulsory trial attendance in 1987. (I doubt whether this attendance requirement was ever enforced: I cannot recall anyone having attended a civil trial in the late 1970s when I was a student, nor from 1984–1987, during which time I was on the staff.) My impression was, and is, that participation in moots replaced trial attendance, but I cannot find any such indication in the calendar before 2000, when satisfactory participation in at least two moots became a degree requirement.

24 A number of Rhodes staff went on to have distinguished academic careers elsewhere, although UCT seems to have been the prime beneficiary. Subsequent to his appointment at Rhodes, Prof Macfadyen at Grey University College (University of the Free State) and the Transvaal University College (University of Pretoria); Prof Beinart went to UCT, where he was Dean on two occasions and also played a prominent role in that university's administration before leaving to occupy a Chair in Jurisprudence at the University of Birmingham and also served as Dean there (Dean 1976 *Acta Juridica* xvii, xix–xx); Mr Schwietering later occupied a Chair at Stellenbosch; Dr Dean, like Prof Beinart left for

continued on next page

Schäfer[25] started his long association with the Faculty, now spanning over 30 years.

Until 1972 the Faculty offered two diplomas, the Diploma in Law and the Diploma in Law (Public Service) in addition to the LLB degree. In that year the B Proc degree (*Baccalareus Procurationis*) was introduced. LLB class sizes in the late 1960s and early 1970s generally fluctuated between 4 and 10. Forty-nine students graduated in the seventh decade, including the first B Proc graduate, MW Schwikkard (1974). The following judges emanating from this generation: NB Locke (1972), LE Leach (BA, 1972) and TD Cloete (1974).

Adv FG Richings joined the staff in 1974, followed by Mr DJ Piron in 1975. Neither of them was to stay for long, however, and both left to take up positions at Unisa – Dr Piron in 1976 and Adv Richings in 1977.[26] Adv AJG Lang[27] and Mr N Levine[28] arrived in 1978, appointed Senior Lecturer and Lecturer, respectively, followed by Mr MJ Oelschig[29] as Senior Lecturer in 1979. The staff complement had by then grown to six. Mr Levine left for Australia in 1981 and Mr JD Haydock[30] was appointed Senior Lecturer, primarily to take charge of Commercial Law teaching at Rhodes's East London campus, followed by the appointment of Ms SH Christie as Lecturer in 1982 and Mr MAK Lambiris as Senior Lecturer in 1983.

Rhodes currently boasts one of the best-run Legal Aid Clinics in the country. Prof Schäfer was instrumental in establishing it in 1974, when it opened once a week for two hours. Students would interview clients and local attorneys would oversee their work on a roster basis. When Adv Lang arrived things changed

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UCT for a professorial post, later to become Dean of Law, and also to leave for the United Kingdom (to take charge of the training portfolio of the London firm, Linklaters); Dr Piron and Dr Richings both went to Unisa as professors; Associate Professor Lambiris emigrated to Australia where he is currently an Associate Professor and Reader at the University of Melbourne; Prof Schwikkard took up a professorial post at UCT, Assoc Prof Clark now lectures at the Univesity of East Anglia and Prof R Meintjes-van der Walt is an adjunct professor at the University of Fort Hare.

25 He was a prosecutor in Rhodesia and served his articles in Grahamstown before joining the staff.

26 Adv Richings later left Unisa to practise at the Bar in Durban, where he subsequently took Silk.

27 Andrew Lang practised at the Bar in Rhodesia and lectured at the University of Rhodesia before coming to Rhodes. He was an outstanding lecturer and had a wonderful rapport with students. He left the Faculty in at the end of 1983 to practise at the Bar in Grahamstown, later taking Silk. He also acted as a judge on occasions.

28 Mike Oelschig recalled in his farewell speech (24 October 2002): "Neville Levine was the best-dressed man that I have seen in academic circles. He wore a new or different suit every day . . . He was also an outstanding cook."

29 Mike Oelschig had been a magistrate in Rhodesia for 20 years before becoming a Lecturer (and later Senior Lecturer) in Law at the University of Rhodesia in 1957. As a teacher, he favoured the Socratic method, and students held him in high regard. He served as Deputy Dean of Law from 1998 until his retirement in 2002, acting as Dean on occasions, and was a central figure in the residential and disciplinary systems at Rhodes.

30 John Haydock was a long-time magistrate in Rhodesia prior to coming to Rhodes. Although he taught Company Law and Lease and Agency on the Grahamstown campus, his initial work focussed mainly on teaching Commercial Law in East London. He served as a University Proctor for many years before retiring at the end of 1999 to practise as an attorney in Grahamstown. He continued to teach part-time until 2003.

quite dramatically. He had directed a similar clinic at the University of Zimbabwe and reorganized our clinic substantially when he became the first Clinic Director on a part-time basis. Adv J C Louw (1989–1990), Mr BB Brody (1991–1994), Mr J Campbell (from 1995 onwards) each improved the Clinic's professional services to the extent that in addition to providing legal services to indigent people, it also supports para-legal institutions throughout the Eastern Cape Province and forms an important part of our students' legal education.[31] By the end of the review period, 2005, the Clinic operated three major projects – the Clinic and the Family Law Unit in Grahamstown,[32] and the Rural Centre in Queenstown[33] – employing 17 members of staff.

In 1975 the Faculty moved from the central campus into its current premises on St Peter's Campus, which was formerly a residence (Lincoln House) of the Grahamstown Teachers' Training College. Staff offices used to be on the first floor of the main University building and the Law library used to occupy a small space in the corner of the main library, with an outside door to allow round-the-clock access to those with keys. Now the Faculty had a distinct identity for the first time, with the offices, library and lecture venues together in one building. Prof Beuthin also secured sponsorship and added the Moot Room complex,[34] which to this day adds flavour to our clinic teaching programme.

Between 1975 and 1984 class sizes grew substantially. Having breached 10 for the first time in 1975, classes remained in the twenties from 1978 onwards. Compared with a total of 193 graduates in the first seventy years of the Faculty's existence, 174 students graduated B Proc and LLB during the eighth decade alone. JG Grogan was the Faculty's first LLM graduate, in 1984.

When Prof Beuthin retired in 1984, Prof Alastair Kerr became Dean and Head of Department, and Prof Ivan Schäfer and Prof JR Harker[35] were appointed to Chairs. At the same time, further staff changes also occurred. Adv Lang left academia for the Grahamstown Bar, and Mr CM Plasket and I joined the staff, Mr Plasket to become the first full-time permanent staff member to be based in East London.In 1986 Ms Christie[36] and Mr Plasket left. Growth in East London

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31 For a short while the Faculty also provided legal services under the auspices of the Legal Aid Board. Mr I Sogoni was the first Principal of the Legal Aid Board Clinic (1996–1999) and Mr Jeram (2000) succeeded him until that Clinic gained a status separate from the University.

32 Apart from the Director, the Clinic has two principal attorneys. Mr SB Mkumatela was the first Deputy Director until Prof ID Schäfer succeeded him in 2004, and Ms B Amsterdam was the Co-ordinator of the Family Law Unit until 2005.

33 Mr JC de Wet was the first Director of the Centre until 2004. Mr P Pringle succeeded him in 2005.

34 He obtained the Moot Room furniture from the old East London Magistrate's Court, which at the time was being refurbished.

35 Prior to joining the staff Ross Harker lectured at the University of Natal, Pietermaritzburg, and was Dean of Law at the University of Venda.

36 On leaving Rhodes Sarah Christie spent six years as a senior researcher at the Institute of Development and Labour Law at the University of Cape Town. She served as Senior Convening Commissioner for the Commission for Conciliation Mediation and Arbitration in Cape Town before leaving the organisation to practise as an attorney, arbitrator, mediator and trainer in employment law and dispute resolution. She is a Judge on the World Bank Administrative Tribunal and has acted as consultant to a number of public international organisations about employment relations, including the International Monetary Fund, the World Health Organisation and the United Nations.

meant that two staff members were appointed there, Ms L Van der Walt and Ms G Robertson[37] and similar growth in Grahamstown meant that a further two persons were appointed there in 1987 – Mr JG Grogan, as Senior Lecturer, and Mr DJ Leyshon, as Lecturer. Mesdames Van der Walt and Robertson left in 1988, however, and Mr DA Maree (1976) and Mr M Moodley took over their tasks in East London. Mr JN Cocks replaced Mr Moodley in 1991.[38]

The 1970s and 1980s were of course fraught politically. Although no-one easily admits guilt, we should at least acknowledge that political issues were not at that time at the forefront of the Faculty's educational mission. It took a while for us to enroll our first black students. Strini Naidoo graduated in 1979, followed by Lex Mpati in 1983. Sarah Christie was the first female full-time staff member, appointed in 1982,[39] while Prof Richman Mqeke was the first black academic in Grahamstown,[40] appointed only in 1997. But at least those who passed through the Faculty continued to achieve, and those who became judges were L Mpati (1983), SS Mainga (1985), MR Madlanga (1986) – and also Clive Plasket (PhD, 2003), who lectured here at the time, and again later.

In 1988, the posts of Dean and Head of Department were split, with Prof Kerr remaining as Dean and Prof Schäfer becoming Head of Department. On Prof Kerr's retirement in 1991, Prof Ross Harker became Dean, John Grogan was promoted to Professor, and Mr GW Barker[41] and Mr BK Peckham[42] joined the staff – to fill the vacancies created by Prof Kerr's retirement and Prof Lambiris's departure for Australia in 1990. Mrs M Weaver lectured for a year in 1990 and in 1992, when Mr Leyshon left, Ms AL Moss commenced duties. Dr ZJ Dabek joined the Faculty a year later, in 1993, following Ms Moss's departure in 1993, and he, in turn, left at the end of 1994. In the meantime, I was promoted to professor in 1993. During this period the Faculty also offered a Street Law programme in schools and prisons. I co-ordinated the programme from 1989 on a part-time basis, and again a few years later, as did Mr FJ Khoza (2000–2001), but in between Ms B O'Brien (1990–1992) and Mr C Ndzengu (1993–1994) did so in a full-time capacity.

The sharp rise in graduates continued, with 288 LLB and B Proc students having graduated in the ninth decade. In addition, in 1986, the Faculty conferred its first PhD degree on JR du Plessis.

In 1995 Mrs BJ Clark and Adv L Meintjes-van der Walt were appointed lecturers.[43] Prof Harker, who was Dean at the time, left academia in 1996 for private practice[44] and I was appointed to succeed him. Mrs E Davis and Ms L van

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37 Mrs L van Rooyen lectured in East London for a year in 1986.

38 Don Maree and Jeremy Cocks remained on the staff until the end of 2002 when the East London branch of Rhodes University was incorporated into the University of Fort Hare.

39 Ms M-AC Hofman was a temporary leave substitute lecture in 1971 (information supplied by Adv Les Roberts).

40 Matthew Moodley lectured in East London in 1989 and 1990.

41 Having previously been an attorney and an advocate, Gordon Barker lectured at the University of Bophuthatswana before taking up a post at Rhodes.

42 Prior to joining the staff Brian Peckham lectured at the University of Venda, where he also acted as Dean of Law.

43 Brigitte Clark had previously lectured at UCT and Riekie Meintjes-van der Walt had previously lectured in East London.

44 After a short spell in publishing, Ross Harker served his articles and is now practising as an attorney and conveyancer in Port Elizabeth.

den Berg joined in staff in that year, Mrs Davies as a specialist lecturer responsible for academic development in the Faculty.

In 1997 Prof Schäfer retired and went into private practice as an attorney, but retained some lecturing responsibilities for a few years thereafter.[45] Prof RB Mqeke was appointed to the vacant Chair[46] and Prof Grogan succeeded him as Head of Department. However, soon thereafter, in 1998, he too left the Faculty, to become a labour consultant – as did Ms van den Berg, who went into private practice in Cape Town. And we lost another staff member that year when Brian Peckham suddenly passed away. The vacancies that arose were filled by Mr CM Plasket[47] and Mr GB Glover.

The high turnover of senior staff resulted in the University rethinking the Faculty's administrative structure. In 1998 the University resolved that one-department faculties should be restructured: the Department of Law ceased to exist, and the posts of Dean and Head of Department were amalgamated. All the administrative responsibilities now vested in the Dean and Deputy Dean of Law. I then continued to serve as Dean, but the post now incorporated the functions of Head of Department, with Mike Oelschig serving as Deputy Dean.

That year also saw a major shift in the provision of legal education nationally. The B Proc degree was terminated, as was the post-graduate LLB degree, and instead a four-year undergraduate LLB degree became the common entry-level degree for legal practice, irrespective of the profession. A shift in curriculum also occurred, with greater emphasis being placed on practical skills.[48] The Faculty also had a physical revamp around this time. With the help of sponsorship from the Professional Provident Society and alumni, staff rooms were increased, the library was extended and a computer laboratory was installed.[49]

John Haydock left the staff for private practice in 1999 and Prof PJ Schwikkard, the first woman to be appointed to a Chair of Law at Rhodes, joined the Faculty in 1999 for a short sojourn of two years, as well as Mr FJ Khoza, who lectured from 1999 to 2001.[50]

In 2001 Prof Mqeke took over from me as Dean with Assoc Prof Meintjes-van der Walt, Assoc Prof Clark, and on her departure for England, Mr Barker, each serving approximately a year as Deputy Dean. In 2004 I again became Dean, with Gordon Barker continuing as Deputy Dean. In the meantime, Mike Oelchig retired in 2002. Since then the following persons joined the permanent staff: in

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45 In 2004 Ivan Schäfer rejoined the Faculty for a three-year spell as Deputy Director of the Legal Aid Clinic.

46 Richman Mqeke had previously lectured at the University of Fort Hare, before taking up a Chair at the University of the Transkei, where he subsequently was Dean of Law and also the University Registrar.

47 Clive Plasket had previously lectured in East London. Having spent some time as an attorney in Johannesburg, he came to Grahamstown as Director of the Legal Resources Centre before rejoining the Faculty staff.

48 For a while, though, the postgraduate LLB and B Proc degrees were still officially in the calendar, as these degrees were being phased out.

49 The money that remained was invested and now provides an annual bursary, The Law Alumni Bursary, to a deserving student.

50 PJ Schwikkard became a professor at UCT, while Chicco Khoza became an attorney in Johannesburg.

2002, Mrs SEH Driver[51] and Assoc Prof WW Kulundu-Bitonye (only for a just more than year, however);[52] in 2003, Ms R Krüger,[53] and Mr HW wakwa-Mandlana; in 2004, Ms F Badat, Ms S Fodor and Mr D Holness, Adv LJ Roberts, SC;[54] and in 2005, Mr M Lehloenya[55] and Ms H van Coller.[56] In the meantime, Prof Meintjes-van der Walt was promoted to a Chair in 2004, but left soon after.[57]

Classes increased dramatically from the mid-nineties. They hovered between 30 and 40 for a decade before reaching over 40 for the first time in 2002 and over 50 in 2003. The final year class in 2005 numbered 65. So, despite the termination of the B Proc degree in 1997, the final decade under review saw yet another sharp increase in graduate numbers, this time totaling 406.

Before closing, some recognition should be given to those who worked behind the scenes – the librarians and the secretarial staff. When the Faculty moved to St Peter's Campus and had a separate library for the first time, Mrs E Rezelman was both secretary and librarian (1977–1984). Mrs SM Maclennan was appointed part-time librarian (mornings only) from 1985 to 1997 and Mrs R Greaves was then appointed on a full-time basis from 1998 until 2003. In 2004 Mrs J Otto succeeded her.[58] Records in respect of secretarial staff are sketchy, however, and I have only the following information available: Mrs McLoughlin (1976); Mrs L Pitt (1977); Mrs Erica Rezelman (1977–1984); Mrs Susan Muddle (part-time 1983); Mrs Marion Penney (part-time 1983–1991); Mrs Louise Donaldson (1991 –1997); Ms Liziwe Futuse (1997 –2005); Ms Janna Prinsloo (part-time 2003–2004); Ms Katlego Gabashane (part-time 2005) and Ms Sonya de Villiers (2005). Those who were Administrative Assistants were: Morny Andersen (1985); Mrs Marie Japp (1986–1988); Mrs Wendy Pieterse (1988–1990); Mrs Heather Kew (1990–1991); Mrs Joan Hack (1991–1995); and Mrs Sandy Scrivener (1995–2000). Mrs Suzette Flanagan became Administrative Assistant in 2001 and was promoted to Faculty Manager in 2004.

One can see that, as it enters its next centennial year, the Faculty looks very different from when it first started. Although we are still a very small faculty by national standards, we now have 12 full-time staff members, and a number of part-time staff. Staff are essentially career academics, not practitioners, although we do have a thriving legal aid clinic with 17 staff members that offers some

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51 Previously Sarah Driver had worked for many years in the Master's Office in Grahamstown.

52 Wanyama Kulundu-Bitonye's previous position was Dean of Law at the National University of Lesotho and he left Rhodes in May 2004 to become head of judicial training in his home country, Kenya.

53 Rósaan Krüger joined the Rhodes staff at the East London Campus in 2001 and transferred to Grahamstown Campus in 2003. Prior to joining academia, she served her articles with the Centre for Community Law and Development of the Potchefstroom University and was admitted as an attorney.

54 Les Roberts is a former Attorney-General and Director of Public Prosecutions for the Eastern Cape. He joined the Rhodes staff on his retirement from the Civil Service.

55 Michael Lehloenya lectured at the University of the Free State prior to taking up the appointment at Rhodes.

56 Mr J Haydock, Ms C Johnson, Mr R Poole and Ms A Wagenaar were regular part-time lecturers during this period.

57 She is now an Adjunct-Professor of Law at the University of Fort Hare.

58 Ms Silvia January was appointed Library Assistant in 2003.

practical perspective to students. We graduated just under 60 students in 2004 and will probably top that number in 2005.

In its first hundred years, the Rhodes Faculty of Law graduated 1043 LLBs, 35 B Procs, 16 LLMs and 10 PhDs,[59] with two-thirds of those graduating in the past twenty years. I have not noted all the achievers, and the various ways in which they impacted, and continue to impact, on society in this review, but even so, we can see that there is much to reflect upon and much to celebrate. Rhodes's Law Faculty may be small, but, in boxing parlance, it has punched way beyond its weight. And, as we glance in the other direction, along the road ahead, we see that there is much to look forward to. I am confident that with its current staff and students the Faculty is well placed to build on its heritage.

PROFESSOR JR MIDGLEY
Dean of Law
Rhodes University

59 These figures might not be entirely accurate, as I have had to piece the information together from various sources. They do provide a fairly accurate general impression, however.

Guests at the dinner hosted by LexisNexis Butterworth Publishers on 10 May 2005 to commemorate the centenary of legal education at Rhodes University. Photograph courtesy of Kodak Express, Grahamstown.