Speculum Juris

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ARTICLES

NOTES AND COMMENTS

The Constitution, the Bill of Rights, and the Law of Succession (2)

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7 INTRODUCTION

Those unacquainted with customary law might think that all that needs to be said about the present position is that the Intestate Succession Act 81 of 1987 now applies to those whose estates were dealt with under customary law and that all estates are now administered as directed in the Administration of Estates Act 66 of 1965. Those acquainted with the subject know that there is more to be said than that.

7 1 The meaning of "intestate": Oral dispositions made in expectation of death

When the Intestate Succession Act was passed it applied only to estates which devolved according to South African common law. Now it applies in addition to estates of those who, when they lived, were subject to, or entitled to take the benefit of, customary law. It follows that if a person is said to have died "intestate" the meaning must now be that the deceased (1) did not leave a will valid according to South African common law, and (2) did not leave the customary law equivalent of a South African common law will. That equivalent is an oral disposition made in expectation of death, but not necessarily in expectation of death in the then immediate future.[1] Being oral, there needs to be some evidence of it and one of the requirements is that it must be publicly declared though the amount of publicity may vary.[2] An important rule is that in customary law freedom of testation is not complete. It is limited to the extent explained elsewhere.[3] Because the disposition is the equivalent of a will the person who made it may be referred to as a "testator". This means that there will be cases in which it may be necessary to indicate which system of law is being considered.

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* This is the second part of a two-part article. The first part may be found in (2005) 19 *Speculum Juris* 185–205.

1 See Kerr *Customary Law* 113–118 esp the evidence of Cetwayo, ex-king of the Zulus (1883 Comm 239 at 528) and the decision in *Gobeni v Gobeni* 1929 NAC 8 (C&O), Bennett S*ourcebook* 408, Bennett *Customary Law in South Africa* 2004) 351–352, Olivier *et al* "Indigenous Law" *LAWSA* Vol 32 First Reissue para 230; Olivier *et al Privaatreg* 450–453; *Seymour's Customary Law* 311–313.

2 *Ibid*.

3 *Ibid*.

As the existence of oral dispositions is in no way unfairly discriminatory, and as customary law is required by the Constitution to be, in the words of the majority in *Bhe*, "accommodated, not merely tolerated",[4] it is clear that oral dispositions made in expectation of death continue to be part of the law.[5] As the majority noted in para 121, the proposals in para 120 are at present only proposals for consideration by the legislature, so the one at the end of para 120 lettered (d) does not at present affect the point just made.

Where there is such an oral disposition it will often deal with only part of the estate so many of the cases in which there are oral dispositions are likely to be cases of persons dying partly testate and partly intestate.[6]

7 2 Testamentary succession in two systems of law at the same time

The majority in *Bhe* emphasized in para 131 that, in its view, its judgment was concerned *only* with "intestate deceased estates which were governed [before the judgment was given] by s 23 of the Act." With respect, the judgment has an effect on a number of other issues, one being testamentary succession in two systems of law at the same time.

Before the judgment subsecs 23(1), part of (2) and (3) laid it down that the property mentioned in 23(1) and part of (2) devolved according to customary law.[7] Since the judgment those subsections no longer form part of the law. There is now no rule preventing anyone (including those entitled to take the benefits of customary law) making a South African common law will, and including within the terms of that will his wishes for the devolution of all his property. There is also no rule preventing any person entitled to take the benefits of customary law dealing, within the limitations imposed by that system of law, with his intentions concerning part of his property by means of an oral disposition in expectation of death. May a testator who comes within the scope of customary law, without making any formal change in the terms of the South African common law will, by oral disposition leave all or part of the property named in it to someone other than the person who would have received it in terms of the South African common law will had the disposition not been made?

There is a case in which a testator who complied with all the formal requirements of South African common law wills established a fideicommissum in which the fideicommissary (the beneficiary after the first beneficiary named in the will) was described in language appropriate to customary law: *Nxasana v Nxasana*.[8] The fiduciary (the first beneficiary named in the will) was prohibited from selling, leasing or mortgaging "or in any other way alienat[ing]" a farm and it was stated:

> "That the said farm shall upon his death devolve upon the general heirs of succeeding generations, for such number of generations as fixed by law and likewise be subject to the same restrictions as to alienation as hereinbefore set out."

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4 Para 41.

5 See *inter alia* s 39(3) of the Constitution.

6 On the point that a person may die partly testate and partly intestate see Corbett *et al Succession* 562 and Meyerowitz *The Laws and Practice of Administration of Estates and Estate Duty* (2004) para 19.1.

7 The tables of succession to quitrent land in tribal settlements referred to in subsec 23(2) were statutory customary law: Kerr *Customary Law* 159.

8 1967 BAC 35 (N–E) ("BAC" is an abbreviation for Bantu Appeal Court), commented on by Kerr "A fideicommissum incorporating conditions based on Bantu Law" 1969 *SALJ* 25.

Two other clauses showed that the polygynous household head desired his family to live on the farm in conditions similar to those governing customary law families. The court held that the terms of the will were binding on the parties. The decision can be justified on the ground that South African common law seeks the intention of the testator and will enforce that intention when it is clear what it is. The approach of customary law is the same.[9] Both the South African common law method of making one's decisions known (which requires writing) and the customary law method (which does not require writing) are lawful.

Since s 23 was declared invalid there are no rules preventing those within the scope of customary law from making use of whichever lawful method is convenient at the time. Hence, when one asks what arrangements the deceased made concerning his/her estate, account should be taken of the dispositions made by both methods. It follows that a testator can change whatever is in a written will by making a later oral disposition in expectation of death, and conversely one who first made an oral disposition can change it by a later written will. There may well be circumstances where someone who has made a written will is involved in an accident, or whose health deteriorates markedly when he has no writing materials to hand, but note that there must be public intimation of an oral disposition so it cannot be effective if it is merely a whispered statement to one person immediately before death.

The exposition given above covers also the question sometimes asked: can a testator who falls within the scope of customary law and who has made a South African common law will subsequently deprive a beneficiary under the will of the benefit in that will by complying with the customary law requirements for disinherison.[10] The answer is "Yes".

7 3 The order of intestate succession

7 3 1 Surviving Spouses

(a) Where the deceased was monogamous

The great majority of intestate estates brought within the terms of the Intestate Succession Act by the decision in the *Bhe* trilogy of cases will be valued in financial terms at less than R125 000.[11] Where that is the case and there are children and a surviving spouse the surviving spouse will be awarded the whole estate and the children will receive nothing.[12] Not only that but the surviving spouse will receive the estate in South African common law ownership and will be entitled to consume it, or, by making a South African common law will, to bequeath it to anyone, or to any cause, with no connection whatever with the family. This could not have been done before the decision, because subsecs 23(1), part of (2) and (3) did not allow it. The net result is that in cases of intestacy in which there is a surviving spouse and children and the estate is

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9 For the rule in general see Corbett *et al Succession* 625 and for the position in customary law see the authorities referred to in Kerr *Customary Law* 113–114.

10 For the requirements see Kerr *Customary Law* 118–122, Bennett *Sourcebook* 405–408, Bennett *Customary Law in SA* 350–352; Olivier *et al LAWSA* Vol 32 para 232; Olivier *et al Privaatreg* 474–486; *Seymour's Customary Law* 302–306.

11 The financial worth of the estates in the *Bhe* and *Shibi* cases furnish examples.

12 Section 1(c)(i) of the Intestate Succession Act. For the figure R125 000 see *Family Law Service* para H69(3).

valued at less than R125 000 instead of a single heir (the senior male) who did not have complete freedom of testation there will be a single heir (the surviving spouse) who will have complete freedom of testation.

(b) Where the deceased was polygynous

The Court prescribed that in the case of the death intestate of a polygynous head of a household each surviving spouse will inherit a child's share or up to R125 000, whichever is the greater,[13] and all the children will be counted without regard to the ranking of the houses in the polygynous household in which they are.[14] If the assets in the estate are not sufficient to provide each spouse with R125 000, the estate is to be equally divided between the surviving spouses.[15] Perhaps because the majority's approach in para 124 was to await parliamentary legislation, it did not comment on the fact that when there are more wives than one the household head is looked upon as having as many estates as he has wives. As Mr RJ Dick, Special Magistrate, King William's Town said in evidence to the 1903 Commission: "If a man had three wives he would have three separate estates."[16]

In the present context it should be noted that one of the functions of allotment of cattle to different houses is to provide for the separate "estates" on the death of the head of the household.[17] This function cannot be carried out if all the children in all the houses are counted together. House property[18] includes *ikhazi* received for daughters of the house and their increase, and the earnings of the wife in the house, but the rule laid down in *Bhe* case distributes that income together with other house property amongst all the children of all the houses.

Of crucial importance in polygynous marriages is the question of the nature of the different houses, the property each has, and the nature of the household as a whole and its property.[19] There is no detailed consideration of the structure of a household in the *Bhe* trilogy of cases. It appears that what lies behind para 136.7 is what is said in para 124, particularly the last sentence thereof which reads: "In order to avoid possible inequality between the houses in such unions, the estate should devolve in such a way that persons in the same class or category should receive an equal share."

It is important to note that this sentence relates to "houses" so one would expect the rule in pare 136.7 to be about houses. Instead it is about individuals (the widows and all children), irrespective of the houses in which they are. In

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13 Para 136.7.
14 *Ibid*.
15 *Ibid*.
16 1903 Comm 5996 vol 2 at 459. For an example see *Sivanjana v Sivanjana* 1915 3 NAC 27.
17 See Kerr *Customary Law* 109–113; Bennett *Customary Law in SA* 244; Olivier *et al LAWSA* Vol 32 para 230; Olivier *et al Privaatreg* 453–459; *Seymour's Customary Law* 273.
18 On the distinction between household property and house property among the Cape Nguni and what property falls into each category see Kerr *Customary Law* 125–129; Bennett *Sourcebook* 232–237; Bennett *Customary Law in SA* 244, 256; Olivier *et al LAWSA* Vol 32 para 233; Olivier *et al Privaatreg* 485; *Seymour's Customary Law* 135. On succession to house property, see Kerr *Customary Law* 147–154; Bennett *Customary Law in SA* 338–339; Olivier *et al LAWSA* Vol 32 para 226; Olivier *et al Privaatreg* 440ff; *Seymour's Customary Law* 275.
19 *Ibid*.

making the change the majority may have thought that inheritance by houses is incompatible with the Bill of Rights, or it may have overlooked the rule of the customary law of succession that the heir (now it would be the heirs) in each house inherit(s) the house property. Is such a rule incompatible with the Bill of Rights? It must be remembered that what is incompatible with the Bill of Rights is not all forms of discrimination but *unfair* discrimination.[20] When it is remembered that one of the sources of house property is the earnings of the wife in the house and another is allotment to the house by the household head as an indication of his wishes for the devolution of the property to the members of that house I suggest that it is clear that inheritance of house property by the members of the house is not unfair and should therefore have been referred to in para 136.7 as lawful.

Reference to recent history may assist in understanding the difficulty. In customary law before the *Bhe* decision the head of a polygynous household could evidence his decisions on the devolution of property in two ways: (1) by making an oral dispensation in expectation of death,[21] and (2) by allotting property to the house(s) he wished to benefit.[22] He could not make a South African common law signed and duly attested will.[23] After the *Bhe* decision the head of the household can (1) make an oral disposition in expectation of death,[24] and (2) make a written will that is signed and witnessed as required by South African common law. This latter is one of the results of removing from the law the choice of law rules that were contained in s 23 of the Act. If, as is the case, the head of the household can determine the devolution of property by making his wishes known either in an oral disposition in expectation of the death or by a South African common law will why should he be deprived of the opportunity to do so by the allotment of property to houses which he wishes to benefit?

An example will illustrate the problem. Suppose that there is a household in which there are three houses, a great house, a right hand house, and a *qadi* to the great house, in each of which there are children, and that the value of the assets is less than R250 000. Suppose, further, that the wife in the right hand house dies and the household head dies intestate shortly thereafter. If the rule in para 136.7 is followed, the two surviving spouses share the whole estate equally, and none of the children get anything. The children of the great house and of the *qadi* to that house will be looked after by their mothers; but those in the right-hand house will have no parent to help them and no portion at all of their father's estate, not even *per stirpes* through their deceased mother. This is such an extraordinary result that it surely was not intended.

With respect, it is suggested that the rule in para 136.7 should be amended as soon as possible by whichever competent authority first has an opportunity to do so. When it is amended, the division of a polygynous household into a number of houses each of which has its own property should be recognised, and the new

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20 See subsecs 9(3) and (4) of the Constitution.

21 See sections 7.2 and 7.3 of this article.

22 See Kerr *Customary Law* 109–113; Bennett *Customary Law in SA* 244; Olivier *et al LAWSA* Vol 32 para 230; Olivier *et al Privaatreg* 453–459; *Seymour's Customary Law* 273.

23 See subsec 23(1) of the Act as it then read.

24 This method was not affected by the removal from the law of section 23 of the Act.

rules of succession applied to each such house separately; and, further, it should be borne in mind that unallotted property used to be inherited by the great house,[25] but that with the new system of benefits to surviving spouses and to all children, the responsibilities of the heirs in the great house will be less than they were before if the recommended change is introduced. There should no longer be a standard rule that unallotted property is inherited by heirs in the great house. Unallotted property should be distributed, I suggest, among all the houses.

What mechanisms are available to bring about a change in the law, in this case in the rule in para 136.7? The usual ones are legislation or a subsequent court case. Unless parliament were immediately to set aside a considerable amount of time to deal with the problem legislation would take a long time.[26] In the period before the legislature enacts new rules, if, say, an executor is faced with a problem in connection with a small estate, normally it would be clear that if action were to be taken in court the estate would be so impoverished that no heirs, not even the widows, would inherit anything. This raises the question of the method by which one can respond to the invitation in para 136.10 which is quoted above.[27] Can an executor approach the Constitutional Court directly without having to spend the money in the estate? If money has to be spent, would the South African Human Rights Commission and the Women's Legal Centre Trust, which were granted direct access to the Constitutional Court in the third of the cases in the *Bhe* trilogy,[28] be prepared to go back to that Court in pursuance of the invitation in para 136.10? If no money is likely to be available from any source, could the Court issue a new rule by something similar to a Practice Declaration or Practice Note, ie by a method that does not involve the delay of getting onto the roll and does not involve any expenditure? This last would be the simplest and most expeditious way of solving the problem. It would be a new and unusual step; but then the invitation in para 136.10 to approach the Court for a variation of an order that has made a rule similar to a legislative enactment, is also new and unusual.

7 3 2 Intestate succession by consensus of "all interested parties" after the deceased's death?

Under a heading "The facilitation of agreement" the majority of the Court said in para 130:

> "The order made in this case must not be understood to mean that the relevant provisions of the Intestate Succession Act are fixed rules that must be applied regardless of any agreement by all interested parties that the estate should devolve in a different way. The spontaneous development of customary law could continue to be hampered if this were to happen. The Intestate Succession Act does not preclude an estate devolving in accordance with an agreement reached among all interested parties but in a way that is consistent with its provisions. There is, for example, nothing to prevent an agreement being concluded between both surviving wives to the effect that one of them would inherit all the deceased's immovable property, provided that the children's interests are not affected by the agreement . . ."

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25 See Kerr *Customary Law* 125–129, 144–145.
26 See paras 114–116.
27 In section 6.1 of this article.
28 See para 7.

It is clear from the example that the agreement that is referred to is one between surviving "interested parties" after the deceased's death – the passage is not about oral dispositions by the deceased in his lifetime made in expectation of his death.

With respect, in a number of places the language is not easy to understand. This is apparent from the following points:

(a) The majority did not give any authority for the proposition that the provisions of the Intestate Succession Act are not to be regarded as "fixed rules". The example given suggests that the majority had in mind what Meyerowitz calls a "redistribution" agreement.[29]

(b) The majority did not explain who fell within the category of "interested parties". Meyerowitz says that those entitled to be parties to a redistribution agreement are heirs, legatees, and surviving spouses of marriages in community of property.[30] This means that in intestate estates (as in testate ones), if there is to be a valid redistribution agreement, one has first to discover who are heirs or surviving spouses. Heirs in which system of law: South African common law or customary law? The answer cannot be "customary law" because the decision, except in regard to succession to "status and traditional leaders",[31] has removed from the law most of the rules of the choice of law relating to the customary law of succession.

(c) Further, in the same paragraph quoted above, it is said that the agreement reached must be "consistent with [the] provisions" of the Intestate Succession Act. These are provisions of South African common law. Hence the question above about the heirs in which system of law must be answered as those in South African common law.

(d) The third problem is the sentence reading: "The spontaneous development of *customary law*[32] could continue to be hampered if this were to happen". ("This" means regarding "the relevant provisions of the Intestate Succession Act [as] fixed rules that must be applied regardless of any agreement by all interested parties that the estate should devolve in a different way".) As the only example given by the majority is of an institution of South African common law, namely, the redistribution agreements referred to by Meyerowitz, it is difficult to imagine what future agreements of a different kind would be regarded as consistent with the Intestate Succession Act and at the same time treated as the formulation of a new rule in customary law. It is much more likely that persons trying to persuade the Master of the High Court, or the Court itself, to wind up the estate in accordance with their wishes would receive an answer such as the following.

> The Constitutional Court has emphasised in the *Bhe* trilogy of cases that "it is not possible to develop the rule of primogeniture as it applies within the customary law rules governing the inheritance of property" (para 94); and that "[t]he primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights" (para 95). You [the group seeking a new development in customary law]

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29 Meyerowitz paras 12.31; 13.17.
30 Meyerowitz para 12.31.
31 Para 94 *in fine*.
32 Para 130, emphasis added.

> would have to persuade the Court that not just one agreement about one estate but a whole series of rules on a new customary law of intestate succession should be accepted by the Court as governing all future customary law estates. This is not covered by the statement in para 130 of the *Bhe* decision that agreed variations must be consistent with the provisions of the Intestate Succession Act.

With respect, it seems to be clear that the Court has unified South African common law and customary law on intestate succession except as regards status and traditional leaders.[33] The only practicable method of re-introducing a new customary law system of intestate succession would seem to be for the legislature to enact one. If such a one were to be proposed it should be preceded by a special commission like the 1883 one, ie one which seeks *inter alia* to discover what those who would be subject to it want it to be.

7 4 Quitrent land

The declaration of invalidity of the whole of s 23 of the Act involves the removal of the special rules for the inheritance of quitrent land in tribal settlements. Quitrent land will now be treated as one of the items of property in the estate.

7 5 The development of new choice of law rules in succession

There was a time when customary law could only be applied in court if both parties to the action were within its scope, or if a statutory provision (such as subsecs 23(1), part of (2) and (3) as they then were) so provided. In 1988 the rule laying down that in court cases both parties had to be subject to, and entitled to take the benefit of, customary law ceased to be applicable.[34] For example, it is now possible for one party to an *nqoma* contract to be subject to, and entitled to the benefits of, customary law in most of that party's affairs and the other party not to be so subject except in relation to the contract in question.[35] As far as I am aware there is as yet no case in which. although *neither* party is normally within the scope of customary law. they agree to regulate part of their affairs, including contracts, according to that system of law. To bring oneself to a limited extent within the scope of customary law by entering into a commercial contract needs to be distinguished from cases where two contracting parties, after learning about the terms and conditions of a particular contract (eg two friends of the parties in the *nqoma* contract referred to above, neither of whom fall within the scope of customary law), spell out the same terms in a South African common law contract between themselves. In the last mentioned case, the contracting parties have all the rights and obligations of an *nqoma* contract, but they have them in South African common law because that law allows contracting parties to enter into unique contracts whose terms come from the agreement between them.[36] Such

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33 Cf Section 8.3 of this article below.

34 See Kerr "Customary law in all courts" 1989 *SALJ* 166 168–170. The requirement that both parties to a court case had to be subject to, or entitled to the benefits of, customary law was not carried forward into the Law of Evidence Amendment Act.

35 *Ibid.*

36 If there is a dispute about an implied or residual provision the circumstances may be such the customary law may need to be considered. See Kerr 1963 *Acta Juridica* 49. On implied and residual provisions see Kerr *The Principles of the Law of Contract* 6ed (2002) 337–341; 354–379. Note that if there is a dispute about an alleged implied provision of a South African common law contract the test of the existence or non-existence is that in South African common law; but as the parties are thinking about a contract that is in essence the

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a case is comparable to the one already decided in the law of succession in which a person normally subject to or entitled to take the benefit of customary law made a South African common law will imposing a fideicommissum incorporating a condition imposing customary law provisions.[37]

A different problem might arise in family law. Can two persons, neither of whom is within the scope of customary law, agree to enter into a potentially polygynous marriage with terms originating in customary law, but reduced to writing and agreed upon between them? And could the alleged husband then enter into a second similar transaction with another person (also not within the scope of customary law) while remaining in the arrangement with the alleged first wife? Then could all three of them argue that the two agreements are two South African common law marriages because the terms they contained were customary law terms adopted by agreement? It is clear that such agreements would not be recognised as South African common law marriages because they would be seeking to set up an arrangement which is contrary to the South African common law provisions on marriage to which they are subject.[38] Further, in South African common law not all agreements are contracts.[39] Nor does it seem to be competent for two persons who have no connection with customary law to claim that they bring themselves within the scope of customary law and are husband and wife (or wives) in a customary law marriage or customary law marriages because they have done everything those entering into customary law marriages do.

There not now being any statutory provision on the choice of law in succession between South African common law and customary law, the courts may wish to follow the choice of law rules in contractual cases. That branch of the law appears to favour the "system [of law] with which the contract had its closest and most real connection"[40] or the "proper" law of the contract.[41] Professor Forsyth has an interesting discussion on the choice of law in cases concerned with contractual obligations, but as his book is about inter-territorial conflicts of law rather than inter-personal conflicts, most of the discussion is about the relevance of the law in different places (eg the place where the contract was entered into or the place where the contract was to be performed). These discussions, though stimulating in themselves, are not of great assistance where both systems of law are in the same country, as South African common law and customary law are. Similarly, Forsyth's exposition on testamentary[42] and intestate[43] succession abounds with references to various places – the place of one's

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same as one in customary law they may well also be contemplating, though not expressing, provisions the same as, or similar to, customary law ones. Similarly if there is a dispute about a residual provision in a South African common law contract the residual provision (whether already existent or being formulated for the first time by the court) is one in South African common law; but because the circumstances under consideration are the same as, or similar to, those known to customary law that law will usually merit consideration for comparative reasons.

37 See above in Section 7.3 of this article.

38 The parties to such arrangement do not comply with the requirements of the Marriage Act 25 of 1961.

39 See Kerr *Contract* 181–182, 187ff.

40 See Forsyth *Private International Law* 294 ff.

41 Forsyth *Private International Law* 294–325.

42 *Private International Law* 368ff.

43 *Private International Law* 366–368.

domicile, the place where goods in the estate are, the place where a will is drawn up, the place where land left by will is situated etc. Again, such rules are not of great assistance when both systems of law are in the same country.

In the result pending enactments by the legislature the court will need to develop new provisions on the choice of law in succession. When courts do so it should be noted that subsec 1(3) of the Law of Evidence Amendment Act is confined to inter-tribal conflicts of law – it does not cover the above problems.

7 6 Maintenance

Maintenance of the other members of the family used to be one of the main duties of the heir.[44] An heir in the old sense will not exist in intestate estates wound up in future in accordance with the Intestate Succession Act, so family members in need of maintenance should be entitled by virtue of a new statute or an amendment to the Maintenance Act 99 of 1998 to claim reasonable maintenance.

7 7 Guardianship and custody of children

The better view is that the natural guardian of a child is the guardian in the system of law "generally pertaining to the minor".[45] If it is found that consideration of the facts in question lead to a decision that for a particular child or children, the guardian and custodian is to be found in customary law, and it is the father who died, there is now no customary law rule on who the new guardian and custodian is to be. It used to be the customary law heir; (ie the person indicated by the then rules of male primogeniture and universal succession), but after the decision in *Bhe* that can no longer be the case.

An interesting feature of the *Bhe* case (treating it separately from the other two cases in the trilogy) is that the third applicant, the mother of the two minor children who were the first and second applicants, brought her application "on behalf of her two minor daughters,"[46] but the question of her right to do so does not seem to have been considered in any court: there is no mention of the point in the order in para 136.11(a). Hence, it cannot be claimed that the court made any ruling on the point. The report of the case does not give sufficient information on the factors that could have been considered in choosing the system of law that would provide the guardian and custodian. If consideration had been given to the problem and it had been found that system was customary law, the question would have been debated and mention made of it in the Court's order.

I suggest that the first person before whom the question is raised, presumably a magistrate acting in an administrative capacity, should adopt a similar approach to that in para 130 and, if it is the father who has died, ask the family to

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44 Kerr *Customary Law* 108–109. Note that some of the authorities go back to the 1883 and 1903 Commissions. See also Bennett *Sourcebook* 416; Bennett, *Customary Law in SA* 334; Olivier *et al LAWSA* Vol 32 para 233; Olivier *et al Privaatreg* 435–436; *Seymour's Customary Law* 298.

45 *Ngcamu v Majozi* 1959 NAC 74 (N–E) 75 per Ramsay P with whom the other members of the court concurred, commented on in Kerr "Does a minor need two natural guardians in two systems of law to assist him at the same time?" 1965 *SALJ* 487. See this article on the factors to be taken into account in determining the issue for a particular child.

46 Para 10.

agree to the mother of the minor children becoming their guardian and custodian. Failing that, if the case is brought before a court it should develop the law to provide for the appointment of the mother in such circumstances.

7 8 The effect of the absence of a universal successor on the rules concerning *kheta* of the *ikhazi*

If a wife in a customary marriage leaves her husband without good cause, he may desire her to return, or, failing that, may wish to claim the return of, the *ikhazi*[47] (the cattle he gave in terms of his *lobola* contract). [48] The *lobola* contract is entered into in expectation of a marriage, but is separate from the marriage as it is between the father or guardian of the bride and the bridegroom or a member of the bridegroom's family.[49] If the bride's father is still alive when she leaves her husband, and if she has returned to her father, her husband must first *phutuma* (alternative spelling *putuma*) her, ie seek her return.[50] If he and her father cannot persuade her to return, her father becomes liable to *kheta* (alternative spelling *keta*), ie return, the cattle less allowable deductions.[51] (There are added complications if she has not returned to her father, but they are not relevant to the present enquiry.)

If her father dies before his daughter leaves her husband, she used normally to return to her father's heir (often referred to as her "guardian") who had taken his father's position in the household[52] in this as in other matters, and was bound to *kheta* the *ikhazi* (less allowable deductions), using his own property to do so if the amount in the estate was not sufficient.[53] In estates devolving in terms of the Intestate Succession Act, there is no universal heir. All children share equally and no one takes the deceased's position in the family. It follows that after the death of the wife's father, no-one is bound to restore the *ikhazi*. In other words, in estates devolving according to the Intestate Succession Act, the obligation to restore *ikhazi* in appropriate circumstances lasts only for the lifetime of the wife's father. However, if the surviving spouse has inherited the whole estate because its value was below the prescribed figure (at the time of writing R125 000), it is arguable that the spouse should *kheta* the *ikhazi*. It may well be

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47 *Ikhazi* are the cattle paid under a *lobola* contract: see *Family Law Service* para G29.

48 *Ibid*, where it is mentioned that in Zulu law the word *lobolo* is used of the cattle.

49 *Family Law Service* para G28; Bennett *Customary Law in SA* 236. It follows that the fact that there is now only one ground for termination of a customary marriage, viz irretrievable breakdown of the marriage (see s 8(1) of the Recognition of Customary Marriages Act 120 of 1998) does not mean that fault is irrelevant when the question relates to the *lobola* contract.

50 Koyana *Customary Law in a Changing Society* (1980) 18; *Family Law Service* para G66; Olivier *et al Privaatreg* 192–202; *Seymour's Customary Law* 181–186.

51 Koyana 17ff; *Family Law Service* paras G64–67; Olivier *et al Privaatreg* 116.

52 See Kerr *Customary Law* ch 12; Olivier *et al Privaatreg* 217. *Seymour's Customary Law* 183–186 refers to the wife's "guardian" when he means her father or his heir. So does Bennett *Customary Law in SA* 277–278. For the circumstances in which the cattle are returnable see *Family Law Service* paras G59–61; Bennett *Customary Law in SA* 277–278; Olivier *et al Privaatreg* 215–218; *Seymour's Customary Law* 181–186. (Note that in the new circumstances the last paragraph in *Seymour's Customary Law* 186 ought not to be followed. So also in the new circumstances the arguments in Olivier *et al Privaatreg* 180–182 in favour of a requirement to return all *ikhazi* (less allowable deductions), can no longer be considered arguable in respect of the period after her father's death.)

53 *Dlumti v Sikade* 1947 NAC 47 (C&O) 47.

that there will be those who regard the present situation as unsatisfactory. If so, the problem should be referred to the special commission that is recommended in the final section of this article.

7 9 The liability of the head of household for delicts committed by the members of his household

There was a time when the head of a household owned everything within the household, even income or assets brought in by adult members, and was expected to keep the members of his household in control. As he was the recipient of all the income and assets it was clear that he had to pay whatever damages were awarded against members of his household for delicts committed by them.[54] In 1905 a change was made, after which the household head no longer owned the income earned by adult members or the property they acquired in other ways.[55] However, the rule that the household head is liable for the delicts of members, whether he was a party to the delict or not and whether he knew of it at the time of commission or not,[56] continued[57] except in KwaZulu/Natal, where it is limited to delicts of minors who are resident in the household with its head.[58]

The question that now arises is whether in present circumstances the liability of the head of the household is to continue. The contrast between the circumstances described in paras 75–76 and the present ones described in para 80 is so great that it appears that the first court before which a case is brought should now declare that the head of a household is no longer to be held responsible for delicts of members of the household except for those of minors of whose delicts the head had knowledge, or to which he gave encouragement. This adopts the KwaZulu/Natal position, except that it requires a link between the head of the household and the commission of the delict, and thus avoids the complicated issue of "residence" in the household.

8 LIMITED OR COMPLETE FREEDOM OF TESTATION? PROPOSALS FOR THE FUTURE

8 1 General

After the decisions on the introduction of gender equality and equal shares for all children, the next most important change has been the grant of complete freedom of testation to those who in the past had only limited freedom of testation. Subsections 23(1), part of (2)[59] and (3) imposed a limitation on freedom of testation. It is therefore clear that the declaration of the invalidity of the whole s 23 brought about, *inter alia,* the grant of complete freedom of testation for those who previously did not have it.[60] The reason is that South African common law is

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54 *Mlanjeni v Macala* 1947 NAC 1 (C&O).

55 *Ibid.*

56 *Morolong v Jordaan* 1948 NAC 31 (C&O); *Peter v Sango* 1972–1974 BAC 185 187.

57 For further details see *Family Law Service* para G25(b); Bennett *Customary Law in SA* 325–327; Olivier *et al LAWSA* Vol 32 paras 220–222; Olivier *et al Privaatreg* 418–434; *Seymour's Customary Law* 82–90. Note that the liability is only for delicts in customary law; it does not extend to delicts in South African common law.

58 *Ibid.*

59 See section 4 above.

60 Section 23 as a whole was, with the exception of one part of subsec (2), comprised of two parts: (1) the choice of law rules, and (2) rules about the administration of estates. For

continued on next page

open to all inhabitants, and it (South African common law) allows complete freedom of testation, ie a testator who makes a will as prescribed in the Wills Act 7 of 1953 is allowed to dispose of all the property in the estate to whomsoever, or to whatsoever cause, the testator pleases and the law will see to it that the testator's instructions are followed.

It is unusual to find a major change being made without anything being said in the opinions about the state of the law resulting from the change.[61] Perhaps the resulting state of the law was overlooked because the majority thought that the judgment was concerned *only* "with intestate deceased estates which were governed by s 23 of the Act".[62] With respect, the judgment's effect cannot be so limited as it removed the subsection that directed devolution by customary law. That law allows only limited freedom of testation in the institution corresponding to wills, namely, oral dispositions in expectation of death.

The limitation used to be that dispositions could not be used to disinherit the presumptive heir.[63] Now that there is no longer a single presumptive heir, dispositions, it appears,[64] cannot be used unfairly to deprive one or some of the children of a reasonable share[65] in order to give one or more of the others an unfair advantage.

Whatever reason the Court had for not dealing with the topic, the declaration of invalidity of the whole of s 23 means that there are now two systems of law open to those subject to, or entitled to take the benefit of, customary law: (1) South African common law and (2) customary law. The most obvious illustration of the practical outcome of the change has already been mentioned: if someone dies intestate and there is a surviving spouse and the estate is valued at less than R125 000, it all passes to the surviving spouse under the Intestate Succession Act. That spouse may then dispose of it by will in such a way that none of the children receive anything.[66]

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example, the decision in *Moseneke and others v The Master* on the administration of estates only: see Kerr 2002 *Speculum Juris* 17–24.
In her interesting review of harmonising the law or unifying it Knoetze "Voorstelle ter hervorming van die inheemse erfopvolgingsreg" 2004 *Speculum Juris* 188 200 is also of the opinion that the removal of section 23 necessarily results in the repeal of the limitations on freedom of testation.

61 Nothing is said in the opinions about the Court's view of this change. There is also nothing in detail about the questions on the point which were argued before the Court. It is noted in paras 29–31 that the question of the validity of the whole of s 23 was raised by the applicants in the third case of the trilogy, namely the South African Human Rights Commission and the Women's Legal Centre Trust, who were represented by two Counsel and there were two Counsel for the second respondent who was the Minister for Justice and Constitutional Development. There is only the broadest of statements in para 33 that the applicants dealt with issues "already before the Court", broadened "the scope of the constitutional investigation", and added "fresh insight on difficult issues."

62 Para 131, emphasis added.

63 See the cases in Kerr *Customary Law* 116–118.

64 There is at the time of writing no reported decision on the point; but the proposition seems to be required to accommodate the new division of the estate between all children. In other words the principle of limitation stays although the persons who benefit differ.

65 On the need to consider the circumstances in each case see below in this section of this article.

66 See above section 7.4.

In principle the main problem is this: in the modern world is there any value in encouraging families to remain in contact with each other and, where necessary, to support each other? Those who answer this question affirmatively (as do many others, and I) need to explore possible avenues of making further changes in the law. The two main methods of reform are what they normally are: (1) reform by legislation, and (2) reform by the courts. Both the legislature and the courts need to bear in mind the task of making the law reflect the values referred to in the Constitution and, in particular, in the Bill of Rights.[67] When the principles of reform are being contemplated regard should be had to the wider context of the law of succession as suggested, for example, by Professor De Waal in his article on "The social and economic foundations of the law of succession".[68]

8 2 What limitation, if any, should be proposed?

8 2 1 Where there is a will

The limitation proposed should be simple and easily understood so that those who make wills are able to understand what is considered to be appropriate. The Roman legitimate portion was a fraction of the estate, the size of the fraction differing at different times. A better approach is to give those who consider that they have not been fairly provided for the opportunity to ask a court to review the issue and to make a redistribution if necessary. If this is the chosen way a careful definition of the closeness to the deceased of the family relatives and/or dependants who are permitted to challenge the will is needed. (Many writers refer to extended families without specifying where the boundaries of such families are.) The South African Law Reform Commission has been thinking about this for a considerable time and should be asked to report on its present proposals. The proposals should include consideration of polygynous households, treating each of the houses as a separate estate.

8 2 2 Where there is no will

Now that the Intestate Succession Act governs all intestate estates, the two most important problems are (a) small estates in which there is a surviving spouse, and (b) estates of a deceased polygynist.

In the case of small intestate estates where there is a surviving spouse the problem is how to ensure that there is something left to be divided among the children when the surviving spouse dies. This can be done by transforming the right of the surviving spouse in the whole estate or in a portion of it from ownership to a servitude[69] in appropriate cases.

What are "appropriate" cases depends not only on the value of the estate, but also on family circumstances. For example, consider an estate as small as the *Bhe* and the *Shibi* ones. Had there been a surviving spouse in addition to young children, it would have been appropriate to declare that the servitude covered the whole estate. If, however, the members of the family were all grown-up and

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67 As to the courts' rule see *Carmichele v Minister of Safety and Security and another: Centre for Applied Legal Studies Intervening* 2001 4 SA 938 (CC) and the cases following it.

68 1997 *Stell LR* 162.

69 The servitude need not be called a usufruct (Kerr *Customary Law* 90–91) but it should have many of the attributes of a usufruct. It should not have the requirements of customary law concerning a widow's need to reside on the deceased's land to be entitled to the servitude (Kerr *Customary Law* 91–93) as that is not appropriate in most modern conditions.

providing for their own financial needs, it would be appropriate to declare that the whole of the estate should devolve on the surviving spouse in full ownership. There may also be circumstances in which a time limit for the existence of the servitude should be set. For example, the older children may be adults providing for their own financial needs but the youngest will only complete his/her education in a year's time and may need to be assisted for a short while before being able to meet his/her own financial needs. The executor should be given the task of ascertaining the family needs, usually calling together a family gathering, and making a proposal concerning the servitude.

In the case of intestate estates of polygynists, it should be provided that the property of each house plus its share of the household property should be treated as a separate estate.[70]

8 3 On whom should the limitation be imposed?

The limitation should, I suggest, be imposed on everyone. Those subject to, or entitled to take the benefits of, customary law can be expected to welcome the imposition of a limitation because, in broad outline, it retains the rule as they know it. It will probably not receive a welcome from many of those not subject to, or entitled to take the benefits of, customary law. To them it should be explained that although South African common law does not at present have any limitation on testamentary freedom (it had one in the past), many other systems of law have it in one form or another,[71] and for those who wish to retain strong family ties it would be an improvement to have the kind of limitation outlined above.[72] Further, if the limitation is imposed on everyone there can be no question of any incompatibility with the Bill of Rights on the grounds of unfair discrimination. Part of the law will then have been unified.

8 4 Interpretation of wills

South African common law is said to have a strong presumption against partial intestacy.[73] This proposition now needs to be modified. Where the testator is a person subject to, or entitled to take the benefit of, customary law, the statement referred to can no longer be considered to be applicable because, as is explained above,[74] it is now possible for such persons to make oral dispositions in expectation of death both before and after making a will.

If such a person contemplates making such a disposition but has not yet made it, eg he makes a will mentioning property he has bought from his earnings, but says nothing about inherited property because he intends to deal with it by making an oral disposition, he is partially intestate until he makes the disposition. When he has made it he is fully testate because both the will and the disposition have to be taken into account. If he thereafter has a change of mind

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70 See above section 7.4 where it is pointed out that now that there are no longer heirs by male primogeniture and universal succession the unallotted property should be divided among the houses.

71 See Hahlo "The case against freedom of testation" 1959 *SALJ* 435; De Waal 1997 *Stell LR* 162; Du Toit "The limits imposed upon freedom of testation by the *boni mores*: lessons from common law and civil (continental) legal systems" 2000 *Stell LR* 358.

72 In section 7.2 of this article.

73 Corbett *et al Succession* 507–508.

74 In Section 7.3 of this article.

about the inherited property and cancels the disposition he becomes partially intestate again. If his change of mind is about the property that he has mentioned in his will, and he destroys that will before he makes another, he is again partially intestate.

9 CONCLUSION

For the fifth time[75] I recommend that a special commission be set up to enquire what those subject to customary law, or entitled to take the benefit of it, would like it to be and to report on measures to reform it within the parameters of the Constitution and the Bill of Rights.

75 For the first four times see above in Section 6.6 of this article.

Duress and enrichment claims: A review article

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1 INTRODUCTION

Duress as a cause of action in private law is most commonly encountered in the law of contract.[1] However, duress is also a relevant issue in cases where a non-contractual performance of some kind has occurred, in the context of the law of unjustified enrichment.[2] Currently, where it can be proved that a non-contractual transfer of property or money has occurred unjustifiably under duress, the transfer will be considered to have occurred *sine causa*, or without legal cause, and the aggrieved party will have an action for recovery. According to the authorities, the relevant specific enrichment action under which a claim based on duress must be framed is the *condictio indebiti*.[3] This article will discuss how South African law came to recognise that duress constituted a ground for instituting the *condictio indebiti*, and examine what the courts have required a plaintiff to prove in order to make out a case for restitution of a non-contractual performance because of duress.

2 THE *WHITE BROTHERS* CASE

The first case in South African law concerning non-contractual payments made under duress was that of *White Brothers v Treasurer-General*,[4] decided in the Cape in 1883. The opinions expressed in this decision put the law on the path that it continues to tread today. The facts of this case were as follows. The plaintiffs had instituted a claim for the recovery of payments that they alleged

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1 See for example *Broodryk v Smuts* NO 1942 TPD 47; *Arend v Astra Furnishers (Pty) Ltd* 1974 1 SA 298 (C); *BOE Bank Bpk v Van Zyl* 2002 5 SA 165 (C); Kerr *The Principles of the Law of Contract* 6ed (2002) 318ff; *The Law of Contract in South Africa* 4ed (2001) 349ff; Van der Merwe *et al Contract General Principles* 2 ed (2003) 103ff.

2 Cf Du Plessis *Compulsion and Restitution. A historical and comparative study of the treatment of compulsion in Scottish private law with particular reference to the law of restitution or unjustified enrichment* (Unpublished PhD thesis, Aberdeen, 1997) 127 and "Fraud, Duress and Unjustified Enrichment" in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 194 212. In the contractual context, a performance occurs *obligandi causa*, whereas a performance in a non-contractual context would usually occur *solvendi causa.* See Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 889 and "Unjustified Enrichment: The Modern Civilian Approach" 1995 *OJLS* 403 405-406.

3 See *CIR v First National Industrial Bank Ltd* 1990 3 SA 641 (A).

4 (1883) 2 SC 322. For another review of the case, see Du Plessis *Compulsion and Restitution* 135.

had been made under duress. In short, the plaintiffs complained that they had unlawfully been forced to pay customs duties for goods that they, as merchants, had imported into the harbour at Port St Johns. These goods had continuously been impounded by the authorities, and since the plaintiff"s livelihood depended on getting access to the goods, they were each time forced to pay the duties to secure the release of the goods. During the years 1878 to 1881, the White Brothers paid out just over £1018 in dues. Eventually, the White Brothers took action in the courts to reclaim this amount, alleging the money had been paid under duress. They argued that these customs duties had not been due, since the Governor and High Commissioner of the Colony (Sir Bartle Frere) had not had the authority to order that customs be levied at Port St Johns. This authority, they alleged, was vested in the English Parliament and sovereign alone, and Sir Bartle Frere had not procured this authority before beginning to collect customs duties at Port St Johns. The upshot was, in the opinion of the White Brothers, that the customs officials had unlawfully coerced them into paying this money by withholding their goods.

All three judges who heard the case delivered opinions. The most comprehensive opinion was that written by De Villiers CJ. The Chief Justice granted the defendants absolution from the instance. This was so for two reasons. First, De Villiers CJ investigated at length the question whether the payments that had been made were *ultra vires* or not.[5] On this point De Villiers CJ held that only payments made up to 1879 could be considered *ultra vires*. De Villiers CJ conceded that Sir Bartle Frere's original proclamations concerning the payment of duties at Port St Johns had been made without the authority of the Imperial government. However, the illegality of such payments was cured in 1879 by the ratification of the proclamations by the Secretary of State for the Colonies. While the learned judge held that this ratification did not cure the illegality of the previous payments, all payments made thereafter were valid, and could not be reclaimed.

The second aspect of De Villiers CJ's argument concerned the cause of action regarding those payments that had been extracted when the Colonial Government was not legally empowered to do so. This he classified as a claim for *restitutio in integrum*. De Villiers CJ said:

> "Now the only tangible ground upon which the plaintiffs can claim relief in the present case is that the payments were not voluntary, that they were made under a sort of duress, and that therefore the first of the grounds for restitution which I have just mentioned [metus] is in principle applicable. The plaintiffs, it has been fairly argued, were constrained to make the payments by the fear that they would not obtain their goods without such payments, and in order to induce the Collector of Customs to do that which he was bound to do without payment."[6]

Having identified this as a case of duress, De Villiers CJ turned to the works of those writers who he considered to have been influential in articulating the classical Roman-Dutch position: Voet, Van der Linden and Pothier. From these sources De Villiers CJ identified what he considered to be certain rudiments: first, that it is the lack of "free consent" that invalidates contracts or payments made because of threats; secondly, that this lack of free consent will not lightly

5 345-348.
6 349.

be presumed: the intimidation will thus have to be such as would affect a person of "ordinary firmness"; and thirdly, that it is only threats of serious evil directed against one's person or one's family that will invalidate a payment or contractual obligation. He also pointed out that in the English law of the time, a contract could not be avoided for duress when the threat had been made against property. De Villiers CJ attributed this congruence between the two systems to the influence of Roman law on English judges.

> "The principles of the Civil Law must have been clearly present in the mind of LORD DENMAN in giving judgment in the case of *Skeate vs Beale* (11 Ad. & E. 990): 'We consider,' said he, 'the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods.'" [7]

This similarity led him to conclude, in his opinion, that the civilian law of duress and the English law of duress were identical, and English law could be applied to the facts of the case before him.[8] As he saw it, the English position was as follows:

> "I take it to be clear that although mere duress of goods will not avoid a contract, a payment of money in order to obtain goods improperly obtained is not considered to be a voluntary payment, and is therefore recoverable. But in all the cases which have been cited to establish this proposition, there has been some unequivocal act on the part of the person paying to show that the payment was not a voluntary one."[9]

Since this was not a contractual arrangement under scrutiny, but a case in which the plaintiffs were reclaiming payments that had been made under duress, De Villiers CJ held that the payments could be recovered, but only if the payments were shown to be "involuntary". In order to prove this, the plaintiffs had to show that some overt protest had been made at the time of payment.[10] On the facts, De Villiers CJ held that no clear proof of protest existed, and that the plaintiffs were not, for this reason, entitled to reclaim any of what they had paid.

Smith J agreed with De Villiers CJ's order and his statement of the law, but found against the plaintiffs for different factual reasons. Dwyer J (in what eventually amounted to a dissenting opinion) held that the plaintiffs were entitled to reclaim the money that they had paid.[11] As far as Dwyer J was concerned, these payments had been exacted under duress of the plaintiff's goods. The plaintiffs had been put in a position whereby they had no realistic option but to pay the money over, in the light of the threat that their property would be withheld unless they paid over the customs dues. These threats were, in Dwyer J's eyes, unlawful, since his lordship found that Sir Bartle Frere had acted *ultra vires* in ordering the customs dues to be levied without the express prior authority of the sovereign.[12] It is significant to note that Dwyer J was sceptical of the notion that clear

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7 350.

8 350. This was a common feature of De Villiers CJ's judgments. See Walker *Lord De Villiers and His Times: South Africa* 1842-1914 (1925) 80-84.

9 351.

10 350-351. De Villiers CJ relied upon three English decisions where the requirement of protest had been articulated. These were: *Parker v The Great Western Railway Company* 7 M&G 253, *Parker v Bristol and Exeter Railway Company* 6 Exch 702, and *Ashmole v Wainwright* 2 QB 837.

11 336.

12 334-5. Dwyer J relied particularly on an *obiter dictum* of Parke B in the Privy Council case of *Cameron v Kyte* Knapp's PCC 332, where it was held that the Governor of a Colony does not, merely by virtue of his position, have sovereign authority delegated to him, and any unauthorised act that he performs is not a valid act of the Crown.

proof of protest was required before a payment made under duress of goods could be recovered. He remarked:

> "[I]t is said that any illegality in the levy was cured by a voluntary payment by the plaintiffs of the sums claimed to be repaid, and that unless the payments were made under protest, they must be regarded as involuntary. I cannot agree that the authorities go to this extent . . . I think there was sufficient evidence of duress and illegality to render more formal protests unnecessary."[13]

Although the government was ultimately successful by a majority of two to one, the legal and factual disputes within the three opinions mean that it is technically impossible to extract a ratio decidendi from the case. But subsequent courts did not trouble themselves with such academic niceties. When reading the reports of ensuing cases where this sort of problem arose, one is struck by the fact that it is as if neither Smith nor Dwyer JJ were involved in deciding the case at all. In the next twenty-five years, the judgment of De Villiers CJ in the *White Brothers* case became the automatic point of reference for cases decided in the erstwhile Colonial and Republican courts where the plaintiff sought to have payments set aside as a result of duress of goods, and in each and every case, the approach set down by De Villiers CJ was applied.[14] This should not be surprising: De Villiers CJ's impact on the South African legal system, both from a point of view of principle and by sheer force of his character, is legendary.[15] What is significant, though, is the effect this judgment was to have on the law concerning the recovery of payments made under duress.

At a macro-level, the most important feature of De Villiers CJ's judgment in the *White Brothers* case was that it absorbed the 19th century English doctrine of duress of goods into South African law. Of course, this sort of mixing is not necessarily a problem: since the South African legal system is hybridised, there are many areas of South African law where English common law and Roman-Dutch civilian principles have coalesced or have been harmonised, to the benefit of the system as a whole. Problems only emerge where the overlapping is unprincipled. It is submitted that unfortunately, this was just such a case. Three important factors emerge from De Villiers CJ's judgment. First, there was the absorption of the peculiar differentiation between threats to property in the contractual realm (which were not actionable), and threats concerning property in the law of unjustified enrichment (which were actionable). Secondly, from a philosophical perspective, the entitlement of the aggrieved party to relief was grounded in the notion that such payments, when induced by duress, are "involuntary". Thirdly, the requirement of protest was identified as a sine qua non of any successful claim for the return of money paid under duress of goods. It is submitted, for preliminary purposes, that De Villiers CJ's judgment put the South African law regarding the recovery of payments made under duress on an unsatisfactory path from the outset.

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13 335 and 336.

14 See *Knapp and Kayser v Loonguana* (1892) 7 EDC 61; *De Beers Mining Company v Colonial Government* (1888) 6 SC 155; *Leicester Brilliant Syndicate v The Colonial Government and the New Elandsdrift Mining and Estate Company* (1898) 15 SC 121 127; *Vergotinie v Ceres Municipality* (1904) 21 SC 28 (and cf 1904 (14) CTLR 92); *Hopkins v The Colonial Government* (1905) 22 SC 424, 1905 (15) CTLR 647; *Van Mandelsloh v The African Banking Corporation Ltd* 1905 (28) NLR 628 640.

15 For a discussion of De Villiers CJ's enormous impact in the South African legal system see Corder *Judges at Work* (1984) 34.

The principles laid down by De Villiers CJ in the *White Brothers* case continued to be applied by the newly founded provincial divisions of the Supreme Court after Union in 1910.[16] And it was not long before the newly established Appellate Division was called upon to examine this legal problem. A trio of cases concerning payments allegedly made under duress were taken on appeal in 1914 and 1915: *Benning v Union Government (Minister of Finance)*;[17] *Union Government (Minister of Finance) v Gowar*;[18] and *Caterers Ltd v Bell and Anders*.[19] The trend remained: these three decisions provided judicial affirmation of De Villiers CJ's approach in the *White Brothers* case, and firmly established the traditional features of an action for the recovery of money paid under duress of goods.

3 THE FEATURES OF AN ENRICHMENT CLAIM FOR MONEY PAID UNDER DURESS

Having reviewed how the early South African courts and the Appellate Division came to deal with enrichment claims for duress, it is necessary to discuss in more detail the key features of such a cause of action. The traditional features[20] of an enrichment claim for payments made under duress of goods in South African law can be identified as the following:

- The aggrieved party seeks repayment of money handed over in order to secure the release of property that is being withheld;
- The party will have to show that he or she was entitled to the property;
- The payment must not have been due, and as such, the demand must have been unlawful;
- The payment must have been involuntarily made;
- The involuntary nature of the payment is determined by establishing whether the party protested at the time payment was made;
- A litigant's remedy for restitution is enforced in terms of the relevant enrichment action: the *condictio indebiti*.

These six features require some analysis and explanation.

3 1 The ambit within which recovery on grounds of duress may occur

Traditionally in South African law, claims for restitution for non-contractual transfers have concerned threats to withhold property, or what has been called "duress of goods". In *Benning v Union Government (Minister of Finance)*, the Appellate Division confirmed that (a) a payment of money made to regain possession of (b) corporeal property that was being withheld was recoverable, if all the requirements of duress could be proved.[21] The case concerned the payment

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16 See *Verster v Beaufort West Municipality* 1911 CPD 356; *Cupido v Brendon* 1912 CPD 64 73; *Kama v Rose-Innes* 1913 CPD 393 396; *Benning v Union Government (Minister of Finance)* 1914 CPD 422; *Gowar v Union Government (Minister of Finance)* 1914 EDL 428.

17 1914 AD 420.

18 1915 AD 426.

19 1915 AD 698.

20 I have deliberately not called these six features "elements" that must be proved to have duress as a cause of action, since they are not all elements, and cover other matters, such as the identity of the appropriate action.

21 However, the claim ultimately failed, since there was no proof of protest (421). For interest's sake, this case is of historical significance for two reasons. First, Lord De Villiers CJ handed down the decision on behalf of the court. The Chief Justice was thus able to

continued on next page

of customs duty that Benning had made in order to acquire possession of a floor-surfacing machine detained by the Commissioner of Customs at the docks in Cape Town. Several other cases fit this traditional mould. To give just one more example, in *Knapp and Kayser v Loonguana*, the respondents cattle had been impounded, and he had been coerced into paying a sum of money in order to secure their release.[22] However, the ambit of the action does extend beyond this traditional situation. One can see this occurring in two distinct ways.

3 1 1 Extension of the idea that payments of money may be recovered

Traditionally, aggrieved parties in South African law have sought to recover payments of money made under duress. But claims are not limited to the recovery of payments of money alone. Like in Roman and Roman-Dutch law, it is possible for the aggrieved party to recover property handed over *sine causa* to avert a threat. In *Miller v Bellville Municipality*,[23] the plaintiffs had decided to develop a piece of land owned by them. To do so, they needed the consent of the Municipality. But before the Municipality would approve the development scheme, the plaintiffs were required to relinquish, free of charge, a portion of the property in order that it could be used for the construction of streets.[24] After this had occurred, the Appellate Division held, in another case,[25] that the clause allowing the Municipality to expropriate land free of charge was ultra vires. Therefore the plaintiffs sought to have their transfer of land revoked, inter alia on the basis that they had been forced to hand the land over because of their fear that the building plans would not be approved if this did not occur.[26] The court held as a principle of law that the remedy for duress of goods did not extend merely to the repayment of money alone. The remedy was also available where the person had been forced to hand over property under duress. This was so because the remedy was designed to ensure that one party was not unjustifiably enriched at the expense of the other, and therefore it did not matter in what way the enrichment had occurred.[27]

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confirm his *White Brothers* decision in the loftier environs of the Appellate Division. Secondly, an analysis of the South African Law Reports shows that this judgment was the final reported judgment of Lord De Villiers's legal career.

22 *Knapp v Kayser & Loonguana* 61. See too *Vergotinie v Ceres Municipality, Verster v Beaufort West Municipality and Mattison v Mpanga* 1928 (2) PH, A44 for other cases where stock was involved. In *White Brothers v Treasurer General*, the plaintiffs sought to recover dues paid to secure the release of their commercial goods that had been impounded. The plaintiff in *Hopkins and Co v The Colonial Government* had paid an extra transportation fee after the Railways had refused to deliver a cargo of stone until the higher tariff was paid. The case of Cupido v Brendan concerned the validity of payments made to secure the possession of stud certificates, which had to be handed over to the racing authorities before the plaintiff's horses could race legally.

23 1973 1 SA 914 (C).

24 Clause 8A(i) of the Bellville Town Planning Scheme.

25 *Belinco (Pty) Ltd v Bellville Municipality* 1970 4 SA 589 (A).

26 920E-F.

27 921A-B. Although ultimately, on the facts of the case, the claim based on compulsion failed, since there was no evidence whatsoever that the donation had been made under protest (922). For another case concerning property, see *Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* 1960 2 SA 686 (SR).

3 1 2 Extension of the idea that corporeal property be withheld to induce the payment

The courts have also expanded the scope of the action by broadening the rule that the threat must have been directed against the plaintiff's corporeal property. This extension has occurred in two ways.

First, the withholding of incorporeal property (including rights) can also be classified as duress of goods, provided all the other necessary elements are satisfied. When one considers that incorporeal rights are classified as property in South African law,[28] this extension of the rule beyond the traditional detention of corporeal property is entirely in accordance with principle. The leading case in this regard is *Union Government (Minister of Finance) v Gowar*.

In that case, the Appellate Division had to decide whether a payment made in order to get a public official to register a life usufruct on the title deeds of immovable property was equivalent to a payment made under duress of goods. One Mr Gowar (the deceased husband of the respondent) had granted his wife a usufruct over his property in his will. The Registrar of Deeds had refused to register the usufruct unless Mrs Gowar paid transfer duty. Mrs Gowar eventually paid the money (£75 3s 6d) under protest, and then sued the government, alleging the payment was not due, and that she was entitled to recover it. Innes CJ conceded that in such a case there was no detention of goods in the normal sense of the word. However, the Chief Justice (Solomon JA and Wessels AAJA concurring) held that the actions of the Registrar of Deeds amounted to a failure to perform a public duty, which amounted to a "detention of a right".[29] It was held that there was no difference in principle between the normal detention of corporeal property and this particular scenario, and therefore the law on duress of goods was applicable to the facts. Innes CJ said:

> "If a payment made under protest to obtain possession of goods wrongfully obtained is involuntary, than a payment similarly made to obtain delivery of a right wrongfully withheld is also involuntary. A man who under protest pays transfer duty not legally claimable in order to secure registration in the Deeds Office is surely in the same position as a man who similarly pays customs dues wrongfully demanded in order to obtain possession of his goods."[30]

Although the fact is not mentioned by any of the five Judges of Appeal in *Gowar*'s case, this extension had already occurred in an earlier decision of the Cape Supreme Court in *De Beers Mining Co v The Colonial Government*, where the Colonial Government had refused to register transfer certain diamond claims until an extra (undue) stamp duty of £2063 was paid.

A second development with respect to the property requirement is that in several cases a remedy has been granted in situations where a payment was made in response to threats that were directed against the plaintiff"s property, but where the defendant was *not yet* in fact in possession of the property. In *Kama v Rose Innes*, the plaintiff had tendered a sum of £111 to the defendant (the Deputy Sheriff of King Williamstown) to satisfy a judgment against him, and therefore avoid a writ of execution against his property. The sheriff refused to accept this

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28 See Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 4ed (2003) 39.

29 435. See too 440-1 (per Solomon JA) and 454 (per Wessels AAJA).

30 435.

amount, claiming that an extra sum of £5 had to be paid in respect of his fees. He threatened to attach the plaintiff"s property unless the full amount of £116 was paid. The plaintiff eventually paid the full amount under protest, and sued to recover the additional sum, which he claimed was neither due nor payable. The court held first that the fees charged were excessive,[31] and secondly that the plaintiff had been coerced into making the payments because of the ramifications of the sheriff"s threat to attach his property.[32] The plaintiff succeeded in reclaiming his money on the basis of duress of goods. A similar finding was made in *Brakpan Municipality v Androulakis*.[33]

The Appellate Division appeared to endorse this extension in the case of *Kruger v Sekretaris van Binnelandse Inkomste*,[34] where Jansen JA stated that a claim for the recovery of payments made because of the existence of the *possibility* that one"s goods would be attached, could fall under the definition of duress.[35] However, this particular protraction of the traditional rule was carefully circumscribed by the Appellate Division in *CIR v First National Industrial Bank Ltd*. Nienaber AJA held that the mere prospect of penalties being imposed would not automatically bring the doctrine of duress of goods into play.[36] Only in circumstances where an unlawful demand is made, backed up by "inevitable statutory penalties",[37] would the court be able to infer that an act of duress has occurred. The key word is "inevitable": so, a demand backed up by an official sanction (like a writ of execution) would qualify as duress (eg *Kama*'s case above), but in the *First National Bank* case, where a penalty could be imposed not automatically, but merely at the discretion of the Commissioner for Inland Revenue, this was held not to fall under the extended rule.

Cases like *Kama* and *Brakpan Municipality* concern contingent threats to corporeal property. In the spirit of the *Gowar* case, the Supreme Court of Appeal has also recognised that payments made in response to a threat that certain rights could potentially be withheld, can be recovered. In *Dali v Government of the Republic of South Africa*,[38] certain members of the Venda Government Pension Fund paid back money that had accrued to them from the Fund, and which the Venda Government had alleged were overpayments. The Fund members had been coerced into paying back the money by threats (contained in a proclamation by the relevant Government Department) that any active member who refused to pay would be suspended without pay, and that the courts would be deprived of any jurisdiction to hear any disputes with regard to the payments. In the Supreme Court of Appeal the Government conceded that such threats amounted to duress, and the court held that payments made in the light of such contingent threats could be reclaimed.[39]

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31 *Kama*'s case 399.
32 *Kama*'s case 397.
33 1926 TPD 658.
34 1973 1 SA 394 (A).
35 410C-D. However, on the facts there could be no finding of duress, since the threat that was made was completely legal, in that it was made in pursuance of a judgment of court. See the judgment of the court a quo at 399A, and the judgment on appeal at 411C-E.
36 *CIR v FNB* 647G.
37 *CIR v FNB* 648E.
38 2000 3 All SA 206 (A).
39 209-210.

These extensions show that an action for the return of money or property transferred under duress applies not only to the conventional threat to property. As far as enrichment claims for duress are concerned, it has been recognised since the late 19th and early 20th century that an action may be instituted where the threat operates in a wider sense, to the detriment of the aggrieved party's rights. Invariably in these cases (including the cases concerning threats to corporeal property) the threat has severe implications for the patrimonial or economic interests of the aggrieved party, whether it be because the person cannot get hold of his property that he or she needs for his or her business,[40] or because the access to the right that could potentially be withheld could compromise his or her estate or business.[41] Effectively, this means that the phenomenon of economic duress has been recognised and accommodated quite happily in the law of unjustified enrichment since the 1800s, contrary to the position in the law of contract, where economic duress is not recognised today.[42]

3 2 Entitlement to the property or right

Before a party will be able to reclaim payments made under duress, that party will have to show that he or she was entitled to the property that was in possession of the other party. This requirement seems obvious, but lay at the heart of the dispute in *Caterers Ltd v Bell and Anders*. In this case, the plaintiff brought an action to recover money that it claimed it had been forced to pay to the defendants (a firm of attorneys) in order to get possession of deeds of transfer pertaining to certain plots of land. But the plaintiff's claim failed for one very simple reason: it was unable to prove that the payment was made on its behalf, nor that, at the time the payment was made, it was entitled to the transfer deed.[43] At the time of the payment, Caterers Ltd had been registered as a company, but no directors had yet been appointed, and no-one had any authorisation to make any payments on behalf of the company. Innes CJ summed up the problem in the following way:

> "It is important to note that Caterers Ltd had no knowledge whatever of these transactions, or the letters written; and the payments made ostensibly on its behalf . . . It [Caterers Ltd] had been floated with the object of running a small sanatorium, which was not proceeded with. It had elected no directors and appointed no manager, secretary or other officer, and, though its articles contained a clause purporting to invest the subscribers to the memorandum with all the powers of directors, no resolution had been taken thereunder. The company, therefore, was for practical purposes little more than a legal expression."[44]

In effect, Caterers Ltd was not responsible for the payment, nor had it the right, at the time the money was paid, to the transfer deeds at all. This lack of *locus standi* was fatal to the company's claim.

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40 As in *White Brothers v Treasurer-General*, where White Brothers needed the property to sell on to their customers.

41 As in *De Beers Mining Co v The Colonial Government*, where De Beers needed transfer of its ownership of claims to be registered before it could commence mining diamonds commercially.

42 See *Van den Berg & Kie Rekenkundige Beamptes v Boomprops* 1028 BK 1999 1 SA 780 (T) 784J.

43 *Caterers v Bell and Anders* 705 (per Innes CJ); 708-710 (per Solomon JA); 712 (per CG Maasdorp JA).

44 704.

3 3 The payment must not be due, and as such, the demand must have been unlawful

Before the aggrieved party will be able to show that the other party was enriched unjustifiably, that party will have to prove that the payment that he or she made was *indebitum*, or not in fact due. This is an axiomatic feature of any successful claim of this nature. The way in which the courts determine this is to ask whether the threat to withhold the property or right was unlawful, since the demand for payment was unlawful.[45] In the words of Jansen JA in *Kruger v Sekretaris van Binnelandse Inkomste*: "Vir vreesaanjaging om grond vir restitusie te wees, moet dit onregmatig wees . . . 'n Persoon wat "n vonnisskuld betaal uit vrees vir die teenuitvoerlegging van 'n geldige vonnisskuld kan kwalik sê dat die vreesaanjaging onregmatig was."[46]

In *Kruger*'s case, the plaintiff was unable to make out a case of duress, since the court held that the money demanded by the Commissioner for Inland Revenue in that case was entirely in accordance with the rules of the Income Tax Act, and was indeed due and payable.[47] On the other hand, in *Union Government (Minister of Finance) v Gowar*, a majority of the Appellate Division held that the payment that Mrs Gowar had made to the Registrar of Deeds to get her life usufruct registered had been unlawfully demanded, since the relevant Act exempted her from liability for payment.[48]

As the case law stands, assessing the legitimacy of the demand has invariably required the court either to interpret whether particularly wide or vague statutory language makes provision for the sort of payment that was demanded (as in the *Gowar* case), or to determine whether the person demanding payment has acted beyond the powers he or she has in terms of delegated legislation, which provides for the exercise of some administrative discretion. In the second instance, if the power is exercised for some purpose other than that contemplated by the drafters of the legislation, this will render the demand unlawful.[49]

3 4 The payment must be involuntary

A refrain that runs like a golden thread through the cases is that the payment must have been involuntary. In the *White Brothers* case, De Villiers CJ said:

> "I take it to be clear that although the mere duress of goods will not avoid a contract, a payment of money in order to obtain goods improperly obtained is not considered to be a voluntary payment, and is therefore recoverable."[50]

In other words, the person was placed in a position where he or she had no choice but to make the payment in order to secure the release of the property, which would otherwise have been withheld. From whence does this approach

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45 Of course, it is not an essential feature of claims for unjustified enrichment generally that the enrichment have been unlawful or *contra bonos mores* in any way. The requirement is relevant to claims predicated upon duress, though.

46 *Kruger v Sekretaris van Binnelandse Inkomste* 410E-F.

47 417E. This was the Income Tax Act 31 of 1941, since repealed.

48 *Union Government (Minister of Finance) v Gowar* 432 (per Innes CJ); 439 (per Solomon JA); 444 (per De Villiers AJA) and 450 (per Wessels AAJA). Juta AJA dissented, holding that, in his opinion, the payment had validly been claimed by the Registrar of Deeds.

49 Cf *Port Elizabeth Municipality v Uitenhage Municipality* 1971 1 SA 724 (A).

50 *White Brothers v Treasurer-General* 351.

originate? Certainly not from the traditional Roman and Roman-Dutch sources. The English approach to duress and the civil law approach to duress may have been tarred with the same brush by De Villiers CJ,[51] but the Roman-Dutch authorities are seldom referred to in the unjustified enrichment cases.[52] Rather, this "voluntariness" approach finds its origins in the 19th century English cases from which De Villiers CJ borrowed so heavily in the *White Brothers* case. In particular, his lordship relied on a dictum from *Parker v The Great Western Railway Company*[53] in adopting this terminology, which is indicative of the fact that at the time, the English doctrine of duress was philosophically grounded in the theory of the overborne will. The requirement that the payment must have been "involuntary" was repeated in the Appellate Division by Innes CJ in *Union Government (Minister of Finance) v Gowar*.[54]

Since then, the idea that a payment made under duress is an involuntary payment has become an established feature of any case of this kind.[55] And one simple question dominates the enquiry as to whether or not a payment was involuntary, to the exclusion of any other. That is the question whether the payment was made under protest.

3 5 The existence of a protest

3 5 1 Origins

The roots of this protest requirement are once again to be found in the judgment of De Villiers CJ in the case of *White Brothers v Treasurer-General*.[56] The Chief Justice was adamant that proof of protest was critical to the plaintiff's claim in this context:[57] "[I]t is impossible to know whether the payment is voluntarily or

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51 *White Brothers v Treasurer-General* 351; *Union Government (Minister of Finance) v Gowar* 433.

52 The only times where the Roman and Roman-Dutch law of duress is referred to in these unjustified enrichment cases are in *White Brothers v Treasurer-General* 350; *Gowar v Minister of Finance* 433 ; *Union Government (Minister of Finance v Gowar)* 451-452 (per Wessels AAJA); *Kruger v Sekretaris van Binnelandse Inkomste* 410. Barring the *Kruger* case, the mention of the Roman-Dutch law does not have a fundamental impact on the determination of the disputes.

53 7 M&G 253 at 293, where Parke B said: "We are of the opinion that the payment was involuntary." This passage is also quoted by both Innes CJ and Solomon JA in *Union Government (Minister of Finance) v Gowar* 434, 441. In that case Wessels JA at 453 cites an early edition of the English text *Pollock on Contracts* to the effect that such payments are treated as "involuntary" in English law.

54 436.

55 See *Knapp and Kayser v Loonguana* 63; *De Beers Mining Company v Colonial Government* 156; *Vergotinie v Ceres Municipality* 29; *Cupido v Brendon* 73; *Kama v Rose-Innes* 396-397; *Benning v Union Government (Minister of Finance)* 1914 CPD 422 425-426; *Gowar v Minister of Finance* 438-439, 441; *Benning v Union Government (Minister of Finance)* 422; *Union Government (Minister of Finance) v Gowar* 434, 435, 436, 441, 445, 453; *Caterers Ltd v Bell and Anders* 704; *Lilienfield and Co v Bourke* 1921 TPD 365 at 370-1; *Port Elizabeth Municipality v Uitenhage Municipality* 741D; *Miller v Bellville Municipality* 1973 1 SA 914 (C) 921; *CIR v First National Industrial Bank Ltd* 647D-F; *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* 1996 4 SA 1151 (T) 1155H. See too Eiselen and Pienaar *Unjustified Enrichment: A Casebook* (1999) 138.

56 De Villiers CJ found authority for this requirement in English law, citing *Parker v The Great Western Railway Co*; *Parker v Bristol and Exeter Railway Co and Ashmole v Wainwright.*

57 *White Brothers v Treasurer-General* 351.

involuntarily made unless some unequivocal objection to the payment is made at the time it is made."

De Villiers CJ made it quite clear that an articulated protest is a sine qua non; an unexpressed mental reservation will not be sufficient. Ever since the *White Brothers* decision, it has been accepted almost unanimously, and generally without question, that the existence of some form of protest is a critical and inalienable factor to the success of a plaintiff"s claim for the return of payments made under duress of goods.[58] Any possible doubts about the need for protest in cases of this character were dispelled by Innes CJ in *Union Government (Minister of Finance) v Gowar*:

> "Where goods have been wrongly detained and where the owner has been driven to pay money in order to obtain possession, and where he has done so not voluntarily, as by way of gift or compromise, but with an expressed reservation of his legal rights, payments so made can be recovered back, as having been exacted under duress of goods. The *onus* of showing that the payments had been made involuntarily and there had been no abandonment of rights would, of course, be upon the person seeking to recover. And hence the importance of a protest or unequivocal statement of objection made at the time. Without such protest it is difficult to see how the plaintiff"s state of mind could be established to the satisfaction of the court."[59]

3 5 2 The nature and effect of a protest

The circumstances in which the protest is made, as well as the interpretation that the court does place upon the protest, will determine the effect it has on the transaction between the parties. The protest that the aggrieved party makes can be interpreted in a number of different ways. In *CIR v First National Industrial Bank Ltd*, Nienaber AJA described the first form of protest as follows:

> "The phrase can serve as confirmation that, in the broad sense, the payment was not a voluntary one or, in the narrower sense, that it was due to duress. The failure so to stipulate could support an inference that the payment was voluntary or that in truth there was no duress."[60]

In this scenario, the existence of a protest will provide the court with proof that the payment was made under duress (and therefore, in the opinion of the court, involuntarily). One might label this the *White Brothers* scenario. The plaintiffs in that case would have needed to provide evidence that some obvious protest had been made at the time the customs duties had been paid, in order to succeed with their allegation that they had been forced to pay the money under duress of goods. In this circumstance the protest is not generally made with the knowledge that it is a requisite element of a claim for unjustified enrichment. Typically, the person would protest indignantly as a matter of course to vent his or her frustration about the threat and the demand.

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58 See *Knapp and Kayser v Loonguana* 63; *De Beers Mining Co Ltd v Colonial Government* 156; *Leicester Brilliant Syndicate v The Colonial Government and The New Elandsdrift Mining and Estate Co* 122; *Vergotinie v Ceres Municipality 29; Van Mandelsloh v The African Banking Corporation Ltd* 640; *Hopkins v The Colonial Government; Cupido v Brendan* 73; *Lilienfield and Co v Bourke* 370; *Brakpan Municipality v Androulakis* 663; *Mattison v Mpanga*; *Miller v Bellville Municipality* 921C; *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* 1154; Cassim "Economic duress in the law of unjust enrichment in USA, England and South Africa" 1991 *CILSA* 37 67.

59 *Union Government (Minister of Finance) v Gowar* 434.

60 *CIR v FNB* 649G.

The second interpretation of a protest was described by Nienaber AJA in the following way:

> "It [the protest] can serve to anticipate or negate an inference of acquiescence, lest it be thought that, by paying without protest, the *solvens* conceded the validity or the legality of the debt, or his liability to repay it, or the correctness of the amount claimed. The object is to reserve the right to seek to reverse the payment."[61]

In this scenario, the aggrieved party who is being coerced into making the payment under duress realises that it is necessary for him to exhibit some protest at the time payment is made in order to satisfy the protest requirement, and to ensure that he has expressly reserved his right to reclaim the payment if it is subsequently challenged and found not to be valid. One might describe this as the *Gowar* scenario. At the time Mrs Gower made her payment to get her usufruct registered, she noted her protest at the demand made by the Registrar of Deeds, reserved her rights to contest the Registrar's ruling, and, after the registration of the usufruct had been completed, she took legal proceedings to challenge the validity of the demand made upon her.[62] Mrs Gowar was able to show, to the satisfaction of the court, that an unlawful threat had been made, that she could not secure registration of her right in any other way other than by making the payment, and that she had protested at the time she had paid, so demonstrating (in the eyes of the court) that her payment was involuntary. All the basic elements of the duress claim were present. But, as far as the protest is concerned, where this scenario differs from the first is that the protest is made deliberately and intentionally, in a calculated fashion, rather than as a spur-of-the-moment expression of disgust.[63]

Thirdly, protesting against a payment made on demand might not help the person at all. Simply saying that one is paying "under protest", and no more, when one hands over money is not sufficient to warrant a refund: payment under protest does not equate to payment under duress. The plaintiff will have to show that all the elements necessary to make out a case of duress are proved, of which protest is but an aspect. At the very least, the plaintiff will have to show that he or she was put in a dilemma situation by some unlawful threat. To justify a claim for repayment on the grounds of duress, the aggrieved party must prove this, and evidence of protest is but one ingredient of that cause of action.[64]

A good example of the practical application of this rule may be found in the case of *Vergotinie v Ceres Municipality*. The plaintiff sought to reclaim a grazing fee of 10s levied against him by the Municipality, which he had paid under protest. At the trial, the plaintiff could lead no evidence that any threat had been made that his cattle would be impounded if he did not pay the licence money. De Villiers CJ (Hopley J concurring) held that mere protestations were not enough to justify the claim. There needed to be proof that his property had been subjected to duress: since no threats of any kind had ever been made, the plaintiff's appeal was dismissed.[65]

3 6 The nature of the action to obtain a remedy of restitution

3 6 1 Restitutio *or* condictio*?*

It may be trite that a non-contractual payment made under duress can be reclaimed, but the type of action the aggrieved party must bring in order to obtain

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61 *CIR v FNB* 649H.
62 *Union Government (Minister of Finance) v Gowar* 430.
63 See too *De Beers Mining Co v The Colonial Government*.
64 See *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* 1155-1156.
65 *Vergotinie v Ceres Municipality* 29.

this relief has been a matter of debate. In the *White Brothers* case, De Villiers CJ treated the plaintiff"s claim as one for *restitutio in integrum* based upon metus.[66] He repeated this view in *Leicester Brilliant Syndicate v The Colonial Government and the New Elandsdrift Mining and Estate Company*[67] and *Benning v Union Government (Minister of Finance)*.[68] He was consistently and adamantly of the opinion that this was not a situation where a plaintiff could have a remedy in terms of an enrichment *condictio*, and that the *condictiones* were not designed for, and were not intended to apply to, payments made under duress.[69]

In the case of *Union Government (Minister of Finance) v Gowar*, the majority came to the opposite conclusion. In that case Innes CJ drew a clear distinction between the Roman-Dutch rules on *metus* on the one hand, and the English rules of duress on the other hand. Implicit in his judgment is that in classic cases of *metus*, as defined by the Roman-Dutch writers, an order of restitutio in integrum will generally lie for acts amounting to duress of the person. As far as the learned Chief Justice could ascertain, coercive forces directed at property did not amount to duress in Roman-Dutch law.[70] However, on the basis of equity, the learned Chief Justice felt that a person who was forced to pay money to release property ought to be entitled to a remedy, and that those South African cases that had allowed an aggrieved party a remedy in such circumstances were correct. But what was the nature of the plaintiff"s action to obtain the remedy? As far as Innes CJ was concerned, the answer was to be found by drawing an analogy with the English position. In English law, the claim took the form of a quasi-contractual *assumpsit* for the recovery of money had and received. The equivalent action in South Africa was not an action for *restitutio in integrum* (which he saw as being an action particular to the law of contract), but rather a claim to be prosecuted in terms of an enrichment action. To be more precise, in South African law, money paid over without good cause was to be reclaimed by means of a *condictio*.

> "As a fact the English decisions allowing money paid under duress of goods to be reclaimed are not based upon the principle of what we should call a *restitutio in integrum*; they are examples of relief granted by reason of the quasi-contractual relationship created by the receipt by one person of money which rightfully belongs to another. The actions shape themselves in assumpsit for the recovery of money had and received for the use of the plaintiff . . . It seems to me that money wrongly exacted by a possessor of goods from the true owner as a condition precedent to their delivery, and paid by the latter not as a gift, but in order to obtain possession of his

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66 *White Brothers v Treasurer-General* 349-351. A comparable approach was adopted in *Kruger v Sekretaris van Binnelandse Inkomste* 39. In that case Jansen JA identified the plaintiff"s claim as one for restitution, which he was seeking to enforce in terms of the *actio quod metus causa* (410B). This is the only instance where the old Roman *actio* is referred to in the unjustified enrichment cases. The adoption of this term seems inappropriate, since it is unlikely that the *actio quod metus causa* was even received into Roman-Dutch law.

67 128.

68 422.

69 See on this point *White Brothers v Treasurer-General* 349; *Benning v Union Government (Minister of Finance)* 422.

70 Wessels AAJA disputed this by referring to isolated instances where certain jurists did appear to recognise the possibility that threats directed against property constituted duress (451).

> own property and with a reservation of his own rights would be recoverable by a *condictio*. As in English law, so in ours, a quasi-contractual relationship would be established which would enable money so paid to be reclaimed."[71]

Innes CJ did not go on to discuss what type of *condictio* would be relevant to a case of this nature. De Villiers AJA stated in his opinion that the relevant enrichment action was the *condictio indebiti*.[72] The fact that De Villiers AJA found that this case was not a duress case appears to have escaped both subsequent courts and academic writers.[73] In the years after the *Gowar* decision, the courts in South Africa, as well as academic writers have generally accepted that the condictio indebiti has become the proper designation for an action for restitution of a non-contractual payment coerced by duress.[74]

3 6 2 The condictio indebiti

The *condictio indebiti* is probably the most well-known and most liberally utilised enrichment action in South African law.[75] Traditionally, it was the action that allowed a plaintiff to reclaim either money or property that had been handed over in error, when the money was in fact not due.[76] Should a plaintiff be successful in pleading the *condictio indebiti*, the defendant will be required to restore the property or money to the plaintiff,[77] together with any fruits or accessories.[78] If the particular thing cannot be returned, its value may be recovered.[79] In the case of *La Riche v Hamman*,[80] Watermeyer CJ set down three requirements that have to be proved before a *condictio indebiti* will lie:

> "The condictio indebiti is a personal action by which the solvens reclaims quod indebiti solutum est . . . In order to succeed in that claim, the plaintiff has to prove

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71 *Union Government (Minister of Finance) v Gowar* 433-434.

72 444.

73 In fact, he decided the case on the basis of an alternative ground, viz simple protest, not duress.

74 In Caterers v Bell and Anders, which was heard in the Appeal Court only six months after the *Gowar* decision, both Solomon JA and CG Maasdorp JA referred to the action as one brought in terms of the *condictio indebiti* (709, per Solomon JA, and 712, per CG Maasdorp JA). Other cases concerning payments made under duress, where the *condictio indebiti* was held to be the appropriate action, are: *Mattison v Mpanga; Gluckman v Jagger and Co* 1929 CPD 44 47; *Cranbourne Road Council v Derbyshire Estates Ltd* 1967 1 SA 8 (R); *Port Elizabeth Municipality v Uitenhage Municipality* 741C; *Miller v Bellville Municipality* 25 and *Goldroad (Pty) Ltd v Fidelity Bank (Pty) Ltd* 1155. For academics who state that an action for duress is framed in terms of the condictio indebiti, see De Vos *Verrykingsaanspreeklikheid* 3ed (1987) 172; Hutchison et al (eds) *Wille's Principles of South African Law* 8ed (1991) 637; Eiselen and Pienaar *Unjustified Enrichment: A Casebook* 128; *LAWSA* Vol 9 para 79(b); Du Plessis *Compulsion and Restitution* 136ff.

75 De Vos *Verrykingsaanspreeklikheid* 171. I do not intend to discuss this remedy in great detail, since the topic has been researched in depth by other authors. For a comprehensive analysis of the *condictio indebiti*, its origins, development and current applications, see De Vos *Verrykingsaanspreeklikheid*; DP Visser *Die Rol van Dwaling by die Condictio Indebiti.'n regshistoriese ondersoek met 'n regsvergelykende ekskursus* (Dr Jur thesis, Leiden, 1985); Van der Walt "Die Condictio Indebiti as Verrykingsaksie" 1966 *THRHR* 220; Eiselen and Pienaar *Unjustified Enrichment*: A Casebook 106ff.

76 *D* 12.6.1.1; Voet 12.6.1; De Vos *Verrykingsaanspreeklikheid* 23; *LAWSA* Vol 9 para 78.

77 *D* 12.6.7.

78 *D* 12.6.65.5.

79 Voet 12.6.12.

80 1946 AD 648.

(1) that the property which he is reclaiming was transferred to the defendant;
(2) that such transfer was given indebite, in the widest sense (i.e., that there was no legal or natural obligation to give it);
(3) that it had been transferred by mistake."[81]

The first two requirements are relatively straightforward. But the third requirement needs some explanation. Transfer by mistake means that the money or property must have been transferred *solvendi animo per errorem*: in other words, because of an erroneous belief that the property or money was due or payable.[82] The rule has traditionally been qualified in a number of ways. The first hallowed qualification used to be that the mistake had to be one of fact, and not law.[83] The controversy surrounding the appropriateness of this requirement has been laid to rest by the Appellate Division in the case of *Willis Faber Enthoven (Edms) Bpk v Receiver of Revenue*,[84] where Hefer JA held that in South Africa we should no longer draw a distinction between mistakes of fact and law for the purposes of the condictio indebiti.[85]

The second fundamental qualification to the mistake element is that the mistake must be excusable (or *iustus*), and should not have been made in a careless or foolish manner (*supina aut affectata*).[86] This requirement has also been the subject of much criticism,[87] but the court in *Willis*'s case refused to avail itself of the opportunity to expunge it from our law, and therefore it remains an important facet of a successful claim under the *condictio indebiti*.

Thirdly, as a natural consequence of the requirement that the payment or transfer must have been made by mistake, no action will lie if the plaintiff makes the payment voluntarily (*scienter*), knowing or believing that the payment is not due.[88] A payment made in these circumstances will be classified as a valid donation or a compromise.

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81 656. See too *Frame v Palmer* 1950 3 SA 340 (C) 346.

82 D 12.6.1; Gaius *Institutes* 3.91; Voet 12.6.6; Grotius *Inleiding* 3.30.6; Huber *HR* 3.35.2; Van Leeuwen *Censura Forensis* 1.4.14.3; *Union Government v National Bank of South Africa Ltd* 1921 AD 121; *Recsey v Riche* 1927 AD 554 556; Eiselen and Pienaar 115ff; *LAWSA* Vol 9 para 79.

83 Voet 12.6.7; *Rooth v The State* (1888) 2 SAR 259; *Benning v Union Government (Ministerof Finance); Leicester Brilliant Syndicate v The Colonial Government and the New Elandsdrift Mining and Estate Company* 127; *Cranbourne Road Council v Derbyshire Estates Ltd* 10; *Miller v Bellville Municipality* 919B-C.

84 1992 4 SA 202 (A).

85 224B. Joubert, Nienaber, Van den Heever JJA and Kriegler AJA concurred on the point of law. The judgment has been welcomed by commentators. See Eiselen and Pienaar *Unjustified Enrichment: A Casebook* 126-7; Visser "Error of Law and Mistaken Payments: a Milestone" 1992 SALJ 177; C-J Pretorius "The Condictio Indebiti, Error of Law and Excusability" 1993 THRHR 315. The decision in the *Willis Faber* case was in fact cited by Lord Goff of Chieveley in his speech in the equivalent English case of *Kleinwort Benson Ltd v Lincoln City Council* 1999 2 AC 349 374A.

86 Voet 12.6.7; *Divisional Council of Aliwal North v De Wet* (1890) 7 SC 232 234; *Union Government v National Bank of Southern Africa Ltd* 125; *Rahim v Minister of Justice* 1964 4 SA 630 (A).

87 See *Wille's Principles* 637; De Vos *Verrykingsaanspreeklikheid* 69-70, 184-185; Van der Walt 1966 *THRHR* 226-230; Visser *Die Rol van Dwaling by die Condictio Indebiti* 177-182, 288-298; Eiselen and Pienaar *Unjustified Enrichment: A Casebook* 127.

88 D 12.6.1; D 50.12.6; C 4.5.9.pr; Voet 12.6.6; Grotius 3.30.6; *Union Government (Minister of Finance) v Gowar* 445; *CIR v First National Bank Ltd* 655.

But how then can this particular action be relevant to a payment made under duress? The glaring problem with the *condictio indebiti* is that in cases where a payment is made under duress, the person does not make the payment by mistake. Since payment by mistake is an essential element of a claim under the *condictio indebiti*, it seems inappropriate to classify the action for the repayment of money handed over under duress as a condictio indebiti. The answer is that the Appellate Division appears to have created an exception to this requirement. The general opinion is that in *Union Government (Minister of Finance) v Gowar*, the ambit of the *condictio indebiti* was extended beyond its traditional confines, to cover the situation where a person knowingly pays over a debt that he or she does not consider to be due, but does so because he or she has been forced to make the payment under duress.[89] There has been some disquiet expressed by certain writers about whether the *condictio indebiti* is the correct action under which to classify a claim for the return of money paid under duress. De Vos[90] contends that while this is the position that has been adopted by the courts, it is a clear departure from the Roman-Dutch law, where the appropriate action would have been either an order of *restitutio in integrum*,[91] or a *condictio ob turpem vel iniustam causam*.[92] De Vos submits that the better action would be the *condictio sine causa specialis*,[93] presumably for the reason that he feels the action for the recovery of money paid over under duress does not, in the strict sense of the law, fall fairly and squarely under the elements of the three traditional *condictiones*. This view is endorsed by Wessels.[94]

The problem concerning the appropriate action was raised and debated before the Appellate Division in *Commissioner for Inland Revenue v First National Industrial Bank Ltd.* The arguments of De Vos and Wessels were rejected, and the Appellate Division held that the position should remain that which it has been since the *Gowar* case. The learned Judge held that it was unnecessary to decide whether this *sui generis* action under the auspices of the *condictio indebiti* was either an extension or a sub-species of the *condictio indebiti*, or a separate type of *condictio indebiti* that existed on its own.[95] It was sufficient to say that the *condictio indebiti* was the proper niche into which such cases fitted.

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89 See De Vos *Verrykingsaanspreeklikheid* 172; LAWSA Vol 9 para 79; *Wille's Principles* 637-638; Eiselen and Pienaar *Unjustified Enrichment: A Casebook* 138-139; Visser *Die Rol van Dwaling by die Condictio Indebiti* 229ff.

90 *Verrykingsaanspreeklikheid* 172. This assertion concerning the Roman-Dutch position is repeated in *LAWSA* Vol 9 para 79.

91 Lambiris *Orders of Specific Performance and Restitutio in Integrum in South African Law* (1989) 245-246 seems to agree. For an example in support of this approach, see Voet 4.1.26, where he said: "[R]estitution may be prayed against a contract *or other transaction made or performed*, as when one through fear, fraud, or slip due to mistake has experienced loss in contracting, compromising, paying, standing surety, adiating on inheritance, or other similar way." (My emphasis).

92 Voet 12.5.1 says: "A *condictio ob turpem causam* is a personal *stricti* iuris action by which is reclaimed something given on account of an act involving baseness on the part of the receiver." And, further along: "Examples are if one person has given to another ... with a view to something being restored or done which ought as a matter of course to be restored or done."

93 De Vos *Verrykingsaanspreeklikheid* 172.

94 *The Law of Contract in South Africa* (1951) para 1182.

95 *CIR v FNB* 647E.

This decision has effectively subdued further debate on the true form an action for repayment because of duress should take.[96] The *condictio indebiti* may not originally have been conceived to deal with payments under duress, but this is one of the situations where the South African courts appear to have been quite happy to extend the ambit of the traditional enrichment actions in an ad hoc fashion, and to cast the net of liability further than was ostensibly the case in Roman or Roman-Dutch law.[97]

4 COMMENTS

The situation described above with regard to cases of duress in enrichment law has some curious features, which merit some discussion. The first thing is the idea that a payment or transfer made under duress is an involuntary one. The law therefore remains, from a philosophical perspective, securely entrenched in a theory of the overborne will. The difficulty with this theory is that it is now widely recognised that when a person acts under duress, they do not do so "involuntarily" in some sort of state of automatism at all: rather, they are faced with a dilemma situation, and must make a very firm choice, albeit an unpalatable one. De Villiers CJ himself foreshadowed the difficulty of using the term "involuntary" in the *White Brothers* case, where he said: "[w]here a man is forced by menaces to his person to make payments which he is not legally bound to make, it cannot be said that there is total absence of consent – but, inasmuch as his consent is forced and not free, the payment is *treated as involuntary*, and therefore subject to restitution".[98] This simply confuses the issue, for if there is not a total absence of consent, and the person did have to make a choice, it can hardly be described as an involuntary act. This test of voluntariness deflects one from the real enquiry in such cases: whether an illegitimate threat has been made, and which has induced the other party into making the payment or transfer, since he or she has no reasonable alternative but to do so.[99] The theory of the overborne will tends to deflect the courts from this proper scientific enquiry into the existence or otherwise of duress.

The second problem is that underpinning the proof of involuntariness: the requirement of that some protest must have been made at the time of the transfer. Proof of protest may assist in providing inferential evidence of duress in borderline cases, but it is submitted that this is about as far as the utility of a protest can be stretched. In confrontational situations it may be wiser to keep quiet, rather than to antagonise the other party any further with complaints. And why should the aggressor be entitled to escape responsibility for his or her actions due to the fact that the party faced with a threat failed to complain? Making a protest a requirement could also have the effect of reducing the protest to a formality, rather than a heartfelt objection, which would deprive the protest of any real meaning. As a result, it is submitted that the existence of an unequivocal protest clouds the true enquiry as to the existence of duress even further.

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96 See Du Plessis *Compulsion and Restitution* 139. Further confirmation that the *condictio indebiti* is the appropriate action may be found in *Dali v Government of the Republic of South Africa* 210.

97 See De Vos *Verrykingsaanspreeklikheid* 244-310; *Wille's Principles* 630; *LAWSA* Vol 9 para 75.

98 *White Brothers v Treasurer-General* 351 (my emphasis).

99 Cf the views of Atiyah "Economic Duress and the 'Overborne Will'" 1982 *LQR* 197 202.

The final complexity with the current legal position is that by incorporating cases of duress under the *condictio indebiti*, there has been a clear departure from the traditional idea that the *condictio indebiti* concerns the recovery of payments made by mistake.[100] A payment under duress is certainly not a payment made by mistake, which means that the entire foundation of the *condictio indebiti* is called into question.

Perhaps we should not be too surprised that our law has developed in this way. It was only in the mid 20th century that South African law finally came to recognise that unjustified enrichment constituted a separate and distinct facet of the law of obligations, with its own distinct characteristics. And although this branch of the law is receiving increasing attention, the law of unjustified enrichment remains something of a Cinderella subject in South Africa right up to this day.[101] Now, cast the mind back to the early days of the colonial courts in the 1800s, when these conceptual developments were still some years away, and enrichment cases were generally treated as a "quasi-contractual" oddity. Add to this mix colonial judges who lived in a fairly primitive and rudimentary environment. Most of these judges were schooled in English law, yet they were expected to nurture and apply rules, principles and doctrines of Roman and Roman-Dutch law that were not only alien to them, but were also difficult to establish due to a lack of source material. Finally, there was very little authority to be found in the Roman-Dutch sources anyway on non-contractual payments made under duress, especially with regard to cases that did not concern threats of physical harm. The above analysis has shown that our law in this area continues to reap the rather odd product of the strange decisions made by the courts in these early times.

5 CONCLUSION

The nature of an enrichment claim based on duress can only be described as a curious legal hybrid, which has developed its character more as a result of misunderstanding and ill-conceived choice than out of clear principle. The failure of our courts to recognise a general enrichment action continues to bedevil the law of unjustified enrichment in South Africa, for until this occurs, it is unlikely that our courts will be prepared to think about, and re-analyse the scope and operation of the various enrichment actions in much depth. In the meanwhile, the curiosities identified above will continue to remain.

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100 See *La Riche v Hamman* 656.

101 For a similar view see Zimmermann and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 523.

The inclusion of trade measures in MEAs: Necessary evil or *deus ex machina*?

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1 INTRODUCTION

The existing trade-environment debate[1] in the World Trade Organisation (WTO)[2] has raised questions in relation to Multilateral Environmental Agreements (MEAs) that include trade measures[3] which may be in violation of WTO law.[4] There are more than two hundred MEAs currently in force.[5] According to an estimate, thirty of these agreements contain trade measures and are of concern to WTO members.[6] Discussions regarding the MEA-trade conflict

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1 See in this regard Schoenbaum "International Trade and Protection of the Environment: The Continuing Search for Reconciliation" 1997 *American J of International Law* 268-313; Shaw & Schwartz "Trade and Environment in the WTO State of Play" 2002 *J of World Trade* 129-154 and Steinberg "Trade-Environment Negotiations in the EU, NAFTA and WTO: Regional Trajectories of Rule Development" 1997 *American J of International Law* 231ff.

2 As a result of the Uruguay round, the General Agreements on Tariffs and Trade Organisation became the WTO on 1 January 1995. See the Marrakesh Agreement establishing the World Trade Organisation of 15 April 1994, hereinafter referred to as the WTO Agreement.

3 Two different types of measures can be distinguished: classic trade measures (which refer to import or export restrictions and licensing arrangements); and other kinds of measures that can impact on trade (such as packaging and labelling requirements). The Montreal Protocol on Substances that Deplete the Ozone Layer of 1987 serves as a classic example of the relationship between MEAs and the WTO. Article 4 of this agreement authorises trade measures that are also directed against non-parties. These trade measures are focused on emissions that deplete the ozone layer. Other examples of relevant MEAs are: The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal of 1989; The Convention on Biological Diversity of 1992; The Cartagena Protocol on Biosafety to the Convention on Biological Diversity of 2001; The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade of 1998; The Framework Convention on Climate Change of 1992; and The Kyoto Protocol of 1997.

4 See for instance Motaal "Multilateral Environmental Agreements (MEAs) and WTO Rules: Why the 'Burden of Accommodation' Should Shift to MEAs" 2001 *J of World Trade* 1215-1233; Marceau "Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties" 2001 *J of World Trade* 1081-1131 and Kerr "Who Should Make the Rules of Trade? – The Complex Issue of Multilateral Environmental Agreements" 2002 *The Estey Centre J of International Law and Trade Policy* 163-175.

5 Motaal 2001 *J of World Trade* 1215.

6 Kerr 2002 *The Estey Centre J of International Law and Trade Policy* 163-175. No trade measures taken in terms of a MEA have yet been the subject of a dispute settlement in the

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mostly take place on the basis that of the inclusion of trade measures in MEAs is simply accepted; there is generally no attempt to ascertain whether the inclusion of trade measures in MEAs is the optimal way of enforcing environmental measures.[7] In order to come up with valuable proposals in relation to the MEA-trade debate, one first needs to examine why trade measures are included in MEAs. Is it optimal to do this? Asking why trade measures are used to enforce provisions in a MEA will hopefully enrich the debate and also aid international trade lawyers to reach possible solutions in this regard. In this article, the author will therefore critically discuss the question whether trade measures are indeed optimal to address environmental problems. The second part of this article focuses on proposals in relation to the solving of the trade-MEA debate. The final part of this article will aim to suggest possible solutions pertaining to the relationship between MEAs and the rules of international trade.

2 IS THE INCLUSION OF TRADE MEASURES AN OPTIMAL APPROACH?

2 1 Kuznets Curve

The first question that one needs to ask is whether free trade may induce economic efficiency, and accordingly increase environmental protection, or whether trade liberalisation will merely increase damage to the environment.[8] It is in this regard that one must take cognisance of the Environmental Kuznets Curve, which states, as a general principle, that growth harms the environment at low levels of income, but at high levels of income the quality of the environment is improved.[9] At higher levels of income per capita, the demand of the public for enhanced environmental protection in a democratic society increases, and the government responds by

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WTO. A GATT dispute did arise in the case of the EU-Chile controversy on swordfish, but the dispute was referred to the International Tribunal for the Law of the Sea. See *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)* (Order on Constitution of Chamber), Order 2000/3 of 20 December 2000. It is most likely that a challenge of trade measures taken pursuant to an MEA will be adjudicated by the WTO dispute system. The MEAs mostly do not include effective dispute settlement mechanisms such as the one for which the WTO provides. This absence of dispute settlement mechanisms will induce countries to revert to the WTO dispute system. Article 23 of the Dispute Settlement Understanding (DSU) furthermore constitutes a general commitment by all members to subject their WTO-related disputes only to WTO-adjudicating bodies. Article 23(1) states that: "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding." Cognisance must also be taken of para (2), which states that: "Members shall not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding."

7 Basson "The Relationship between Multilateral Environmental Agreements and the Rules of the World Trade Organisation" 2002 *SAJELP* 83.

8 See for instance Stonehouse "A Review of the WTO and Environmental Issues" 2000 *J of Agricultural and Environmental Ethics* 133.

9 See Levinson "The Ups and Downs of the Environmental Kuznets Curve" http://www.georgetown.edu/faculty/aml6/pdfs&zips/ups%20and%20downs. Levinson, however, points out that the pollution does not necessarily always increase with economic growth.

implementing environmental regulations. In this sense, environmental quality is a luxury that can be achieved once liberalised trade results in an increase in income.[10] An important qualification exists in this regard: basic social needs must be met before financial resources can be allocated for environmental regulation. This implies that environmental degradation takes place in the interim period until efficient environmental regulation can be afforded. Environmental degradation may, however, be of such an extent during the interim period that it would be impossible to remedy the environment once it can be afforded. It is possible that free trade may in the long term also benefit environmental protection. As such, free trade need not be viewed in the negative sense that most environmental proponents view it. The restriction of trade via trade measures taken pursuant to MEAs will not necessarily be optimal for its envisaged purpose: the protection of the environment.

2 2 Pareto efficiency

It is, in the context of this discussion, interesting to refer to "Pareto efficiency" which is normally used as a standard of efficiency in the field of economics.[11] Pareto efficiency is defined as the situation where "goods cannot be reallocated to make someone better off without making someone else worse off". Markets may not deliver Pareto efficient results, and in these instances environmental degradation may occur where incomplete markets exist.[12] Incomplete markets exist where the cost to the environment is externalised. Where externalities exist, economic actors do not take full account of the cost and benefits of their activities, and therefore do not allocate resources efficiently. Externalities may arise where an efficient property rights system is not in place.[13] One of the features of such a system is that it is exclusive in the sense that benefits and costs accrue to the owner as a consequence of owning and using the resources.[14] In the case of public goods, exclusivity tends to be absent, and externalities occur. These goods have a non-competitive nature, which means that the consumption of the goods does not diminish their availability to another group. Public goods are furthermore accessible to all. Environmental resources, such as air and the ozone layer, fit these requirements. It is in this regard that the Kuznets Curve tends to yield less positive results. Frankel and Rose found that in relation to the emission of greenhouse gases, governments tend to be more reluctant to translate economic prosperity into environmental performance.[15] The nature of public goods serves as an incentive for states to free ride on the environmental contribution of other states. In these circumstances free trade may not lead to the desired environmental protection.

Imperfect information is also a cause of environmental degradation, because decisions that are taken without all pertinent information do not convey the correct picture regarding the environmental impact of the decision.[16] A third

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10 Stonehouse 2000 J of Agricultural and Environmental Ethics 122.

11 Saito "Yardsticks for "Trade and Environment": Economic Analysis of the WTO Panel and the Appellate Body Reports regarding Environment-oriented Trade Measures" http://www.jeanmonnetprogram.org/papers/01/013701.html

12 See in this regard Tietenberg *Environmental Economics and Policy* (1994) 32.

13 Motaal 2001 *J of World Trade* 1227.

14 The other features are: universality, transferability and enforceability.

15 Frankel and Rose "Is Trade Good or Bad for the Environment?" http://www.nber.org/~confer/2002/ees02/frankel.pdf

16 *Ibid*.

cause of environmental degradation may be government failure, for example where politicians end up responding more to lobbyists' interests than to public interest. Government intervention should only take place where incomplete information or imperfect markets exist. It should be noted in this regard that government intervention can also lead to inefficiency where public interests are negated at the time of the intervention.

Government intervention may be needed where the first two conditions exist, as long as a new inefficiency is not created. The question is accordingly not whether government intervention is needed in certain circumstances, but in what manner this should occur. The fact that an inefficient property rights system is present in the case of public goods leads to the existence of externalities. In the latter instance trade measures, such as import bans, are not Pareto efficient, due to the fact that certain actors may be worse off where trade measures raise prices.[17] The problem will be addressed at its source, where environmental resources are assigned a value.[18] The use of economic instruments, such as taxes, charges and tradeable pollution permits or standard setting will therefore be more efficient as a mechanism to remedy environmental degradation.[19] The use of economic instruments may be more Pareto efficient, but the international enforcement of these instruments is problematic. The problem of enforcing compliance serves as a reason for the inclusion of trade measures in MEAs. In terms of Pareto efficiency a "second-best" instrument is chosen, due to the fact that international enforcement of the optimal instrument is problematic. One of the reasons for the problems associated with the enforcement of international environmental measures in this regard is the lack of an international environmental organisation. The establishment of a Global Environmental Organisation (GEO) has been advocated as a solution to deal with issues relating to the international environment.[20] A GEO may serve as an umbrella organisation that may oversee the proliferating number of MEAs. In this sense the GEO may be comparable to the WTO secretariat. A GEO may accordingly co-ordinate environmental efforts and the co-operation of states in this regard. The organisation may furthermore facilitate the design of MEAs with minimal trade-distorting effects. At present, the Least Developed Countries may not find the establishment of a GEO attractive, as they fear that developed countries may dominate the organisation, and manipulate it for their own ends.[21] The fears of LDCs must accordingly be addressed, and real commitments regarding market access must be made to them.

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17 See also Motaal 2001 *J of World Trade* 1231.

18 In terms of this argument other kinds of trade measures, such as packaging, labelling and product requirements will be Pareto efficient, due to the fact that these measures can address the root cause of an environmental problem.

19 Motaal 2001 *J of World Trade* 1231ff.

20 Esty & Ivanova "Making International Environmental Efforts Work: The Case for a Global Environmental Organization" http://www.yale.edu/envirocenter/bios/case.pdf. See further Runge "A Global Environmental Organization (GEO) and the World Trading System" 1999 *J of World Trade* 400. It is not my intention to investigate the various aspects of the GEO in detail; Runge presents a good overview in this regard. See also Dunoff "International Misfits: The GATT, the ICJ and Trade-Environment Disputes" *Michigan J of International Law* 1994 1043-1127; Esty "GATTing the Greens" *Foreign Affairs* (Nov/Dec 1993) 123-136; Bauer & Biermann *Does Effective International Environmental Governance Require a World Environment Organization? The State of the Debate Prior to the Report of the High-Level Panel on Reforming the United Nations* Global Governance Working Paper No 13 (2004)

21 Runge 1999 *J of World Trade* 413.

The establishment of a GEO must, however, not be seen as an absolute solution that will solve the problems discussed in this article. Establishing a GEO may result in a better co-ordination of international environmental efforts, as well as a better co-ordination between trade and environment initiatives. But in many instances negotiators may still choose trade sanctions as a "second-best" instrument, for reasons of enforcement. The trade-environment debate will still be of relevance even if this organisation were to be established, as the membership of such an organisation would mostly include the members of the WTO, and the members the WTO have not been able to reach consensus with regard to issues of trade and environment in that forum.[22]

2 3 The North-South divide

One cannot discuss the trade-environment debate without examining the North-South conflict that exists in the WTO.[23] Northern countries, for instance, view trade measures in MEAs as an important mechanism to induce Southern countries to promote environmental performance. Southern countries, on the other hand, view these measures as a form of eco-imperialism, and tend to argue that the relationship between North and South is clouded by unfairness. In the past, developed countries utilised resources without much concern for the impact on the environment, and in this manner became economically strong. The developing countries feel that it is their turn to do the same, in order to ensure that they can achieve a certain level of economic development. This debate is especially relevant in relation to non-product related processes and production methods (non-PPMs),[24] which the dispute system of the WTO is reluctant to consider justifable in terms of art XX.[25]

It is furthermore common cause that a great disparity exists between Northern and Southern countries, and that the latter did not receive the benefits it hoped for at the Uruguay Round. The trade system instituted by the WTO means that developing countries cannot resort to economic options, such as trade barriers or

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22 This statement does not imply that a Global Environment Organisation should not be established. The establishment of such an organisation is, however, not a sole solution to the trade-environment debate. See in this regard Scholtz "Co-operative approaches to Environmental Governance" http://www.fu-berlin.de/ffu/akumwelt/bc2004/download/scholtz_f.pdf

23 See Scholtz "The Relationship between Environment and Trade in the WTO: Prolonging the Conflict between North and South?" 2004 *Speculum Juris* 250.

24 This refers to measures that relate to processes that do not add any distinguishing characteristics to the product. See for instance Charnovitz "The Law Of Environmental 'PPMS' in the WTO: Debunking the Myth of Illegality" 2002 *Yale J of International Law* 59-110 and Gaines "Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?" 2002 *Columbia J of Environmental Law* 383ff

25 Article XX makes provision for general conditional exceptions that override obligations imposed by the GATT. The exceptions relevant to the trade-environment dispute are arts XX (b) and (g). Article XX states that: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health; . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

subsidies, which developed countries used to use to promote their own development in the twentieth century.[26] This does not imply that the WTO regime does not make provision for the needs of developing countries. The WTO Agreement, for example, contains the "Enabling Clause", which can serve as a legal basis for the preferential treatment of products originating in developing countries.[27] It must, however, be noted that it is in the discretion of developed countries to determine which countries and which products will receive this preferential treatment. Developed countries are therefore not compelled to make use of this clause. In general, developing countries have various needs, including especially the need for economic assistance, such as the rescheduling or even cancellation of foreign debt and the transfer of modern technology.[28] Development aid is of importance to close the gap between developed and developing countries. Development aid contributions are, however, in decline.[29] It must be remembered in this regard that the trade-environment debate must be addressed at its source. One of the sources of this problem is by nature developmental: the disparity between the developed and developing countries leads to a situation where developed countries can "afford" environmental measures, and developing countries cannot.

The universal nature of public goods, such as the ozone, dictates a situation where co-operation of other states is vital to ensure that environmental problems can be solved.[30] It is therefore important for developed countries that developing countries do not undermine their efforts by polluting without reservation. It is in these instances that developed countries may try to coerce developing countries into conforming to certain environmental standards. Pareto efficiency is not realised when trade measures are taken pursuant to MEAs in this regard. The source of the problem is also not addressed. The fact that an efficient property rights system is not in place leads to "free rider" problems. The suggestion that

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26 Cassese *International Law* (2001) 410.

27 For an extensive overview of special and differential treatment provisions relating to developing countries, see *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/77, 25 October 2000.

28 Cassese *International Law* 397. At the international level the UN and its Specialised Agencies are the point of reference in relation to technical development, which includes the transfer of know-how. The World Bank and the organisations resorting under the World Bank organises development co-operation of a financial nature.

29 Koch-Weser "Sustaining Global Environmental Governance: Innovation in Environment and Development Finance" in Esty & Ivanova (eds) *Global Environmental Governance Options & Opportunities* http://www.yale.edu/environment/publications/geg/toc.html. See also Matz "New Strategies for Environmental Financing?" 2003 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 504ff. The majority of developed states do not meet the target for official development assistance, which should be 0.7% of the gross national product of donor states. Matz distinguishes between environmental financing in the strict sense and financial transfers to achieve predominantly developmental aims such as poverty eradication, which at the same time respects standards of sustainability. Official development assistance can accordingly not be considered as environmental financing. Matz, however, acknowledges the fact that the distinction between the two tiers of financing is blurred due to the very nature of sustainable development.

30 It is in this regard that the principle of co-operation is of importance. This principle is well known in international environmental law as it is included in many treaties, international acts and finds further support in state practice. In terms of international environmental law this principle entails that states must co-operate in order to reach certain goals. See Sands *Principles of International Environmental Law* (2003) 249.

resources must be allocated economic value via mechanisms such as taxes, is also not without problems. Analysis has shown that the burden of these taxes may fall more heavily on the poor.[31] These measures may accordingly increase the problem even further and have a retrogressive effect at the end of the day. One needs to take cognisance of the North-South divide in order to generate potential solutions to the problem.

3 DELIBERATIONS OF THE CTE

3 1 Introduction

The CTE has scrutinised in detail the relationship and the possible conflicts that may arise between the WTO and MEAs.[32] In general, WTO Members fear that two general types of conflicts may arise.[33] First, a dispute may arise between two parties to an MEA, who are both members to the WTO, regarding a trade measure taken in terms of a MEA, and the trade measure is in violation of an MEA. The second conflict concerns a dispute between two Members of the WTO where one is a non-party to the MEA.

The different approaches that have been proposed by countries to solving a possible conflict between MEAs and the WTO can be broadly categorised into four positions.[34] The first position can be described as the *status quo* approach, due to the fact that various Members are of the opinion that the current WTO rules enable Members to protect the environment.[35] It is not surprising that the supporters of this viewpoint are mainly from developing countries. It is clear that this approach will not contribute to the current debate. This approach ignores the fact that a potential conflict exists between MEAs and the WTO.

In terms of the second proposal, WTO rules should accommodate MEAs without amending the rules. In terms of this approach, countries have proposed that WTO rules should be waived on a case-by-case basis for trade measures authorised by MEAs.[36] The problem with this approach is that a waiver is of a temporarily nature, and would still not provide legal certainty to negotiators of MEAs regarding the relationship between MEAs and the WTO.[37] New Zealand's 1996 proposal suggested that an "Understanding" could be drafted that would subject MEAs to tests prior to examining trade measures.[38] Japan made a similar suggestion when it proposed the drafting of a "Non-Binding Interpretative Guideline".[39] New Zealand also proposed the establishment of a voluntary consultative

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31 For an analysis of problems associated with environmental taxes, see Schoenbaum 1997 *American J of International Law* 305ff.

32 *Report of the Committee on Trade and Environment*, WT/CTE/W/40 of 12 November 1996. Item 1 of this report for instance discusses the various proposals relating to the issue.

33 Motaal 2001 *J of World Trade* 1216.

34 Shaw and Schwartz 2002 *J of World Trade* 132-137.

35 *Report of the Committee on Trade and Environment*, WT/CTE/W/40 para 11.

36 *Report* Para 12. Article IX of the WTO makes provision for a waiver of obligations of the WTO in exceptional circumstances. A waiver is subject to an approval of a minimum of three quarters of the Members of the WTO. A waiver is time-limited and must be reviewed periodically. It may furthermore still be challenged under the WTO dispute settlement system.

37 *Report* para 14.

38 Communication from New Zealand, WT/CTE/W/180 of 28 May 1996.

39 Negotiators of MEAs can also use the guidelines. Proposal by Japan, WT/CTE/W31 of 30 May 1996.

mechanism guided by first-best principles, which will be used to determine whether trade measures are the most effective way to solve the problem.[40] According to this proposal, a country may consult with another country in the instance where the first is a signatory to a MEA that provides it with the right to invoke a trade measure against another country. The two countries may then choose to embark upon consultations, during the course of which they may decide to consider a hierarchy of policy instruments to address the environmental problems. It is interesting to note that the voluntary consultative mechanism does not exclude the imposition of a trade measure. Other measures that may be considered are the provision of financial assistance and the transfer of technology and/or technical know-how. In terms of this proposal, MEA negotiators may consider including the mechanism in new MEAs. In relation to current MEAs, Members may utilise the consultative mechanism before trade measures are applied.

The third approach suggests that WTO rules should be amended to accommodate trade measures taken pursuant to MEAs. In 1996, the EU suggested that art XX should be expanded to allow for measures that are taken pursuant to provisions of a MEA.[41] This exception would then constitute art XX(k). In addition to art XX(k), an "Understanding" would be drafted, which would include criteria with which a MEA would need to comply before it can be considered under art XX(k). In a revised position, the EU proposed a shift in the burden of proof under art XX where disputes relate to MEAs, which would entail that the country that claims that a MEA is not exempted from GATT rules will carry the burden of proof.[42] This suggestion still does not address the substantive issues, as it does not clarify the relationship between MEAs and GATT rules, and accordingly does not promote legal certainty for the negotiators of MEAs.

Switzerland proposed the drafting of a "Coherence Clause".[43] In the instance of conflict between a trade measure taken pursuant to an MEA and the WTO, the application of the measure should be scrutinised, and not the legitimacy of the objective or the necessity thereof.[44] A list of MEAs benefiting from this clause would then be established.[45] Switzerland then revised this proposal, and stated that it could be incorporated in a decision on "mutual supportiveness and deference".[46] The relevant MEAs would be designated by the use of established criteria. The Swiss proposal would imply a change to the WTO rules in the sense that it waives the "necessity" test.[47]

Motaal identifies a fourth position, which entails that Members should acknowledge the rules of international trade in the event where agreements are

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40 Communication from New Zealand, WT/CTE/W/180 of 9 January 2001.
41 Submission by the European Community, Non-paper of 19 February 1996.
42 Submission by the European Community, WT/CTE/W/170 of 19 October 2000.
43 Submission by Switzerland, Non-paper of 20 May 1996.
44 Paragraph 19.
45 In terms of the North American Free Trade Agreement (NAFTA) trade measures in terms of specified MEAs take precedence over trade rights of the NAFTA. See Chapter 1 of Part 1 of the North American Free Trade Agreement of 17 December 1992. For an overview of the relationship between NAFTA and the environment, see Ueda "Exploring a Balance in Trade-Environment Issues: Approaching the NAFTA and ASEAN" 2001 *European Business LR* 108ff.
46 Submission by Switzerland, WT/CTE/W/139 of 8 June 2000.
47 See in this regard Motaal 2001 *J of World Trade* 1226.

negotiated, and should accommodate those rules by applying restraint in the use of trade measures.[48] This position may overlap with the second position due to the fact that both are aimed at non-amendment of the WTO rules. The second position is more pro-active, in the sense that it proposes to clarify the way in which rules of international trade must be taken into account in relation to a MEA. It may even lead Members to show restraint regarding the application of trade measures, because of environmental reasons. It is interesting to note that the proposals relating to the relationship between international trade rules and MEAs do not address the differences between North and South. The Southern countries resist amendments, which will accommodate trade measures included in MEAs. It is due to a lack of consensus that the members of the CTE struggle to find a way forward.

3 2 Doha and beyond

The Doha Ministerial Declaration confined the negotiations between trade and environment to the following issues: the clarification of the relationship between existing WTO rules and specific trade obligations set out in MEAs, the exchange of information between the WTO and MEA secretariats, the criteria for the granting of observer status to other international organizations, and the liberalisation of trade in environmental goods and services.[49] At the first meeting of the Trade Negotiations Committee (TNC),[50] it was agreed that negotiations on trade and environment would take place in Special Sessions of the CTE.[51] The Committee on Trade and Environment Special Session (CTESS) has tried to develop a common understanding of the mandate as provided for in the Doha Ministerial Declaration.[52] This understanding is evolving on the basis of two impetuses: the identification of specific trade obligations (STOs), and a conceptual discussion on the WTO-MEA relationship. The deliberations of the CTESS have focused particularly on the content of the term "STO".[53] The inquiries accordingly focus more on the different components of the mandate than on an analysis of potential results.[54]

A great deal of the debate has focused on the identification of STOs in MEAs. Most members of the CTE are of the view that STOs refer to mandatory trade measures. For instance, various countries are of the opinion that trade obligations

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48 Motaal 2001 *J of World Trade* 1218.

49 Paragraph 31 of the WTO Ministerial Declaration, WT/MIN(01)/DEC/1 of 20 November 2001, hereafter referred to as the Doha Declaration. Paragraph 31(i) states that: "With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question."

50 The TNC was established to supervise the overall conduct of negotiations. See para 46 of the Doha Declaration.

51 See Agenda Item 2 of the Statement by the Chairman of the General Council, T/C/1 of 4 February 2002.

52 Paragraph 4 of the Report of the Chairperson of the CTE Special Session to the Trade Negotiations Committee, TN/TE/7 of 15 July 2003.

53 See for instance Submission by Malaysia, TN/TE/W/29 of 30 April 2003.

54 See for instance paras 4 and 8 of TN/TE/7.

that allow for the discretion of parties regarding the acceptance of obligations, as well as the implementing measures, should not be regarded as STOs.[55] This implies not only that a specific result, but also the specific measure that needs to be implemented, must clearly be spelled out.

Switzerland, however, has a much broader view of STOs. The Swiss distinguish between two categories in this regard: (i) trade measures that are explicitly provided for and mandatory under MEAs; and (ii) other measures that are appropriate and necessary to achieve a MEA objective.[56] The latter refers to MEAs which specify an obligation to achieve results, and the measures which may be implicitly derived from the sphere in which they should be taken. Switzerland is accordingly of the opinion that the trade measures referred to above may be deemed to be consistent with the WTO rules among the MEA parties.

It seems that in general the debate regarding the mandate in para 31(i) had not progressed beyond the identification of STOs. A further issue is to ascertain whether, or in which circumstances, STOs are in conformance with WTO rules.

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55 Paragraph 4 of Submission by Korea, TN/TE/W/13 of 8 October 2002; Paras 5-7 of Submission by the Argentine Republic, TN/TE/W/2 of 23 May 2002; Para 7 of Submission by India, TN/TE/W/23 of 23 February 2003; Para 19 of Submission by Malaysia, TN/TE/W/29 of 30 April 2003. Korea believes that the term "STO" should be interpreted on the basis of its ordinary meaning. China seems to concur with the viewpoint of these countries, as it stipulates criteria which inter alia read that "Measures to be implemented must be explicitly provided for and clearly identified . . . They must not be arbitrarily interpreted or substituted by other measures." See para 5 of Submission by China, TN/TE/W/35/Rev1 of 3 July 2003. Paragraph 7 includes a categorisation of STOs according to the sources of these provisions. "STOs under preamble of MEAs" are included in the latter list. It is to an extent unthinkable that a STO, which is mandatory and specific, will be included in a preamble. The preamble of a treaty is important for interpretation, as art 31.1 of the Vienna Convention on the Law of Treaties, 1969 reads that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." According to art 31.2 the context for the purpose of interpretation also refers to the preamble and the annexes. Hong Kong-China also does not grant Members a form of discretion, as they are of the opinion that a STO must be obligatory and "must specify explicitly the actions which Parties shall take to fulfill the relevant obligations", and a STO must furthermore affect the free flow of goods. See para 5 of the Submission by Hong Kong, China, TN/TE/W/28 of 30 April 2003. Japan is of the opinion that trade measures qualify as STOs if they "are explicitly provided for as mandatory under a MEA." Where the "obligation de résultat" is explicitly provided for in a MEA and the relevant trade measure is included in the MEA as a potential means to meet the obligation, the measure may be rebuttably presumed to be a STO consistent with WTO rules where the measure meets certain requirements. The trade measure in question must firstly be based on scientific principles and the scope of the trade measure must be "proportional in range and degree in the pursuit of the MEA objectives." In the instance where the decision to take a trade measure is left to the discretion of the Member, such a measure may not be deemed to be a STO. See para 5 of Submission by Japan, TN/TE/W/26 of 25 April 2003. Various members have made contributions regarding what a "MEA" entails. Colombia, for instance, supports the notion that a MEA should be multilateral, in force and open for accession. See para 2 of the Statement by Colombia on the Relationship between Existing WTO Rules and Specific Trade Obligations (STOs) Set out in MEAs, TN/TE/W/43 of 25 August 2004. See para 13 of the Submission by the Argentine Republic, TN/TE/W/2 of 23 May 2002.

56 Contribution by Switzerland, TN/TE/W/21 of 10 February 2003. A previous submission by Switzerland introduced the need to define the different categories of STOs and further determine under what circumstances these provisions may be in conformity with WTO rules as they acknowledge the fact that the implementation of STOs may be inconsistent with WTO rules. Para 4 of Submission by Switzerland, TN/TE/W/4 of 6 June 2002.

At present no clear definition has been agreed upon for the identification of STOs. The first important step is to clarify the Doha mandate and to work from that basis. This should, however, not be done in isolation from the bigger trade-environment context. It is the opinion of this author that the mandate should urgently be clarified so that Members may address the problem before a conflict arises. Defining the term "STO" is, of course, no easy matter. A wide definition of the term may result in problems, as parties to a MEA may use their discretion to invoke measures that may be in contradiction of WTO rules. The approach of Switzerland may be favoured, as it does provide a very limited amount of discretion to countries in relation to the measures that they may invoke.

It is thus submitted that it is wise to define STOs in the light of the definition of Switzerland. STOs in MEAs must subsequently be identified. It is in this regard that the matrix of MEAs may be of great use.[57] The matrix of MEAs with reference to STOs will ensure legal certainty, as members would have agreed to the inclusion of these measures in MEAs. It would consequently be most peculiar for contracting parties to object to the implementation of STOs, as they would have agreed upon them in the first place. The problems with trade measures will mostly arise where members have a discretion to implement certain measures against other parties, and the other parties are of the opinion that the MEA does not authorise the actions undertaken. As a result, it is wise to define STOs in a strict sense and follow a very narrow approach in identifying the second category as proposed by Switzerland.

4 POTENTIAL SOLUTIONS

4 1 Transfer of technology between North and South

The conflicting relationship between international trade rules and MEAs must be addressed by taking cognisance of the principles of sustainable development included in the Rio Declaration on Environment and Development.[58] In this regard the transfer of environmentally friendly technology is of great importance.[59] Developed countries can play a major role in ensuring that developing countries acquire the necessary technology to ensure improved environmental performance. The Global Environment Facility (GEF) is important for purposes of this sort of assistance and technology transfer. The GEF is a joint project of the World Bank, the United Nations Environment Programme (UNEP) and the United Nations Development Programme (UNDP).[60] The GEF is to provide

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57 See WT/CTE/W/160/Rev2 of 25 April 2003.

58 Principles 5, 6, 7, 9 and 12 of the Rio Declaration on Environment and Development, Doc A/Conf 151/5, 1992, hereinafter the Rio Declaration.

59 This is in line with Principle 9 of the Rio Declaration. The Johannesburg Declaration on Sustainable Development, Doc. A/Conf.199/20, also refers to the importance of the transfer of technology.

60 See Silard "The Global Environment Facility: A New Development in International Law and Organization" 1995 *George Washington J International Law & Economics* 607- 654. Other funds may also be of importance in relation to the financing of sustainable development. Agreement was reached at the World Summit on Sustainable Development in Johannesburg to establish the World Solidarity Fund to eradicate poverty and promote social and human development in the developing countries. See Röben & Röben "Institutional Aspects of Financing Sustainable Development after the Johannesburg Summit of 2002" 2003 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 517-520.

"new and additional grants and concessional funding to meet the agreed incremental costs of measures to achieve agreed global environmental benefits" regarding climate change, biodiversity loss, international waters, land degradation, ozone depletion and persistent organic pollutants.[61] The agreed incremental costs concerning chemical management, where they relate to the focal areas, shall also be eligible for funding, as well as those activities that have been agreed upon by the GEF Council. The GEF is the designated financial mechanism for three conventions: the United Nations Framework Convention on Climate Change of 1992; the Biodiversity Convention of 1992; and the Stockholm Convention on Persistent Organic Pollutants of 2001.[62] The GEF also serves as a financial mechanism for the Kyoto Protocol of 1997 and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity of 2001 (Cartagena Protocol). These enactments all concern threats that relate to the absence of an efficient property rights system, and where the danger of free riding may occur. Although the GEF may play an important role in the transfer of environmentally friendly technology to developing countries, it is not without its problems. Recently, the liquidity of the GEF has reached a low point, due to the fact that some sponsors did not meet their obligations.[63] Developed countries must address this problem and ensure that the GEF has the necessary finances to ensure the efficient transfer of technology. This will ensure a win-win scenario for both Northern and Southern countries. In this manner developed countries can ensure that the promotion of environmental standards in relation to PPMs take place in the long term. This can be done via the transfer of environmental friendly technology as a means to realise a certain standard, both in relation to the process, as well as the end product.[64] Trade liberalisation will accordingly not be restricted by means of suspicious protectionist measures, and economic growth can be achieved by developing countries, so helping to alleviate poverty. The fact that developed countries will provide technical assistance to developing countries will ensure that the interim period of environmental degradation is addressed. This will curtail irreparable environmental degradation. It is important in this regard to take note of the fact that developing countries also have responsibilities to assist in promoting sustainable development. These states should ensure that the received assistance should be utilised in an efficient manner, in terms of its original intended purpose. Developed countries, on the other hand, must transform their way of thinking. The importance of promoting sustainable

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61 Paragraph 2 and 3 of the GEF Instrument.

62 Paragraph 6 of the GEF Instrument.

63 Koch-Weser in Esty & Ivanova (eds) *Global Environmental Governance Options & Opportunities* http://www.yale.edu/environment/publications/geg/toc.html. The decision was made at the World Summit on Sustainable Development to replenish the GEF for the third time. Matz 2003 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 511.

64 The transfer of technology implies that intellectual property rights will be affected. The TRIPS Agreement will have an effect on the transfer of technology. This is a comprehensive international instrument on intellectual property rights which establishes minimum standards regarding *inter alia* industrial designs, patents and the protection of undisclosed information. See Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 1C, Legal Instruments-results of the Uruguay Round (1994). See Scholtz "The Transfer of Technology between the North and the South: Killed by the TRIPS Agreement?" 2005 *Tilburg Foreign LR* 208.

development in developing countries must be acknowledged. In this way Pareto efficiency can be achieved, and the environmental standards of developing countries will be enhanced. Trade measures taken pursuant to MEAs address the symptoms of the problem, but not the root cause, which is the lack of the implementation of various elements of sustainable development.

The scenario sketched above may be the most efficient, but is it viable to expect that developed countries will be obliged to transfer technology? It has already been indicated that trade measures are taken pursuant to MEAs in order to ensure that environmental measures are enforced, due to the difficulties experienced with enforcement and compliance of provisions of MEAs. It is important in this regard to ensure that the technological transfer does take place, and is not merely dependant on the unilateral "goodwill" of certain developed countries. It is thus important that extensive and clear provisions are embodied in international agreements, such as MEAs, in this regard. The enforcement mechanisms of MEAs must be strengthened. This will mean that more detailed and extensive dispute settlement mechanisms should be included in MEAs to ensure that a dispute settlement body can serve as an appropriate forum to settle disputes.

The Montreal Protocol may serve as a good example of a MEA that has specific provisions relating to developing states. Article 5 of this Protocol provides for delayed compliance of developing countries in certain circumstances. In terms of art 5.3, parties will "undertake to facilitate . . . the provision of subsidies, aid, credits, guarantees or insurance programs to Parties that are developing countries." Article 9 also makes provision for co-operation relating to research, development, public awareness and the exchange of information, while taking into account the needs of developing countries. The problem with these provisions is that they do not provide clear or mandatory obligations that need to be met by developed countries. It is accordingly important to go further than the content of these provisions, and include definite obligations for developed countries.[65] This does not imply that a MEA should be seen as a vehicle for development. MEAs could, however, make a valid contribution to the transfer of environmental technology, and thereby promote sustainable development practices in developing countries. These actions may form part of an international holistic approach which is geared towards the promotion of sustainable development.[66]

4 2 The establishment of a voluntary consultative mechanism

It is important that delegates of the CTESS establish consensus regarding the concept of STOs. They must expedite the matter in order to progress to the

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65 Article 22 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity of 2001, hereinafter referred to as the Biosafety Protocol, for instance also makes provision for capacity building in developing countries via the allocation of financial resources and transfer of technology and know-how. This provision does not contain concrete obligations for developed countries in this regard. This is especially problematic due to the fact that most developing countries do not have the know-how and experience in relation to the domestic regulation of biosafety. See Phillips & Kerr "Alternative Paradigms: The WTO versus the Biosafety Protocol for Trade in Genetically Modified Organisms" 2000 *J of World Trade* 68.

66 The global community has committed itself at the UN Millennium Summit to halving poverty by the year 2015. It is estimated that an additional amount of $50 billion in official development assistance is needed. See Koch-Weser in Esty & Ivanova (eds) *Global Environmental Governance Options & Opportunities* http://www.yale.edu/environment/publications/geg/toc.html 4.

finding of solutions. Reaching consensus on the definition of a STO, however, still does not solve the MEA-trade debate. It is important to establish a definition of STOs, as this will address potential conflict between parties of a MEA and the WTO Agreement. In general there should be no problem where both parties are signatories to a MEA due to the principle of *pacta sunt servanda*, but a problem may arise where a trade measure provides discretion to a party regarding the implementation of that measure. It is accordingly wise first to establish a definition of a STO and include the relevant STOs in a matrix of MEAs. The WTO members may then adopt an interpretative decision.[67] An interpretative decision may create more predictability and legal certainty.[68] The interpretative decision may refer to the principle of deference, which would include objective criteria to determine the MEAs to which the WTO should defer competence in accordance with the proposed matrix. The interpretative decision could also set out the approach of mutual supportiveness, whereby the WTO and MEAs should focus on their primary competence. The latter proposal relates to the potential disputes where parties are signatories to the MEA. It still does not address the issue of existing trade measures that are not STOs.

It may therefore be valuable to address the problem in a more pro-active fashion. The proposal of New Zealand regarding the establishment of a voluntary consultative process is interesting and may prove useful in decising whether the implementation of trade measures are indeed the first-best instrument to address environmental problems.[69] This approach may even be taken further in the sense that negotiators of MEAs may decide whether trade measures are an optimal approach to addressing environmental problems prior to including trade measures and a voluntary consultative mechanism in a MEA. In general the consultative process should be guided by the notion of Pareto efficiency. The usage of classical trade measures would be less likely where the necessary technological transfer takes place, so as to ensure more standardised environmental measures.

Certain problems may arise in relation to the voluntary consultative mechanism, as it is clear that this process would be voluntary. It may therefore be possible that a signatory to a MEA would decide not to invoke the consultative process, or the consultative process may fail. It is therefore suggested that art IX of the WTO be made use of where an u decide whether trade measures are an optimal approach to addressing environmental problems insoluble conflict arises between the WTO and existing MEAs, and the consultative process fails. Obligations relating to existing MEAs can be waived on a case-by-case basis. The fact that no disputes in relation to concluded MEAs have arisen yet, may be an indication that art IX would not need to be used in future.

5 CONCLUSION

In summary, it is proposed that the following solutions may address the MEA-trade debate:

(i) The problem must be viewed from a holistic perspective, which implies that cognisance must be taken of the North-South divide. The transfer of

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67 This may be done on the basis of art IX.2 of the WTO Agreement. See Submission by Switzerland, TN/TE/W/4 of 6 June 2002.

68 See Submission by Switzerland, WT/CTE/W/139 of 8 June 2000.

69 Committee on Trade and Environment's (CTE) meeting on 13-14 February 2001, TE/035, 20 February 2001. This will be applicable where a trade measure is not a recognised STO.

technology as well as developmental assistance may be a first-best option to ensure that environmental problems may be addressed in a spirit of international co-operation without invoking trade measures which may be detrimental to developing countries.

(ii) Negotiators of MEAs must be more reluctant to include trade measures. They must follow the principle of Pareto efficiency in order to determine whether trade measures are optimal to address environmental issues.

(iii) Consensus must be reached regarding the definition of a STO, in order to include all relevant STOs in the WTO matrix. An interpretative decision will ensure that Members will accept STOs.

(iv) The voluntary consultative mechanism should be used prior to the implementation of non-STO measures, to ensure that conflict may be solved in these instances. It is also proposed that the mechanism be included in future MEAs. The Conference of the Parties or secretariat of the relevant MEA can be used as a facilitator for the process.[70] Relevant stakeholders, including the WTO, should be co-opted in this process.[71] Article IX should be utitlised where this process fails and the conflict persists.

(v) In the instance where a MEA authorises trade measures against a party who is not a signatory to the MEA, it is most probable that this measure is in contravention of the WTO rules. Negotiators of MEAs should refrain from the inclusion of such measures in MEAs. With regard to current MEAs, it is important to invoke the voluntary consultative mechanism.

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70 MEAs mostly establish a Conference of Parties (COP) on which parties are represented. The COP has various functions. It acts in relation to internal matters and it facilitates the establishment of new obligations. It also supervises the implementation and compliance of parties in relation to the protocol. It also adopts arrangements with international organizations and states. Other denominations may be used, such as Meetings of the Parties (MOPs). MEAs mostly make use of secretariats in existing international governmental organisations, such as the United Nations. See Churchill & Ulfstein "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law" 2000 *American J of International Law* 626.

71 The WTO and UNEP are for instance cooperating on trade and environment issues and especially the issue of the relationship between international trade and MEAs. The secretariats from MEAs as well as UNCTAD have also been co-opted in this regard. See for instance Committee on Trade and Environment's (CTE) meeting on 27-28 June 2001, TE/036, 6 July 2001.

Comparative method: Comparing legal systems and/or legal cultures?

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A comparative lawyer studying laws outside the context of his own culture is like a colour-blind painter: *what he paints is foggy shapes and lines only*.[1]

1 INTRODUCTION

Comparative law, the comparison of different legal systems of the world,[2] is an enterprise that has developed explicit conceptual frameworks for comparison between state legal systems. Placing legal systems into different "legal families" has for long been used as a conceptual framework to be utilised by comparative lawyers.[3] According to this approach it has become customary in South Africa to distinguish between inquisitorial and adversarial or accusatorial families of law,[4] not only for purposes of law reform but also in the interpretation of the Constitution.[5] Reception[6] of foreign law can take place at different levels: (a) reception in legislative and constitutional drafting; (b) reception by the judiciary;[7] and (c) what Mostert calls reception through scholarly work.[8] In the first part of the article, when examining the more traditional approaches to the

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1 Banakas "The Method of Comparative Law and the Question of Legal Culture Today" 1994 *Tilburg Foreign LR* 153.

2 Zweigert and Kötz *An Introduction to Comparative Law* 2 ed (1987) 2.

3 David and Brierley *Major Legal Systems in the World Today* 3 ed (1985) 17-22.

4 Note that the adversarial (accusatorial) and inquisitorial distinction has been criticised by Damaska *The Faces of Justice and State Authority*. *A Comparative Approach to the Legal Process* (1986) 3-6, as not capable of adequately describing modern systems of law. See also Nijboer "Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective" 1993 *Am J of Comp L* 308.

5 The Constitution of the Republic of South Africa, 1996.

6 A working definition of reception for the purposes of this article is the following: A process whereby legal concepts from a foreign jurisdiction are adopted or assimilated in another legal jurisdiction.

7 See s 39 (1) of the Constitution of the Republic of South Africa, 1996:
"(1) when interpreting the Bill of Rights, a court, tribunal or forum –
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law
(2) when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

8 Mostert "Big Oaks from Little Acorns Grow (or: the significance of Foreign law for the Development of South African Constitutional Property Law)" 2001 *Stell LR* 498.

comparative method, I shall use the somewhat "overworked"[9] terms of certain jurisdictions being either inquisitorial or adversarial and others as "mixed".[10]

In this article I should like to show that in using the comparative method for law reform purposes or in judicial interpretation, it is no longer merely enough to look towards both the adversarial and inquisitorial models for solutions. It is suggested that the *modus operandi* should rather be not only to compare rules, but also to evaluate legal cultures.[11] Friedman explains the notion *legal culture* as follows:

> "[b]y legal culture we mean the ideas, values, attitudes and opinions people in some society hold, with regard to law and the legal system . . . Legal culture is the source of law – its norms create the legal norms; and it is what determines the impact of legal norms on society."[12]

When reforming any area of any legal system, it is not sufficient to look at optimal structural and rule-based solutions without also taking into account the local legal culture into which such proposed solutions are to be transplanted[13] as well as the cultural context of the "donor" jurisdiction. In finding solutions for legal problems in the South African justice system, the existing South African legal culture must inform such an undertaking.

In the first section I review some traits that customarily have become associated with the so-called adversarial and inquisitorial methods. The second section investigates the meaning of and the extent to which legal culture should be factored into comparative methodology.

2 THE ADVERSARIAL AND INQUISITORIAL SYSTEMS

2 1 Introduction

Traditionally, the adversarial system is described as a contest between two equal parties, seeking to resolve a dispute before a passive and impartial judge, with a jury pronouncing one version of the facts to be the truth.[14] Both the prosecutor and judge are actively involved in truth finding.

Although traditionally the English and American systems are quoted as examples of the accusatorial model, and the Dutch, French and Spanish systems as examples of the inquisitorial system, it should be noted that almost no country today has a system which is purely adversarial or purely inquisitorial.[15] This is explained by Goldstein as follows:

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9 Brants and Field "Convergence in European Criminal Justice" in Fennell *et al* (eds) *Criminal Justice in Europe. A Comparative Study* (1995) 181.

10 See Snyman "The Accusatorial and Inquisitorial Approaches to Criminal Procedure: Some Points of Comparison between South African and Continental Systems" 1975 *CILSA* 100-111, who explains how the South African criminal procedure although accusatorial in character also displays definite inquisitorial traits.

11 Banakas 1994 *Tilburg Foreign LR* 119-124.

12 Friedman "Is there a Modern Legal Culture?" 1994 *Ratio Iuris* 118.

13 See Watson *Legal Transplants: An Approach to Comparative Law* (1974).

14 Nijboer 1993 *Am J of Comp L* 303. He also alerts comparative researchers to the fact that the "character" of a system is not necessarily found in formal legal rules, but that it should also be sought in the actual day-to-day practice of the law.

15 The adversarial procedures have been subjected to a wide range of criticism on the grounds that the process does not take truth-finding seriously enough. See Jackson "Evidence: Legal Perspective" in Bull and Carson (eds) *Handbook of Psychology in Legal Contexts* (1995) 166. Jackson suggests with reference to Damaska that "instead of comparing the

continued on next page

> "These portraits of accusatorial and inquisitorial systems are, of course, idealized. European criminal procedures are no more purely inquisitorial than ours are purely accusatorial. Europeans too have accusatorial elements and mixed systems; they may tolerate more discretion than their literature concedes and may, in many instances, be moving towards greater role for counsel and more explicit protection for the accused. Nevertheless, these are central tendencies."[16]

Bearing these remarks in mind, I now turn to examine the structural characteristics of the English and Dutch systems which, as pointed out above, may be regarded as typical examples of adversarial and inquisitorial systems respectively. Although the two systems may be more alike in reality than the classical models imply, there are certain distinguishing characteristics that need to be borne in mind in dealing with these systems from a comparative point of view.

2 2 Presentation of evidence

The English Royal Commission on Criminal Justice captures the significant distinction between the common law and civil law traditions in the following terms:

> "In this context, the term 'adversarial' is usually taken to mean the system which has the judge as an umpire who leaves the presentation of the case to the parties (prosecution and defence) on each side. These separately prepare their case and call, examine and cross-examine their witnesses. The term 'inquisitorial' describes the systems where judges may supervise the pre-trial preparation of the evidence by the police and, more important, play a major part in the presentation of the evidence at trial. The judge in 'inquisitorial' systems typically calls and examines the defendant and the witnesses while the lawyers for the prosecution and the defence ask supplementary questions."[17]

The general rule in favour of oral evidence in the adversarial system has its origin in the English common law and trial procedure.[18] Cross and Tapper state:

> "Perhaps the most important feature of an English trial, civil or criminal, is its 'orality'. Much greater weight is attached to the answers given by witnesses in court on oath or affirmation than to the written statements previously made by them."[19]

The preference for oral evidence as opposed to written statements can be ascribed to the fact that in the adversarial system the verbal confrontation between the witness and the cross-examiner is seen as the most effective way to test the version of the witness.[20]

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capacity of adversarial and inquisitorial systems to find the truth, it is better to view both adversarial and inquisitorial systems as two different truth-certifying procedures which have been developed to take account of societal conceptions of how to settle disputes and enforce the law".

16 Goldstein "Reflections on Two Models: Inquisitorial Themes in American Procedure" 1974 *Stanford LR* 1009.

17 *Royal Commission on Criminal Justice Report* chaired by Viscount Runciman (1993) 3.

18 South African law of evidence has the English law of evidence as its common law.

19 Cross and Tapper *Cross on Evidence (*1985) 248. See in general Devlin *The Judge* (1979) 54-55; Sahm "Demeanor Evidence: Elusive and Intangible Imponderables" 1961 *ABAJ* 580; Zander *Cases and Materials on the English Legal System* (1948) 315.

20 Best and Phipson *Best on Evidence: The Principles of the Law of Evidence with Elementary Rules for Conducting the Examination and Cross-Examination of Witnesses* (1992) para 100: "But of checks on the mendacity and misrepresentations of witnesses, the most effective is the . . . (one) . . . requiring their evidence to be given *viva voce*, in the presence of the party against whom they are produced, who is allowed to 'cross-examine' them; ie to ask them such questions as he thinks may serve his cause."

It is therefore not surprising that it has been said that the "centrepiece of the adversary system is the oral trial . . .",[21] and that "the ordinary process of examination, cross-examination and re-examination . . . is the basic principle of the adversary system'.[22] In fact, Wigmore[23] referred to cross-examination as "the greatest legal engine ever invented for the discovery of the truth".[24]

In the inquisitorial systems in general little emphasis is placed on oral presentation of evidence[25] or on cross-examination.[26] According to the classical inquisitorial model cross-examination in the adversarial system is regarded as "an attempt to 'corner' a witness into an attitude which the cross-examining party has himself decided upon beforehand, and as a method whereby the most honest witness can be driven or twisted into contradicting himself".[27] Since in the inquisitorial system most of the questioning of witnesses is conducted by the judge, the distinction between examination-in-chief and cross-examination is unknown.[28]

Inherent to the concept of orality, is the fact that public hearing is the crucial stage of the criminal justice process in adversarial proceedings. The public hearing is designed for the oral screening of evidence and the oral performance of witnesses. Usually the evidence collected during the pre-trial investigations is of no value unless tested at a public hearing. In the Netherlands, although the principle of orality was laid down in the Dutch Code of Criminal Procedure of 1926, this adversarial element was immediately undermined in the same year by the Hoge Raad's acceptance of the admissibility of hearsay evidence.[29] The "inquisitorial" character of the criminal process is therefore more apparent in practice than found in the rules of the code of criminal procedure.[30]

The inquisitorial presiding officer[31] plays a more active role, both during and sometimes even before the trial. He introduces and elicits the evidence by questioning the witnesses and the accused, and only then allows the prosecutor and defence to put questions to the witnesses. He is not bound by the evidence introduced at the trial. This has often given rise to the view that the inquisitorial judge searches for the material truth, whereas the accusatorial judge searches only for the formal truth since he relies upon the information that has been placed before him.[32]

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21 Devlin *The Judge* 54.
22 Mildred *The Expert Witness* (1982) 122; Cleary (ed) *McCormick on Evidence* (1984) para 19.
23 Wigmore *A Treatise on the System of Evidence in Trials at Common Law* 3rd ed (1940) 32.
24 The protagonists of the adversarial system believe that cross-examination is the only tool to reveal the true facts. What the "truth" in legal fact-finding is, they do not say.
25 Germany is an exception to this generalised notion. See Foster *German Law & Legal System* (1993).
26 Goldstein 1974 *Stanford LR* 1009.
27 Snyman 1975 *CILSA* 109.
28 Herman "Various Models of Criminal Proceedings" 1978 *SACC* 5.
29 HR 20 December (1926) *NJ* 1927 85.
30 This is an example of where "legal culture" had an effect and was stronger than the actual legislative reform. See section 3 below.
31 There are three categories of presiding officers in inquisitorial systems viz. (i) judges; (ii) assessor-judges; (iii) lay-assessors. The "episodic" style (see Damaska *Evidence Law Adrift* (1997)) of inquisitorial proceedings also has different judges performing different functions. In this way an examining or investigating judge (*juge d'instruction*) can be distinguished from the decision-making judge.
32 Snyman 1975 *CILSA* 103.

Herman[33] argues that an advantage of the active judge in the inquisitorial model is that, since he has to decide the case, he knows best what information he requires and what questions he needs to put to the witnesses and the accused. By being able to conduct the interrogations himself, he obtains the necessary evidence rather than having to wait for the evidence to be presented to him by the parties.

One of the main criticisms levelled against the inquisitorial system relates to the double role which the judge has to fulfil. He has to act as both the investigator who has to find the evidence and the arbiter who has to make an objective decision. Snyman[34] argues that these two functions contradict one another, as it would be difficult for a judge to be completely unprejudiced against the accused if he has to act as prosecutor and judge at the same time. Although the judge also has to investigate circumstances which favour the accused, he is, nevertheless, perceived by the accused to be associated with the state-prosecuting authorities.

The accusatorial system, on the other hand, is criticised as not being a search for the material truth, since the judge is limited to the evidence placed before him by the parties in making his decision and he has very little discretion to move beyond this.[35]

2 3 Dominant players

Damaska[36] has argued that the essential feature which distinguishes adversarial systems of justice from inquisitorial systems is the parties' control of the range of the dispute, and the collection, preparation and presentation of evidence. In adversarial systems each party is responsible for developing evidence to support its arguments, while in inquisitorial systems an official performs most of the evidence eliciting activities. Goldstein[37] explains that in the former systems both parties "play an aggressive role in presenting and examining witnesses and in shaping legal issues". This has given rise to the "contest" or "battle" theory of justice where parties are left to prove their own case and the judge acts as an impartial umpire to see that the rules of the game are observed.[38] In respect of inquisitorial systems it can be argued that there is no party contest at all.

In adversarial systems the investigation is motivated by self-interest rather than public interest. Unlike the inquisitorial systems, there is no investigative judge to seek out the "truth" and as Jörg *et al* observe: "despite official rhetoric about impartiality in prosecution, the concrete legal duties of police and prosecution lawyers do not extend to seeking out exculpatory evidence." [39]

The traditional approach of adversarial systems to allow the examination of the witnesses and experts to be placed in the hands of the parties' counsel has been perceived to be incompatible with the traditional inquisitorial view that the chief function of a court of law is to find out the truth and not merely to decide which party has adduced better evidence.[40]

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33 Herman 1978 *SACC* 12-13.
34 Snyman 1975 *CILSA* 107-108.
35 Snyman 1975 *CILSA* 108.
36 Damaska "Presentation of Evidence and Fact-finding Precision" 1975 *U Pa LR* 1083.
37 Goldstein 1974 *Stanford LR* 1016.
38 Snyman 1975 *CILSA* 109.
39 Jörg, Field and Brants "Are Inquisitorial and Adversarial Systems Converging?" in Fennell *et al* (eds) *Criminal Justice in Europe. A Comparative Study* (1995) 49.
40 Zeidler "Evaluation of the Adversary System: As Comparison, Some Remarks of the Investigatory System of Procedure" 1981 *Australian LJ* 395.

2 4 Rules of evidence

The adversarial system is characterised by an elaborate law of evidence.[41] The detailed law of evidence can be seen as a natural consequence of the jury system,[42] since it is argued that lay persons may not be in a position to place the appropriate weight on certain prejudicial evidence. Over time strict rules with regard to the admissibility and exclusion of evidence have developed.[43]

In the inquisitorial system the rules of evidence are less technical and less restrictive. The emphasis in the inquisitorial model is not on the admissibility of evidence, but rather on the value that is to be attached to the evidence. In the case of hearsay evidence the focus is on how much weight will be attributed to that type of evidence and not on whether it is admissible or not.[44] In general the Continental law of procedure is characterised by free appreciation of proof.[45] Kralik explains that:

> "The principle of free appreciation or evaluation of evidence means that the court is not fettered by any formal rules of evidence, but can evaluate the evidence produced by the parties or taken *sua sponte*, in its own free and reasonable evidence, including happenings in the courtroom, which are not evidence in the strict sense, as it deserves in reason. Behind this principle is familiar history of dissatisfaction with a system of weighing evidence by artificial scales and tables, against which draftsmen of codes of procedure were in full reaction. So the principle of free appreciation of the evidence is now the most characteristic aspect of modern continental procedure. As compared with English and American law, continental law is less strict in regard to the admissibility of evidence and the procedure of proof taking, any evidence – even hearsay – is admissible. It is left to the court to decide how much value is to be attached to the evidence."[46]

In common law systems the rules of evidence are a means by which courts can exercise retrospective control over the way in which investigations have been conducted. In inquisitorial systems there is contemporaneous judicial control of the investigation according to statute.

2 5 Status of court decisions

According to the common law tradition court decisions are seen as important sources of law, whereas in the civil law tradition legislation remains the most important source of law. Whereas the decisions of higher courts form precedent and should be followed according to the *stare decisis* doctrine in common law systems,[47] court decisions as a general rule form no binding precedent in civil law courts. In inquisitorial systems, court decisions may however, reflect the

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41 Love "The Applicability of the Rules of Evidence in Non-Jury Trials" 1951-1952 *Rocky Mt LR* 480.

42 *Ibid*.

43 Nokes *An Introduction to Evidence* (1967) 18; Heydon *Evidence: Cases and Materials* (1997) 3; Cross and Tapper *Cross on Evidence* 248 explain that: "Although some of the modern rules of evidence can be traced to the middle ages, the story of the development really begins with the decisions of the common law judges in the seventeenth and eighteenth centuries."

44 Richings "German Criminal Trials: Some Notes and Impressions" 1978 *SACC* 225.

45 See generally Damaska "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" 1973 *U Pa LR* 506n66; Nijboer *Algemene Grondslagen van der Bewijsbeslissing in het Nederlandse Strafprosesrecht* (1982) 54.

46 Kralik *Introduction to the Continental Judicial Organisation and Civil Procedure* (1963) 6-7.

47 Hosten *et al Introduction to South African Law and Legal Theory* 2 ed (1995) 386-388.

current trend or legal culture at a specific time which may deviate from the "black letter" law and may be followed in practice.[48]

2 6 In sum

Despite the fact that the adversarial/inquisitorial distinction is not hard and fast,[49] there are some indicators by reference to which the adversarial (common law) and inquisitorial (civil law) systems can be distinguished. The following table[50] reflects the most salient characteristics that have been traditionally associated with these systems as discussed above, although no one system will manifest all these attributes in an unqualified manner.

Indicia of adversarial (common law) systems	*Indicia* of inquisitorial (civil law) systems
• Court decisions are the important source of law	• Legislation is usually the important source of law
• *Stare decisis* for continuity	• No *stare decisis,* reference to Code articles
• Elaborate decisions, to be followed	• Brief decisions, not creating precedent, although superior court decisions are often followed in practice
• Such control as is exercised by courts over investigations is retrospective via rules of evidence	• Contemporaneous judicial control of investigation in accordance with code of criminal procedure
• Judicial passivity	• Judicial activity
• Parties are responsible for obtaining and introducing evidence	• Court has power to obtain evidence
• Accused pleads guilty/not guilty	• Accused not required to plead
• Decision based entirely upon material introduced by parties	• Decision can be based upon any material lawfully available to the court
• Oral evidence, with cross-examination the primary test of testimonial reliability	• Generally written evidence is given priority over oral evidence
• No inference of guilt from accused's silence	• Inference of guilt from accused's silence may legitimately be made
• Little disclosure of defence case before trial	• Full disclosure of prosecution and defence cases prior to trial
• Trial as the site of contest	• Trial as verification of dossier
• Institutional trust reposed in dialectic of parties and finder of fact.	• Institutional trust reposed in state officials

48 Swart "The Netherlands" in Van den Wyngaert (ed) *Criminal Procedure Systems in the European Community* (1993) 285.

49 Damaska *The Faces of Justice and State Authority* (1986); Mattei "Three Patterns of Law: A Taxonomy and Change in the World's Legal Systems" 1997 *Am J Comp L* 5.

50 This table is based on some of the criteria found in frameworks provided by Alldridge "Scientific Expertise and Comparative Criminal Procedure" 1999 *E&P* 144 and Örucü "Mixed and Mixing Systems: A Conceptual Search" in Örucü, Attwool and Coyle (eds) *Studies in Legal Systems: Mixed and Mixing* (1996) 339.

3 LEGAL CULTURE

3 1 Introduction

There is a growing belief among socio-legal scholars in the recognition and identification of legal cultures for purposes of the comparative methodology. It is hypothesised that what people think about the law and the values embedded therein will influence their attitude to law, their willingness to comply with law, "and that lawyers studying the law of other jurisdictions cannot understand the law without understanding the legal culture of that particular jurisdiction".[51] Gibson and Caldeira[52] also maintain that one cannot understand the role of law in a society without understanding something of its legal culture.

Legal systems, one should remember is the result of a layered complexity as pointed out by Gambaro and Sacco as quoted by Mattei:

> "We should also consider an even larger difficulty that depends on the dynamic nature of legal systems; on the coexistence within them of different layers and sub-layers; from that of different borrowings and receptions that divide the legal systems into different areas of law (e.g. public law based on the common law and private law based on the civil law as in many Latin American countries) and by different legal formants (e.g. case law and legal scholarship of a given system borrowing from sources of different legal systems such as in many modern European countries and such as in the United States during the age of legal formalism."[53]

3 2 The concept 'legal culture'

There has long been debate between lawyers and sociologists about the meaning and value of the concept "legal culture".[54]

Lawrence Friedman has over the years developed a variety of definitions of legal culture.[55] In his 1985 *The Legal System* he postulates that legal culture "refers to public knowledge of and attitudes and behaviour patterns toward the legal systems" and that legal cultures may also be "bodies of custom organically related to the culture as a whole".[56] Friedman has also defined legal culture as ideas, attitudes, expectations and opinions about law, held by some people in a given society.[57]

Karl Klare[58] defines legal culture as follows:

> "By legal culture I mean professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies developed by participants in any given legal setting? What is their repertoire of recurring argumentative moves? What counts as a persuasive legal argument? What types of arguments, possibly valid in other contexts (e.g. in political philosophy), are deemed outside the professional discourse of lawyers? What enduring political and ethical commitments influence professional discourse? What are understandings of and assumptions about politics, social life and justice? What 'inarticulate premises [are]

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51 Gibson and Caldeira "The Legal Cultures of Europe" 1996 *Law and Society Review* 55.
52 *Ibid*.
53 Mattei 1997 *Am J of Comp Law* 14.
54 See, for example, the debate between Roger Cotterrell and Lawrence Friedman in Nelken (ed) *Comparing Legal Cultures* (1995) 193.
55 Friedman *The Legal System: A Social Science Perspective* (1985) 193.
56 Friedman *The Legal System* 194.
57 Friedman *The Republic of Choice: Law, Authority and Culture* (1990) 213.
58 Klare "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146.

> culturally and historically ingrained' [*Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) para 19] in the professional discourse and outlook."[59]

Comparing legal cultures gives the researcher/judge a more realistic look at the legal system that is investigated. To cling to the notion that the law of a particular jurisdiction can be found in "black letter law", ignores the fact that "legal culture is a socially derived product encompassing such interrelated concepts such as legitimacy and acceptance of authorities, preference for and beliefs about dispute arrangements, and 'authorities' use of discretionary power".[60] A compelling example of this is the 1926 Criminal Procedure Act in the Netherlands, which makes provision to incorporate the English "fair process" by direct oral presentation of evidence during trial, although this is not followed in practice.[61]

Researchers' interest in the interconnection between the different levels of law, such as the relationship between "law in books" and "living law" reflects, according to Nelken,[62] a specific kind of legal culture.

Scholars like Blankenburg and Bruinsma[63] have tried to integrate various aspects of legal culture and they argue that legal culture should be treated as a "multi layered" concept which includes legal norms, salient features of legal institutions and the infrastructure, social behaviour in creating, using and not using law, as well as the legal consciousness in the legal professions among the public.[64]

The way in which new legislation is received within a given legal culture will ultimately influence the impact of such legislation in practice. In response to the passage of the Human Rights Act 1998 in the United Kingdom, Murray Hunt gives expression to how legal culture can influence or even hamper the acceptance of the Act:

> "At risk of over-simplification, there is some justification for saying that there are two particular features of this country's current prevailing legal culture that are most likely to hinder the development of the human rights culture envisaged by the Human Rights Act. One is the unquestioning loyalty demanded to the absolute, continuing, and indivisible sovereignty of Parliament and the other is the acceptance of the primacy of private ordering."[65]

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59 Klare 1998 *SAJHR* 167.

60 Bierbrauer "Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese and Germans" 1994 *Law and Society Review* 243-264.

61 Although the Code embodies the principle of immediacy (onmiddelijksbeginsel) or of direct testimony, the Hoge Raad (Supreme Court) soon after the introduction of the Code accepted hearsay testimony as evidence. HR 20 December (1926) *NJ* 1927 85.

62 Nelken "Law in Action or Living Law? Back to the Beginning in Sociology of Law" 1984 *Legal Studies* 157-174.

63 Blankenburg and Bruinsma *Dutch Legal Culture* 2 ed (1994).

64 Gessner, Hoeland and Varga *European Legal Cultures* (1995); Blankenburg "Indicators for Studying Legal Cultures" in Nelken (ed) *Comparing Legal Cultures* (1995).

65 Hunt "The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession" 1999 *Journal of Law and Society* 86 92. Klare 1998 14 *SAJHR* 187 argues that lawyers "can address problems concerning the democratic legitimacy of judicial power by honesty about and critical understanding of the plasticity of legal interpretation and of how interpretative practices are a medium for articulating social visions".

By contrast, the birth and development of the South African Bill of Rights and its influence on the South African substantive law is quite different.[66] What should comparative lawyers be aware of when using South African law for comparative purposes?

4 A SOUTH AFRICAN LEGAL CULTURE?

4 1 The South African Constitution

In briefly using South Africa as an example of how legal culture can influence comparability of the South African jurisdiction with other systems, certain critical aspects need to be highlighted. The historical context of the birth of the South African Constitution as "[h]ammered out at the very brink of civil war, [it] strikes a balance between a variety of fiercely contending interests"[67] must not be forgotten. In *AZAPO v President of the Republic of South Africa*[68] Mahomed DP (as he then was) referring to the Promotion of National Unity and Reconciliation Act 34 of 1995 stated:

> "If the Constitution . . . kept alive the continuous retaliation and revenge . . . the [historic] bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimization."[69]

Fundamental human rights are enshrined in the South African Constitution adopted by an elected Constitutional Assembly to be the supreme law of the land.

Cameron,[70] however, reminds us of the fragility of the new South African legal systems and states that the Constitution represents "an uneasy pact" made about the past and indicating how to deal with the future; "a pledge" about how governmental power should be used at present and "a promise" about how to deal with the future.[71]

Justice Langa stated in *S v Makwanyane*:

> "It may be that for millions in this country the effect of the change has yet to be felt in a material sense. For all of us though *a framework has been created in which a new culture must take root and develop*."[72]

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66 Justice Mahomed (as he then was) expressed it as follows in *S v Makwanyane* 1995 3 SA 391 (CC) para 262:
"In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."

67 Fedler and Olckers *Ideological Virgins and Other Myths: Six Principles for Legal Revisioning* (2001) 8.

68 1996 4 SA 671 (CC).

69 Paragraph 19.

70 Cameron "Our Legal System – Precious and Precarious" 2000 *SALJ* 371.

71 Cameron 2000 *SALJ* 373.

72 1995 3 SA 391 (CC) para 221.

It is within this ideal framework that South African law must be understood and interpreted.[73]

4 2 The preamble

The preamble serves to remind South Africans of their past and sets out the ideals for the new legal dispensation:

> "We the people of South Africa, Recognize the injustices of our past: Honour those who have suffered for justice and freedom in our land, Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
>
> May God protect our people.
>
> Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
>
> God seën Suid-Afrika. God bless South Africa.
>
> Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika."

As early as in 1995[74] Justice Albie Sachs highlighted the significant importance of the Preamble of the Interim Constitution:

> "The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value. It comes up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purpose. This is not a case of making the Constitution mean what we like, but making it mean what the framers wanted it to mean; we gather their intention not from out subjective wishes but from looking at the document as a whole."[75]

4 3 Founding values

The South African Constitution explicitly declares that the founding values of the new society are:

> "(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the Constitution and the rule of law.

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73 The fact that the Constitution erects the infrastructure for a new legal culture, does not, however, guarantee that the legal culture will germinate in the head and minds of its citizens. Cox, in his seminal book *The Role of the Supreme Court in American Government* (1976) 117 as quoted by Corbett "Aspects of the Role of Policy in the Evolution of our Common Law" 1987 *SALJ* 52 expresses this as follows: "Constitutional adjudication depends, I think, upon a delicate symbiotic relationship. The Court must know us better than we know ourselves. Its opinions may, as I have said, sometimes be the voice of the spirit, reminding us of our better selves … But while the opinions of the court can help to shape our understanding of ourselves, the roots of its decisions must be already in the nation."

74 *S v Mhlungu* 1995 3 867 (CC).

75 Paragraph 112.

(d) Universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."[76]

These are the values that must now inform all aspects of the South African legal order. The South African legal system is shaped by the Constitution and all law, including the common law and customary law, derives its force from the Constitution.[77]

4 4 When interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom, courts tribunals and forums must consider international law and may consider foreign law[78]

The guidelines found in s 39 have been encapsulated as follows: "values it seeks to nurture for a future South Africa";[79] ". . . values that fuel our progress towards being a more humane and caring society;[80] of a more mature society".[81] Comparable democracies, for purposes of ascertaining the values contained in open and democratic societies have been the United States of America[82] and Canada.

4 5 When interpreting any legislation, and when developing the common law or customary law, every court tribunal or forum must promote the spirit, purport and objects of the Bill of Rights

This demand of s 39(2) seems to have been the most difficult for the ordinary courts to come to grips with, especially where these courts had to deal with matters previously regulated according to customary law and religion and/or culture.[83] The "common law enclave approach"[84] seems finally to have been given the kiss of death in *The Pharmaceutical Manufacturers Association of SA: in re: ex parte Application of President of the RSA*.[85]

4 6 Public opinion

One layer of legal culture is seen by some to be the population's attitude and belief in the values and legitimacy of the law.[86] Max du Plessis, in his insightful article "Between Apology and Utopia – The Constitutional Court and Public

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76 Chaskalson "The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order" 2000 *SAJHR* 193 196. See also *Pharmaceutical Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44.

77 Section 1 of the Constitution.

78 Section 39 of the South African Constitution.

79 *S v Williams* 1995 3 SA 632 (CC) para 63.

80 *S v Zuma* 1995 2 SA 642 (CC) para 17.

81 *S v Makwanyane* para 222.

82 *S v Makwanyane* para 58; *Coetzee v Government of South Africa*; *Matiso v Commanding Officer, Port Elizabeth* 1995 3 SA 631 (CC) para 45; *S v Coetzee* 1997 3 SA 572 (CC) para 14.

83 *Prince v President of the Law Society of the Cape of Good Hope* 2000 3 SA 845 (SCA); *Prince v President of the Law Society, Cape of Good Hope* 2002 2 SA 794 (CC); *Mthembu v Letsela* 1997 2 SA 936 (T); *Mthembu v Letsela* 1998 2 SA 675 (T).

84 This approach was based on the view or approach that the common law was immune against the dictates of the Constitution.

85 2000 3 BCLR 241 (CC) paras 49, 51 and 55.

86 Gibson and Caldeira 1996 *Law and Society Review* 52.

Opinion",[87] focuses on the controversial constitutional cases involving the manner in which the South African Constitutional Court has dealt with the issue of public opinion. The Constitutional Court's stance on public opinion is that it is guardian of constitutional rights and in its exercise of its powers it is "insulated from public opinion."[88]

Others, like Du Plessis, believe that public opinion should not be rejected by the Constitutional Court in its reasoning and decision-making process with regard to constitutional law issues.[89]

4 7 *Ubuntu*

In the *Makwanyane*[90] case, the Constitutional Court judges sought to forge the concept of *ubuntu* as a reflection of a value system that could be considered indigenous and South African. The late Mohamed J (as he then was) referred to "the reciprocity [ubuntu] generates in interaction with the collective community".[91] According to Madala J the concept carries in it the ideas of "humaneness, social justice and fairness".[92] Sachs J suggested that the invocation of ubuntu by the court would "restore dignity to ideas and values that have long been suppressed or marginalized".[93]

Some writers have seen *ubuntu* as an answer to the quest for an indigenous jurisprudence[94] and ask whether it was stillborn.[95] *Ubuntu* is mentioned in the post-amble of the Constitution, and is therefore one of the values on which the new South African legal order is based:

> "The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not victimisation."[96]

The Nguni word *ubuntu* may be translated as "humaneness" or the "link that binds men [sic] together".[97] The essence of *ubuntu* is the connection between individual and community.[98]

Dr Desmond Tutu (previously Archbishop of Cape Town) outlined his version of the concept as follows:

> "Our people must show the world God has given us a great gift, *ubuntu* . . . However, the world should also know that forgiveness and reconciliation are not cheap . . . *Ubuntu* says I am human only because you are human. If I undermine

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87 2002 *SAJHR* 1-40.
88 2002 *SAJHR* 8.
89 Davis *Democracy and Deliberation* (1997) 47.
90 *S v Makwanyane* para 263.
91 Paragraph 237.
92 Paragraph 365.
93 Paragraph 365.
94 English "Ubuntu: The Quest for an Indigenous Jurisprudence" 1996 *SAHJR* 641-648.
95 English 1996 *SAJHR* 641.
96 Per Madala J in *S v Makwanyane* para 237.
97 Van Niekerk "A Common Law for Southern Africa: Roman law or indigenous African law?" 1998 *CILSA* 158 167.
98 Mbigi & Maree *Ubuntu: The Spirit of African Transformation Management* (1995) 109 ff.

> your humanity, I dehumanise myself . . . That's why African jurisprudence is *restorative* rather than *retributive*."[99]

In my opinion there is no insurmountable conflict between *ubuntu* and the "values that underlie an open and democratic society".[100]

4 8 The epilogue

The historical context of the Constitution, the reason for its introduction and the legal culture of the transplantee jurisdiction can co-determine comparability. Nowhere is it more explicitly stated in the epilogue to the Constitution:

> "This Constitution provides a historic bridge[101] 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."

5 CONCLUSION

All legal systems are mixing in one way or another in our world of globalisation and ever-increasing contacts and mutual influences.[102] In the words of Orücü:

> "Legislators and courts are looking at other jurisdictions at least for inspiration if not for direct borrowing, in an effort to improve responses to shared human problems. Legal ideas and institutions are crossing borders rapidly."[103]

This article endeavours to indicate that comparative legal method is not only a question of borrowing from other legal systems, or knowing whether other legal systems share common characteristics with one's own. The example of South Africa attempted to illustrate very briefly the problems and pitfalls that a comparative lawyer may encounter when reception from one jurisdiction to another takes place, without taking into account the legal culture of the "lending" jurisdiction or without sufficient insight into the legal culture of the "borrowing jurisdiction".

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99 Profile *Mail & Guardian* March 1996.

100 See, however, Kroeze "Doing Things with Values: The Role of Constitutional Values in Constitutional Interpretation" 2001 *Stell LR* 265 268-269.

101 The late Etienne Mureinik argued that South Africa's new Constitution must be a bridge from a culture of authority to a culture of justification in which 'every exercise of power is expected to be justified: in which the leadership given by government rests on the potency of the case offered in defence of its decisions; not the fear inspired by the force at its command. "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 *SAJHR* 31 32.

102 Nelken "Comparing Legal Cultures: An Introduction" in Nelken (ed) *Comparing Legal Cultures* (1997).

103 Studies in Legal Systems: Mixed and Mixing 351.

Ownership most foul: The Achilles heel of anti-money-laundering legislation?

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1 INTRODUCTION

> "[*T*]*reasure is an ancient deposit of money, memory of which no longer survives, so that it is without an owner*." [1]

Money laundering is the process of concealing money so that it can be used without detection of the illegal activity that produced it. From a criminal point of view, concealment serves two purposes: first, to safeguard the money and secondly, to safeguard its owner. The reason for such safeguarding relates to the purpose of current anti-laundering strategies: to bring about the "financial devastation"[2] of criminals. To this end, it is imperative not only to trace, freeze and confiscate the proceeds of crime, but also to identify the persons who are directly or indirectly involved in the laundering cycle.[3]

Contrary to the view quoted above, laundered money is never ownerless. Holding those liable who benefit from money laundering entails tracing the "dirty money"[4] back to the owner. But money launderers hide their identities within company structures and prey upon the near anonymity which sprouts from private and correspondent banking relationships. Primary anti-laundering legislation is unable to address some of the concerns regarding identifying the ownership of laundered money and/or property purchased with it. Some of these concerns include:

- tracing so-called "beneficial ownership" (in contrast to "legal ownership") back to criminals;
- tracing the "beneficial ownership" of corporate entities; and
- identifying ownership within correspondent and private banking relationships.

I will discuss each of these ownership issues in this article. Pertinent questions will be analysed only in as far as they relate to tracing the ownership of

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1 Prichard *Leage's Roman Private Law* (1961) 191–192.

2 US Department of State "International Narcotics Control Strategy Report" (1994) 470.

3 Gilmore *Dirty Money – The Evolution of Money Laundering Counter-Measures* (1995) 23-24; Smit *Clean Money, Suspect Source – Turning Organised Crime Against Itself* (2001) 55–56. Banks are predominately tasked with identifying their customers because the process of laundering, which consists of placement, layering and integration of criminal money within the financial system, takes place mainly within banks.

4 Rider "The Limits of the Law: An Analysis of the Interrelationship of the Criminal and Civil Law in the Control of Money Laundering" 1999 *J of Money Laundering Control* 209 212, where "dirty money" is described as money, or some other form of wealth, that is derived from a crime.

laundered money. Although I am aware that the concept of beneficial ownership is not recognised in South African property law,[5] I will nonetheless demonstrate how it in principle serves launderers in hiding their identities from the authorities. But Before describing and investigating the problem of tracing ownership with respect to money laundering, it is important to delimit the crime.

2 WHAT IS MONEY LAUNDERING?

The term "money laundering" was first used in print in 1973 during the Watergate scandal in the United States.[6] In general, money laundering refers to a process by which criminally derived money, or any form of wealth, is put through a number of financial transactions so that its true (criminal) origin is disguised. Thus, a person who conducts a financial transaction while aware that the *funds* or the *property* involved are the proceeds of crime, and intends to benefit from that transaction, is guilty of laundering money.

Possibly due to the novelty of the term "money laundering", in the first international legislative effort to criminalise money laundering,[7] the actual term "money laundering" was never used to define the concept. The Vienna Convention criminalises, among other things,

> "the conversion or transfer of property, knowing that such property is derived from any offence . . . for the purpose of concealing . . . the illicit origin of the property"

and

> "the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or *ownership of property*, knowing that such property is derived from an offence" (my emphasis).

In contrast, South African anti-money-laundering legislation[8] delimits the term "money laundering" clearly as

> "an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or *any interest which anyone has in such proceeds*" (my emphasis).

Launderers have three objectives, namely concealing the ownership and source of dirty money; maintaining control over it; and changing its form so that it becomes untraceable.[9] An intent to launder money is not required for criminal prosecution. Rather, conduct which facilitates the result of laundering, such as moving funds through company accounts[10] whilst knowing its origin, is criminalised. It is thus impossible to create money-laundering offences without creating specified unlawful activities or predicate crimes to generate "proceeds".[11] Money laundering is therefore inseparable from crime.

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5 As opposed to South African taxation laws, where beneficial ownership is distinguished from legal ownership. See further section 3.2 below.

6 Richards *Transnational Criminal Organisations, Cybercrime, and Money Laundering: A Handbook for Law Enforcement Officers, Auditors, and Financial Investigators* (1999) 13.

7 See art 3(1)(b) of the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereafter the Vienna Convention) 1988 UN Doc E/Conf 82/15 (1989) 28 *ILM* 493.

8 See s 1 of the Financial Intelligence Centre Act 38 of 2001 (hereafter FICA) and ss 4–6 of the Prevention of Organised Crime Act 121 of 1998 (hereafter POCA). The latter defines money laundering in terms of a number of criminal offences.

9 Antoine *Confidentiality in Offshore Financial Law* (2002)147.

10 See s 4.1 below.

11 Or "dirty money". Also see section 3 below.

3 THE CONCEPT OF OWNERSHIP

3 1 General concepts of ownership

It may be useful to investigate the commonly understood meaning of "owner" when trying to distinguish between relevant terms, such as "legal owner" and "beneficial owner". In general an "owner" has been defined as "[o]ne who has the right to possess, use, and convey something; a proprietor".[12] Ownership is the collection of rights allowing one to use and enjoy property, including the right to transfer it to others. The right to possess a thing regardless of any actual or constructive control, is also implied.[13] "Ownership" consists of the following five components: possession; management and control; income and capital; transfer *inter vivos* and on death; and legal protection.[14]

Some explanations of "owner" also include "beneficial owner".[15] Accordingly, a person with a legal title (ownership) also has the right to use and enjoy the property. Sometimes the distinction between a "legal owner" and a "beneficial owner" may become blurred.[16] Consider, for example, legal terminology. Now and then the meaning of terms, such as "legal ownership" and "beneficial ownership", are explained by referring to them interchangeably.

The term "beneficial ownership" is often used to describe the ability of a person or group of persons to control the activities and assets of a corporate entity.[17] Control over property may be exercised by natural or legal persons, which would include, for example, the shareholders of a company. Despite the fact that the term "beneficial ownership" is often used, there is still no established legal definition of the term. In the sphere of international banking, "beneficial ownership" or "beneficial interest" is regarded as the entitlement to receive some or all of the benefits of ownership of a security or other financial instrument.[18] Benefits, such as income, voting rights and the power to transfer, would sprout from such ownership.

This, then, brings me to the main difference between a "legal owner" and a "beneficial owner", the position of the latter being important in identifying some forms of corporate ownership. A "legal owner" at English common law holds a legal title to property and enjoys all the other rights to property ownership. Such an owner also has a personal right against the person who, for example, manages the legal entity.[19]

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12 Campbell & Garner (eds) *Black's Law Dictionary* 7 ed (1999) *sv* "owner".

13 *Ibid sv* "ownership".

14 Ziff *Principles of Property Law* 3 ed (2000) 2.

15 See eg Leff "The Leff Dictionary of Law: A Fragment: Part 3" 1985 *Yale LJ* 1855 2149.

16 Brown "Beneficial Ownership and the Income Tax Act" 2003 *Canadian Tax J* 401 402.

17 HM Treasury/Department of Trade & Industry *Regulatory Impact Assessment Disclosure of Beneficial Ownership of Unlisted Companies. Regulatory Impact Assessment – A Consultation Document* (July 2002) paras 4.1-4.2.

18 BIS Committee on Payment and Settlement Systems "A Glossary of Terms Used in Payment and Settlement Systems" (March 2003) 9 http://www.bis.org/publ/cpss00b.pdf (accessed 26-08-2005).

19 Megarry & Thompson (eds) *Megarry's Manual of the Law of Real Property* 7 ed (1993) 64. Substantial differences exist between the positions of a trust beneficiary in South African law and in English law. Suffice it to say that English law follows equity and tracing rules which are not applicable under South African law.

By contrast, a "beneficial owner" is the person who benefits from the ownership of a security, property or mutual fund regardless of who holds the legal title. Thus, a money launderer may not possess a legal title to the proceeds of crime, but may enjoy the monetary benefits that flowed from them. Consequently, a launderer may be held liable as a "beneficial owner" although there is no legal title in his or her name.[20] This construction of the liability of a "beneficial owner" under anti-money-laundering statutes raises some practical and evidential problems, for example determining the extent of a beneficiary's liability where multiple and/or minor beneficiaries and "legal owners" exist simultaneously. None of these problems are addressed by current anti-money-laundering legislation or measures.

3 2 The South African concept of ownership

Three sources of property law are recognised in South Africa: the common law, which is found in the writings of the old authorities (for example, Grotius and Voet); different statutes passed by Parliament; and decisions of our courts.[21]

The legal meaning of ownership under South African law is first and foremost determined by accepted common law rules. These rules are based upon a combination of Roman-Dutch, canon and Germanic customary legal principles.[22] At common law ownership is defined as a combination of all the real rights which a person may have to and over corporeal property,[23] or as a right that consists of a bundle of rights, powers and liberties.[24] A real right gives one the power to do with a thing as one pleases.[25] A thing is defined as a corporeal object taking up space and which is an independent legal entity susceptible to private ownership, of use to mankind and of value.[26] Ownership includes the right to possess, use, destroy or alienate an object and thus encompasses comprehensive control over it.[27] Honoré presents a rather complex description of ownership, identifying eleven elements that provide a complete meaning of the term.[28] He explains that legal ownership includes the right to possess, use or manage the income or the capital from a thing. Ownership also entails the right to security; the right to

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20 USA Corporate Governance *Glossary* http://www.corpgov.org/glossary.php3?glossary_id=11(accessed 26-08-2005).

21 Sonnekus "Property Law in South Africa: Some Aspects Compared with the Position in Some European Civil Law Systems – The Importance of Publicity" in Van Maanen & Van Der Walt (eds) *Property Law on the Threshold of the 21st Century* (1996) 285 291–298.

22 Van der Merwe "Property in Mixed Legal Systems: South Africa" in Van Maanen & Van Der Walt (eds) *Property Law on the Threshold of the 21st Century* 355 360; Van Der Walt "The South African Law of Ownership: A Historical and Philosophical Perspective" 1992 *De Jure* 446–455.

23 Hall & Maasdorp *Maasdorp's Institutes of South African Law Vol II The Law of Property* 10 ed (1976) 27; Van Der Merwe in *Property Law on the Threshold of the 21st Century* 365.

24 Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* (1960) 578.

25 Voet 5.2.1 in Maasdorp & De Villiers (eds) *The Institutes of South African Law Vol II The Law of Things* 6 ed (1938)14.

26 Sonnekus in *Property Law on the Threshold of the 21st Century* 301. Although ownership implies holding something of value, this requirement is not mentioned in anti-money-laundering legislation. Also see section 3.3 below.

27 Grotius 2.3.4 & Voet 7.1.3 in Maasdorp & De Villiers *Institutes* 37.

28 Honoré "Ownership" in Guest (ed) *Oxford Essays in Jurisprudence* (1961)107 113.

transfer; the prohibition of harmful use; liability for performance; and the right to a thing's remainder.

Sonnekus simply delimits ownership as a relationship between a legal subject and a corporeal object whereby a person may for his own benefit do with the object as he pleases provided that it is not forbidden by law.[29]

It is therefore trite that "legal ownership" at common law confers upon a person extensive rights over an object. In essence, the South African concept of "legal ownership" corresponds with the internationally accepted notion of the term.[30]

As I have mentioned before,[31] South African property law does not recognise the concept of "beneficial ownership". Sonnekus emphatically states that there is no place under South African law for two different types of ownership to exist simultaneously over the same thing.[32] But the concept of "beneficial ownership" is recognised in other areas of South African law, such as the law of trusts and the law of taxation.[33] "Beneficial ownership" in the context of trusts and taxation law does not, however, infer the same kind of ownership as understood under the concept "legal ownership". For this reason a brief discussion of the concept is required.

To reiterate, under English law dual ownership, consisting of "legal ownership" and equitable interests or "beneficial ownership" of an object, is possible.[34] Roman-Dutch law also recognised a division of ownership into full ownership, where the title to property and its use was settled in one person, and less than full ownership where title and use were separated.[35] The latter so-called "less than full ownership" consisted of the following two parts:[36]

- The empty title that remained with the (nominal) owner; and
- The rights of *use*[37] separated from the title that was granted to another person.

Although this medieval distinction was replaced by the modern idea of ownership which recognised only one form of ownership ─ the title of "owner" for the holder of the title whilst the user holds a mere right of entitlement ─ it may be relevant when one attempts to explain the meaning of "beneficial ownership" in terms of South African law.

Seeing that our concept of ownership is considered to be individualistic and absolute, our common law does not provide, in contrast to English law, for it to be divided into equitable interests.[38] An owner may, however, deal with an

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29 Sonnekus in *Property Law on the Threshold of the 21st Century* 301.
30 See s 3.1 above.
31 See s 1 above.
32 Sonnekus in *Property Law on the Threshold of the 21st Century* 311.
33 The Regulations in Terms of the FICA (GG No 1595 of 2002), which is introduced by s 77(1)(b) of the Act, do refer to trust beneficiaries. It is stipulated that the name of a trustee (Reg 15(e)) and his address and contact particulars (Reg 15(g)) must be obtained by an accountable institution when it is establishing a business relationship or, conducting a transaction with the trust. Regarding the law of taxation, see below.
34 De Waal "Aspects of the English, Scottish & SA Trusts Compared" 2000 *SALJ* 548 550–552.
35 Van Der Walt 1992 *De Jure* 452–453.
36 *Ibid.*
37 My emphasis.
38 Van Der Merwe in *Property Law on the Threshold of the 21st Century* 365.

object as he pleases and may transfer segments of it to others who will acquire a limited real right in it.[39]

Limited real rights are regarded as real rights "less than ownership" in an object owned by a person other than the holder of such a right.[40] A limited real right gives to its holder powers which are either inherent in the universal right of ownership, or which prevent an owner from exercising his ownership rights.[41] A limited real right may also reduce a person's ownership of an object or suspends it so that he retains only a "reversionary interest" in it.[42] The holder of a limited real right who benefits from his holding this right is thus nothing more than the "beneficial owner" of the rights he holds.

As mentioned earlier, South African law recognises "beneficial ownership" mainly in the sphere of trust law and taxation law. In the law of trusts the courts commonly refer to the "beneficial ownership" of trust property.[43] The term "beneficial ownership" in this sense does not award legal ownership of the trust property to the beneficiary.[44] Rather, it depicts the trust beneficiary's protected rights *in personam* against the trustees of a trust. So, unless a trust beneficiary possesses a personal right to the transfer of the ownership of, or a real right in specific property, he has no greater rights than an unsecured creditor where the property of a debtor has been improperly disposed of.[45] As a result, the differences between "legal ownership" and "beneficial ownership" may exist in the unique rights a person holds in relation to an object.

"Beneficial ownership", in contrast to "legal ownership", denotes an entitlement to receive the benefits of ownership where the object's legal title is held by someone else. It is perhaps an "ownership" that exists in little more than an interest in an object. It does not amount to "legal ownership" since the rights a "beneficial owner" holds over an object are restricted.

Thus, although dual ownership, consisting of "legal ownership" and "beneficial ownership", is not recognised under South African property law, the term "beneficial ownership" is recognised in other areas of the law, albeit with a different meaning attached to it. Current anti-money-laundering-measures do not discriminate between the objects of so-called "legal ownership" and "beneficial ownership". Any benefits obtained through crime are deemed proceeds of crime.[46]

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39 Harry Silberberg *The Law of Property* (1975) 37-38; CG Van Der Merwe *Sakereg* 2 ed (1989) 175.

40 *Ibid.*

41 Silberberg *The Law of Property* 43.

42 See eg *Van Zyl v Strandfontein Namaqualand Estates (Pty) Ltd* 1930 CPD 270 272; *Moola v Estate Moola* 1957 2 SA 463 (N) 464 B–E.

43 See eg *Lucas' Trustee v Ismail & Amod* 1905 TS 239 247; *Strydom v De Lange* 1970 2 SA 6 (T) at 11, or to trust property as "belonging" to a beneficiary, see *CIR v Sive's Estate* 1955 1 SA 249 (A) 262; *CIR v Polonsky* 1942 TPD 249 253–254.

44 Cameron, De Waal, Solomon & Kahn *Honoré's South African Law of Trusts* 5ed (2002) 564; Stander "When Trustee Owns Trust Property Beneficiary Has in General Only a Protected Rights in Personam" 1999 *Tydskrif vir Regswetenskap* 145 147–152 where the author distinguishes between the position of the beneficiary of an ownership trust and the beneficiary of a bewind trust; s 11 of the Trust Property Control Act 57 of 1988.

45 Cameron *et al Honore's South African Law of Trusts* 8.

46 See s 1 of the FICA and s 1 of the POCA.

3 3 Ownership and the proceeds of crime

As stated earlier,[47] identifying the proceeds of crime is an integral part of anti-laundering strategies. The reason for this is two-fold. First, criminally derived property can be confiscated if proved to be the proceeds of a crime.[48] Secondly, people who benefited directly or indirectly from the proceeds of crime can be prosecuted. It is therefore crucial to establish what is understood by the term "proceeds of crime".

South African anti-laundering legislation criminalises all forms of ownership of the proceeds of crime. It does not draw a fundamental distinction between ownership of the proceeds of crime and ownership of property acquired with such proceeds. Both forms of ownership are criminalised.

In s 1 of the FICA the terms "proceeds of crime" and "property" are defined with reference to their meaning in terms of s 1 of the POCA. The term "proceeds of crime" includes

> "[a]ny property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived".

Money and any other movable, immovable, corporeal or incorporeal things, as well as any rights, privileges, claims and securities and any interest in it, and all proceeds of it, are regarded as "property" in terms of national and international anti-laundering legislation.[49] "Proceeds of crime" include property held by a person for himself or herself, while property held by a person to whom such person has made an "affected gift",[50] is deemed realisable property.[51]

So, the proceeds of crime and property acquired with them include any benefits or profits that were gained as a direct or indirect consequence of crime. Broadly defined terms in the context of preventing crime obviously serve an important purpose in identifying the money launderer. However, recognising assets as the proceeds of crime may not present such a huge challenge as tracing and proving their ownership may do.

4 CONCEALING IDENTITIES WITHIN CORPORATE STRUCTURES

4 1 The misuse of corporate entities

In principle, money laundering is not just about "hiding" the proceeds of crime but also about rendering it re-usable for legitimate purposes.[52] In short, so-called

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47 See s 1 above.

48 Section 50 of the POCA. The POCA provides for the criminal confiscation of proceeds of crime, assets of corresponding value and instrumentalities of crime. Thus far, the Asset Forfeiture Unit of the National Prosecuting Authority has seized assets worth over R400 million (see IMF "South Africa: Report on the Observance of Standards and Codes – FATF Recommendations for Anti-Money Laundering and Combating the Financing of Terrorism" (April 2004) IMF Country Report No. 04/118 para 9 http://www.imf.org/external/pubs/ft/scr/2004/cr04119.pdf (accessed 26-08-2005).

49 Section 1 of the FICA; art 1 of the Vienna Convention.

50 This may be defined as property acquired with, or through, crime.

51 Section 15 of the POCA.

52 Walter *Secret Money: The Shadowy World of Tax Evasion, Capital Flight and Fraud* (1989) 150.

"dirty money"[53] must be converted into money that is associated with legitimate businesses, or money that seemingly originates from acceptable sources, for the process to be successful.

Money laundering has a negative influence on the business that is used during the laundering process. It does so by creating an illusion that more *bona fide* business exists than is actually the case; by creating an artificial demand for products; and by damaging the reputation of institutions who innocently become involved.[54] Laundering can ruin the reputation of business sectors and countries alike. Business entities that may be used as instruments to launder money and to conceal the identities of the launderers include companies, trusts, partnerships and close corporations. However, only the position of companies will be discussed here.

Generally three kinds of companies may be distinguished in terms of South African legislation: a private company; a public company; and a foreign company, which could be either private or public.[55] For present purposes it is unnecessary to provide a detailed explanation of the differences between private and public companies. Suffice it to say that the misuse of private companies for laundering purposes is negligible.[56]

In June 2002, a consultation paper was published in England which concerned the disclosure of beneficial ownership of unlisted companies. An impact assessment study was commissioned to examine the balance between the potential law-enforcement benefits of more open disclosure as against the potential burden placed on companies.[57] It was found that those who control the assets of a company set-up for criminal purposes, may avoid any beneficial ownership of the company's shares.[58] Included here were shareholders, beneficial shareholders, directors, shadow directors, creditors or a third party controlling the company by blackmail, extortion or coercion. In short, a company may be controlled by persons who are neither its directors nor its owners.[59]

Numerous problems exist in establishing who the beneficial owners of a company are. Some of these problems relate to the information contained in company registers. Seeking to establish ownership by reference to a register of members was found to be ineffective.[60] The reason relates to the difficulty in defining ownership. Minimum disclosure of information seemingly does not identify all those who may have an interest in a company. Existing minimum-disclosure provisions are inadequate in expediting identification. The registration of nominees as the legal owners of a company makes it more even more difficult and identifying beneficial owners may prove impossible.[61]

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53 Rider 1999 *J of Money Laundering Control* 212.

54 HM Treasury/Department of Trade and Industry *Regulatory Impact Assessment Disclosure of Beneficial Ownership of Unlisted Companies* para 2.5. Smith *Clean Money, Suspect Source - Turning Organised Crime Against Itself* (2001) 21.

55 Section 1 of the Companies Act 61 of 1973, as amended.

56 The reason for this is simple: the desired anonymity that is essential to launderers is difficult to attain, as a private company by definition limits the number of its members, restricts transfers of its shares, and prohibits public participation (see the Companies Act s 20).

57 HM Treasury/Department of Trade and Industry *Regulatory Impact Assessment Disclosure of Beneficial Ownership of Unlisted Companies* para 1.4.

58 *Idem* para 5.1.

59 *Ibid.*

60 *Idem* paras 10.5-10.6.

61 *Idem* para 10.1.

Shell companies, often also called "international business corporations" or "private investment companies", have no function other than to carry out criminal activities and hide money from the authorities.[62] They are designed to conceal criminally derived profits and assets and as such, are essential tools with which money launderers conceal their money.

Shell companies very often display the following traits: they are most commonly purchased from banks, lawyers and accountants so they can have a history; and they must operate outside the jurisdictions where they are incorporated.[63] Little is known about their assets because these companies are not required to file financial reports. Since shell companies are usually incorporated as legal entities with limited liability, they employ bearer shares and nominee shareholders and directors as money-laundering instruments. Bearer-share companies are owned by the bearer of company shares so that no identification of ownership is possible; ownership of such bearer-share companies passes with the transfer of the share certificates themselves.

Both private and public companies may be formed for legal purposes only.[64] Public companies may investigate their share ownership and must keep a register of their members that is open to inspection.[65] The point is, however, that keeping a members' register and launching an investigation are of little use if it is impossible to ascertain the identity of a listed member. Sometimes investigations into the latter's identity may be compared to looking for a needle in a haystack – in the end, an investigator may decide to relinquish the search in favour of trusting proffered information. Confirming the legality of the said company may also be futile if it proves impossible to authenticate information about its beneficiaries.

These are the problems that banks face when accepting certain companies as customers. The question that follows is how banks should go about identifying those beneficiaries that hide behind company structures as described above? Depending on the nature of the investigation and the kind of company involved, it may be useful to enlist the assistance of international agencies which are willing and capable of meeting such requests for information.

To this end, it is vital that all countries establish effective mechanisms to obtain, and to share internationally, information on the beneficial ownership and control of such entities established in their own jurisdictions.[66] The following three objectives may provide a means for measuring the effectiveness of information exchanges:[67]

- beneficial ownership and control information must be maintained or be obtainable;

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62 OECD *Misuse of Corporate Vehicles for Illicit Purposes* (2001) (hereafter the OECD Report) para 2.

63 HM Treasury/Department of Trade and Industry *Regulatory Impact Assessment Disclosure of Beneficial Ownership of Unlisted Companies* para 1.1.

64 Section 32 of the Companies Act.

65 Sections 113 & 105 respectively.

66 OECD "Options for Obtaining Beneficial Ownership and Control Information – A Template Prepared by the Steering Group on Corporate Governance" (1 Sept 2002) 5 http://www.oecd.org/dataoecd/50/40/1961539.pdf (accessed 26-08-2005).

67 *Ibid*.

- there must be proper oversight of the system that obtains and maintains such information; and
- non-public information on beneficial ownership and control must be shared internationally.

Information that should be obtained to prevent the misuse of corporate entities will vary depending on the type of entity.[68] For example, banks that have as a customer a public company who holds shares in another company, should try to identify its ultimate beneficial owner. Where a customer is a shell company, the identity should be established of any representative from whom information has to be obtained.

4 2 Concealing identities within banks

4 2 1 The role of banks in the laundering process

Despite stronger anti-money-laundering controls, it is estimated that US$ 500 billion to US$ one trillion in criminal proceeds are laundered through banks worldwide each year.[69] While traditional bank secrecy is almost a thing of the past, banks are still being targeted by criminals.[70] The reason for this relates to the availability of highly specialised money-laundering techniques with which to exploit the vast array of banking services on offer.[71]

Successfully tracing the ownership of this money may often depend on the kind of banking products relied upon during the laundering process. As I will now explain, the nature of correspondent and private banking is such that these structures have attracted the attention of money launderers seeking new ways to clean criminally derived money.

4 2 2 Correspondent banking

Correspondent banking involves one bank, the correspondent bank, providing financial services to another bank, the respondent bank. A credit institution which acts as a correspondent bank usually controls a number of financial transactions for customers of the respondent bank. The result is that the correspondent bank has little choice but to rely on the respondent bank to verify the legitimacy of its customers' earnings and may, as a result, run certain risks:[72]

- the correspondent bank will seldom know the quality of the anti-laundering measures that are in place at the respondent bank; and
- the respondent bank may act as an intermediary for another bank; consequently, a correspondent bank could be doing business with a sub-respondent bank without knowing anything about its customers or reputation.

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68 *Idem* 7.

69 Alldridge *Money Laundering Law. Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (2003) 4.

70 International Monetary Fund & World Bank *Twelve-Month Pilot Program of Anti-Money-Laundering and Combatting the Finance of Terrorism (AML/CFT) Assessments and Delivery of AML/CFT Technical Assistance* (31 March 2003) para 29.

71 Gup *Targeting Fraud* (1995) 69.

72 Financial Action Task Force on Money-laundering "Report on Money-laundering Topologies 2001-2002" (1 Feb 2002) DocPlen38/R2e, paras 24-32.

It has been suggested[73] that the responsibility to combat money laundering between the two banks remains with the correspondent bank itself. As such, correspondent banks are expected to ensure that their customer-identification policies are updated on a regular basis to incorporate customers of respondent banks. They should know on whose behalf they are acting and who the beneficiaries of the funds are.

In the United States, a proposal was recently put forward concerning the misuse of correspondent banking for laundering purposes.[74] It is proposed that security-brokers and other relevant financial institutions should confirm that the foreign banks to which they offer correspondent accounts are not shell banks and are not using their accounts to provide services to shell banks. In addition, specific information regarding the ownership of their foreign respondent banks should be obtained and regularly up-dated.[75]

4 2 3 Private banking

The nature of private banking also makes it susceptible to laundering and concealing the identity of a money launderer.[76] Private banks offer preferential financial services to customers with a high net worth. Private bank accounts may be opened in the name of an individual, a company, a trust or an intermediary and are usually managed by an appointed banker. The risk, with regard to money-laundering, is that the banker may fail to exercise due diligence with regard to identifying a customer and monitoring the movement of funds in his or her account.

The problem is this: an appointed banker is responsible for providing a personalised service to its customer and for developing a strong, long-term banking relationship with the customer.[77] In return for such services, the appointed banker can earn fees in excess of R10 million per customer per year. Private banking services mostly demand a high degree of confidentiality regarding customer account information. Thus, it is not unknown for private bankers to assist their customers in financial planning through offshore entities. Shell companies[78] are formed to hold a customer's assets. The effect is that the company, rather than the beneficial owner of the assets, becomes the account holder at the private bank. Private banks may accordingly know little about the identity of the true beneficiary of the money in an account.

The following five factors in private banking increase its vulnerability to money-laundering:[79] the role of private bankers as client advocates; powerful

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73 *Idem* para 31.

74 Yim "A Securities Lawyer's Take on Proposed Anti-Money-laundering Initiatives: A 'Brave New World' for Broker-Dealers?" http://www.cybersecuritieslaw.com/wslawyer/yim.htm (accessed 26-08-2005).

75 *Ibid.*

76 International Monetary Fund & World Bank *Twelve-Month Pilot Program of Anti-Money-Laundering* paras 33-43.

77 Testimony of Richard A Small Before the Permanent Subcommittee on Investigations, Committee on Governmental Affairs, US Senate "Vulnerability of Private Banking to Money-laundering Activities"(10 Nov 1999) http://hsgac.senate.gov/111099_small.htm (accessed 26-08-2005).

78 See s 4.1 above

79 Committee on Governmental Affairs "Minority Staff Report for Permanent Subcommittee on Investigations Hearing on Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities" (9 Nov 1999) http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:61699.wais (accessed 26-08-2005)

clientele which dislike questions; a corporate culture of secrecy; a corporate culture of relaxed controls; and the competitive nature of the industry. Suffice it to say that a fundamental problem with the effective detection of laundering within the private banking relationship is that private bankers are being asked to fill contradictory roles. On the one hand they are expected to develop a personal relationship with a customer and increase his or her deposits with the bank. On the other hand, private bankers must also establish the identity of their customers, monitor their accounts for suspicious activity and question suspicious transactions. These contradictory roles may cause a banker to neglect his anti-money-laundering duties.[80] Launderers are usually aware of the dilemma a private banker faces and exploit it to the latter's detriment.

In spite of the progress that has been made by the authorities, significant anti-laundering policy deficiencies have not yet been addressed by some private banks. Lackadaisical verification of customers' identities combined with a "hear no evil, see no evil" attitude adopted by some private bankers[81] for the sake of profit do not help the anti-laundering cause.

This abuse of private banking by money launderers may be prevented if sound private-banking practices are implemented.[82] In this regard, due diligence policies and procedures that require banks to obtain basic information from their customers, to understand the sources of funds, and to identify suspicious activity, may be effective.[83] In addition, private bankers should analyse their customers' intended use of their accounts and constantly review account activity to determine that customers act within the boundaries of the established relationship.

5 EVALUATION

Combating the misuse of corporate entities to launder money has a paradoxical quality about it. Companies, with the possible exception of those incorporated for charitable purposes, exist to create wealth, and as much of it as possible. By contrast, anti-laundering policies, such as KYC policy's due diligence measures, dictate that corporations should refuse the business of affluent customers and become part of a global fight against money-laundering. It is thus no wonder that

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80 *Ibid.*

81 See eg Johnson "Money Laundering Exposes Nigeria's Oppressors" (10 Nov 2000) http://www.wsws.org/articles/2000/nov2000/nige-n10.shtml (accessed 26-08-2005). It is widely accepted that a former Nigerian dictator Sani Abacha laundered approximately US$ 4 billion through more than thirty banks in the United Kingdom, Switzerland, the United States, Germany and Luxembourg. No disciplinary action was taken against the major banks which accepted deposits from him, such as Bankers Trust, Barclays, Citigroup, Goldman Sachs, HSBC, Merrill Lynch and National Westminster Bank.

82 Financial Action Task Force on Money-laundering "Report on Money-laundering Topologies 2001-2002" para 3.

83 Such policies are known as the "Know Your Customer" standard and South African banks are compelled, in terms of s 77(1)(b) of the FICA and the Regulations passed in terms of this section (see note 33 above) to implement its provisions. Section 21 of the FICA encapsulates the aim of the Regulations: since 30 June 2003 banks are prohibited from conducting business with *unidentified* customers (my emphasis). They are accordingly instructed to obtain a certain amount of information about a potential customer and to verify its authenticity before accepting it as a customer. Any suspicious transactions should be reported to the Financial Intelligence Centre which will receive, analyse and disseminates these reports (ss 2 and 27).

Swiss banks denounced the American created KYC policy as a way to "undermine Swiss banking".[84]

At present the Financial Intelligence Centre, which is the South African anti-money-laundering authority, concerns itself with ensuring implementation of basic anti-laundering measures by those institutions designated in the FICA.[85] The dangers posed by certain public companies and bank-customer relationships may not warrant the attention they deserve.[86]

Having anti-laundering legislation in place does not guarantee prudent enforcement of its measures. Perhaps it is time that the authorities realise that the war against money laundering is not one that they can win alone and with legislative weapons alone. The business sector must be involved and its co-operation must be given voluntarily. Possibly, co-operation could be forthcoming if business entities, such as companies, could be persuaded that the benefits of preventing laundering within their businesses far outweigh the disadvantages that come from being associated with it.

A recurrent theme on how to address business misuse is the necessity for international co-operation to promote adequate information exchange. An enhanced disclosure regime could reduce the time spent on conducting identity verifications and also result in the saving of costs spent on extended customer investigations.

The successful recovery of the proceeds of crime depends on being able to identify and locate assets that can be linked to crime. To this end, more accurate identification of legal and beneficial owners should be a priority. This could be achieved by having unambiguous, well publicised guidelines within a bank on how to complete customer profiles, corroborate sources of wealth, monitor transactions, and identify suspicious account activity. These guidelines may discourage criminals from approaching institutions for business.

With regard to correspondent and private banking, the responsibility of enforcing prudent customer identification policy practices must remain with the management of a bank. Where identification investigations are met with no or little success, it should be reported to the authorities. It is unfortunately true that a bank may subsequently find itself in an unfavourable position: should it keeping mum about its suspicions regarding a customer, or should it report the customer even though the latter may be legitimate.

A policy of not accepting a new customer before receiving a solid endorsement from an existing one could be adopted which may prevent unnecessary reports. Also, enforcing such a policy should be non-negotiable and sacrificing the policy for profit should not be condoned. But in the end, it is still the bank that bears the burden of deciding when to report a customer to the authorities.

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84 Committee on Governmental Affairs "Minority Staff Report for Permanent Subcommittee on Investigations Hearing on Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities".

85 See Schedule 1 (List of Accountable Institutions) of the FICA.

86 According to the IMF "South Africa: Report on the Observance of Standards and Codes – FATF Recommendations for Anti-Money Laundering and Combatting the Financing of Terrorism" para 6, South Africa has a comprehensive legal structure to fight money laundering. Yet money-laundering offences have not been adequately investigated and prosecuted (*idem* para 12). This is partly due to the fact that some of the law enforcing structures are new and currently focussed only upon investigating criminal offences which are connected to money laundering and not the crime itself.

Childhood sexual-abuse narratives: Taking their place in a long line of "gendered harms" and "mirrored silence"

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1 INTRODUCTION

Despite the special safeguards provided for children in the 1996 Constitution,[1] which *inter alia*, stipulate that children have a right to family and parental care as well as protection against maltreatment, neglect, abuse or depredation, tragically child sexual abuse remains a serious and prevalent problem in our society.[2] Throughout the last ten years, the issue of child sexual abuse has become virtually a household topic.[3] The media has been instrumental in bringing a number of cases to the critical attention of the South Africa public.[4] The

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1 Section 28(1)(a) and (d) of the Constitution of the Republic of South Africa, 1996.

2 See Haffejee "Sexual abuse of Indian (Asian) children in South Africa: First report in a community undergoing cultural change" 1991 *Child Abuse and Neglect* 147-151; Collings "Childhood sexual abuse in a sample of South African University males: Prevalence and risk factors" 1991 *SA J of Psychology* 153-158 and "Child sexual abuse in a sample of South African women students: Prevalence, characteristics, and long-term effects" 1997 *SA J of Psychology* 37-42; Boller *et al Violence against Women in Metropolitan South Africa* (155 Monograph Series No 41); Stanton *et al Improved Justice for Survivors of Sexual Violence? Adult Survivors' Experiences of the Wynberg Sexual Offences Court* (1997) 17; Van Dokkum "The statutory obligation to report child abuse and neglect" 1996 *Acta Juridica* 163; Argent *et al* "Child abuse services at children's hospital in Cape Town" 1995 *Child Abuse & Neglect* 1313-1321; Madu & Peltzer "Child abuse among high school students in Northern Province of South Africa" *South African Data Archive* (1998).

3 See Wood & Jewekes "Violence, rape, and sexual coercion: everyday love in a South African township" 1997 *Gender & Development* 41-46; Armstrong "Rape in South Africa: An invisible part of Apartheid's legacy" 1994 *Focus on Gender* 35-39.

4 In *Ferreira v S* 2004 4 All SA 373 (SCA) para 58 Marais JA observed: "Civil society, through the medium of non-governmental organizations and other agencies, and with the help of the media, has publicized the prevalence of domestic abuse, provided succour and moral and material support for those who have experienced or are experiencing it, and ensured that it occupies the continuing attention of those in authority."

troubling and painfully vexing rape of a nine-month old girl re-christined Baby Tshepang[5] by the press in the small Northern Cape town of Louisvaleweg, near Upington in October 2001 is a prime example.[6] Abuse of this nature, in addition to posing immediate threat to the physical well being of the victim, its extremely debilitating psychological *sequelae* may remain with the victim throughout adulthood.[7] MacFarland J put it this way:

> "Rape is unlike any other sort of injury incurred by accident or neglect. Survivors of rape must bear social stigmatisation which accident victims do not, Rape is not about sex; it is about anger, it is about power and it is about control. It is . . . 'an overwhelming life event'."[8]

While child sexual abuse has a long history,[9] recent years have brought a new sense of awakening to the problem and enormous commitment to eradicating the

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5 The nickname means "have hope". After the news of Baby Tshepang's rape, six men were arrested almost immediately, but then released. Finally, David Potse, the boyfriend of the baby's mother, was arrested and sentenced to life imprisonment. It was also revealed that the mother was out drinking when the infant, left alone in a room, was raped. The only case that bears resemblance to Baby Tshepang is the Canadian decision in *R v Brooks (*2000) 141 CCC (3d) 321, 182 DLR (4th) 513, where the accused was convicted of first-degree murder in connection with the death of a 19-month-old child murdered in her crib. The child had been beaten and sexually assaulted. Only the accused and the child's mother had access to the apartment on the night in question. The accused's pants were found in the apartment stained with his semen, together with blood of the same type as that of the child and juice similar to that found in her bottle.

6 This case was front-page news all over the country. "South Africa: The Reality behind Child Rape" *Mail & Guardian* 8 November 2002; "Local tragedy makes it onto the big screen" *Sunday Times Metro* October 2 2005 14. See also a theatre play *Tshepang – Third Testament* by Lara Foot Newton.

7 The psychological manifestations of incest suffered by adult survivors have been subject of considerable academic study in recent years. Experts have noted a strong correlation between incest and long-term damage: severe anxiety and depression, sexual dysfunction, and multiple personality disorder. Additionally, the internalization of the anger and anxiety that the incest victim has not been allowed to express, frequently results in a profound self-hatred that causes self-destructive behaviour later on. Incestuous childhood victimisation commonly leads to other abusive relationships, self-mutilation, prostitution, and drug and alcohol addiction. See generally, Forward & Buck *Betrayal of Innocence: Incest and its Devastation* (1978) 163-178; 181-186; Beitchman *et al* "A review of the long-term effects of child sexual abuse" 1992 *Child Abuse* 101 103-109; Browne & Finkelhofer "Impact of child sexual abuse: A review of the research" 1986 *Psychology Bulletin* 66 69-72; Gelinas "The persisting negative effects of incest" 1983 *Psychiatry* 312 315-322; Herman *et al* "Long term effects of incestuous abuse in childhood" 1986 *American J of Psychiatry* 1293 1295.

8 *Jane Doe v Metro Toronto (Municipality Commissioner of Police*) (1998) 160 DLR (4th) 697 746.

9 According to Oates "Understanding the problem" in Oates (ed) *Understanding and Managing Child Sexual Abuse* (1990) 3: "Sexual exploitation of children by adults is not new. What is new is the professional and public awareness of a problem which has been present for many centuries. As far back as the Roman Empire there is documentation of the popularity of boy brothels in many cities, whilst Athens had a 'rent-a-boy' service . . . Sexual abuse of girls was also common. In some cultures daughters were loaned to guests as an act of hospitality, whilst children no older than 11 years were kept at houses of prostitution, according to the records of the London Society for the Protection of Young Females." See also Miller *Thou Shall Not Be Aware: Society Betrayal of the Child* (1984) 124-134, describing historical acceptance of sexual behaviour with children as harmless, amusing, and even beneficial.

scourge of sexual predation. In this context, courts have adopted a sensitive approach to dealing with cases of child rape. The views expressed by Justice Sabharwal in *State of Rajasthan v Om Prakash*[10] concerning the importance of safeguarding childhood and youth against exploitation and against sexual abuse are reflective of this enlightened approach:

> "Child rapes cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of the sexual pleasure. There cannot be anything more obscene than this. *It is a crime against humanity.* Many such cases are not even brought to light because of social stigma attached thereto. According to some surveys, there has been steep rise in the child rape cases. *Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are our country's future. Hope of tomorrow rests on them. In our country, a girl child is in very vulnerable position and one of the modes of her exploitation is rape besides other mode of sexual abuse.* These factors point towards a different approach required to be adopted."[11]

Adverting to sentencing in relationship rapes,[12] Cameron JA expressed similar sentiments in a very clear and strong language. His lordship's remarks are telling:

> "(a) First and obviously, a family member is also a member of the wider public and equally obviously as deserving as the rest of the public of protection against rapist, including those within the home. Indeed, *where a rapist's victim is within his family, she constitutes the part of the public closest to, and therefore most evidently at risk of the rapist.*
>
> (b) Second, rape within the family has its own peculiarly reprehensible features, none of which subordinate it in the scale of abhorrence to other rapes. *The rapist may think the home offers him a safe haven for his crime, with an accessible victim, over whom he may feel (as the accused did) he can exercise a proprietary entitlement*.
>
> (c) Third and lastly, the fact that family rape generally also involves incest ... grievously complicates its damaging effects. At common law incest is still a crime. Deep social and religious inhibitions surround it and stigma attends it. *What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture*."[13]

This analysis is uncannily appropriate when applied to children who have generally been used as "sexual guinea pigs"[14] by adult caretakers whom they depend upon for love or family security. Incest represents the most egregious violation

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10 2002 8 Criminal Law Journal 29 (SC).

11 *State of Rajasthan v Om Prakash* para 9 (emphasis added).

12 See generally, Rumney "When rape isn't rape: Court of Appeal sentencing practice in cases of marital and relationship rape" 1999 *Oxford Journal of Legal Studies* 243; Bridges "Perceptions of date and stranger rape: A difference in sex role expectations and rape-supportive belief" 1991 *Sex Roles* 291.

13 *S v Abrahams* 2002 1 SACR 116 (SCA) 124H-125D (emphasis added). See also *B(R) v Children's Aid Society Metropolitan Toronto* 1995 1 S.C.R. 315 433; *S v Mvamvu* 2005 1 All 435 (SCA) para 15.

14 Forward & Buck *Betrayal of Innocence: Incest and its Devastation* cited by Temkin J "Do we need the crime of incest?" 1991 *CLP* 185n60, comment: "[A] sibling victim can be as severely traumatized as any victim of an adult aggressor . . . Most often they are female victim of an older brother who has taken advantage of their sexual naïveté to satisfy his sexual cravings . . . where the brother is around puberty and the sister a couple of years younger, he is generally using her as a sexual guinea pig."

of the parent/child relationship.[15] As the authorities make it clear, incest is really doubly wrong – the act of incest is followed by an abuse of the child's innocence to prevent recognition or revelation of the abuse. As the Californian court has remarked:

> "As a practical matter a young child has little choice but to repose his or her trust with a parent figure. When such person abuses that trust, he commits two wrongs, the first by sexually abusing the child, the second by using the child's dependency and innocence to prevent recognition or revelation of the abuse. This may be accomplished by enforcing secrecy around the acts or even by teaching the child that the sexual acts are normal or necessary to the relationship."[16]

While many survivors[17] of childhood sexual abuse remember the abusive incidents, some survivors apparently repress, or subconsciously force, the memories from their minds in order to avoid stress or anxiety associated with that trauma. Consider the example of Ms Van Zijl. At the age of 39, Ms Van Zijl was a troubled middle-aged woman. She had problems with alcohol and drug abuse, possessed low self-esteem, and inhibited and unsatisfying sexual relations. Her behavioural history was sprinkled with instances of self-mutilation and suicide attempts. She had a tumultuous and complicated relationship with Ms Potgieter. At a certain point in her relationship with Ms Potgieter, in the course of alcohol-induced argument about her reluctance to engage in sexual relationship, she retorted [in substance]: "I wish [the defendant – Mr Hoogenhout, otherwise known as Oom Maree] had done things to you, then you would understand how I feel." Only after watching Oprah Winfrey Show on television in 1996 dealing with the subject of child abuse did Ms Van Zijl begin to understand the source of her problems.[18]

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15 The case of *Allen v Farrow* 197 Ad 2d 327 (1994) is instructive in this regard. There, a father (Allen) had an affair with the adopted adult daughter (Previn) of his wife (Farrow). In denying his request for custody of Previn's siblings, the court observed that Allen's insistence that the relationship with Previn was between two consenting adults "demonstrates a chosen ignorance of his and Ms Previn's relationships to Ms Farrow, his three children and Ms Previn's other siblings. His continuation of the relationship . . . shows a distinct absence of judgment . . . and an absence of any parenting skills." See further, Sanger "Consensual sex and the limits of harassment law" in MacKinnon & Siegel (eds) *Directions in Sexual Harassment Law* (2004) 77.

16 *Evans v Eckelman* 265 Cal Rptr 605 (Cal App, 1 Dist 1990) 608-609.

17 The proper label for adults who experienced abuse as children is a question that has generated much discussion. Widespread use of "survivor" has replaced the initial use of "victim" in order to emphasise the strength and agency of the person involved. Recent debate questions whether this emphasis on strength conceals the actual power dynamic and violence of the abuse. In keeping with the most common usage to date, this paper will generally employ "survivor," but without any intent to downplay the power inequalities and lack of choice inherent in the original violence.

18 Some of the most persuasive support for the existence of delayed recall, or "repression" comes from documented cases of sexual abuse by clergy. See an unreported opinion in *People v Franklin* California Court of Appeal on April 2, 1993. The key witness was the defendant's daughter, Eileen Franklin, who recovered memories of sexual abuse by her father, memory that he apparently confirmed. However, the case itself involved the father's rape and murder of Eileen Franklin's childhood friend twenty years earlier. Eileen Franklin reported that her memories of that incident returned one day when her young daughter, whose eyes were the same colour as the murder victim's turned to gaze up at her in precisely the position from which her childhood friend had looked at her as the murder occurred. Ms Franklin's subsequent rendition of the memory to police included many of the details. Her father, George Franklin, was convicted of murder on the basis of his

continued on next page

Shortly thereafter, she caused a disturbance at the home of friends. When she went to apologise, one of them, Jay, a final year psychology student, invited her to talk about things that were worrying her. That led Ms Van Zijl to disclose to Jay some of her experiences at the hands of the defendant. Eventually, seeing that Ms Van Zijl was incapable of expressing herself or unwilling to do so, Jay suggested that she write her story down and they would meet again to talk things over. With difficulty, she followed the suggestion. She showed the statement to Ms Potgieter. Far from alienating her, as she feared, it had the effect of drawing them closer together. As her therapy progressed, Ms Van Zijl recovered memories that had been repressed for nearly forty years. These memories of her early childhood included the severe sexual abuse by her uncle when she was less than seven years old. As the memories trickled and then flooded back, she began to understand what the immense pain she had been living with for most of her life.[19]

Despite the public's education and acceptance that sexual abuse is prevalent in the family setting, there is also a clear message that the main, and often only witness to this kind of crime, may not be credible.[20] Given this societal background, the incongruities in Ms Van Zijl's story, and the lack of evidence to corroborate her charge, it would not be surprising to see this defendant acquitted. And yet, Ms Van Zijl's narrative describing her uncle's conduct and her own behaviour might not be incongruous or implausible at all. For it has become well accepted in the psychiatric community that children subjected to *repeated* acts of abuse will not struggle or resist, but will accommodate to such abuse over time, becoming passive and seemingly accepting of repugnant sexual acts.[21] Indeed, the phases abused children pass through and the coping behaviours they develop to adjust to repeated sexual abuse has comes be known as the "Child Sexual Abuse Accommodation Syndrome".[22] Accommodation as a component of patterned sexual abuse is not only accepted among experts – the courts have also acknowledged its relevance in cases of long-term incest or sexual abuse.[23]

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daughter's testimony. See too *Lovelace v Keohane* 831 P 2d (Okla 1992) (involving a woman who repressed her memory of clergy abuse and subsequently confirmed memory through the abuser's confession); *Sanchez v Archdiocese of San Antonio* 873 SW 2d 87 89 (Tex Ct App 1994) (involving a woman who recovered memories of clergy abuse and claimed to have reported it at the time); *Meirs-Post v Schafer* 427 NW 2d 606 609 (Mich Ct App 1988) (involving an adult survivor's previously repressed memory of the sexual abuse she suffered as a child resurfaced while watching a television programme on victims of childhood sexual abuse); *Carney v Roman Catholic Archbishop of Boston* 16 Mass LR 3. See also *Mary D v John D* 264 Cal Rptr 633 (Cal Ct App 1989).

19 Adapted from the facts of Van *Zijl v Hoogenhout* 2005 2 SA 93 (SCA) paras 20-40.

20 Ronald Summit states that even some clinical specialists still believe that allegations of sexual abuse arise out of fantasy, confusion or displacement of the child's wish for the power of seductive conquest. See Summit "Abuse of child sexual abuse accommodation syndrome" 1992 *J of Child Sexual Abuse* 153 197. Jean Goodwin attributes these clinicians' beliefs to the Freudian principle that incest is based on fantasy. See Goodwin *et al* "False accusations and false denials of incest: Clinical myths and clinical realities" in *Sexual Abuse: Incest Victims and Their Families* (1989) 17.

21 Summit 1992 *J of Child Sexual Abuse* 154-155.

22 For an overview of the Child Sexual-Abuse Accommodation Syndrome, see Summit "The sexual abuse accommodation syndrome" 1983 *Child Abuse and Neglect* 177.

23 For additional information as to how the courts use and view Child Sexual-Abuse Accommodation Syndrome, see Askowitz & Graham "The reliability of expert psychological testimony in child sexual abuse prosecutions" 1994 *Cardozo LR* 2027; Myers *et al*

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The case of *Van Zijl v Hoogenhout*[24] provides a vivid example of sexual-abuse accommodation and repression and gives the immediate impetus for this article because of the pervasive questions the Supreme Court was called upon to answer: concerned whether (a) the applicable prescription statute accommodate a victim who manifests such *sequelae*, by either staying or suspending the running of prescription, if the victim is prevented or seriously inhibited, by reason of his or her psychological condition, from instituting action?; (b) if so, how does it provide the accommodation?; and (c) the evidence brings the plaintiff within the scope of the protection? These questions epitomise the admissibility battles and controversies between law and other disciplines that are being waged in the courtrooms across numerous jurisdictions.[25] It is "novel psychological evidence" or "syndrome evidence" that cognised the harm of domestic abuse in all its manifestations.[26] The cost of legal vindication is that victims must be willing to

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"Expert testimony in child sexual abuse litigation" 1989 *Nebraska LR* 1; Adams "Interviewing methods and hearsay testimony in suspected child sexual abuse cases: Questions of accuracy" and "Court mandated treatment and required admission of guilt in cases of alleged sexual abuse: Professional; ethical and legal issues" 1997 *Institute for Psychological Therapies Journal*; Garrison "Child sexual abuse accommodation syndrome: Issues of admissibility in criminals trial" 1998 *Institute for Psychological Therapies Journal* and "United States Supreme Court: Analysis and the application of the confrontation clause in regard to cases of child sexual clause" 1997 *Institute for Psychological Therapies Journal* and "Child sexual abuse accommodation: Issues of admissibility in criminal trials" 1998 *Institute for Psychological Therapies Journal* all from_http://www.ipt-forensic.com/journal/authors1.htm.

24 2005 2 SA 93 (SCA).

25 A well-known example is the identification of individuals by their deoxyribonucleic acid ("DNA"). For review of the controversy, see: Moenssens "DNA evidence and its critics – How valid are the challenges?" 1990 *Jurimetrics* 87; Hoeffel "The dark side of DNA profiling: Unreliable scientific evidence meets the criminal defendant" 1990 *Stanford LR* 465; Thompson "Evaluating the admissibility of new genetic identification test: Lessons from the 'DNA War'" 1993 *J of Criminal Law & Criminology* 22; Balding & Donnelly "The prosecutor's fallacy and DNA evidence" 1994 *Criminal LR* 711; Steventon "Creating DNA database" 1995 *J of Criminal Law* 411; Rosenthal "My brother's keeper: A challenge to the probative value of DNA fingerprinting" 1995 *Am J of Criminal Law* 195; Nakashima "DNA evidence in criminal trials: A defence Attorney's primer" 1995 *Nebraska LR* 444; Robertson & Vignaux "Explaining evidence logically" 1998 *New LJ* 159; Redmayne "The DNA database: Civil liberty and evidentiary issues" 1998 *Criminal LR* 437; Donnelly & Friedman "DNA database searches and the legal consumption of scientific evidence" 1999 *Michigan LR* 931; Hibbert "DNA databanks: Law enforcement's greatest surveillance tool?" 1999 *Wake Forest LR* 767; Tracy & Morgan "Big brother and his science kit: DNA database for 21st century crime control?" 2000 *J of Criminal Law & Criminology* 635; Evett, Foreman, Jackson & Lambert "DNA profiling: A discussion of issues relating to the reporting of very small match probabilities" 2000 *Criminal LR* 341; Bernasconi "Beyond fingerprinting: Indicting DNA threatens criminal defendants" constitutional and statutory right" 2001 *American University LR* 979; Stevens "Arresting crime: Expanding the scope of DNA database in America" 2001 *Texas LR* 921; Valdivieso "DNA warrants: A panacea for old, cold rape cases?" 2002 *Georgetown LR* 1009.

26 For example, in *People v McAlpin* 812 P 2d 563 (1991) 569 the Supreme Court of California held that expert evidence on the common reactions of child molestation victims is admissible "to prove that such witness's credibility when the defendant suggests that the child's conduct after the incident – eg, a delay in reporting – is inconsistent with his or her testimony claiming molestation . . . Such expert testimony is needed to disabuse jurors to commonly held misconceptions about child sexual abuse and to explain the emotional antecedents of abused children"s seemingly self-impeaching behaviour." On battered women syndrome, see *Ferreira v S* paras 26-29 and 37-38.

make public otherwise private facts about themselves and the perpetrators of sexual abuse. As a practical matter, judicial engagement with experiences of victims of domestic abuse has compelled the courts, if only reluctantly, to subject to legal scrutiny "what goes behind the closed doors of ostensibly respectable and law-abiding households."[27]

The issue of the pros and cons of syndrome evidence in child sexual-abuse cases, procedural hurdles that confront an adult survivor of childhood sexual abuse seeking criminal justice or civil redress against the abuser, the delicate balance between advancing actions based on long-repressed memories (particularly in cases without cogent corroboration) and implementing procedural safeguards to minimise injustice occurring at the expense of an innocent defendant as well as the question of third party liability in delict, medical malpractice by psychotherapists, and the like,[28] will be dealt with in forthcoming companion articles. This article is an attempt to examine the use of novel psychological evidence based on child sexual-abuse accommodation syndrome and memory repression syndrome in long-term sexual molestation cases. The essence, at a theoretical level, is to get to grips with the intersection between law and gender, as well as to reveal the inequality that is embedded in the legal systems' failure to protect vulnerable groups in society.[29]

2 THE NATURE OF THE PROBLEM

Child sexual abuse and rape are important examples of a 'gendered harms'[30] and an obvious site of gender in equality. The following statement is illustrative:

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27 Per Marais JA in *Ferreira v S* para 59.

28 See *Ramona v Isabella* No 61898 (Cal Superior Ct May 13, 1994). For additional readings, see: Behnke "Old duties and new: Recovered memories and the question of third-party liability" 1999 *J of American Academy of Psychiatry and the Law* 279-300; Bowman & Mertz "A dangerous direction: Legal intervention in sexual abuse survivor therapy" 1996 *Harvard LR* 551-639; Schopp & Wexler "Shooting yourself in the foot with due care: Psychotherapist and crystallized standards of tort liability" 1989 *J of Psychiatry & Law* 163 188-189.

29 In *S v Baloyi* 2000 2 SA 425 (CC) para 12 Sachs J expressed concern about the ineffectiveness of the criminal justice system in addressing family violence. The learned judge said: "The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of the society that the daily trauma of the vast numbers of women counts for little. The terrorization of the individual victim is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic sexist behaviour are normalized rather than combated. Yet it is precisely the function of the constitutional protection to convert misfortune to be endured into injustice to be remedied." See further Hathaway "Gender based discrimination in police reluctance to respond to domestic assaults complaints" 1986 *Georgetown LJ* 667; Robbins "No-drop prosecution violence: Just good policy, or equal protection mandate?" 1991 *Stanford LR* 205; Dutton "Understanding women's responses to domestic violence: A redefinition of battered woman syndrome" 1993 *Hofstra LR* 1191; Keitner "Victim or vamp? Images of violent women in the criminal justice system" 2002 *Columbia J of Gender & Law* 38; Browne "Due process and equal protection challenges to the inadequate response of the police in domestic violence situations" 1995 *Southern California LR* 1295; Minaker "Evaluating criminal justice responses to intimate abuse through the lens of women's needs" 2001 *Canadian J of Women & Law* 74; Juthani "Police treatment of domestic violence and sexual abuse: Affirmative duty to protect vs Fourth Amendment privacy" 2003 *New York University Annual Survey of American Law* 51.

30 Conaghan "Gendered harms and the law of tort: Remedying (sexual) harassment" 1996 *OJLS* 407: "The essential argument is that harm, whether a social or a legal concept, has a

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> "It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women."[31]

This insight is consistent with critical analysis beyond 'black-letter'[32] law, and in particular on how the criminal justice system falls short of offering women andchildren the equal protection and benefit of the law. Attention has been paid in particular to the targeting for sexual assault of people who experience intersecting inequalities, such as women and children.[33]

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gendered content. From a social perspective, feminists have argued that women suffer particular harms and injuries as *women,* their experience of pain and injury is distinguishable, to a large extent, from the experience of men. This claim has at least two dimensions. On the one hand pregnancy and childbirth, menstrual and/or ovulation are obvious examples of gender specific "harms" men do not or cannot experience these traumas directly. On the other hand, the concept of gendered harm can also embrace those harms which, although not exclusive to women in any biological sense, are risks which women are more likely to incur than men – the risks of rape, incest sexual harassment, spousal abuse or, more contentiously, the risk of harmful medical intervention. Although men can and do experience these harms also, they are, arguably, less likely to do so. Moreover, in so far as they do incur such risks, their experience of them as men is different and distinct from how they are experienced by women." As Robin West observes "the quality of our suffering is different from that of men's, as is the nature of our joy." See "The difference in women's hedonic lives: A phenomenological critique of feminist legal theory" in Fineman & Thomsaden (eds) *At the Boundaries of Law: Feminism and Legal Theory* (1991) 115. See further Graycar & Morgan *The Hidden Gender of Law* (1990) 272-276; Howe "Social injury towards a feminist theory of social justice" 1987 *International J of Sociology of Law* 423 and "The problem of privatized injuries: Feminist strategies for litigation" in Fineman & Thomsaden (eds) *At the Boundaries of Law* 148-167; West "Jurisprudence and gender" 1988 *University of Chicago LR* 1; Bender "An overview of feminist torts scholarship" 1993 *Cornell LR* 575; Conaghan "Tort law and the feminist critique of reason" and Peppin "A feminist challenge to tort law" both in Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (1996); Chamallas "Importing feminist theories to change tort law" 1997 *Wisconsin Women's LJ* 389; Schlanger "Injured women before common law courts, 1860-1930" 1998 *Harvard Women's LJ* 79.

31 *R v Oslin* 1994 86 CCC (3d) 481, 26 CR (4th) 1 23, 1993 4 SCR 595, per Cory J. Although both men and women experience childhood sexual abuse, abuse, and both women and men sexually abuse others, the vast majority of sexual abuse or greater concern about under-reporting because so many women have reasons not to report abuse. The Preamble of the Domestic Violence Act 116 of 1998 reads: "And having regard to the Constitution of the Republic of South Africa, and in particular, the right to equality and to freedom and security of the person; and international commitments and obligations of the State towards ending violence against women and children and including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child." See also Preamble to Criminal Law (Sexual Offences) Amendment Bill B50-2003: "Whereas there is high incidence of sexual offences in the Republic which in turn has a particularly disadvantageous impact on vulnerable persons, the society and the economy – women and children are particularly vulnerable persons to sexual offences."

32 A detailed discussion of "black-letter" law is outside the remit of this paper. However, for the purpose of this paper I adopt a definition offered by Hutchison "Beyond black-letterism: ethics in law and legal education" 1999 *The Law Teacher* 301 302, who describes "black-letterism" as an approach to law that claims "to concentrate on narrow statement of what the law is and eschews resort to extra-doctrinal considerations of policy or context".

33 See generally Schneider "Equal rights to trial for women: Sex bias in the law of self-defence" 1980 *Harvard CR-CL LR* 623 "Particularity and generality: Challenges of feminist

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Earliest feminist scholarship was forged in the areas of criminal law. It is here that feminists began to explore the meaning of gender equality in criminal law, and wrestle with difficult issues, such as the disparate treatment of women, both as victims and offenders.[34] Indeed, criminal law remains the centrepiece of modern feminist legal critique and reform.[35] Feminists examining criminal law have been concerned with uncovering the ways criminal law contributes to women's deprivation by continuing to reflect and protect patriarchal interests.[36] They have challenged the male perspective that structured the definition of rape and discounted the harm of domestic violence.[37] This reflects the intensification

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theory and practice in work on woman-abuse" 1992 *New York University LR* 520, and "Resistance to Equality" 1996 *University of Pittsburgh LR* 447; Crocker "The meaning of equality for battered women who kill in self-defence" 1985 *Harvard Women's LJ* 121; Nightingale "Judicial attitudes and differential treatment: Native woman in sexual cases" 1991 *Ottawa LR* 71; Boyle "The role of equality in criminal law" 1994 *Saskatchewan LR* 203; Boyle & McCrimmon "The constitutionality of Bill C-49: Analyzing sexual assault law as if equality really mattered" 1998 *Criminal LQ* 198; McInnes & Boyle "Judging sexual assault law against a standard of equality" 1995 *University of British Columbia LR* 341; Beecher-Monas "Domestic violence: Competing conceptions of equality in the law of evidence" 2001 *Loyola LR* 81.

34 See eg Denno "Gender, crime and the criminal law defenses" 1994 *J of Criminal Law and Criminology* 80 and "The role of gender in a structured sentencing system: Equal treatment, policy choices, and the sentencing of female offenders under the United States sentencing guidelines" 1994 *J of Criminal Law and Criminology* 181; King "Avoiding gender bias in downward departures for family responsibilities under the Federal Sentencing Guidelines" 1996 *New York University Annual Survey of American Law* 273; Lacey "Unspeakable subjects, impossible rights: Feminism, sex and criminal law" 1998 *Canadian J of Law & Jurisprudence* 47; Nourse "The "normal" success and failures of feminism and the criminal law" 2000 *Chicago-Kent LR* 951.

35 See generally Mackinnon "Difference and dominance: On sex discrimination" in *Feminism Unmodified: Discourses on Life and Law* (1987) and "Feminism, Marxism, Method and the State: An Agenda for Theory" 1982 *Signs* 515; Dworkin *Intercourse* (1987); Smart *Feminism and the Power of Law* (1989); Schulhofer "The gender question in criminal law" in Paul *et al* (eds) *Crime, Culpability and Remedy* 105 and "Taking sexual autonomy seriously: Rape law and beyond" 1992 *Law and Philosophy* 35; Williams "The equality crisis: Some reflections on culture, courts and feminism" 1982 *Women's Rights Law Report* 175; Olsen "Statutory rape: A feminist critique of rights analysis" 1984 *Texas LR* 387; Scales "The emergence of feminist jurisprudence: An essay" 1986 *Yale LJ* 1373; Daly & Chesney-Lind "Feminism and criminology" 1988 *Justice Quarterly* 497; Bartlett "Feminist legal methods" 1990 *Harvard LR* 829; Rhode "Feminism and the state" 1994 *Harvard LR* 1181.

36 Smart "Law's power, the sexed body, and feminist discourse" 1990 *J of Law and Society* 326 344 comments: "Because . . . men's sexuality is constructed around the supposedly more straightforward (honest?) and obvious imperative of erection, penetration and ejaculation, women are often to be guardian of what men most want, but which they have little understanding . . . This in turn constructs sexual encounters or relationships in terms of how men can gain control of, or access to, their pleasure which is inconveniently located in women's bodies. *Figuratively speaking, women are seen as having charge of something which is of greater value to men than to themselves.*" (Emphasis added.) See further, Duncan "Law's sexual discipline: Visibility, violence, and consent" 1995 *J of Law and Society* 326; Jefferson "Masculinities and crimes" in Maguire, Morgan, & Reiner (eds) *The Oxford Handbook of Criminology* 2nd ed (1997) 543-549.

37 See Hall "Rape: The politics of definition" 1988 *SALJ* 67 74 (noting that the non-consent formulation "shifts the inquiry from the behaviour of the accused to that of the victim"); Bumiller "Rape as a legal symbol: An essay on sexual violence and racism" 1987

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of debates regarding the legal regulation of sexual conduct.[38] In South Africa, as in other jurisdictions, there is considerable public discussion about rape, child molestation,[39] pornography,[40] prostitution,[41] and sexual assault. Some of these debates were triggered by feminists who challenged the split between public and private realms,[42] and who argued that sexual exploitation and coercion or undue

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University of Miami LR 75 84 (arguing that in seeking changes to treatment of rape complaints reformers "may have oversimplified the problem and the solution"); Bridgemen & Millns *Feminist Perspectives on Law* (1998) 394; Adler *Rape on Trial* (1987); Wickton "Focusing on the offender's forceful conduct: A proposal for redefinition of rape law" 1988 *George Washington LR* 399; Puttkamer "Consent in rape" 1925 *Illinois LR* 416; Bridges "Perceptions of date and stranger rape: A difference in sex roles expectations and rape-supportive beliefs" 1991 *Sex Roles* 291; West "Rape in the criminal law and the victim's tort alternative: A Feminist Analysis" 1992 *University of Toronto Faculty LR* 96; Dryden & Lengnik "Rape in the criminal justice system" 1997 *J of Criminal Law & Criminology* 1194.

38 See for example: Criminal Law (Sexual Offences) Amendment Bill [B50-2003] and the Compulsory HIV Testing of Alleged Sexual Offenders Bill [B10-2003]. See also Artz & Combrinck "A Wall of words" redefining the offence of rape in South African law 2003 *Acta Juridica* 72;Oberman "Turning girls into women: Re-evaluating modern statutory rape law reform" 1994 *J of Criminal Law & Criminology* 15.

39 See e.g. Le Roux & Mureriwa "Paedophilia and the South African criminal justice system: A psychological perspective" 2004 *SACJ* 41.

40 Child pornography is a growing national concern. Technological advances have only exacerbated the problem. In addition to the threat of paedophiles stalking children on-line, the growth of Internet usage has resulted in a proliferation of on-line child pornography. See eg *De Reuck v Director of Public of Prosecutions, WLD* 2003 2 SACR 445 (CC). For a useful discussion see Smith "Private possession of child pornography: Narrowing at-home privacy rights" 1991 *New York University Annual Survey of American Law* 1011; Burker "The criminalisation of virtual child pornography: A constitutional question" 1997 *Harvard J on Legislation* 439; Benedet "Pornography as sexual harassment in Canada" in MacKinnon & Siegel (eds) *Directions in Sexual Harassment Law* (2004) 417.

41 See eg S *v Jordan* 2002 2 SACR 499 (CC). For the discussion of this issue in the context of feminist discourse, see Dworkin *Pornography: Men Possessing Women* (1983); Overall "What's wrong with prostitution? Evaluating sex work" 1992 *Signs* 705; Baldwin "Split at the root: Prostitution and feminist theory discourses of law reform" 1992 *Yale J of Law and Feminism* 47 and "Strategies of connection: Prostitution and feminist politics" 1993 *Michigan J of Gender & Law* 65; Chancer "Prostitution, feminist theory and ambivalence: Notes from the sociological underground" 1993 *Social Text* 143; Barry *The Prostitution of Sexuality* (1995); Shaver "The regulation of prostitution: Avoiding the morality traps" 1995 *Canadian J of Law and Society* 123; Machen "Women's work: Attitudes, regulation and lack of power within the sex industry" 1996 *Hastings Women's LJ* 177; Nussbaum "Whether from reason or prejudice: Taking money for bodily services" 1998 *J of Legal Studies* 693; Bernstein "What's wrong with prostitution? What's right with sex work? Comparing marks in female labour" 1999 *Hastings Women's LJ* 91; Lewis "Controlling lap dancing: Law, morality and sex work" in Weitzer (ed) *Sex for Sale: Prostitution and the Sex Industry* (2000) 203; Murray "Labour regulation in the legal sex industry in Victoria" 2003 *Australian J of Labour Law* 321.

42 See eg Olsen "The family and the market: A study of ideology and legal reform" 1983 *Harvard LR* 1497 and "The myth of state intervention in the family" 1985 *University of Michigan J of Law Reform* 835; Freeman & Mensch "The public-private distinction in American law and life" 1987 *Buffalo LR* 237; Minow "Redefining families: Who's in and who's out? 1991 *University of Colorado LR* 269; Cahn "Family law, federalism and the Federal Courts" 1994 *Iowa LR* 1073; McConnell "Beyond metaphor: Battered women, involuntary servitude and the Thirteen Amendment" 1992 *Yale J of Law and Feminism* 207; Maloney "Gender-motivated violence and the Commerce Clause: The civil rights provision of the Violence

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influence were in the public domain just as much as matters relating to property rights.[43] According to public-private dichotomy, men are naturally suited to the public world of government and commerce, whereas women (or, more accurately, white middle-and upper-class women) are destined for the private sphere of home and hearth, where they hold sway as the angels of the house, bear and rear children, and provide men with respite from the rigours of the outside world.[44] This view found its most robust exposition in Justice Bradley's concurrence in *Bradwell v Illinois*:

> "[T]he civil law, as well as nature herself, has always recognised a wide difference in the respective spheres and destinies of man and woman . . . The constitution of the family organisation, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."[45]

In a stimulating foreword on the meaning of gender equality in criminal law, Dorothy E Roberts states:

> "This interest in criminal law makes sense. Although the law generally compels and legitimates prevailing relationships of power, the criminal law most directly mandates socially acceptable behaviour. Criminal law also helps to shape the way we perceive women's proper role in society."[46]

Feminist scholars have made dramatic contributions to rape law.[47] They have demonstrated how, historically, the law of rape has regulated competing male interests in controlling sexual access to females, instead of protecting women's interests in controlling their own bodies and sexuality.[48] The proposition that the

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Against Women Act after *Lopez*" 1996 *Columbia LR* 1876; MacKinnon "Disputing male sovereignty: On *United States v Morrison*" 2000 *Harvard LR* 135 135-177.

43 See Cornell *The Imagining Domain* (1998); Schulhofer *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (1988); Nedelsky "Recovering autonomy" 1989 *Yale J of Law and Feminism* 7; West "Legitimating the illegitimate: A comment on 'Beyond Rape'" 1993 *Columbia LR* 1442.

44 Goldfarb "Public rights for 'private' wrongs" in MacKinnon & Siegel (eds) *Directions in Sexual Harassment Law* 518, citing Cott *The Bonds of Womanhood* (1977) 63-100.

45 83 US (16 Wall) 130 (1872) 141.

46 Roberts "Foreword: The meaning of gender equality in the criminal law" 1994 *J of Criminal Law and Criminology* 1. See also Roberts "Rape, violence, and women's autonomy" 1993 *Chicago-Kent LR* 359.

47 On rape shield reforms, see Ordover "Admissibility of patterns of similar sexual conduct: The unlamented death of character for chastity" 1977 *Cornell LR* 90; Letwin "'Unchaste character' Ideology and the Californian rape evidence law" 1980 *South California LR* 35; Temkin "Regulating sexual history evidence – The limits of discretionary legislation" 1984 *ICLQ* 942 and McNamara "Cross-examination of the complainant in a trial of rape" 1981 *Criminal LJ* 25; McColgan "Common law – Relevance of sexual history evidence" 1996 *OJLS* 275; Maloka "Disclosure of sexual history evidence after *S v M*" 2004 *Speculum Juris* 264. For a discussion in the context of marital exemption, see: Laird "Reflections on marital exemption" 1992 *MLR* 386; Wells "Law reform, rape and ideology" 1985 *J of Law and Society* 63 66-73.

48 Miller *Against Our Will: Men and Rape* (1975); Estrich *Real Rape* (1987) and "Rape" 1986 *Yale LJ* 1087; Holmstrom & Burgess *The Victim of Rape: Institutionalized Reactions* (1978); Berger "Man's trial, woman's tribulation: Rape cases in the courtroom" 1977 *Columbia LR* 1; Robin "Forcible rape: Institutionalized sexism in the criminal justice system" 1977 *Crime & Delinquency* 130; Backhouse "Skewering the credibility of women: A reappraisal of corroboration in Australian legal history" 2000 *The University of Western*

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law has historically discriminated against the sexual assault complainant hardly requires elaboration.[49] As the majority of the Supreme Court of Canada correctly pointed out in the case of *R v Mills*:

> "Speculative myth, stereotypes, and generalised assumptions about sexual assault victims . . . have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecution of sexual offences."[50]

3 A SHORT PRIMER ON NOVEL PSYCHOLOGICAL EVIDENCE[51]

"Novel psychological evidence" or "syndrome evidence" is an all-embracing term. These expressions refer to expert evidence, given by forensic psychologists and, less often, forensic psychiatrists (and occasionally by counsellors, psychiatric nurses and even criminologists), about certain forms of behaviour that are said to be indicative of stressors suffered by particular classes of victims (battered women, molested children, victims of rape, survivors of conflicts). The main kinds of expert evidence fitting into the category of psychological syndrome are: battered women syndrome,[52] rape trauma syndrome,[53] battered child syndrome/

Australia LR 79; Hoskins "The rise and fall of the corroboration rule in sexual offence cases" 1983 *Canadian J of Family Law* 173-214; Ellison "Cross-examination in rape trials" 1998 *Criminal LR* 605; Kramer " Rule by myth: The social and legal dynamics governing alcohol related acquaintance rapes" 1994 *Stanford LR* 115; Geddes "The exclusion of evidence relating to a complainant's sexual behaviour in sexual offence trials" 1999 *New LJ* 1084; Kibble "The sexual history provisions: Charting a course between inflexible legislative rule and wholly untrammeled judicial discretion?" 2000 *Criminal LR* 274.

49 Catherine MacKinnon is perhaps the most vocal critic of common law treatment of women. In "The logic of experience: Reflection on the development of sexual harassment law" 2002 *Georgetown LJ* 813 815, MacKinnon did not mince her words. She asserts: "In the past, the common law can hardly be said to have been a force for women's equality, making the development of sexual harassment law an anomaly. The common law has historically reflected social structure, custom, habit, and myth to give legal sanction and legitimacy to men's social power over women. Common law made tradition into law, and tradition did not favour sex equality. The common law made tradition of coverture, for example, built in and on women's near chattel status in marriage to become a legal fountainhead of all women's legalized subordination. It generated among other doctrines the marital rape exclusion (rape isn't rape if she's your wife), chastisement (beating isn't battery if she's your wife), the preclusion on women's property ownership (you own her so you own what she owns), and likely contributed to rape law's corroboration requirement and the instruction that rape complainants are particularly not to be believed."

50 1999 3 SCR 668 para 119, 139 CCC (3d) 321, 28 Cr (5th) 207.

51 In *State v Kelly* 478 A 2d 364 (1984) 387 the judge commented: "[Syndrome evidence] is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge." See also Freckleton, "Novel Psychological Evidence" in Freckleton & Selby (eds) 1993 *Expert Evidence Vol 1* para 1-3331 and "Novel scientific evidence: The challenge of tomorrow" 1988 *Australian Bar Review* 243; McCord "Expert psychological testimony about child complainants in sexual abuse prosecutions: A foray into the admissibility of novel psychological evidence" 1986 *J of Criminal Law & Criminology* 1 and "Syndrome, profiles and other mental exotica: A new approach to the admissibility of nontraditional psychological evidence in criminal cases" 1987 *Oregon LR* 19; Dahl "Legal and psychiatric concepts and the use of psychiatric evidence in criminal trials" 1985 *California LR* 411.

52 The leading authorities on the subject include: *State v Norman* 378 SE 2d 8 (NC 1989); *R v Lavallee* 1990 55 CCC (3d) 97; *Osland v The Queen* 1998 HCA 75; *Ferreira v S* 2004 4 All SA 373 (SCA). See generally, Martinson *et al* "A forum on *Lavallee v The Queen*:

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child sexual-abuse accommodation syndrome, pre-menstrual syndrome,[54] repressed memory syndrome and false memory syndrome.

At this juncture, it is appropriate to locate syndromes on a "continuum of diagnostic reality". In order to understand term "syndrome", as Annon says, it may help to clarify and define some of the allied or associated terms:

Women and self-defence" 1991 *University of British Columbia LR* 23; Boyle "The battered wife syndrome and self-defence" 1990 *Canadian J of Family Law* 171; Grant "The 'Syndromization' of women's experience" 1991 *University of British Columbia LR* 51; Shafer "*R v Lavallee*: A review essay" 1990 *Ottawa LR* 607;Bauman "Expert testimony on the battered wife syndrome" 1983 *St Louis University LJ* 407; Schneider " "Describing and changing: Women's self-defence work and the problem of expert testimony on battering" 1986 *Women's Rights Law Reports* 202; Brodsky "Educating juries: The battered woman's defence in Canada" 1987 *Alberta LR* 461; Cipparone "The defence of battered women who kill" 1987 *University of Pennsylvania LR* 427; Creach "Partially determined imperfect self-defence: The battered wife kills and tells why?" 1982 *Stanford LR* 615; Diamond "Criminal law: The justification of self-defence" (1987) *Annual Survey of American Law* 673; Willoughby "Rendering each woman her due: Can a battered woman claim self-defence when she kills her sleeping batterer?" 1989 *Kansas LR* 169; Mahoney "Legal images of battered women: Redefining the issue of separation" 1991 *Michigan LR* 1; Stubbs "Battered woman syndrome: An advance for women or further evidence of the legal system's inability to comprehend women's experience" 1991 *Contemporary Issues in Criminal Justice* 267 and "The (Un)reasonable battered woman" 1992 *Contemporary Issues in Criminal Justice* 359; Schuller & Vidaman "Battered woman syndrome evidence in the courtroom" 1992 *Law and Human Behaviour* 273; Scutt "'No syndrome' The reality for battered women" 1992 *Impact* 18; Anderson & Anderson "Constitutional dimensions of the battered woman syndrome" 1992 *Ohio State LJ* 363; Leader-Elliot "Battered but not beaten: Women who kill in self-defence" 1993 *Sydney LR* 403; Toffel "Crazy woman, unharmed men, and evil children: Confronting the myths about battered people who kill their abusers, and the argument for extending battering syndrome self-defenses to all victims of domestic violence" 1996 *Southern California LR* 337; Shafer "The battered woman syndrome: Some complicating thoughts five years after *R v Lavallee*" 1997 *University of Toronto LJ* 1; Magnum "Reconceptualising battered women syndrome evidence: Prosecution use of expert testimony on battering" 1999 *BC Third World LJ* 593; Miccio "Notes from the underground: Battered women, the state, and conceptions of accountability" 2000 *Harvard Women's LJ* 133; Murdoch "Is imminence really necessity? Reconciling traditional self-defence doctrine with the battered women's syndrome" 2000 *Northern University of Illinois LR* 191; Hatcher "The gendered nature of the battered woman syndrome: Why gendered neutrality does not mean equality" 2003 *Annual Survey of American Law* 21.

53 On these generally see Lauderdale "The admissibility of expert testimony on rape trauma syndrome" 1984 *J of Criminal Law and Criminology* 1366; Buchele & Buchele "Legal and psychological issues in the use of expert testimony on rape trauma syndrome" 1985 *Washburn LJ* 26; Massaro "Experts, psychology, credibility and rape: The rape trauma syndrome issue and its implications for expert psychological testimony" 1985 *Minnesota LR* 395; Watson "'Rape victim syndrome' and inconsistent rulings on its admissibility around the nation: Should the Washington Supreme Court reconsider its position in *State v Black*?" 1988 *Willamette LR* 1011; Economou "Defence expert testimony on rape trauma syndrome: Implications for the stoic victim" 1991 *Hastings LJ* 1143.

54 See Horney "Menstrual cycle and criminal responsibility" 1978 *Law and Human Behaviour* 25; Apodaca & Fink "Criminal law: Premenstrual syndrome and the courts" 1984 *Washburn LJ* 64; Carney & Williams "Premenstrual syndrome: A criminal defence" 1983 *Notre Dame LR* 353; Dalton "Premenstrual syndrome: A new criminal defence?" 1983 *California Western LR* 281; Chait "Premenstrual Syndrome & our sisters in crime: A feminist dilemma" 1986 *Women's Rights Law Reports* 267; McCarthur "Through her looking glass: PMS on trial" 1989 *University of Toronto Faculty LR* 826; Reece "Mothers who kill: Postpartum disorders and criminal infanticide" 1991 *UCLA LR* 699; McSherry "'The return of raging hormones theory': Premenstrual syndrome, postpartum disorders and criminal responsibility" 1993 *Sydney LR* 292 and "Premenstrual syndrome and criminal responsibility" 1994 *Psychiatry, Psychology and Law* 139.

> "A *sign* is an observable manifestation of a pathological condition seen by the examiner (red splotches associated with measles). A *symptom* is generally considered a subjective complaint by the individual (reporting a headache). A *disease* or *disorder* is a group of symptoms or signs that occur together, and implies a specific cause or pathophysiologic process. On the other hand, a syndrome is a group of signs and symptoms that are based on their frequent mutual occurrence that may suggest a common underlying course, pattern, or treatment selection, but *do not* necessarily imply a specific cause. Therefore, to start with, a syndrome is *less* specific than a disorder or a disease."[55]

Some syndromes point with a greater certainty to their cause than others. For example, the Battered Child Syndrome[56] is a diagnostic device that examines bruising and other physical injuries on a child and establishes that such injuries can only occur from physical abuse. Unlike diagnostic syndromes, non-diagnostic syndromes do not point to a particular cause.

The child sexual-abuse accommodation syndrome ("CSAAS") provides a good example of non-diagnostic syndrome. This syndrome, or any components of it, does not detect sexual abuse that has already occurred and it explains the possible reactions that an abused child may experience.[57] This conveys a perspective that is found in all of Summit's work, notably in his fine contribution "Abuse of the child sexual accommodation syndrome":[58] that the syndrome was not designed to "prove" that abuse has occurred, but to explain children's reactions to sexual abuse. He wrote:

> "The CSAAS originated, then, not as a laboratory hypothesis or as a designated study of a defined population. It emerged as a summary of diverse clinical consulting experience, defined at the interface with paradoxical forensic reaction. It should be understood without apology that the CSAAS is a clinical opinion, not a scientific instrument."[59]

A particularly strong argument for maintaining the distinction has been made by Myers,[60] who is concerned that the examiners do not explain to the judges or juries the differences between diagnostic and non-diagnostic syndromes. The *differentia* of those non-traditional syndromes, according to Myers lies in the fact that non-diagnostic syndromes should not be admissible to prove that a person's symptoms resulted from a particular cause. Discerning the subtle distinction between diagnostic and non-diagnostic syndrome has not been the easiest of the exercises. Perhaps it is unsurprising that the question that continues to tax courts in comparative jurisdictions is to rule on the admissibility of novel psychological evidence in sexual assault cases.

4 THE CHILD SEXUAL-ABUSE ACCOMMODATION SYNDROME

It has been widely recognised that the shock and confusion engendered by parental sexual molestation, together with the demands for secrecy, may lead to

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55 Annon "Child sexual abuse accommodation syndrome: Issues of admissibility" http://www.ipt.com/journal/volume 10/j10 2.htm 1.

56 Kemp *et al* "Battered-child syndrome" 1962 *J of the American Medical Association* 17-24.

57 See generally Summit "The child sexual abuse accommodation syndrome" 1983 *Child Abuse & Neglect* 177-193.

58 Summit "Abuse of child sexual abuse accommodation syndrome" 1992 *J of Child Sexual Abuse* 153-167.

59 Summit *J of Child Sexual Abuse* 156

60 Myers *Evidence in Child Abuse and Neglect* 2 ed vol 1 & 2 (1992).

the development of accommodation mechanisms, including "domestic martyrdom" and a range of other destructive behaviours. Ronald Summit describes five phases or behaviours, which make up the sexual-abuse accommodation syndrome.[61] These are secrecy, helplessness, accommodation, disclosure and retraction. He states that the sexual-abuse accommodation syndrome has been discovered in children who have attempted to disclose sexual-abuse and have been ignored, thus:

> "The identified child victim encounters an adult world which gives grudging acknowledgement to an abstract concept of child abuse but which challenges and represses the child who presents a specific complaint of victimisation. Adult beliefs are dominated by an entrenched and self-protective mythology that passes for commonsense. 'Everybody knows' that adults must protect themselves from groundless accusations of seductive or vindictive young people . . . If a respectable, reasonable adult is accused of perverse, assaultive behaviour by an uncertain emotionally distraught child, most adults who hear the accusation will fault the child. Disbelief and rejection by potential adult caretakers increase the helplessness, hopelessness, and isolation and self-blame that make up the most damaging aspects of child sexual victimisation."[62]

To better understand how sexual-abuse accommodation syndrome evolves, we have to acquaint ourselves with the Canadian predecessor of the South African *Van Zijl v Hoogenhout*. In *M(K) v M(H)*[63] a 28 year old survivor sued her father for damages arising from recurrent sexual assault between the ages of eight and sixteen. The crude narrative as summarised by La Forest J was as follows: The long term incestuous abuse of the appellant commence when the respondent, her father, asked her about her knowledge of the female genital and breast areas and the male genital areas. It progressed to the respondent's touching her body and telling her "if he played with [her] breasts that they would grow big". Intercourse began when she was between ten and eleven and continued thereafter two or three times a week. Her co-operation and silence were elicited by various means: the respondent reportedly threatened that disclosure would cause her mother to commit suicide; the family would break up, nobody would believe her, and finally that he would kill her. The appellant had good reason to take these threats seriously, inasmuch as she was told that her mother had been hospitalised for attempting to harm her when she was an infant by cutting her wrists; her father pointed out the scars on her wrist as proof. Her mother who was also named as a defendant in the action, confirmed the incident, but attributed it to depression. She also gave evidence that her mother regularly exhibited irrational behaviour when she was upset, such as pulling her hair and screaming. In addition to the threats, the father induced his daughter to submit to the abuse silently; he rewarded her with pop, potato chips and money. In time, he gave her the responsibility for initiating sexual contact. She was instructed to leave her bedroom light

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61 Summit 1983 *Child Abuse and Neglect* 181. See further Blumer "Depression in abused and neglected children" 1981 *American J of Psychotherapy* 342; Lusk & Waterman "Effects of sexual abuse on children" in MacFarlane & Waterman (eds) *Sexual Abuse of Young Children* (1986); McCoid "The battered child and other assaults upon the family: part one" 1965 *Minnesota LR* 1; Oates "The effects of child sexual abuse" 1992 *Australian LJ* 186; Adams-Tucker "Proximate effects of sexual abuse in childhood: A report on 28 children" 1982 *American J of Psychiatry* 1252.

62 Summit 1983 *Child Abuse and Neglect* 178.

63 1992 3 SCR 6.

on when she wanted him, and she complied out of fear that he would turn to her younger sister for gratification. Eventually, she turned on the light because "that was the way for [her] to do it". Her mental process during the act of intercourse was to imagine herself as an inanimate object, for example a door handle or carpet. This process took place against an emotional backdrop of fear – fear of him and fear of discovery.

Sexual-abuse accommodation typically occurs in cases where the abuser, like Oom Maree, is in a caretaking and apparently loving position with respect to the victim. During the day, Oom Maree treated the plaintiff with outward kindness, made her feel special, brought her treats that her parents could not afford and bribed her with presents such as postage stamps and geological specimens for her collections. Such a perpetrator is in the best position to engage a child to accept sexual behaviour. Since the child cannot tell, cannot resist, and cannot avoid, she responds by accommodating to the abuse, that is, by becoming passive and seemingly accepting of the abuse. Accommodation allows a child like Van Zijl to accept the abuse and survive. She comes to believe that she is responsible for what is happening to her, and that she must keep her family intact by co-operating with her abuser.

The sense of responsibility that is placed on the child for both instigating the incestuous activity and maintaining silence to ensure family stability is awesome. The child is given the power to destroy the family and the responsibility to keep it together. Dr Mausberg, in his evidence in *M(K) v M(H),* thus described it:

> "Imagine yourself in the role of a child with an abusive father or sibling and you can't tell the secret as to what happens between the two of you because if you reveal it the family will be destroyed, they will all scatter away, your mother might kill herself or suffer an illness of devastating proportions, your father, who is the perpetrator of this, will reject you and not love. You, as a child of eight or nine or ten, become in one sense a person of authority in this family, you control what is going to happen to you and everyone else . . . Imagine being a child of eight or nine or ten and facing these awesome powers you have been entrusted with and, at the same time, being dependent on your father for his love, his money, his shelter, his food, so you can't defy him even if you choose to."[64]

While the child's passivity allows her to survive emotionally, it also permits and encourages the perpetrator to escalate his sexual demands without fear of disclosure.

The pattern of abuse and accommodation ends where there is disclosure,[65] which will usually be followed by pressure to retract or suppress the outcry[66] of sexual abuse. This pressure emanates from other family members who cannot accept that the perpetrator could commit these acts, cannot cope with the break-up of the family that disclosure generally requires, or cannot bear the stigma of the feel that outsiders will attach to them. For example, Ms van Zijl begged not to be sent to Oom Maree's home. For her pains, her mother called "'n regte klein

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64 *M(K) v M(H)* 27.

65 Disclosure can be accidental if, for example, another person observes sexual behaviour or finds out that the child has a sexually transmitted disease. See Sgroi *et al* "Conceptual framework for child sexual abuse" in Sgroi (ed) *Clinical Intervention in Child Sexual Abuse* (1982) 17-19.

66 "Outcry" is a term of art in sex crimes cases, which refers to the victim's disclosure to another person that she has been sexually abused.

bleddie stoutgat" (naughty brat) and sent her anyway. The abuse continued.[67] After undergoing abortion at age 15 in standard 7, the plaintiff tried to tell her father that Oom Maree was responsible for her pregnancy but seemed to the plaintiff that her father did not want to talk about it. "I don't think he believed me," the plaintiff said.[68]

Additionally, the powerlessness of a child victim is enhanced as a result of being unable to seek any forms of assistance. Informing a third party of the abuse presents insurmountable difficulties. First, the child must recognise the wrongful nature of the conduct. The abusers often intimate that their actions are natural or normal.[69] Alternatively, abusers warn their victims not tell because no one will believe them.[70] The plaintiff in the case at bar tried to disclose the abuse to her cousin, Lynn Erwee, whose comment was: "Ag, hy speel met my ook" (Oh, he plays with me too). The plaintiff, although doubting that "play" rightly described what was happening to her, found herself unable to pursue the matter.[71] What Oom Maree was doing to her niece could not be described as innocuous game between siblings. Forward and Buck note that "[t]he game of show-me-yours and I'll show-you-mine is usually harmless if it is between young siblings of approximately the same age."[72]

Describing how the child copes with a situation of sexual abuse in which they do not receive help from adult, Summit postulates an adjustment known as "accommodation":

> "If the child did seek or did not receive immediate protective intervention, there is no other option to stop the abuse. The only healthy option left for the child is to learn to accept the situation and to survive. There is no way, no place to run. The healthy, normal emotionally resilient child will learn to accommodate to the reality of continuing sexual abuse. There is a challenge of accommodating not only to escalating sexual demands, but to increasing consciousness of betrayal and objectification by someone who is ordinarily idealised as a protective, altruistic, loving parental figure."[73]

Take Ms Van Zijl for example: "[F]rom about age of 13 or 14 she resorted to self-mutilation, hoping thereby to distract her mind from emotional agony

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67 *Van Zijl v Hoogenhout* para 23.

68 *Van Zijl v Hoogenhout* para 31.

69 Comment "Not enough time? The constitutionality of short statutes of limitations for civil child sexual abuse litigation" 1989 *Ohio State LJ* 753 757. See *Hammer v Hammer* 25 (victim's father had told her that the conduct was "normal and his right").

70 Karp & Karp *Domestic Torts: Family Violence and Sexual Abuse* (1989) 188.

71 *Van Zijl v Hoogenhout* para 27.

72 Forward & Buck *Betrayal of Innocence: Incest and its Devastation* cited by Temkin "Do we need the crime of incest?" 1991 *CLP* 185n60.

73 Summit 1983 *J of Child Sexual Abuse* 184. Levy "Using 'Scientific' testimony 1989 *FLQ* 383 393-394 has critiqued the misuse of the sexual-abuse accommodation syndrome. "Summit's syndrome was turned into a perverse testimonial tool; it could be, and it was, used to prove sexual abuse when the child made an accusation in an unconvincing fashion; and, because the experts asserted that sexually abused children suffering from the syndrome retract their accusations, sexual abuse could be proved even when the child himself claimed that the accusation was untrue. Summit's syndrome evidence should never have been admissible in juvenile and domestic relations court proceedings. The inferences are built on sand; the lawyers, where there are appearances, are too likely to respond inadequately; the judges are too likely to be seduced by it. Yet the syndrome was relied upon in judicial findings that parents had sexually abused their children."

brought on by recollection of the abuse. She returned to this practice from time to time throughout her life."[74]

Equally significant is the status of the abuser who is often a parent or close relative, blaming the abuser or recognising the abuser as evil is psychologically threatening for a dependent child. The dependency of the child-victim on the abuser which is often absolute, and the perpetrator's age, authority, or position often make escape an impossibility.[75] To understand this sense of helplessness and isolation, it is best to refer to a passage from the judgment in *Van Zijl v Hoogenhout*:

> "According to the plaintiff, her mother complained that she already had enough trouble with Jaco and 'nou is ek nog 'n vuilgat ook' [now I am a dirty tramp as well]. That was also sufficient to attract a beating on various occasions. The plaintiff began to wet her bed. She tried to explain to her mother 'oom Maree doen dinge met my' [uncle Maree is doing things to me]. Her mother reacted strongly: 'Ek behoort my voor God te skaam want hy is 'n goeie mens vir ons almal' [I should feel ashamed before God because he is good to us all]. Another hiding followed. On other occasions, her mother would refer to her as 'moedswillig' [wanton] and 'stout' [naughty] and express the wish that she had never been born. The culture of the plaintiff's family was such that sexual matters were not spoken of. In any event, the plaintiff had great difficulty in expressing herself. She attempted to tell her father. His response was Maree is a very good man and you must respect that."[76]

Similarly, the incest survivor in *M(K) v M(H)* tried to disclose incestuous abuse to no avail. At the age of ten or eleven she tried to tell her mother and at age sixteen she told a high school guidance counsellor, who referred her to a school psychologist. Her father had her recant both to the psychologist and to a lawyer for the school board. Other disclosures made after leaving home came to nothing until she finally attended meetings of a self-help group for incest victims and realised that her psychological problems as an adult were caused by the incest. With therapy appellant also came to realise that it was her father rather than herself who was at fault.

A child-victim, traumatised, bewildered, unable to halt the abuse, and unable to obtain external relief, naturally develops a sense of helplessness.[77] Pain, fear, confusion, and guilt are internalised. To manage, the victim is led to a final coping mechanism, the denial of the events and a repression of associated memories of the abusive incidents.[78] Conversely, the child victims' domestic martyrdom in long-term sexual molestation, enforced secrecy, social taboos, and a concomitant delay in seeking redress may operate as bar to claim for damages by an adult survivor against her abuser.

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74 *Van Zijl v Hoogenhout* para 29.

75 Gelinas "The persisting effects of incest" 1983 *Psychiatry* 312 describes the secrecy conditioning that typifies the incestuous relationship. She observes: "It is easy to gain the compliance of a young child by misrepresenting sex as affection or training, by threats and bribes, and by exploiting the child's loyalty, need for affection, desire to please, and especially trust of the parent."

76 *Van Zijl v Hoogenhout* para 24.

77 Olio "Memory retrievable in the treatment of adult survivors of sexual abuse" 1989 *Transactional Analysis Journal* 93 94. For additional reading see Harvey & Herman "Amnesia, partial amnesia, and delayed recall among adult survivors of childhood trauma" 1994 *Consciousness and Cognition* 295-306 and "Adult memories of childhood trauma: A naturalistic clinical study" 1997 *J of Traumatic Stress* 557-571.

78 See generally Herman *et al* "The long term effects of incestuous abuse in childhood" 1986 *American Journal of Psychiatry* 1293.

The causal link between fault and damage is an important factor, essential to the formulation of the right of action that is often missing in cases of long-term intra-familial sexual abuse. In making this connection, the plaintiff must have an awareness of the wrongfulness of the defendant's incestuous conduct. The issue properly hinges on the question of when the victim becomes fully cognizant of who bears the responsibility for his or her childhood abuse, for it is then that the victim realises the nature of the wrong suffered. As such, responsibility plays a pivotal role in both the genesis and cessation of the harms caused by sexual abuse. The close connection between therapy and the shifting of responsibility is typical in incest cases.

It will be recalled that the plaintiff in *Van Zijl v Hoogenhout* conceded that she has always known and remembered the abuse, but she was unaware that the defendant was to blame for incestuous abuse. It was only in 1997 in the course of therapy that she realised that Oom Maree bore the responsibility for the childhood sexual exploitation. The threshold question before Heher JA was whether the plaintiff was guilty of unreasonable inaction by failing to institute her claim upon attaining majority in 1973?[79] The judge in the court *a quo* had ruled, however, that the plaintiff's claim was barred by prescription.

In dismissing the defendant's plea of prescription, Heher JA concluded that the rationale for a rigorous application of prescription is particularly inapposite for incest actions. Damages flowing from long-term intra-familial abuse remain latent until the victim is well into adulthood. Usually when the damages begin to become cognisable, the causal link between the abuse and present psychological injuries is often unknown to the victim. It is respectfully submitted that the Supreme Court of Appeal interpreted the prescription statute in a manner consistent with both ss 34 and 39(2) of the Constitution. The patent inequity of allowing the perpetrators to go on with their lives without liability, while the victim continues to suffer the consequences, clearly point to tolling statutory limitation periods in cases of historical child sexual abuse.

5 THE INVERSION OF THE CHILD SEXUAL-ABUSE ACCOMMODATION SYNDROME

The purpose of CSAAS is to provide an insight into the behaviour of sexually abused children and explain what factors of interaction between the child and the adult world would impact on the child's behaviour. It has neither empirical nor theoretical underpinnings in science, hence the contention that it is a mere "speculation". CSAAS is socially, not clinically determined. Having blurred the lines between diagnostic and non-diagnostic syndromes on the one hand, and conflated CSAAS with the battered child syndrome on the other,[80] some practitioners and

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79 *Van Zijl v Hoogenhout* paras 41 and44.

80 According to Myers, the courts "quickly and correctly accepted expert testimony on battered child syndrome to prove physical child abuse. By 1983 the legal community had become accustomed to syndrome evidence to prove physical abuse. When the child sexual-abuse accommodation appeared on the scene, some attorneys made the mistake of comparing the accommodation syndrome to battered child syndrome, concluding – erroneously – that the accommodation syndrome, like battered child syndrome, is a diagnostic tool. Labouring under this misconception, some prosecutors use the accommodation syndrome as evidence of abuse. Of course, the accommodation syndrome is not a diagnostic device, and the misuses of the accommodation syndrome led to confusion that persists to this day."

continued on next page

prosecutors have incorrectly invoked CSAAS in legal cases involving child sexual abuse. This has inevitably left the port of entry open to the elevation of CSAAS both to the status of "gospel and dangerous pseudoscience".[81] No doubt the source of the misapplication of the CSAAS in criminal trials is its sly equivocation between pathological and non-pathological syndromes. As Summit explains:

> "[S]ome of the distortion stems from misunderstanding of the word syndrome. In medical tradition it means a list, or pattern of otherwise unrelated factors which can alert the physician to the possibility of disorder. Such a pattern is not diagnostic . . . In court cycles; syndrome seems to mean a diagnosis which an expert witness contrives to prove an injury. Syndrome evidence has become a generic term for diagnostic medical or psychological testimony which must be closely scrutinised for scientific reliability . . . Had I known the legal consequences of the word [syndrome] at the time, I might have chosen a name like Child Sexual Abuse Accommodation Pattern to avoid any pathological or diagnostic implications."[82]

6 REPRESSED MEMORY SYNDROME[83]

It is necessary to identify repression on the one hand, recovered memories of childhood sexual abuse and its antithesis – false memory syndrome – on the other hand, in terms of their origins, challenges and the professional, intellectual and social reactions they receive.

The term "repression" is mostly associated with the pioneering work of Sigmund Freud in the field of psychoanalysis.[84] Freud described the essence of repression as lying "simply in turning something away, and keeping it at a distance, from the conscious".[85] He advocated psychoanalysis of the patient with repression during the course of which "the patient can go on spinning a thread of . . . associations, till he is brought up against some thought, the relation of which to what is repressed becomes so obvious that he is compelled to repeat his attempt at repression".[86] Integral to the notion is "avoidance", for instance, of a

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This passage is cited in Annon "Child sexual abuse accommodation syndrome: Issues of admissibility" http://www.ipt.com/journal/volume 10/j10 2.htm.

81 Summit "Abuse of child sexual abuse accommodation syndrome" 1983 *J of Child Sexual Abuse* 153; see also Note "Child sexual abuse accommodation syndrome" http://www.falseallegations.com.csaas.htm 1-4; Not, "A critical look at the child welfare system syndrome evidence" http://www.liftingtheveil.org/syndrome.htm 1-7. See *Bobby Steward v State of Indiana*, 95 Ind 43 (1995) and *Hadden v Florida* (Fla Sup Ct No 87 574, 1997).

82 Summit "Abuse of child sexual abuse accommodation syndrome" cited in Annon "Child sexual abuse accommodation syndrome: Issues of admissibility".

83 On 12 December 1993, the American Psychiatric Association adopted a Statement on "Memories of Sexual Abuse". The Statement (page 2) articulates a model for the process of memory:
"Memory can be divided into four stages: input (encoding), storage, retrieval, and recounting. All of these processes can be influenced by a variety of factors, including developmental stage, expectations and knowledge base prior to an event; stress and bodily sensations experienced during an event; post-event questioning; and the experience and context of the recounting of the event. In addition, the retrieval and recounting of a memory can modify the form of the memory, which may influence the content and the conviction about the veracity of the memory in the future. Scientific knowledge is not yet precise enough to predict how a certain experience or factor will influence a memory in a given person."

84 For an eloquent and easy account of Freud see Bragg with Gardiner *On Giants' Shoulder: Great Scientists and Their Discoveries from Archimedes to DNA* (1998) 213-242.

85 Freud "Repression" (1915) in Strachey (ed) *On Metapsychology* vol II (1991) 147.

86 *Ibid.*

phobia. An object of psychoanalysis can be the re-establishment of the repressed idea. In discussing the process of forgetting, Freud maintained "the motive for forgetting is invariably an unwillingness to remember something which can evoke distress".[87] His stance on the subject was that in relation to "repressed memories", it could be demonstrated that they undergo "no alteration even in the course of the longest period of time".[88]

Current theorists have reshaped Freud's original conception of conscious repression into a mechanism that works unconsciously.[89] The concept of total or robust repression is being invoked to explain how endless numbers of traumatic events spanning years of one's life can be banished completely from awareness, leaving an individual who professes a relatively happy childhood.[90] Repression figured little in professional literature, other than which was distinctly Freudian, but rose to ascendancy during 1980s and early 1990s to raise major intellectual challenges to the accepted bodies of knowledge in social behavioural sciences, law and criminology. In this vein, Blume's description of the sexually abused woman's experience is a significant example of contemporary theories of repressed memories:

> "The incest survivor develops a repertoire of behaviours designed to preserve the secret . . . these behaviours are not calculated to or even conscious. They become automatic and, over the years, almost part of her personality. She denies that she was abused by repressing the memory of her trauma. This is the primary manifestation of 'the secret': incest becomes the secret she keeps even from herself. Repression in some form is virtually universal among survivors."[91]

Repressed memory syndrome evidence is expert evidence that attempt to explain how it can be that a person could "forget" assault and indignities perpetrated upon them. It does so variously in terms of disassociation, denial, posttraumatic amnesia and Freudian repression. It is widely accepted by clinicians that the intense pain or fright[92] that a child-victim of rape or molestation may suffer, and other factors which exacerbate the betrayal trauma, increase the likelihood of memory repression.[93]

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87 Freud *The Psychopathology of Everyday Life* (1901) vol 5 (1991).

88 Freud *Studies on Hysteria* (1895) vol 3 (1991) 226; Freud "Reality in Neurosis and Psychosis" (1924) in *On Psychopathology* vol 10 (1991) 222.

89 Erdelyi "Repression, reconstruction and defense: History and integration of the psychoanalytic and experiental frameworks" in Singer (ed) *Repression and Dissociation Implications for Personality Theory, Psychopathology and Health* (1990); Loftus "The reality of repressed memories" 1993 *American Psychologist* 518-537; Loftus & Ketcham *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* (1996).

90 Erdelyi & Schatzow "Let's not sweep repression under the rug: Toward a cognitive psychology of repression" in Kihlstrom & Evans (eds) *Functional Disorders of Memory* (1979) 355 360.

91 Blume *Secret Survivors: Uncovering Incest and its Aftereffects in Women* (1990).

92 See eg *DeRose v Carswell* 242 Cal Rptr 368 (Cal Ct App.1987) (the plaintiff stated she felt "great fear" during the abusive incidents); *Evans v Eckelman* 265 Cal Rptr 605, 607 (Cal Rptr 1990) (all three male plaintiffs experienced fear of their alleged abuser).

93 See generally Briere & Conte "Self-reported amnesia for abuse in adults molested as children" 1993 *J of Traumatic Stress* 6 21-23; Elliot & Briere "Post-traumatic stress associated with delayed recall of sexual abuse: A general population study" 1995 *J of Traumatic Stress* 629-647; Feldman-Summers & Pope "The experience of "forgetting" childhood abuse: A national survey of psychologists" 1994 *J of Consulting Clinical Psychology* 636-639.

> "Child abuse is especially likely to produce a social conflict or betrayal for the victim . . . Further, there is evidence that the most devastating psychological effects of child abuse occur when the victims are abused by a trusted person who was known to them . . . If a child processed the betrayal in the normal way, he or she would be motivated to stop interacting with the betrayer. Instead, he or she especially essential that the child does not stop behaving in such a way that will inspire attachment. For the child to withdraw from a caregiver on whom he or she is dependent would further threaten the child's life, both physically and mentally. Thus the trauma of child abuse is blocked from mental mechanisms that control attachment and attachment behaviour. The information that gets blocked may be partial (for instance, blocking emotional responses only), but in many cases blocking will lead to a more profound amnesia."[94]

The trauma endured by a victim of childhood sexual abuse is often encouraged by the abusers; abusers frequently threaten their young victims with grave consequences should the victim ever tell of the abusive incidents. Threat such as "If you tell, I'll kill you"[95] are commonplace.[96] To avoid legal and social repercussions and continue to have sexual access to their victims,[97] the abusers normally resort to threats and coercion.

Victims experience irresolvable confusion and guilt over their activities, which they do not understand. Abusers often compound these feelings by claiming that the acts should be a "secret".[98] Abusers may intensify confusion and guilt by accusing the child of seductive behaviour,[99] or by blaming the child for some other wrong, and thus justifying the abuse as a punishment.[100] The defendant in *Van Zijl v Hoogenhout*, Oom Marie, mystified sexual acts as a "secret between us".[101] He also threatened her not to talk about them. In a careful study of incest and children narratives, Feiner notes:

> "Once the initial sexual activity occurs, that activity is characterized by *secrecy*, that is, victimizer conveys to the child that she is to not tell anyone of the abuse. The defendant is able to secure secrecy, because the child does not understand the

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94 Freyd "Betrayal trauma: Traumatic amnesia as an adaptive response to childhood abuse" 1994 *Ethics & Behaviour* 307 312. See further Freyd *Betrayal Trauma: The Logic of Forgetting Childhood Abuse* (1996); Siver *et al* "Recovered memories" in Ramachandran (ed) *Encyclopedia of the Human Brain* (2002) 169-184.

95 Diamond "Awful Truths: Telling the World About Incest Hurts –And Heals at the Same Time" *Chicago Tribune*, November 3 1991, 3.

96 See *Hammer v Hammer* 418 NW 2d 23 (Wis Ct App 1987), 428 NW 2d 552 (Wis 1988) (plaintiff alleged that the abuse was accompanied by threats of harm to her if she ever told anyone); *E.W. and D.W v D.CH.*, 754 P 2d 817 (Mont 1988) (plaintiff alleged that the defendant told her that great harm would befall her if she told anyone).

97 Stalten "Statutes of limitations in civil incest suits: Preserving the victim's remedy" 1984 *Harvard Women's LJ* 189 196.

98 See eg *EW and DW v DCH* 817 (plaintiff alleged that defendant told her that the acts would be "our special secrets"); *Jones v Jones* 576 A 2d 316 318 (NJ Super Ct App Div 1990) (the defendant allegedly repeatedly impressed upon the plaintiff the need for secrecy); *Mary D v John D* 264 Cal Rptr 633 635 (Cal Ct App 1989) (Mary D alleged that her abuser gave her explicit direction never to tell anyone about the acts).

99 Karp & Karp *Domestic Torts: Family Violence and Sexual Abuse* 187.

100 *Hammer v Hammer* 24 (plaintiff said she was told that she caused the acts; that it was her fault that she was being abused). See further Isquith *et al* "Blaming the child: Attribution of responsibility to victims of child sexual abuse" in Goodman & Bottoms (eds) *Child victims, child witnesses: Understanding and improving testimony* (1992) 203-228.

101 *Van Zijl v Hoogenhout* para 24.

> reality of the experience; she is dependent on the perpetrator for whatever reality he assigns to it. When he tells her that the act must be kept secret, the inference that the child draws is that she had done something bad or dangerous that she cannot reveal. Consequently, while some perpetrators secure secrecy by means of intimidation, threats of violence are usually unnecessary. The perpetrator can use the child's shame and fears of abandonment to maintain secrecy.
>
> Keeping the secret causes the child to react with helplessness to additional acts of sexual abuse. While children make some attempt to avoid sexual activity (for example, by feigning sleep at night), children do not naturally or normally resist perpetrators who they depend on for love or family security. Minimal acts of avoidance are easily overcome because of the perpetrator's constant access."[102]

Repression of memories of childhood sexual abuse has immediate coping advantages for a child-victim. By pretending that nothing has happened, the victim can attempt to continue living a "normal life".[103] Repression, however, may lead to serious and long-term disadvantages.[104] The academic findings are well summarised by Lamm in the following passage:

> "The classic psychological responses to incest trauma are numbing, denial, and amnesia. During the assaults the incest victim typically learns to shut off pain by 'dissociating', achieving "altered states of consciousness . . . as if looking from a distance at the child suffering the abuse." To the extent that this defence mechanism is insufficient, the victim may partially or fully repress her memory of the assaults and the suffering associated with them: 'Many, if not all, survivors of child sexual abuse develop amnesia that is so complete that they simply *do not remember that they were abused at all*; or . . . they minimize or deny the effects of the abuse so completely that they cannot associate it with any later consequences.' Many victims of incest exhibit signs of Post-Traumatic Stress Disorder ("PTSD"), a condition characterised by avoidance and denial that is associated with survivors of acute traumatic events such as prisoner of war and concentration camp victims. Like other suffering from PTSD, incest victims frequently experience flashbacks and nightmares well into their adulthood."[105]

These problems, which were similar to those exhibited by Ms Van Zijl, are some of the symptoms of Post Traumatic Stress Disorder ("PTSD").[106] Repressed memory syndrome goes further than abuse accommodation syndrome, however,

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102 Feiner "The whole truth: Restoring reality to children's narrative in long term incest cases" 1997 *J of Criminal Law & Criminology* 1385 1399-1400.

103 See Brewin *et al* "A dual representation theory of posttraumatic stress disorder" 1996 *Psychological Review* 670-686; Brewin & Andrews "Recovered memories of trauma: Phenomenology cognitive mechanisms" 1998 *Clinical Psychology Review* 949-970.

104 For a detailed account, see Herman "The long term effects of incestuous abuse in childhood" 1986 *American J of Psychiatry* 1293; Olio "Memory retrievable in the treatment of adult survivors of sexual abuse" 1989 *Transactional Analysis Journal* 93 93-94.

105 Lamm "Easing access to the courts for incest victims: Toward an equitable application of the delayed discovery rule" 1991 *Yale LJ* 2189 2194-2195. See also Finkelhor and Browne "Traumatic impact of child sexual abuse: A conceptualization" 1985 *American J of Orthopsychiatry* cited in *Van Zijl v Hoogenhout* para 11; Herman *Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror* (1997) ch 5 cited in *Van Zijl v Hoogenhout* para 12.

106 "The essential feature of [Post-Traumatic Stress Disorder] is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or a threat to the physical integrity of another person." *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994) *sv* "Post Traumatic Stress Disorder".

in that it seeks to explain delay in reporting not simply in terms of tendencies for children not to disclose abuse but on the basis that they repress the memory entirely and have nothing which they can report.

7 FALSE MEMORY SYNDROME

The term "repressed memory syndrome" has itself generated the pejorative term "false memory syndrome" as an alternative explanation for delayed memories of childhood sexual abuse. False memory syndrome is described as a serious form of psychopathology characterised by pseudo-memories of childhood sexual abuse. The complex issues involved in the false-memory controversy have provoked a veritable cascade of journal articles.[107] Loftus is a prominent spokesperson for the False Memory Syndrome Foundation and has co-authored a book entitled *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse*.[108] Loftus and Ketcham do not challenge "the reality of childhood sexual abuse or traumatic memories",[109] and the authors "do not question the trauma of the sexually abused child".[110] The authors neither dispute nor affirm recaptured memories. "We are only questioning the memories . . . referred to as 'repressed'-memories that did not exist until someone went looking for them."

Proponents of false memory syndrome posit that "repressed memories often wait patiently until the survivor is in a 'climate of safety' – often a therapist's company – a safe and trusting spot".[111] In the case of certain types of insecure or

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107 See eg Wakefield & Underwager *Investigation into Recovered Memory Therapy* (1994); Erdelyi & Goldberg "Let's not sweep repression under the rug toward a cognitive psychology of repression" in Kihlstrom & Evans (eds) *Functional Disorders of Memory* (1979) 355 360; Kihlstrom "Hypnosis delayed recall, and the principle of memory" 1994 *Experimental Hypnosis* 337-345; Golding *et al* "The believability of repressed memories" 1995 *Law and Human Behaviour* 569-591; Lindsay & Read "'Memory work' and recovered memories of childhood sexual abuse: Scientific evidence and public, professional, and personal issues" 1995 *Psychology, Public Policy and the Law* 846-908; Lief & Fetkewicz "Retractors of false memories: The evolution of pseudo-memories" 1995 *J of Psychiatry and Law* 411-435; Poole *et al* "Psychotherapy and the recovery of memories of childhood sexual abuse: U.S. and British practitioners' opinions, practices, and experiences 1995 *J of Consulting and Clinical Psychology* 426-437; Key *et al* "Perceptions of 'repressed memories' A reappraisal" 1996 *Law and Human Behaviour* 555-563; Golding *et al* "Do you believe in repressed memories?" 1996 *Professional Psychology: Research and Practice* 429-437; Brewin & Andrews "Recovered memories of trauma: Phenomelogy and cognitive mechanisms" 1998 *Clinical Psychology Review* 949-970; Green *et al* "Hypnotic pseudomemories, prehypnotic workings, and malleability of suggested memories" 1998 *Applied Cognitive Psychology* 431-444; Brown *et al* "Recovered memories: The current weight of the evidence in science and in the courts" 1999 *J of Psychiatry and Law* 5-156; Burgess & Kirsch "Expectancy information as a moderator of the effects of hypnosis on memory" 1999 *Contemporary Hypnosis* 22-31; Coleman *et al* "What makes recovered memory testimony compelling to jurors?" 2001 *Law and Human Behaviour* 317; Porter *et al* "The nature of real, implanted, and fabricated memories of emotional childhood events: implications for the recovered memory debate" 1999 *Law and Human Behaviour* 499-516; Woodall "The nature of memory: Controversies about retrieved memories and the law of evidence" 1999 *J of Psychiatry and Law* 151-218.

108 (1996). See also Loftus "Sleeping memories on trial: Reactions to memories that were previously repressed" 1993 *Expert Evidence* 51-59; Loftus "The reality of repressed memories" 1993 *American Psychologist* 518-537; Loftus & Hoffman "Misinformation and memory: The creation of new memories" 1989 *J of Experimental Psychology* 100-104.

109 Loftus & Ketcham *The Myth of Repressed Memory* 141.

110 *Ibid.*

111 Ernsdorff & Loftus "Let Sleeping Memories Lie? Words of Caution about Tolling the Statute of Limitations in Cases of Memory Repression" 1993 *J of Criminal Law and Criminology* 138.

unsuccessful people, "discovery" of childhood abuse offers a convenient and rewarding scapegoat. As Dr Gardner, a Clinical Professor of Child Psychiatry at Columbia University, observed:

> "You're 35 or 40 and your life is all screwed up, and someone offers this very simple solution. 'Ah, I never realised I was sexually abused. That explains it all!' – It's a simple answer for the therapist as well as the patient."[112]

It has been contended that there is no evidence, notwithstanding enormous effort to discover such evidence that memories of traumatic events are routinely or frequently banished to the subconscious to languish for decades, from whence they are later reliably recovered.[113] There is major division of opinion among the ranks of both psychiatrists and psychologists about the theoretical underpinnings of "repressed memory syndrome".[114] Indeed, the contours of the debate about the validity of "repressed" memory therapy follow the contours of debates in other areas of psychology. It is beyond the scope of this article to join in this complex debate here, except to state that it again demonstrates that there is a yawning gulf throughout the discipline of psychology between practitioners' contextual, qualitative underst efforts to analyse those processes using positivistic scientific methodologies.[115]

8 CONCLUSION

The aforegoing discussion demonstrates the ways in which sexual exploitation of children evokes fascinating questions about the intersection of gender, sexual autonomy, domestic violence, criminal culpability and ideological constructs. That children have historically been, and continue to be, a socially vulnerable group can hardly be debated. It is difficult to imagine a more fundamental interest than the right to physical and bodily integrity. Child sexual abuse stigmatises and carries long-term detrimental consequences for victims.

As women's and children's pains broke through public silence,[116] as articulated

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112 "Notable & Quotable" *Wall Street Journal* January 4, 1993 A8 cited in Beaver *Book Review: The Myth of Repressed Memory* 1996 *J of Criminal Law & Criminology* 596 597.

113 Holmes "The evidence for repression: An examination of sixty years of research" in Singer (ed) *Repression and Dissociation: Implications for Personality, Theory, Psychopathology and Health* 1990 85-102. See further Herman & Schatzow "Recovery and verification of memories of childhood sexual trauma" 1987 *Psychoanalytic Psychology*.

114 See generally Singer (ed) *Repression and Disassociation* (1990). See also Edelson *Psychoanalysis: A Theory in Crisis* (1988) 319-364.

115 See Bowman & Mertz 1996 *Harvard LR* 623-632.

116 One cannot ignore the larger social context that has prevented the problem of sexual abuse and domestic violence coming to the fore. Until recently, powerful taboos surrounding sexual abuse have conspired with the perpetrators of domestic tyranny to silence victims and maintain a veil of secrecy around their activities. The observations of the court in *State v Rhodes* 61 NC (Phil.Law) 453 (1868) 457 are reflective of the cogency of social forces that inevitably discouraged victims from coming forward: "[H]owever great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber." Similarly, the Minnesota Supreme Court in *Drake v Drake* Minn 1920 177 NW 624 625 barred a wife from suing her husband for intentional torts – on the ground that "the tranquility of family relations" would be "disturbed by dragging into court investigation at the suit of a peevish, fault-finding husband, or at the suit of the nagging, ill-tempered wife, *matters of no serious moment, which if permitted to slumber in the home closet would silently be forgiven or forgotten . . . [T]he welfare of the home, the abiding place of domestic love and affection, the maintenance of which in all its sacredness, undisturbed by a public exposure of trivial family disagreements, is so essential to society, demands and requires that no new grounds for its disturbance or disruption by judicial proceedings* be engrafted on the law by rule of court not sanctioned or made necessary by express

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by the recognition that the family is often a dangerous place, the role of the courts in safeguarding fundamental rights assumes an even greater importance. The dramatic increase in awareness of child and women abuse and a corresponding increase in the reporting and prosecution of sexual assault cases has led judges to fashion equality to intricate facts of lives of the historically subordinated groups.[117] "[T]hat it should fit the facts" is what Oliver Wendell Holmes, speaking of the common law, observed to be "[t]he first call of a theory of law".[118] Equality interpenetrates law with society in both directions, explaining changing social standards and shaping precedents that create new law in response to new or newly perceived facts. In the real sense, the situations in which courts can and should act for the protection of vulnerable members of society have never and cannot be, defined or limited.

If our culture has been slow to accept the painful and troubling reality of intra-familial child sexual exploitation, it has been more reluctant to give appropriate attention to the problem of the adult "survivor". Various psychological and emotional harms immediately beset the victim of child sexual abuse, but much damage is latent and extremely debilitating. Even in cases where the plaintiff concedes that she has always known and remembered the sexual assaults, she may be unaware that her present physical or psychological problems were caused by the abuse. Prescription legislation provides a little incentive for child abuse victim to prosecute his or her action in a timely fashion if the victim has been

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legislation" (emphasis added). See generally Note "Litigation between husband and wife" 1966 *Harvard LR* 1650 1655-1659; Siegel "The rule of love: Wife beating as prerogative and privacy" 1996 *Yale LJ* 2117 2168-2169; Fredricks & Davids "The privacy of wife abuse" 1995 *THRHR* 471; Ammons "What's God to do with it? Church and State collaboration in subordination of women and domestic violence" 1999 *Rutgers LR* 1207; Mills "Killing her softly: Intimate abuse and the violence of state intervention" 1999 *Harvard LR* 550; Fenton "Mirrored Silence: Reflections on judicial complicity in private violence" 1999 *Oregon LR* 995; Goldfarb "Violence against women and the persistence of privacy" 2000 *Ohio State LJ* 1; Stotland "Tug-of-War: Domestic abuse and the misuse of religion" 2000 *American J of Psychiatry* 696.

117 This point was reinforced by Howie DP in the decision of *Ferreira v S* para 40 as follows: "Her decision to kill and to hire others for the 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 placing itself as far as it can in the position of the woman concerned, with 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. Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women. It also, therefore, means having regard to an abused woman accused"s constitutional rights to dignity, freedom from violence and bodily integrity that the abuser has infringed.*" (Emphasis added.) Similarly, it was noted in *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 160 DLR (4th) 697 702 (Ont Gen Div) that "one of the consequence of the pervasiveness of male sexual violence in our society is that most women fear sexual assault and in many ways govern their conduct because of that fear". See too *S v Chapman* 1997 3 SA 341 (SCA) 344J-345E; *R v Mallot* 1998 1 SCR 123 (SCC) paras 38 & 40. See also Martin "Some Constitutional considerations on sexual violence against women" 1994 *Alberta LR* 535 544.

118 De Wolfe (ed) *Oliver Wendell Holmes: The Common Law* (1881) 167. See also Holmes "The path of the law" 1897 *Harvard LR* 457.

rendered psychologically incapable of recognising that a cause of action exists. The particularities of Ms Van Zijl's narrative powerfully conveyed this fact.

Van Zijl v Hoogenhout demonstrates that the law is responding to the awful reality of sexual predation in the domestic sphere, by taking into account the unique and complex nature of incestuous rape and its consequential harms. By finding contrary to the classic common law mode "of drawing the curtain, shutting out unwanted the public gaze, and leaving the parties to forget and forgive",[119] and by hewing closely to the facts of victimisation that the plaintiff presented, the Supreme Court of Appeal has employed principles of equality to remedy past wrongs, thereby advancing the interests of the less powerful in seeking emotional justice.[120] In cases of historical child sexual molestation, the law cannot any longer be seen as providing cover for rapists and child molesters to go unpunished, typically due to "legal technicalities".[121] Rather, a principled mechanism for equality has been created – from adult survivors' mouths to the Supreme Court of Appeal's ears.

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119 See eg *State v Oliver* 70 NC 60 (1874) 61-62 where it was stated: "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave to the parties to forget and forgive." See too *State v Black* 60 NC (Win) 262 (1864) 263: "[U]nless some permanent injury be inflicted, or there be an excess of violence . . . the law will not invade the domestic forum, or go behind the curtain."

120 Some therapists encourage their patients to sue as "hope for emotional justice." One argument advanced by a therapist who had treated more than 1500 incest victims is that a lawsuit, however, is a "very important step towards devictimisation . . . a further source of validation. The personal satisfaction can be significant." Forward & Buck *Betrayal of Innocence: Incest and its Devastation* 159. See also Feldthusen "The civil actions for sexual battery: Therapeutic jurisprudence?" 1993 *Ottawa LR* 203.

121 As Richard Posner aptly puts it: "[The Constitution] must not be seen as protecting the criminal's interest in avoiding punishment." See "Rethinking the Fourth Amendment" 1981 *Sup Ct Review* 49 51.

NOTES AND COMMENTS

WESTERNIZATION OR PROMOTION OF AFRICAN WOMEN'S RIGHTS?

1 Introduction

A prominent feature of pre-colonial African customary law of succession was male primogeniture. Changed circumstances since the advent of colonialism, up to modernity's Bill of Rights, have caused traditional communities as well as the legislature and courts to grapple with the following question: under what circumstances to deviate from traditional law and allow African women to inherit? In a South African context, the Constitutional Court recently pronounced upon this question by invalidating the statutory provisions governing the application of choice of law rules, as well as the substantive customary law of male primogeniture.[1]

In this discussion the emphasis is not on the constitutionality or not of the male primogeniture rule as such,[2] but on the potential impact of the abolition of the rule on the relations within an African family unit. Specific reference will be made to the legal position of the deceased's dependants, as well as the consequences for the preservation of the extended African family.

2 Customary law of succession

The customary rules of intestate succession are primarily designed to perpetuate a bloodline and transmit a deceased's rights and duties to selected members of his close kin.[3] Therefore, the deceased's heir, usually his oldest son, does not merely succeed to the assets of the deceased, but also to his status. Succession is thus not primarily concerned with the distribution of the deceased estate. At death an immediate need arises to select an appropriate person from a pool of the deceased's relatives to occupy his position so as to cause minimum disruption to the transmission of authority.[4] As in traditional customary law, property is collectively owned, and the family head administers it on behalf of and for the benefit of the family unit as a whole. In this context the customary law of succession

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* Based on a paper delivered at the 12th World Conference of the International Society of Family Law, held in Salt Lake City, Utah, 19-23 July 2005.

1 *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC).

2 I have discussed the constitutionality of the male primogeniture rule with reference to the decision of the Cape Provincial Division in *Bhe* in another contribution entitled "End of the road for the customary law of succession? *Bhe v Magistrate, Khayelitsha* 2004 1 BCLR 27 (C); *Shibi v Sithole* (Case no 7292/01 (T))" 2004 *THRHR* 515.

3 Bekker *Seymour's Customary Law in Southern Africa* 5 ed (1989) 273.

4 Bennett *Customary Law in South Africa* (2004) 335.

operates as an integral part of a complex system which suits the community's needs and way of life. The system has its own safeguards to ensure fairness in the context of rights, duties and responsibilities. In the customary law of succession, for example, the rights of the widow to maintenance and support are protected through various remedies.[5] From this it is clear that originally the customary law of succession was designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community.

Central to the customary law of succession is the rule of male primogeniture in terms of which only a male who is related to the deceased qualifies as intestate heir. Generally women are excluded from succession. This exclusion of women from heir-ship was in keeping with a system dominated by a deeply entrenched system of patriarchy, characterised by the subordination of women to the control of the family head.[6] With succession the heir steps into the shoes of the family head and acquires all his rights and assumes all the responsibilities of family headship. Thus the rule of male primogeniture prevents the partitioning of the family property and keeps it intact for the support of the widows, unmarried daughters and younger sons. Members of the family were thus assured of the heir's protection and enjoyed the benefit of his maintenance and support.

3 The problem with male primogeniture

3 1 Constitutionality of the rule

In *Bhe* it was held that the exclusion of women from inheritance on the basis of gender constitutes a violation of the right to equality as contained in s 9(3) of the Constitution of the Republic of South Africa.[7] Male primogeniture can be regarded as a form of discrimination that entrenches past patterns of disadvantage among a very vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under a constitutional order. It was found that male primogeniture also violates the right of women to human dignity contained in s 10 of the Constitution in that it implies that women are not fit or competent to own and administer property or assume positions of status.[8]

3 2 Changed social context

It is a generally accepted viewpoint that the context within which the male primogeniture rule operated has changed considerably.[9] Factors contributing to

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5 See Bennett *Customary Law* 348-349. These include a possessory interdict for the retention her possession of estate assets when the deceased's relatives make demands on the estate; a personal action against the heir towards a claim for support, for stock to be placed at her disposal, for the removal of the heir from office, for keeping the estate intact at the deceased's homestead, and for the widow to set up an independent homestead with stock from the estate under the control of another member of the deceased's family. Moreover, the widow can insist that the heir consult her before disposing of the estate assets.

6 Venter & Nel "African customary law of intestate succession and gender (in)equality" 2005 *TSAR* 86 88; Pieterse "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final nail in the customary law coffin?" 2000 *SALJ* 630.

7 The Constitution of the Republic of South Africa, 1996.

8 *Bhe* 621E-622B.

9 See, for example, Venter & Nel 2005 *TSAR* 100; Mbatha "Reforming the customary law of succession" 2002 *SAJHR* 261; Bekker & De Kock "Adaptation of the customary law of succession to changing needs" 1992 *CILSA* 368; De Koker "Male primogeniture in African

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the changed socio-economic context include westernisation, commercialisation, industrialisation, urbanisation, impoverishment, and specifically in a South African context, Apartheid and the migrant labour system. Modern urban communities and families are now said to be structured and organised differently in that nuclear families have largely replaced traditional extended families. Single parent households, or even child-run households, primarily caused by the HIV/Aids pandemic, seem to be increasing. In this setting the heir does not necessarily live together with the extended family which would include the deceased's widow/s, as well as other descendants and dependants.The heir often simply acquires the deceased estate without assuming, or even being in a position to assume, any of the deceased's responsibilities. In these changed circumstances the succession of the heir to the estate does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family of the deceased. Compliance with the duty of support is thus frequently more apparent than real.[10] Reasons advanced for non-compliance with the duty of support are, on the one hand, poverty, greed, unemployment of the heir and a denial or neglect of the customary concept of *ubuntu*, arguably under the influence of the westernisation of the way of life. On the other hand, the courts' neglect to describe the widows' and other dependants' rights to the deceased estate in appropriate legal terms, also contributes to difficult enforcement of the maintenance duty.[11] Viewed from this perspective, it is arguable that the heir's duty to support cannot constitute a justification in terms of s 36 of the South African Constitution for the violation of the rights to equality and dignity. However, the question remains whether abolition of the customary law of succession is necessarily the only (appropriate) remedial means, and related to this, what the impact of abolition will be on the preservation of the African family unit.

4 The effect of the abolition of the male primogeniture rule

In *Bhe*[12] in its majority decision the Court struck down the choice of law rules as well as the rule of male primogeniture and ordered that the South African Intestate Succession Act[13] in amended form (primarily to accommodate polygamous marriages within the ambit of the Act) should also apply to Black deceased estates. In terms of this approach the customary law of succession may not be appointed as appropriate system to regulate succession in particular cases. Moreover, the application of the Intestate Succession Act seems to assume that African communities have been transformed from their traditional settings into modern and urban communities. Although this may be the case for some, it is submitted that it is not true of all communities. There are approximately 800 traditional communities in South Africa, each under its traditional leader/s, living subject to customary law. Approximately 18 million South Africans, which constitute about 40 per cent of the population, are subject to traditional rule.[14] It has to be recognised that a majority of Africans have not forsaken their traditional cultures,

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customary law — are some now more equal than others?" 1998 *TRW* 99; Dlamini "The future of African customary law" in Sanders (ed) *The Internal Conflict of Laws in South Africa* (1990) 5-6.

10 See *Bhe* 623B.

11 Bennett *Customary Law* 349.

12 633G-634E.

13 Act 81 of 1987.

14 Bennett *Customary Law* 111.

often transformed to meet changing circumstances.[15] It is submitted that the law should take cognisance of this reality.

In its minority judgment, the Court in *Bhe* identified various reasons that militate against the universal application of the Intestate Succession Act. In essence, the minority approach is founded upon the recognition of legal pluralism as an important feature of the South African constitutional order. It does not envisage the application of the Intestate Succession Act in *all* circumstances, but emphasises the viability of the application of customary law in *some* circumstances.

- First, the Intestate Succession Act is premised on a nuclear family system. By contrast, customary law is premised on the extended family system. In its present form the provisions of the Act are inadequate to provide for the social context for which the customary law of succession was designed to cater.[16]
- Secondly, the primary objective of the customary law of succession is the continuation and preservation of the family unit. The system of succession to the deceased's status ensures the preservation of the family unit in that in terms of this system there is always someone to assume the obligations of the family head to maintain and support the deceased's dependants. The welfare of surviving dependants has been described as the "guiding principle for customary succession".[17] Obviously this is not the object of the Intestate Succession Act, which is aimed at securing the inheritance of individuals irrespective of the socio-economic context within which the individual lives.[18] It is arguable that the consistent application of the Act (as founded in the notion of capitalism) may lead to the disintegration of the family unit that customary law seeks to preserve and perpetuate.[19]
- Thirdly, the abolition of the male primogeniture rule potentially infringes on people's right to be governed by customary law. By all accounts there are a substantial number of people whose lives are governed by customary law. The South African Constitution recognises the right to the application of customary law.[20] It could be argued that those who want to arrange their lives according to custom can make wills to regulate the devolution of their estates accordingly. However, it must be noted that the concept of wills is foreign to most customary systems and often those who need the protection of the law are not conversed with westernised systems.
- It is also contended that the application of the Intestate Succession Act may lead to injustices in certain circumstances. This is illustrated by the scenario where both parents die simultaneously leaving behind minor children. Where the major asset in the estate is the family home, in terms of the Intestate

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15 See, for example, Church "Constitutional equality and the position of women in a multicultural society" 1995 *CILSA* 289 300.

16 *Bhe* 659H.

17 Bennett *Customary Law* 335.

18 De Waal "The social and economic foundations of the law of succession" 1997 *Stellenbosch LR* 162. According to De Waal, inheritance viewed from a Western perspective is reconcilable with the notion of capitalism.

19 *Bhe* 659I-660A.

20 *Bhe* 659I-660A. Section 211(3) of the Constitution empowers courts to apply customary law when that law is applicable, but subject to the Constitution and legislation promulgated to regulate it.

Succession Act each child will be entitled to an equal share in the estate. Where heirs insist on their particular shares, the asset would have to be realised and the proceeds divided equally among the children. Once the family home is sold, there will neither be shelter for the minor children, nor a duty on any of the family members to provide such shelter.[21] The rule of primogeniture is inextricably linked to the institution of a family home and its concomitant family property. Abolition of the male primogeniture rule may well deny that despite westernisation, the typical African family home still exists; that in polygamous marriages the distribution of assets is often quite impractical; and that frequently family homes constitute the only means of livelihood and shelter for family members.[22] Similar hardship may result in circumstances where a deceased is survived by dependants but leaves nothing for their maintenance and support. In this scenario children and other dependants may be left destitute with no one to assume responsibility for their support and maintenance. The male primogeniture rule ensures that there is always someone to assume responsibilities towards the dependants of the deceased. Where there are minor children, in certain circumstances it may be in their best interests that customary law applies. It may serve to prevent the disintegration of the family unit and prevent members of the family from being rendered homeless. Similarly, where the deceased is survived by dependants but leaves no assets to maintain his minor children and other dependants, the application of customary law may indeed serve to protect the dependants.[23] It is in this respect that the law of succession, as contained in the Intestate Succession Act, cannot in an African context fulfill the object of promoting the welfare of surviving dependants.

5 An alternative approach

It seems as if the answer to succession in an African context lies somewhere other than in the application of a system of succession premised on and designed for the western principles of individualism and capitalism. "It lies in flexibility and willingness to examine the applicability of [customary] law in the concrete setting of social conditions presented by each particular case. It lies in accommodating different systems of law in order to ensure that the most vulnerable are treated fairly. The choice of law mechanism must be informed by the need to: (a) Respect the right of communities to observe cultures and customs which they hold dear; (b) preserve [customary] law subject to the Constitution; and (c) protect vulnerable members of the family."[24]

Particular care must be exercised to balance on the one hand the respect for diversity and the right of communities to live by and be governed by customary law, and on the other the need to protect the vulnerable members of the family against exploitation and neglect. In a South African context it is trite law that in history Black women have been the most disadvantaged group; the group most prone to exploitation and abuse.[25] From this it follows that they need particular

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21 *Bhe* 660D-G.
22 *Bhe* 660I-661A.
23 *Bhe* 661D-F.
24 Per the minority judgment delivered by Ngcobo J in *Bhe* 662C/D-E.
25 In the constitutional scrutiny of the unfairness of the discrimination, the court ought to take into account the experiences of the "victim" of discrimination. To determine the impact on

continued on next page

protection against abuse. It may well be that protection is expressed in a way other than the equal application of a particular legal institution or rule (that is, *in casu* the uniform application of the Intestate Succession Act). Ideal protection is founded upon an equalisation of the *setting* within which the institution or rule applies. From a current perspective in a South African context this is unrealistic. Mention has already been made of the adherence to custom in the various traditional communities, particularly in rural areas. It should also be remembered that the *format* of a rule (that is, the way in which it is expressed) should be distinguished from the *substance* thereof (that is, its inherent value and function).[26] With this distinction in mind, often rules that appear to be designed for the subjection of women tend to operate to ensure their security, when viewed from the perspective of functionality. Applied to the male primogeniture rule, its format obviously suggests that women are excluded from succession, but, on the other hand, its function strives to protect the very same group.

The question remains how this balance between the interests of the dependant descendants and widow/s, on the one hand, and the preservation of customary law, on the other, can be achieved. In the concluding chapter of my thesis[27] I consider this question in great detail. I propose first that the principle of choice of law rules be maintained, albeit in a modified manner so as to make provision for the appointment of a system of succession according to the cultural orientation or affiliation of the deceased. Secondly, I propose the development of the customary law as to take cognisance of the rights to inheritance of male and female descendants, as well as the spouse/s, in accordance with the practices of the "living" law. However, with regard to the family home (or respective family homes in the case of a polygynous marriage) and the rights of the eldest male descendant, a harmonisation of the common and customary law could be achieved by recognising the female spouse's limited real right to such home in the form of *habitatio*, while at the same time recognising the male heir's right to ownership, subject to the above personal servitude. It is respectfully submitted that this approach (that is, the recognition of the dual nature of South African law and consequently the differing characteristics of the common and customary law of succession, together with the development of the customary law in accordance with the constitutional values) as opposed to what can be considered as a (partial) abolition of the customary law of succession, more aptly serves the purposes of legal reform.

6 Conclusion

In the modern era cultural contact between the traditional African and Western societies seems to be ever-increasing. In the domain of civil law there tends to be an increasing individualisation of the liability of members of the average African household towards each other. In this regard, the rights of female and younger male members of the family often appear latent when compared to the rights of

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the complainants, ie Black women and children, several factors should be considered, *inter alia* their position in society and whether they have suffered in the past from patterns of disadvantage. See Venter & Nel 2005 *TSAR* 101 for an exposition of relevant case law.

26 See Nhlapo "The African family and women's rights: Friends or foes?" in Bennett *et al African Customary* Law (1991) 141 144.

27 Knoetze *Die Swart Vrou se Reg om te Erf* (LLD thesis, University of the Western Cape, 2004).

the owner-heir. It has been suggested that the urban African often tends to ignore his accustomed kinship obligations by neglecting or refusing to maintain the deceased's dependants. This is perhaps inevitable in communities where the pressure of new economic needs is working a relentless disintegration of the communality of property and responsibility. In this wave of modernisation and westernisation it is pertinent to enquire what the future of African customary law is. Fundamentally, law has to be expressive of the value system of the society in which it is found. Accordingly, it is submitted that customary law is best suited to African society and civil law is best suited to Western society. For that reason choice of law rules relating to succession should be retained and not abolished. However, it is necessary to admit the need for adaptation of customary law to the requirements of a society which is characterised by social, economic and constitutional development. The process of modification is not foreign to the customary law. It is not a dormant system. Customary law is a living organism which has in the past shown its ability to evolve in relation to changing conditions. In consideration of this point of view, it is worthwhile to bear in mind that people are often deeply attached to personal law, as this embodies most of the cultural values of society. Consequently, customary law will be retained for a long time to come in matters concerning status, marriage and succession. Whereas change is desirable and will in fact always take place, there is little merit in being overly anxious to bring about change just for the sake of making it. In that event there is always the danger of disruption and of destroying the balance of interests in society.[28]

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28 The concluding remarks are based on Koyana *Customary Law in a Changing Society* (1980) 156-159.

NOTES ON THE INTENDED REFORM OF THE LAW RELATING TO PUBLIC-SCHOOL FEES

1 Introduction

Some time ago I delivered stringent criticism of the unfair and even fraudulent practices regarding the imposition of school fees in public schools (see Visser "Aspects of school fees at public schools" 2004 *De Jure* 358-362; see further the discussion of *Governing Body, Gene Louw Primary School v Roodtman* 2004 1 SA 45 (C) in 2004 *THRHR* 533-537; "Equal educational opportunities defined and evaluated – some practical observations" 2004 22(3) *Perspectives in Education* 149-151). Having described some of the malpractices, the following conclusion was presented (in 2004 *De Jure* 362):

> "It is recommended that urgent attention should be given to the legislative reform of the provisions in regard to school fees. The current provisions are too vague and simplistic. Much more sophisticated and detailed provisions are required that are not open to so much manipulation. If necessary, such provisions may allow differentiated school fees in prescribed circumstances."

Since then the national Department of Education has embarked on the development of a range of amendments to the South African Schools Act 84 of 1996 ("the Schools Act"), including, crucially, a reform of the law applicable to school fees (see the Education Laws Amendment Bill, 2005, *GG* no 27599 dated 27 May 2005). These amendments are generally to be welcomed. They will hopefully promote more legality, fairness and transparency in a process which effectively implies the imposition of a tax on parents of learners attending public schools.

2 Some of the problems at certain public schools

It is unnecessary to go into detail again regarding all the malpractices, irregularities and illegal schemes devised by certain school principals and educators, and endorsed by governing bodies, in order to maximise the possibility of extracting money from parents. Some of these are:

- *Irregularities regarding exemptions.* Parents deserving full or partial exemptions from school fees (see s 39(2)(b) and (4) of the Schools Act) are not always properly informed or assisted to enforce their rights. On the other hand, parents not legally qualifying for exemptions do in fact receive them – either directly or in a clandestine way. A notable instance is that of parent-educators who are reportedly sometimes not required to pay school fees.
- *Irregularities regarding admission.* School fees and other fees are sometimes used to discourage certain learners from attending a school – in contravention of s 5(1) of the Schools Act (see in general on this type of discrimination, *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T)). In addition, parents are informed by certain schools that they have to pay an "admission" fee every year despite the fact that their children have already been admitted and remain validly admitted to the school.
- *Distortion of legal provisions.* In order to create the appearance of legality, the relevant provisions of the Schools Act are distorted by school officials and parents are generally too uninformed to realise this — or too afraid to challenge the officials of the school. Parents routinely rubberstamp decisions

of the school principal regarding school fees (in terms of s 38(2) of the Schools Act), while many governing bodies have all but abandoned any semblance of independence and are manipulated by the professional school managers.

- *Discrimination and unlawful pressure.* Despite the fact that there should be no discrimination whatsoever against learners whose parents do not or are unable to pay school fees, learners and parents at certain schools are still being intimidated to secure payment.
- *Ultra vires action*. Even though there is no express legal authority, certain schools purport to levy fees in respect of particular subjects taken by a learner in addition to the general school fee. In this regard they appear to have invested themselves with powers as the whole practice flies in the face of the fundamental principle that legal provisions allowing the imposition of financial obligations are to be strictly interpreted (see, eg, the *contra fiscum* approach in *Estate Reynolds v CIR* 1937 AD 70; *Commissioner for Inland Revenue v Simpson* 1949 4 SA 678 (A) 695).
- *Corruption in the provision of goods and services.* Some schools provide lucrative business opportunities for many in doing business either with the school itself or with the parents and learners. This gives school principals and their management teams extraordinary leverage in awarding contracts. Unfortunately it also creates possibilities for corruption in choosing the supplier of goods and services, leading to corrupt payments being made to some school principals, educators and members of school governing bodies at certain schools.
- *Lack of transparency and visibility.* At certain schools vital financial information is expertly hidden from parents and other interested parties.

3 Proposed amendments to the Schools Act

The Education Laws Amendment Bill, 2005 ("the Bill") contains various provisions that seek to address financial malpractices at public schools in connection with school fees and related issues. Some of these are as follows:

(a) Clause 1(c) of the Bill introduces a wide definition of school fees. It is defined as the school fees contemplated in s 39 of the Schools Act and includes any form of contribution, of a monetary or a non-monetary nature, made or paid by a person or body in relation to the attendance or participation of a learner of or in any programme of a public school. It is of importance to note that it covers all educational activities at a school and not merely those indicated by the school for the purposes of "general" school fees. Other new definitions on a macro finance level, such as "adequacy benchmark level of funding per learner" and "norms and standards for school funding", are also provided for. These concepts form a crucial part of the national norms and standards for school funding (see *Memorandum on the Objects of the Education Laws Amendment Bill, 2005* par 2.1).

(b) Clause 3 aims at expanding s 35 of the Schools Act that deals with norms and standards for the funding public schools:

> "(1) Subject to the Constitution and this Act, the Minister must determine national quintiles and national norms and standards for school funding after consultation with the Council of Education Ministers and the Minister of Finance.
>
> (2) The norms and standards for school funding contemplated in subsection (1) must—

(a) set out criteria for the distribution of state funding to all public schools in a fair and equitable manner;
(b) provide for a system in terms of which learners at all public schools can be placed into quintiles, referred to as national quintiles for learners, according to their financial means;
(c) provide for a system in terms of which all public schools in the Republic can be placed into quintiles referred to as national quintiles for public schools, according to the distribution of their learners in the national quintiles for learners; and
(d) determine the procedure in terms of which the Member of the Executive Council must apply the criteria contemplated in paragraph (a)."

It is clear that the existing s 35 of the Schools Act is too cryptic and that the proposed and more detailed provision will better enable the proper management of school funding on a macro level and in a socio-economic sense.

(c) Clause 4(a), in amending s 39 of the Schools Act, contains an important principle regarding the school budget in order to promote financial visibility and transparency. The amendment is intended to compel the governing body to consider the effect of exemptions when determining the budget and to adjust the activities of the school based on a realistic budget and not on the potential income as if all parents are actually expected to pay, and do pay, school fees (see *Memorandum* par 2.1).

(d) Clause 4(b) expressly bans some of the illegal or semi-corrupt practices currently used by certain schools and adds, *inter alia,* the following to s 39 of the Schools Act:

"(5) No public school may charge any registration, administration or other fee, except school fees as defined in section 1.
(6) A public school may not charge a parent of a learner at that school different school fees based on [the] curriculum or extramural curriculum within the same grade."

This should deal effectively with the dubious practices at certain public schools to charge different fees depending on different subjects taken by learners (in the same grade), as well as annual registration fees, and so-called "administration fees", merely in order to have more money available at the school – which could be used in ways that are not generally promoting quality education but merely benefit a few fortunate persons at or associated with the school in question.

This proposed amendment (as well as new additions to s 39 not quoted above) is explained as follows in the *Memorandum* (par 2.1):

> "It is further proposed that the school fees may not include registration fees, administration or other fees. The school may not charge further school fees for additional subjects chosen by learners from the school programme. The Minister must determine the national quintiles for public schools that may not charge school fees. However, the Minister may only make such a determination after he or she is satisfied that there are sufficient funds secured for such a determination. The Member of the Executive Council must subsequently identify and publish a list of these schools in his or her province. The right to charge school fees will only be limited if the school is receiving more than the adequacy benchmark level of funding per learner from the Provincial Department of Education to enable it to function as a public school. If the public school is receiving less from the province than the adequacy benchmark level of funding per learner in terms of the national norms, such school will regain the right to charge school fees until the school's adequacy benchmark level of funding per learner is achieved in terms of the national norms and standards to ensure their effective functioning. This is an

attempt to curb the rising costs to parents of limited financial means of the education of their children. Quintiles one and two are determined on a national basis where the poorest learners in the country as a whole will determine the placement in such a quintiles of the schools which they attend according to the percentage of learners falling within the quintiles one and two. Statistics have shown that distribution patterns of parents of limited financial means are not spread equally between the provinces. Provinces like the Eastern Cape, Limpopo and KwaZulu-Natal have a much higher distribution of parents of limited financial means than the other provinces. Therefore, some provinces will receive more funding from the state than other provinces. The pro-poor approach is one of the cornerstones of the national norms and standards for school funding. In order to give effect to the purpose of the national norms and standards it is crucial to limit the rights of certain public schools to charge school fees."

(e) Clause 5 is intended to amend s 41 of the Schools Act which provides for the enforcement of the payment of school fees, as well as aspects of exemptions:

"(1) A public school may by process of law enforce the payment of school fees by parents who are liable to pay in terms of section 40.

(2) The exemption from payment of school fees must be calculated according to the regulations contemplated in section 39(4).

(3) The exemption from payment of school fees in terms of this Act is calculated retrospectively from the beginning of the year, if the parent qualifies for the exemption.

(4) A public school may act in terms of subsection (1) only after it has ascertained that—

(a) the parent does not qualify for exemption from payment of school fees in terms of this Act;

(b) deductions have been made in terms of regulations contemplated in section 39(4), for a parent who qualifies for partial exemption; and

(c) the parent has completed and signed the form prescribed in the regulations contemplated in section 39(4).

(5) A public school that complies with subsection (4) may act in terms of subsection (1) if—

(a) that school can provide proof of a written notification to the parent delivered by hand or registered post that the parent has failed to apply for exemption contemplated in section 39; and

(b) despite the notice contemplated in paragraph (a), the parent fails to pay the school fees after a period of three months from the date of notification.

(6) A public school may not attach the dwelling in which a parent resides.

(7) A learner may not be deprived of his or her right to participate in all aspects of the programme of a public school despite the non-payment of school fees by his or her parent and may not be victimised in any manner, including but not limited to the following conduct:

(a) Suspension from classes;

(b) verbal or non-verbal abuse;

(c) denial of access to-

(i) cultural, sporting or social activities of the school; or

(ii) the nutrition programme of the school for those learners who qualify in terms of the applicable policy; or

(d) denial of a school report or transfer certificate."

These provisions will make it more difficult in practice for governing bodies to enforce the payment of school fees. However, the obstacles placed in the way of enforcement appear to be necessary and justified in view of certain obviously relevant constitutional values. In addition, the new section expressly addresses

various forms of unfair discrimination that may be practised against learners in order to force their parents to pay. It will simply lead to an undermining of educational rights in s 29 of the Constitution applicable to schools if these indirect enforcement methods are sanctioned. The new section further brings more clarity regarding the effect of an exemption.

4 Evaluation

The provisions in the Bill quoted above generally constitute a long-overdue improvement of the Schools Act. It is encouraging that the national Department of Education has decided to develop and refine the legal framework in order to address the many irregular and unfair practices at public schools in a more comprehensive manner. The observation that there should be "much stricter laws, standards, controls and procedures regarding school finances" and that "current mechanisms are inadequate" (see Visser 2004 *Perspectives in Education* 151), will fortunately no longer be as accurate as it used to be, once the relevant provisions in the Bill are adopted and implemented.

One may, of course, question some of the legal formulations used and point out that there are still areas in which the law may not be sufficient to promote legality and full accountability (eg, there should be more on the provision of information to parents and the appointment of auditors who are really independent). In addition, some of the provisions (on a macro financing level) may be too complex or vague. However, all this does not really detract from the positive value of the Bill as it stands.

Furthermore, it should be observed that some of the practices now outlawed by the new Bill regarding school fees are, in any event, illegal, unauthorised or doubtful in terms of the proper interpretation of the existing provisions of the Schools Act. Nevertheless, the express provisions in the Bill will bring more legal certainty.

The new s 39(6) of the Schools Act (see par 3(d) above) which prohibits different schools fees based on the curriculum within the same grade, may probably be seen as simultaneously authorizing the opposite, namely differentiated school fees in respect of different school grades (see also Visser 2004 De Jure 362 in which limited and reasonable differentiation is advocated). This conclusion could be based on the ex contrariis principle in the interpretation of statutes (see eg, *Consolidated Diamond Mines of SA Ltd v Administrator, SWA* 1958 4 SA 572 (A) 648), since prohibiting differentiation in the same grade arguably permits differentiation between different grades. However, the matter is not all that clear (this is not addressed in the Memorandum par 2.1) and due cognizance must be taken of the contra fiscum principle in the case of doubt, as well as other legal principles (notably s 9 of the Constitution providing for the right to equality, and the applicable principles of administrative law in general) in assessing the lawfulness of differentiated school fees in a given situation. Although the proposed subsection generally constitutes an acceptable limitation on the arbitrary and unlawful differentiation that is currently found at some schools, it is a pity that there are not more provisions in this regard to regulate the position better and prevent abuse.

As experience has shown, a good legal framework is virtually useless without proper implementation and monitoring of the level of adherence. It is hoped that the provincial education authorities will be alive to the huge temptation that exists to abuse the system of imposing school fees and will have effective monitoring

strategies in place to police the new system. And since some of the practices regarding finances at public schools are not merely irregular but also criminal in nature, the state police will also have to become more involved so that an example may be made of those school principals, educators, school officials, members of governing bodies and corrupt auditors who misuse their positions in a criminal manner and are either committing or condoning theft, fraud and corruption in connection with school fees, school property, or in other ways involving the school.

Finally, an official awareness and information campaign should be launched to inform parents of the new provisions and their implications – even before they are actually implemented. Parents are generally so ignorant of the legal principles in terms of which public schools are supposed to be governed and managed that it is comparatively easy to deceive, abuse or exploit them. The implementation of the new provisions will be immensely strengthened by developing a parent community that is aware of the basic legal principles and vigilant about illegal and corrupt practices.

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FREE SPEECH, PARTICIPATION AND DELIBERATION AT MUNICIPAL COUNCIL LEVEL: *SWARTBOOI v BRINK (2)* 2003 5 BCLR 502 (CC)

1 Introduction

The question before the Constitutional Court in *Swartbooi v Brink (2)*[1] did not involve the familiar issue of "fair representation" of political parties at council committees[2] or on the mayoral committee[3] or the role of the municipality in the co-operative structure of government in the present dispensation.[4] It raised an important question of the "functioning and growth of a constitutional democracy, and to a material aspect of the relationship between the judiciary and the legislative and executive arms of government within this democracy".[5] It elicited a judgment on an aspect of democracy and freedom of deliberation at the local government level quite distinct from those issues that had already graced the law reports in the past decade. Put simply, the question was: in the face of the constitutional and statutory provisions relating to the functioning of the local government system in South Africa, is a judge at liberty to award costs of the litigation against the persons of councillors for the part they had played during the debates leading to the passing of council resolution(s) subsequently invalidated in a court of law? This crisp and straightforward question ultimately revolved around the necessary intendments of s 28 of the Local Government: Municipal Structures Act[6] read with s 161 of the 1996 Constitution, the provisions of which are set out below.

2 Constitutional and legislative framework

The entire Chapter 7 of the 1996 Constitution[7] is devoted to Local Government. It sets the basic framework for the organisation and conduct of municipal business, including its internal procedures. In as much as it is the third sphere of government in contemporary South Africa, its structure is different from those of the other two spheres, to the extent that while the executive and legislative authorities in the national and provincial spheres are to some extent separated, both organs are, in the case of a municipal council, fused.[8] The difficulty in classifying the functions of a municipality given this arrangement notwithstanding,[9] the Constitutional Court made it clear in *Fedsure Life Assurance Ltd v*

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1 2003 5 BCLR 502 (CC).
2 See *Democratic Alliance v African National Congress* 2003 1 BCLR 25 (C).
3 *Democratic Alliance v Masondo NO* 2003 2 SA 413 (CC).
4 *MEC for Local Government, Mpumalanga v IMATU* 2002 1 SA 76 (SCA).
5 Per Yacoob J on the Court's reasons for granting the leave to appeal in *Swartbooi v Brink* (1) 2003 5 BCLR 497 (CC) para 9.
6 Act 117 of 1998.
7 See ss 151-164.
8 See s 151(2) of the Constitution. Another instance of the fusion of legislative and executive powers in a municipal council can be gleaned from the provisions of s 158(2) of the Constitution to the effect that a municipality may make (legislate) and administer (execute) by-laws for the effective administration of the matters of which it is empowered to administer.
9 *Colonial Development (Pty) Ltd v Outer West Local Council; Bailes v Town & Regional Planning Commission* 2002 2 SA 589 (N) 607H-608B/C, where Combrink J was faced

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Greater Johannesburg Transitional Metropolitan Council[10] that a distinction could be drawn between when the council acts in executive, administrative or legislative capacities. It held that a municipal council is:

> "[A] deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate . . . The deliberation ordinarily takes place in the assembly in public where the members articulate their own views on the subject of the proposed resolutions . . . The enactment of legislation by an elected local council acting in accordance with the Constitution is, in the ordinary sense of the word, a legislative and not an administrative act."[11]

Although it is always important to bear the foregoing in mind whenever the powers of local government are in issue, it was not critical to the decision in *Swartbooi*, since the law vesting immunity in the municipal council does not state that the immunity from what councillors do or say is limited to their deliberative duties. One of the fundamental provisions securing the constitutional status of local councils is the mandate contained in s 161 to the effect that "Provincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and their members".[12]

The national legislation referred to is the Local Government: Municipal Structures Act. Section 28 of this Act mandates that provincial legislation make provisions that, at a minimum, ensure that councillors have freedom of speech in a municipal council, and in its committees, subject to the relevant council's rules and orders as envisaged in s 160(6) of the Constitution. Such provincial legislation must provide that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for:

- Anything that they have said in, produced before or submitted to the council or any of its committees; or
- Anything revealed as a result of anything that they have said in, produced before or submitted to the council or any of its committees.

It is stated in subsec (2) of this section that until provincial legislation is enacted on this subject, these provisions "will apply to all municipal councils in the province concerned".

3 Prelude to *Swartbooi (2)*

The High Court had awarded costs against certain councillors personally for the part they played in the deliberations in the Nala Local Municipality (the Council) and for their votes in favour of two decisions that affected the rights of the respondents, such decisions having been set aside by the Court. The trial judge had relied on what he considered to be the incompetent, malicious and possibly racist conduct of these members of the council in supporting the decisions that

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with the difficulty of pin-pointing where administrative action ceased and legislative process began in the municipal planning process. This case is a good illustration of the problem of attempting accurately to classify governmental functions in a typical municipal council setting.

10 1999 1 SA 374 (CC).

11 *Fedsure Life v Greater Johannesburg TMC* paras 41-42.

12 Cf s 58(1) and (2) on the immunity of members of the national assembly; s 72, the immunity of the national council of provinces; and s 117, immunity of provincial legislatures.

had been set aside, and on the impropriety of the decisions themselves. Unfortunately, s 28 of the Local Government: Municipal Structures Act was not considered by the court *a quo*. Instead, the judge applied the common law rules in determining liability for costs and the motivation that costs order against the appellants might serve to ensure that members of the council would consider their decisions more carefully in the future – in effect to teach municipal councillors a lesson. The trial judge went so far as refusing the councillors leave to appeal and the Supreme Court of Appeal affirmed the trial court's decision.

The application for leave to appeal a constitutional matter came before the Constitutional Court in *Swartbooi* (1). In granting leave, the Court held that the decision on appeal would have relevance not only to the case at hand but also to the functioning of every municipal council and the conduct of every municipal council member.[13] Yacoob J further held:

> "Members of a municipal council are elected and hold office pursuant to the Constitution[14] and must perform their functions within the terms of the Constitution.[15] The protection accorded by section 28(2) has its roots in the Constitution. In addition, an order by a court that democratically elected members of a municipal council should pay the costs arising out of their conduct in the council raises important constitutional issues. These issues concern the freedom of speech of members of elected deliberative bodies and the separation of powers between the judiciary on the one hand and the executive branches of government on the other. The question of the circumstances in which elected public representatives should incur personal liability for their conduct at meetings of its council is a constitutional matter."[16]

4 Judgment in *Swartbooi (2)*

In *Swartbooi* (2), the Constitutional Court applied its mind to the merits of the appeal. It condemned the attitude of the High Court as improper and against the tenets of judicial authority over legislative and executive powers. Such an attitude reflected an improper purpose and had broken the brittle bond that binds the exercise of the three powers of state embedded in the separation of powers doctrine. As Yacoob J put it:

> "It trenches upon the separation of powers because it is judicial conduct aimed at influencing the conduct of the legislative and executive branch of government. Courts have the power to set aside executive and legislative decisions that are inconsistent with the Constitution. They cannot attempt, by their orders to punish municipal councillors and, in so doing, influence what members of these bodies might or might not do. This motive of the High Court constitutes a dangerous intrusion into the legislative and executive domain."[17]

Interesting enough, although the Court did not consider that statements made by the Mayor outside the Council Chambers would attract immunity under s 161, as amplified by s 28 of the Act, it held that, unlike in the case of national and provincial legislative structures to which the Constitution accords immunity to the exclusion of the executive, the scope of s 161 is not limited to legislative

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13 *Swartbooi* (1) para 9.
14 Sections 157 & 158 of the Constitution of the Republic of South Africa, 1996.
15 Chapter 7 of the Constitution.
16 *Swartbooi* (1) para 8.
17 *Swartbooi* (2) para 25.

function alone, since there is nothing in the other constitutional provisions which justifies a limited reading of this section.[18]

> "The provisions of the Constitution must prevail. The fact that absolute privilege applied only to legislatures and only in respect of their legislative functions before the Constitution took effect is not in itself sufficient reason to limit the protection of section 28 to members engaged in the legislative functioning of the council. Section 28 likewise affords protection to a councillor without reference to the nature of the function. The precise delineation of a particular function of a council as being legislative, executive or administrative is not determinative of the bounds of protection afforded by the legislation in the context of the Constitution. The words of section 28 are certainly wide enough to exempt members of a municipal council from liability for their participation in deliberations of the full council."[19]

In effect, statutory provisions such as s 28 could make provisions wider in scope than those envisaged by s 161 of the Constitution. That is why s 28 exempts councillors from liability in relation to the deliberations in council and its committees. The Court left open the question whether it was the purpose of the legislature to afford protection for everything done or said by any member of a council in any of its committees irrespective of the function or purpose of that committee, because it was not necessary to so decide.[20] It was sufficient for the Court's determination of the issues before it to hold that s 28 protection covers the conduct of members of a municipal council participating in deliberations of the full council (as distinct from a meeting of any of its committees) in the course of the legitimate business of that council. Since it did not matter into which category the function of the deliberations in the council fell, it was not necessary to say whether it was administrative, executive or legislative.[21] It would appear, however, that in so far as the deliberations of the council or its committees are concerned, the classification of the function becomes irrelevant as the immunity applies in any event. In rejecting the argument that the protection afforded the councillors by s 28 should not apply to the conduct of members of a municipal council in support of resolutions subsequently set aside, the Court held:

> "The basis of the submission was that all unlawful acts of a municipal council are contrary to the Constitution and that neither the Constitution nor section 28 could have contemplated protection for conduct of members of a municipal council in support of an unconstitutional decision. This submission is wrong. If it were correct, the protection would not be afforded for conduct of any councillor in support of a decision which had been set aside for any reason whatsoever. It would not then matter whether the member of the council knew that the resolution that was being supported would be or was inconsistent with the Constitution. A member of the municipal council would be liable even if she had no knowledge of the unconstitutionality of the resolution. On this interpretation, the section would protect only that conduct of members of the municipal council in support of lawful resolutions. There is no warrant for reading this limitation into the wide wording of the section. If the section were to protect only that conduct in support of lawful resolutions of a council, the protection would, in my view, be too limited to fulfil the purpose of the protection. That purpose is to encourage vigorous and open debate in the process of decision-making. This is fundamental to democracy. Any

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18 *Swartbooi* (2) paras 14-16.
19 *Swartbooi* (2) para 16.
20 *Swartbooi* (2) para 17.
21 *Swartbooi* (2) para 18.

curtailment of that debate would compromise democracy. The protection is not limited to conduct in support of lawful resolutions."[22]

5 The immunity of elected representatives[23]

Was the High Court justified in piercing through the walls of the immunity by which the municipal councillors were shielded by s 28 in order to levy members for what they did or said while under the statutory veil of immunity?[24] The provisions of this section are not different from what one finds in the provisions of the constitutions and statutes covering parliamentary privilege in other Commonwealth jurisdictions.[25] Surely, the deliberation in a municipal council chamber is the equivalent of the "proceeding in parliament", an area of which a court is forbidden to tread, and in respect of which s 28 seeks to shield the councillor from any form of liability? Both under the common law and the constitutional/statutory framework, a court is not equipped to investigate the merits or otherwise of such proceedings. A Canadian judge once held that no person could have a judgment awarded against him in civil proceedings out of statements made in the House of Commons, and that this privilege attaches also to extensions of the statements contained in a press release concerning them and a telegram to a person affected by them.[26] Houlden J was speaking of the common law position. He held that there was no merit in the civil claim against the Prime Minister and a Cabinet colleague for inducing breach of contract, conspiracy to injure, intimidation and unlawful interference with economic interests of the plaintiffs based on these allegations.

5 1 Wide scope of section 28

It is important to consider briefly the wide scope of s 28. The term "any" qualifying "thing" in that section carries with it broad connotation; it does not

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22 *Swartbooi* (2) paras 19-20.

23 This immunity derives from art 9 of the Bill of Rights 1689 (UK).

24 In terms of ss 57(1) & 116(1) of the Constitution, Parliament and provincial legislatures have the power to determine and control their internal arrangements, proceedings and procedures, whereas ss 58(1) & 117(1) deal with privileges of national and provincial legislatures respectively. Again, members of the Cabinet and of the Executive Council of the Provinces are accountable collectively and individually to the National Assembly and the Provincial Legislature respectively for the performance of their functions in terms of ss 99(2) & 133(2) of the Constitution. It is therefore not open to a member of any legislative chamber to require a Cabinet Minister or a Member of the Executive Council of a Province to account in Court for the performance of his/her duties where the applicant legislator failed to secure such accountability in the legislative chamber – *Oosthuizen v LUR, Plaaslike Regering en Behuising* 2004 1 SA 492 (O).

25 Provisions equivalent to those of art 9 of the Bill of Rights 1689 (UK) could be found in Art V of the Articles of Confederation and Art I § 6, nicknamed the "Speech or Debate Clause", both of which prohibit the challenge or impeachment of any speech or debate in Congress in any court or anywhere outside Congress. See also ss 49 & 51(xxxix) of the Constitution of Australia, and s 16 of the Parliamentary Privileges Act 1987 (Cth); s 242, Legislature Act 1908 and Imperial Laws Application Act 1988 – New Zealand; Arts 105 (Parliament) & 194 (State Legislative Assembly), Constitution of India; Parliamentary Privilege Act 1987 (Zimbabwe); National Assembly (Powers & Privileges) Act Cap 12, Laws of Zambia.

26 Per Houlden J in *Roman Corporation Ltd v Hudson's Bay Oil & Gas Co Ltd* (1971) 2 OR 418 (Ontario HC); (1971) 8 DLR (3d) 134.

mean one, but may have reference to more than one, or to many things.[27] According to *Black's Law Dictionary*, "any" has a diversity of meaning, and may be employed to indicate "all" or "every".[28] In interpreting "anything" (that is, "anything said or any vote given by a member in Parliament") in the context of Art 105(2) of the Constitution of India, the Supreme Court held that it was a term of the "widest import" and equivalent to "everything". It further held that:

> "The only limitation arises from the words 'in Parliament' which means during the sitting of Parliament and in the course of the business of Parliament. We are concerned only with speeches in Lok Sabha. Once it was proved that Parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceedings in any Court. This immunity is not only complete but is as it should be. It is of the essence of parliamentary system of Government that people's representatives should be free to express themselves without fear of legal consequences. What they say is only subject to the discipline of the rules of Parliament, the good sense of the members and the control of proceedings by the Speaker. The Courts have no say in the matter and should really have none."[29]

No such limitation is apparent on the face of s 28.[30] It therefore follows that it is not the province of the Court to delve into the competence of councillors by way of determining the merits of what they said in council meetings, or to examine the contents of those speeches, statements or contributions were or the motives for making them. A court has authority to strike down legislation that is unconstitutional, but it does not do so on the basis that the motive behind the enactment was unreasonable, incompetent or *mala fide*. Such findings are never made by a court of law.[31] This restraint must also extend to the process of lawmaking or deliberations at the local government level.

If, as the Court held, the immunity vested in the municipal council knows no bounds, unlike the immunity of the national and provincial organs, it must follow that a speech of the mayor or member of his/her council made outside the council chamber must also enjoy that immunity. For instance, if the mayor or member of the mayoral council addresses the press or grants a television interview wherein he/she propounds municipal policy that may lead to the initiation of a municipal by-law on say, changes of street names and/or places or the construction of metro-rail or the increase of rateable value of properties in the municipality, he/she does not become liable in damages if someone's business empire or interest is thereby affected. A statement of government policy without more does not constitute a delict, where, as the Supreme Court of Canada held in *Roman Corporation Ltd v Hudson's Bay Oil & Gas Co Ltd*,[32] the statement was made in

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27 *Doherty v King* Tex Civ. App., 183 SW 2d 1004 1007.

28 *Black's Law Dictionary* (6ed) 84.

29 *TK Jain v NS Reddy* AIR 1970 SC 1573 1574.

30 Of course, the well-known exception to the general rule is that where the rights of members are involved, as were clearly evident in *Speaker of the National Assembly v De Lille* 1999 4 SA 863 (SCA) and *Smith v Mutasa and Another NNO* 1990 3 SA 756 (ZS). The general rule that the Courts would not interfere in the internal and legitimate business of the legislature would be displaced and judicial intervention would be warranted in such circumstances would similarly apply in municipal council situations.

31 Okpaluba "Judicial Attitude towards Unconstitutionality of Legislation: A Commonwealth Perspective (part I)" 2000 *SAPL* 50 57-59.

32 (1973) 36 DLR (3d) 413 (SCC). In a judgment read by Martland J, the Supreme Court of Canada affirmed both the judgment of Houlden J and the Ontario Court of Appeal ((1971)

continued on next page

good faith, not maliciously, not capriciously and with no deliberate intention to injure any person specifically. [33]

5 2 The rationale for legislative immunity

It should be pointed out that the whole subject of legislative immunity originated at common law from the basic norm of free speech of members in any and every proceeding in parliament.[34] The principle of judicial non-intervention in the internal affairs and processes of the deliberative organ has been universally accepted by the courts and its rationale variously stated. For instance, in the *Roman Corporation* case, Houlden J spoke of

> "the essence of our parliamentary system of government [being] that our elected representatives should be able to perform their duties, courageously and resolutely, in what they consider to be the best interests of Canada, free from any worry of being called to account anywhere, except in Parliament."[35]

It is not only an important protection of the independence and integrity of the legislature itself; it serves as "protection against possible prosecution by an unfriendly executive and conviction by a hostile judiciary".[36] Again, it is apparent from the history of the free speech or debate principle that "the privilege was not born primarily of a desire to avoid private suits[37] . . . but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary",[38] as well as "to protect the integrity of the legislative process by insuring the independence of individual legislators".[39]

This principle is an aspect of the separation of powers doctrine, and has thus been incorporated into most constitutions of common law countries. It dictates that Parliament be accountable to itself and the electors, but not to the executive

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23 DLR (3d) 292 (Ont. CA)), and held that the statements were made in good faith by the respondents and represented the policy of the Government with respect to a matter of public interest, and such statements cannot give rise to a claim in tort inducing breach of contract if the parties to the contract elect, in the light of the statement, not to proceed to perform the contract. Nor can the appellants obtain damages for intimidation where it cannot be established that the respondents have threatened any unlawful act. A declaration made in good faith by a Minister of the Crown concerning Government policy by appropriate legislation is not a threat of an unlawful act. Finally, as there is no suggestion that the actions of the respondents were taken with a view to injuring the appellants, the claim for damages for conspiracy to harm failed. The emphasis of "good faith" is perhaps understandable in view of the nature of the torts allegedly committed, since it is difficult to foresee a situation where the courts could wade in to investigate the motives for a statement made in Parliament although malice could become relevant if the acts of the Prime Minister and his Cabinet colleague were patently unlawful and were taken against the appellants outside parliamentary business.

33 In the court *a quo* 427 Houlden J had held: "[T]here is no allegation that the defendants Trudeau and Greene acted with malice or for personal gain; their *bona fides* is in no way attacked. Surely the actions which are alleged against them in the statement of claim are exactly what one would have expected of persons in their position when confronted with a transaction which they believed to be detrimental to the best interests of this country".

34 Art 9 of the Bill of Rights 1689 (UK).

35 *Roman Corporation Ltd v Hudson's Bay Oil & Gas Co Ltd* (1971) 8 DLR (3d) 142-3

36 *United States v Johnson* 383 US 169 (1966) 178-179 per Harlan J.

37 See *Tenney v Brandhove* 341 US 367 (1951); *Kilbourne v Thompson* 103 US 168 (1880).

38 Per Harlan J in *United States v Johnson* 180-181.

39 *United States v Brewster* 408 US 501 (1972) 507.

or the courts.[40] Furthermore, the legislature as one of the key organs of democratic government ought to enjoy absolute independence from outside interference or control, the better to perform its functions without fear of legal reprisals, civil or criminal, and to enjoy continued respect.[41] Translated to the present context, these must have been the necessary intendments of s 161 of the Constitution and s 28 of the Municipal Structures Act.

Without delving into the labyrinth of parliamentary privilege, or attempting to trace its origin or scope of its application,[42] attention may be drawn to two decisions which, by analogy, relate to the problem at hand: one from Canada[43] and the other from Australia via the Privy Council.[44] In both of these cases, the plaintiffs were seeking to make the municipalities account through the payment of damages for enacting by-laws that were subsequently invalidated in a court of law. Municipal corporations in both Canada and Australia are not elevated to constitutional status as are their South African counterparts. They are creatures of statute and thus subject to the principles of administrative law. There are therefore no constitutional provisions similar to those in Chapter 7 of the South African Constitution in these countries, nor were statutory provisions of the s 28 type available to the courts when these cases were decided.

5 3 Liability for enacting invalid by-law

If *Roman Corporation* is authority for holding that elected members of the government cannot be inhibited in discharging their public duties by accounting to individual members of the society by way of actions for damages for alleged wrongful performance of those duties, the decision of the Supreme Court of Canada in *Welbridge Holdings*[45] is authority for the proposition that a municipality cannot be held liable for enacting an invalid by-law. The Courts in the latter case had rejected an attempt by a property developer to obtain damages from a municipality for apparent negligence in enacting a by-law. The Supreme Court of Canada, affirming the decisions of the courts below, held that when a municipality exercised administrative or ministerial powers, that is, at its operating level, it might incur liability in contract and in tort, including liability in negligence.[46] But, where it exercised legislative or quasi-judicial powers it, no

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40 *United States v Brewster*.

41 In Andrews (ed) *II Works of James Wilson* (1896) 38 it was stated that: "In order to enable and encourage a representative of the public to discharge his public trust with fairness and success, it is indispensably necessary that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of anyone, however powerful, to whom the exercise of liberty may occasion offence." See also *Report of the Select Committee on the Official Secrets Acts* (House of Commons 1939) xiv, per Burger CJ in *Coffin v Coffin* 4 Mass. 1 (1808) 27.

42 See Okpaluba "Justiciability, Constitutional Adjudication & the Internal Affairs of the Legislature in the Commonwealth: Free Speech and Debate Doctrine" *CILSA* (forthcoming).

43 *Welbridge Holdings Ltd v Metropolitan Corporation of Greater Winnipeg* (1970) 22 DLR (3d) 470 (SCC); (1970) 12 DLR (3d) 124 (Man. CA); 4 DLR (3d) 509 (Hunt J).

44 *Dunlop v Woollahra Municipal Council* 1981 1 All ER 1202 (PC).

45 (1970) 22 DLR (3d) 470 (SCC).

46 See eg *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA); *Pyreness Shire Council v Day; Eskimo Amber Pty Ltd v Pyreness Shire Council* (1998) 151 ALR 147 (HCA); *City of Kamloop v Nielsen* (1984) 10 DLR (4th) 641 (SCC); *Prince George City v Rahn Bros Logging Ltd* (2003) 222 DLR (4th) 608 (BCCA).

less than a provincial Legislature or the Parliament of Canada, might act beyond its powers in the ultimate view of a Court. It would be incredible to say in such circumstances it owed a duty of care giving rise to liability in damages for its breach.[47] Where a municipality failed to abide by the requirement of natural justice in the holding of a public hearing in connection with re-zoning, its failure may make its ultimate decision vulnerable,[48] but no right to damages for negligence would flow to any adversely affected person. [49] Hence, a builder who spent money in reliance on the by-law and suffered loss when the by-law was successfully attacked by ratepayers and declared invalid, had no cause of action.[50]

5 4 Liability for passing an invalid resolution

The appellant, an estate speculator, fared no better in *Dunlop v Woollahra Municipal Council*[51] than the property developer in *Welbridge Holdings.* He had obtained declarations that two resolutions of the municipality were *ultra vires*.[52]

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47 Per Laskin J in *Welbridge Holdings* 478. Martland J (Laskin CJC concurring) similarly held in *Central Canada Potash Co v Government of Saskatchewan* 1979 1 SCR 42 90; (1978) 88 DLR (3d) 609 642 that: "[I]t would be unfortunate, in a federal state such as Canada, if it were to be held that a government official, charged with the enforcement of legislation, could be held to be guilty of intimidation because of his enforcement of the statute whenever a statute whose provisions he is under a duty to enforce is subsequently held to be *ultra vires*."

48 *Wiswell v Metropolitan Corporation of Greater Winnipeg* (1965) 51 DLR (2d) 754.

49 Unsuccessful attempts to recover damages from the government for enacting unconstitutional and invalid laws were made in: *Machin v New Brunswick (Minister of Finance); Rice v New Brunswick* (2002) 209 DLR (4th) 564 (SCC) at 598; *Guimond* v *Attorney General* of Quebec (1996) 138 DLR (4th) 647 (SCC); *Central Canada Potash Co v Government of Saskatchewan* [1979] 1 SCR 42 90; (1978) 88 DLR (3d) 609 642.

50 Even though under the common law, damages are now recoverable in South African public law by victims of negligent acts, omissions or misstatements of public bodies, it is at the same time worth noting that negligence is not easily imputed to those public authorities merely because the administrative decision was successfully impugned in a court of law on review. The usual elements necessary in evaluating liability such as the existence of a legal right and its consequent breach (wrongfulness), the foreseeability of harm and the failure to prevent it occurring (negligence), the causal link (factually and legally) of the act or omission to the injury suffered (causation) must be proved before liability could attach. The Supreme Court of Appeal judgment in *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA), which supports this proposition, also held that in determining the accountability of an official or member of the government to a plaintiff, it was necessary to have regard to his or her specific statutory duties, and to the nature of the function involved. See also *Telimatrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of SA* 2005 2 All SA 97 (W), where Snyder J granted exception to the plaintiff's claim for damages suffered as a result of allegedly wrongful conduct in the performance of the respondent of its duties in the adjudication of a complaint concerning one of the plaintiff's advertising campaigns. This, like the claim in *Olitzki Property Holdings (Pty) Ltd v State Tender Board* 2001 3 SA 1247 (SCA) 1257D-E, falls to be decided on a broad assessment by the court as to whether it is 'just and reasonable' that a civil claim for damages should be accorded.

51 1981 1 All ER 1202 (PC).

52 Cf the principle that resolutions of the legislature per se are not reviewable in a court of law: *Senator Abraham Adesanya v President of the Federal Republic of Nigeria* (1981) 2 NCLR 358; *Chiluba v Attorney General of Zambia* (Unreported) 2002/HP/0630 of 30/08/2002.

One of the resolutions restricted the number of storeys to be constructed, while the other imposed the building line restriction. The reason for the invalidity of the resolutions was that the appellant was not given the opportunity of presenting objections before the resolutions were passed. By reason of the slump in the property market in the period between the passing of the resolutions and the appellant's obtaining the declarations, the appellant was not able to sell his property at the price originally envisaged, and was forced to incur financial loss. He sought damages against the council to recover the loss sustained. The appellant pleaded: (i) trespass on the case, in that he had suffered loss as a result of the invalid resolutions; (ii) negligence, in that the council had failed to take reasonable care by seeking proper legal advice before passing the resolution restricting the number of storeys and had failed to take reasonable care to give the appellant a proper hearing before passing the building line resolution; and (iii) abuse of office by the council in passing the resolutions. The Privy Council affirmed the decision of the trial judge that no liability lay in damages against the council.

The claim on action in the case was based on an Australian High Court case – *Beauderset Shire Council v Smith*[53] – which made its entry into the common law jurisprudence, but was accorded a cold reception; it was never accepted, adopted, followed or applied in Australia, nor did it garner any persuasive influence anywhere in the Commonwealth. It was also rejected in this case as inapplicable. The courts in Australia have held that there must be "something over and above what would ground liability for breach of statutory duty if the action were available".[54] By this vague tort, "independently of trespass, negligence or nuisance but by an action upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other".[55] Their Lordships of the Privy Council held that the requirements of unlawful, intentional and positive acts contemplated in *Beauderset Shire* would not apply to an act that was merely null and void and incapable of affecting legal rights. Accordingly, the council's resolutions being merely invalid and not unlawful in that restricted sense, the appellant's claim on the case failed.

Similarly, the council did what it ought to do: seek the advice of qualified solicitors before it passed its resolutions. In any event, since the question whether the council had power to pass the resolutions could have been answered one way or the other, an answer either way could not have amounted to negligence and breach of duty. Again, the failure by a public authority to give a person an adequate hearing before exercising a statutory power which affected him or his property was not by itself a breach of a duty of care giving rise to an action for damages, because the effect of the failure was merely to render the exercise of the power void, and the person affected, being just as able as the public authority to deduce that fact, was entitled to ignore it, since it was incapable of affecting his legal rights.

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53 (1966) 120 CLR 145.

54 Per Mason J in *Kitano v The Commonwealth* (1973) 129 CLR 151 175. See also *Grand Central Car Park v Tivoli Freeolders* 1969 VR 62.

55 (1966) 120 CLR 145 156. This principle was overruled and declared unsound by a unanimous High Court of Australia in *Northern Territory of Australia v Mengel* (1996) 185 CLR 307.

Their Lordships' opinion on the third leg of the claim based on misfeasance in a public office was brief and apt:

> "In pleading in par 15A of the statement of claim that the council abused their public office and public duty Dr Dunlop (the appellant) was relying on the well-established tort of misfeasance by a public officer in the discharge of his public duties. Yeldham J rightly accepted that the council as a statutory corporation exercising local governmental functions were a public officer for the purposes of this tort. He cited a number of authorities on the nature of this tort, to which their Lordships do not find necessary to refer, for they agree with his conclusion that, in the absence of malice, passing without knowledge of its invalidity a resolution which is devoid of any legal effect is not conduct that of itself is capable of amounting to such 'misfeasance' as is a necessary element in this tort."[56]

6 Conclusion

The Constitution of South Africa is an elaborate and all-embracing document. The legislation regulating the exercise of public power enacted since it came into force is so numerous that a court, like the lower court in *Swartbooi*, may unwittingly enter into adjudication *per incuriam* the relevant law. Local government – the grass-roots of the democratic state – has seen its own share of legislation, which attempts to make it central to the democratic dispensation. In this regard, care must be exercised in locating the prevailing law; there can be no room for stereotypes. Many cases abound in the law reports to show that unless the contrary can be shown in the Constitution or legislation, adjudicative principles ordinarily applicable to the other two spheres of government are to a great extent applicable also to local government. And, where legislation expressly provides for a measure, the courts are duty-bound to apply and interpret the law accordingly.

Although one of the essential tenets of the rule of law is that public officials, like private persons, are liable for their actions, it is recognised that there are counter-balancing immunities in existence to protect public functionaries from being hounded by irate private litigants or a hostile judiciary. *Swartbooi* (2) shows that a local government councillor, like a parliamentary legislator or minister of government, cannot be made to pay damages or costs simply because a court had invalidated the decisions of the official, the resolutions of the municipality or its by-laws. One common factor that emerges from the jurisprudence of the Canadian and Australian cases referred to above is that malice or bad faith is an essential element in grounding liability. The general principle to be distilled from a line of Canadian cases since *Welbridge* may be described as follows: absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for harm suffered in the exercise of statutory duty or by mere enactment or application of a law. This seems to be a reasonable position to take, and it is recommended that South African courts should similarly adopt such an approach.

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56 *Dunlop* 1210a–c.