Speculum Juris

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ARTICLES

NOTES AND COMMENTS

Incey-wincey Spider went Climbing up Again – Prospects for Constitutional (Re)interpretation of Section 28(1)(*c*) of the South African Constitution in the Next Decade of Democracy

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1 INTRODUCTION

This article reviews the first decade of jurisprudence concerning the interpretation of the rights enumerated in s 28(1)(c) of the 1996 Constitution of South Africa (the Constitution), commonly referred to as the children's socio-economic rights clause. Three broad trends are identified, which in the main have resulted in a far more limited scope of application of these rights than was originally anticipated. In addition, affirming existing jurisprudence in relation to socio-economic rights generally, dicta of the Constitutional Court signal clearly that the Court is not going to be persuaded to accept or define a minimum core content to elaborate the scope of individual socio-economic rights and the concomitant extent of the State obligations in respect thereof. In *Minister of Health v Treatment Action Campaign* (*TAC* case),[1] for instance, the Court observed that:

> "It is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis."[2]

The article proceeds to investigate options for a revised understanding of the role of s 28(1)(c) in constitutional jurisprudence. We argue that s 28(1)(c) should not be classified as a socio-economic rights clause, but rather as a constitutional provision for child protection.

2 PHASE 1 – THE PHASE OF OPTIMISM: PRE-*GROOTBOOM*

The wording of s 28(1)(c) differs from other socio-economic rights provisions in the Constitution. The most striking distinction is that, unlike ss 26 and 27, the realisation of the rights in s 28(1)(c) is not subject to progressive realisation by

1 2002 10 BCLR 1033 (CC).
2 Para 35.

the State undertaking reasonable legislative and other measures within its available resources. As a result of this, the rights in s 28(1)(c) have been classified, together with the right to basic education and the rights of detained persons to conditions of detention consistent with human dignity, as rights without internal limitations.[3] Section 28(1)(c) also refers to "basic" nutrition, "basic" health care services, shelter and social services. Section 26(1) merely refers to access to adequate housing and s 27 to access to health care services, and sufficient food and water. This drafting led many commentators to conclude that the Constitution had prioritised children's socio-economic rights and placed children in their right place as a vulnerable group. One such commentator was Pierre De Vos in his widely referenced 1997 article in the *South African Journal on Human Rights*.[4] De Vos submitted that the Constitution enunciates the rights of children as clear, near-absolute core entitlements that are necessary to provide basic subsistence needs of children. He considered children as "the most vulnerable group in any state".[5] De Vos was inspired by the use of the word "basic" in respect of nutrition and health care to submit that the mentioned rights provided children with a safety net in cases of deprivation, neglect, starvation and abuse. De Vos had made a similar submission with reference to s 30(1)(c) of the Interim Constitution, which is congruent in many respects to s 28(1)(c).[6] In these circumstances, an onus was placed on the state to deliver the services where they are non-existent.[7] De Vos suggested that:

> "Whenever a challenge is brought, the court will have to determine whether the level of the services delivered meets the basic needs. If they do not, the court will have to order the state to comply with its obligations under s 30."[8]

Devenish also submitted in 1999 that, unlike the ss 26 and 27 rights, the courts do not have to consider the question of availability of resources in ascertaining whether the state has complied with its s 28(1)(c) obligations.[9] He also submitted that the duty on the State to provide the s 28(1)(c) rights become enforceable where the parents were either deceased or otherwise incapable of rendering parental care.[10] Devenish further defined the obligation imposed on the State to provide the goods and services in s 28(1)(c) when parental incapacity or community inability to provide is established. In his words:

> "The state is therefore responsible for rendering such services where the parents or community is unable to do so, or where what is rendered is inadequate. In these circumstances the state would be obliged to provide such minimum service to prevent *malnutrition* and *disease*."[11]

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3 Liebenberg "Socio-economic rights" in Chaskalson *et al* (eds) *Constitutional Law of South Africa* Revision Service 3 (1998) 41–45.

4 De Vos "Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution" 1997 *SAJHR* 67–101.

5 De Vos 1997 *SAJHR* 88.

6 De Vos "The economic and social rights of children and South Africa's transitional Constitution" 1995 *SA Public Law* 233 256.

7 De Vos 1997 *SAJHR* 88.

8 *Ibid*.

9 Devenish *A Commentary on the South African Bill of Rights* (1999) 386.

10 Devenish 384.

11 *Ibid* (our emphasis).

However, Devenish concedes that the extent of the application of the right will depend on reasonable limitations arising out of the available and finite resources of the State.[12] He replicates the submissions of Cachalia *et al* in reference to s 30(1)(c) of the Interim Constitution.[13] Cachalia *et al* submitted that children are vulnerable,[14] and that s 30 was intended to serve as a safety net. This would be so in cases of deprivation, neglect, starvation or abuse.[15] They contended further that the qualification of the duty with the word "basic" requires that a minimum level necessary to prevent malnutrition or disease must be provided and that this obligation stands notwithstanding the resources allocated through the political processes.[16] Cachalia *et al* also conceded that the provision could have reasonable limitations arising out of the available resources of the State. Likewise, Basson submitted in reference to s 30(1)(c) of the Interim Constitution that children had been awarded these rights because they are clearly the most vulnerable sector of society. He urged courts to accept this prioritisation in state expenditure in the allocation of resources to realise the rights.[17]

In *Grootboom v Oostenberg Municipality*[18] the High Court adopted the same reasoning as the scholars above, by treating the obligations in s 28(1)(c) as enforceable irrespective of the resources available to the State. Davis J began by holding that the obligation to maintain a child rests upon the parents and on the State only in the event that the parents are unable to do so.[19] Davis J thought that there was a distinction in the obligations engendered by s 28(1)(c) and their counterparts in ss 26 and 27, particularly the rights to shelter and housing. He construed shelter to mean a rudimentary form of temporary lodging which does not impose an obligation to provide housing.[20] This distinction was intended to emphasise the fact that children are the bearers of the rights and not the parents, although this, according to Davis, did not mean that children would be removed from the family context and denied any form of parental care. The children would be accompanied by their parents. On the question of resources, Davis J held that the question of budgetary limitations is not applicable to the determination of the rights in terms of s 28(1)(c).[21]

Following this reasoning, Davis J ordered that the children be provided with shelter and accompanied to such shelter by their parents, until such time as the parents are able to shelter their children. He also ordered the respondents to report back to the Court, under oath, on the implementation of the Court orders within a period of three months. This judgment was celebrated as a confirmation of the vulnerability of children and the need to prioritise their basic necessities of life. This celebration was, however, short-lived, and came to an end when the State appealed the judgment to the Constitutional Court (CC).

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12 *Ibid*.
13 Cachalia, Cheadle, Davis, Haysom, Maduna and Marcus *Fundamental Rights in the New Constitution: An Overview of the New Constitution and a Commentary on Chapter 3 on Fundamental Rights* (1994).
14 Cachalia *et al* 100.
15 Cachalia *et al* 102; this submission is supported by De Vos, as described above.
16 *Ibid*.
17 Basson *South Africa's Interim Constitution: Text and Notes* (1994) 46.
18 2000 3 BCLR 277 (C).
19 *Grootboom v Oostenberg Municipality* 288.
20 *Grootboom v Oostenberg Municipality* 288.
21 *Grootboom v Oostenberg Municipality* 291.

3 PHASE 2 – THE PHASE OF DAWNING PESSIMISM: *GROOTBOOM* AND *TAC*

On appeal, the CC differed from the conclusions drawn by Davis J as regards the obligations imposed by s 28(1)(c).[22] The CC noted that the rights and obligations in s 28 can properly be ascertained only in the context of the obligations in ss 25(5), 26 and 27.[23] In the CC's opinion, the reasoning of Davis J produced an anomalous result:

> "People who have children have a direct and enforceable right to housing under section 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be."[24]

The *amicus* in this case had sought to solve the problem of exclusion of other vulnerable groups of people by reading ss 26 and 27 as giving rise to a minimum core obligation, which requires the provision of minimum levels of basic needs to everyone.[25] *The amicus* submitted that s 28(1)(c) was just a specific manifestation of the minimum core.[26] However, the minimum core argument was rejected by the Court, which held that the obligation on the State was to undertake reasonable legislative and other measures within its available resources progressively to realise the rights. The Court contended that people's needs were diverse, and it would be hard to determine what minimum core would address all these needs.[27]

The CC held further that the carefully constructed scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to be provided with shelter on demand. The Court feared that "[c]hildren could become a stepping stone to housing for their parents instead of being valued for who they are".[28] According

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22 *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

23 *Grootboom* (CC) para 74

24 *Grootboom* (CC) para 70.

25 The minimum core obligation has been read into the Covenant on Economic, Social and Cultural Rights (ICESCR) by the UN Committee on Economic, Social and Cultural Rights (the Committee). The Committee has said that "it is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights, is incumbent upon every State party". (See General Comment 3, *The Nature of States Parties' Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991) para 10.) The Committee has given as an example of a *prima facie* violation by a State party a situation in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education. The minimum core content of a right is thus its essential elements, without which the right risks losing its substantive significance as a right. It is the floor below which standards should not fall. See Russell "Minimum state obligations: International dimensions" in Brand and Russell (eds) *Exploring the Core Content of Socio-economic Rights: South African and International Perspectives* 15, and Bilchitz "Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence" 2003 *SAJHR* 1–26.

26 Liebenberg "The interpretation of socio-economic rights" in Chaskalson *et al* (eds) *Constitutional Law of South Africa* 2 ed (2003) 33–49. See also Bekink and Brand "Children's constitutional rights" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 187.

27 *Grootboom* (CC) para 32.

28 *Ibid*.

to the CC, there is an overlap between the s 28(1)(c) rights and the ss 26 and 27 rights. The overlap is not consistent with the notion that s 28(1)(c) creates separate and independent rights for children and their parents.[29] This contextual reading is consistent with the proposal of the drafters of the Constitution, who had suggested that "[i]n taking decisions on the contents of these rights [in section 28] . . . care should be taken not to repeat rights afforded elsewhere in the Constitution to both adults and children".[30] In addition to reading s 28(1)(c) in the context of ss 26 and 27, the Court held that it had to be read in the context of s 28 as a whole. Section 28, especially s 28(1)(b), ensures that children are properly cared for by their parents or families, and only receive appropriate alternative care in the absence of parental or family care.[31] Section 28(1)(c) therefore does not create any primary state obligation to provide shelter on demand to children and their families.[32] The Court stated that:

> "It follows from subsection 28(1)(b) that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law, the obligation to provide shelter in subsection 28(1)(c) is imposed primarily on the parents or family and only alternatively on the State. The State thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that section 28(1)(c) does not create any primary State obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families."[33]

The Court held that the obligation on the State, when children are being cared for by their parents, is to provide the legal and administrative framework necessary to ensure that children are accorded the protection contemplated by s 28. According to the CC, this obligation would be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse.[34] The finding of the High Court that there is a distinction between shelter on one hand, and housing on the other hand, was rejected. The Court held that shelter and housing are related concepts, and one of the aims of housing is to provide physical shelter; that shelter could be ineffective or rudimentary at the one extreme, and very effective or even ideal at the other.[35]

This judgment was a big disappointment to children's rights advocates, who had celebrated s 28(1)(c) as providing space for the direct provision of minimum basic needs of children. The Court's construction was immediately criticised and described as stark,[36] and as an expression of reluctance on the part of the Court to

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29 *Grootboom* (CC) para 74.

30 Constitutional Assembly Constitutional Committee Sub-Committee *Theme Committee 4 Draft Bill of Rights: Explanatory Memoranda Volume 1* (Unpublished documents, on file with authors) 159.

31 *Grootboom* (CC) para 76. See too for a discussion of the interplay between sub-ss 28(1)(b) and (c), Chapter 23 "Children" in Davis and Cheadle (eds) *Constitutional Law: The Bill of Rights* 2 ed (2005).

32 *Grootboom* (CC) para 77.

33 *Grootboom* (CC) para 77.

34 *Grootboom* (CC) para 78.

35 *Grootboom* (CC) para 73.

36 Sloth-Nielsen "Too little? Too late? The implications of the Grootboom case for state responses to child headed households" 2003 *Law, Democracy and Development* 113–136.

interpret even the unqualified socio-economic rights to include an individual entitlement for direct material assistance from the State.[37] The approach was also described as an "exceedingly narrow reading of section 28, evidently a product of pragmatic considerations".[38] The pragmatic considerations "suggest judicial reluctance to intrude excessively into priority setting at the democratic level".[39] The Court's initial perception of "parental" or "family" care appears to have confined this to the provision of mere physical care, irrespective of the parents' capacity to provide for their children due to poverty or other reasons such as natural disasters. The Court, in holding that the children in this case were being cared for by their parents, and were not in alternative state care and had not been abandoned,[40] lost sight of the reality that these parents were themselves in a crisis and incapable of providing meaningful care. What this meant was that the rights of children living in families who are too poor to provide them with basic necessities had to be determined in terms of ss 26 and 27.[41] Indeed, the Court mentioned that one of the ways in which the State would meet its s 27 obligations "would be through a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances".[42]

The other leading socio-economic rights case, the *TAC* case, appears, to a limited extent, to have restored the confidence of children's rights advocates that the Constitution is capable of protecting children as a vulnerable group. This case arose from a government programme of providing Nevirapine, a drug believed to reduce the chances of transmission of HIV/AIDS from mother to child during childbirth. The programme was allegedly unreasonable because of its restriction to selected hospitals, thereby excluding an HIV/AIDS positive mother (and her child) who did not have access to these hospitals. Relying on the *Grootboom* precedent, the State had argued that the primary obligation to provide for the basic health care of (the unborn) children lay on their parents.[43] The Court rejected this submission and, by expanding the ruling in the *Grootboom* case, held that the primary obligation to provide children with basic health care no doubt rests on those parents who can afford to pay for the services.[44] However, in the Court's opinion, the State is obliged to ensure that children are accorded the measure of protection arising from s 28, and moreover, the State bears the primary responsibility as regards basic health care for children when "the implementation of parental or family care is lacking".[45] The Court said that:

> "Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the State to make health care services available to them."[46]

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37 Liebenberg "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?" 2002 *Law, Democracy and Development* 159 173.
38 Sunstein *Designing Democracy: What Constitutions Do* (2001) 232.
39 *Ibid*.
40 *Grootboom* (CC) para 79.
41 Liebenberg in Chaskalson *et al* (eds) *Constitutional Law of South Africa* 33-50.
42 *Grootboom* (CC) para 78.
43 *Grootboom* (CC) para 76.
44 *Grootboom* (CC) para 77.
45 *Grootboom* (CC) para 79.
46 *Ibid*.

It is not very clear from the judgment as to what the court meant by the phrase "implementation of parental or family care is lacking". However, in the context of the judgment, especially the quotation above, it appears that lack of implementation of parental care encompassed more than custodial care. For those parents who depend on the State for their health care needs and those of their children, although capable of providing a minimum level of mere physical care, cannot be said to be providing health care services. This issue is further elaborated in part 4 2 below.

But one should be very careful in celebrating the *TAC* judgment. In the first place, the court avoided any broad findings that would have wider application and that could easily be extended to other rights. Instead, it made its decision only in the context of the children's rights to basic health care and in the context of a deadly disease, HIV/AIDS. There is no doubt that poor people are dependent on the State for certain health care services because of the infrastructural needs they require. Provision of health care services requires technical skills, expensive equipment and medication which may be beyond the reach of the poor. The *TAC* judgment does not read that children have a direct entitlement to basic health care generally in circumstances where their parents cannot afford it. The CC merely uses the primary State obligation argument as regards basic health care as a point of departure for its conclusion that the restricted State Nevirapine programme was unreasonable.[47]

The *TAC* case, therefore, still leaves unresolved the extent of the State's direct responsibility for the fulfilment of children's socio-economic rights in the context of large-scale indigence among parents.[48] It is not even clear whether the State's primary role can be extended with ease to health conditions other than HIV/AIDS. The judgment was carefully worded – and contextualised – to avoid imposing general obligations on the State arising from entitlements on demand. The Court stuck to its "reasonableness" standard of review and rejected submissions that socio-economic rights can be read as self-standing and giving rise to claims for socio-economic deliverables. The CC juggled both ss 27 and 28 in crafting its reasonable standard, which appears to emphasise the point, evident from the *Grootboom* case, that the socio-economic rights in s 28(1)(c) are not different from those in ss 26 and 27.

4 THE REVISIONIST PHASE

Faced with the stark position that s 28(1)(c) does not seem to advantage children in any meaningful way over adult beneficiaries of socio-economic rights, some commentators have, post *TAC*, sought to imbue s 28(1)(c) with a revisionist, and on the face of it attractive, alternative meaning. One example is Creamer, who argues that because the formulation of children's rights is not internally constructed so as to be subject to "available resources" or "progressive realisation", as is the case with the section 26 and 27 socio-economic rights, "government programmes seeking to achieve the implementation of these [ie the s 28(1)(c)] rights should have to comply with a higher standard which would include

47 Liebenberg 2002 *Law, Democracy and Development* 185.
48 Sloth-Nielsen 2003 *Law, Democracy and Development* 121.

additional elements in the test for reasonableness".[49] He goes on to suggest that the "higher priority" could include the requirement that programmes giving effect to s 28(1)(c) rights "should be implemented as rapidly as possible" and that they "should be so devised as to reach all children in need, *inter alia,* entailing the explicit identification of children to be targeted, either due to their removal from the family environment or inadequate family care".[50] He notes that the progressive realisation clause under ss 26 and 27 explicitly allows government to rely on resource constraints as a justification for a lengthier delivery time. Because there is no such justification that attaches to basic children's rights under s 28, he deduces that programmes designed to advance children's socio-economic rights should be:

> "[C]haracterised by *accelerated* and *comprehensive* service delivery to all children in need . . . A reasonable time period, which should be regarded as concomitant with the state's obligation to prioritise these rights, will be measured in terms of the period required for the urgent marshalling of real administrative capacity rather than any delay being justified in terms of a constraint of financial resources."[51]

These suggestions have been accorded a cautious nod of acknowledgement in later sources. Liebenberg cites the proposed "higher standard of reasonableness" review with apparent approval,[52] while still noting that the current jurisprudence has not resolved whether children have a direct entitlement to the socio-economic rights in s 28(1)(c). She nevertheless argues that this would entail placing the state under a higher standard of justification as to why relevant programmes do not benefit children in need. Streak, too, alludes to a higher standard of reasonableness review, citing Creamer and Liebenberg, repeating the arguments for prioritisation and accelerated delivery of services to meet children's basic needs.[53]

However, it is our contention that this form of revisionist interpretation is unhelpful, and moreover, that it would not convince the CC. There are three main reasons for this assertion. First, calling for a higher standard, and implementation that is rapid and accelerated, or of greater priority, is vague; higher than what? Accelerated by comparison to what? The answer can be given only with reference to an unspecified programme of implementation of "non-child" socio-economic rights, a programme that might differ depending on the right in question and where it falls in the list of government priorities. Thus progressive realisation of the delivery of health rights might be significantly different from implementation of programmes relating to housing. Against which benchmark is the accelerated delivery of children's rights then to be measured?

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49 Creamer "The implication of socio-economic rights jurisprudence for government planning and budgeting: the case of children's socio-economic rights" 2004 *Law Democracy and Development* 221 231. See too Creamer "The impact of South Africa's evolving jurisprudence on children's socio-economic rights in budget analysis" in *IDASA Occasional Papers* (2002) 17.

50 *Ibid*.

51 Creamer 2004 *Law, Democracy and Development* 231 (italics in the original).

52 Liebenberg "Taking stock: The jurisprudence on children's socio-economic rights and its implications for government policy" 2004 *ESR Review* 3–6.

53 Streak "Government's social development response to children made vulnerable by HIV/AIDS: Identifying gaps in policy and budgeting" in *IDASA Occasional Papers* (2005) 11–12.

Secondly, the revisionist view tacitly endorses a "minimum core content" line of reasoning, in that the higher standard assumes a baseline of some sort from which to assess whether a more expeditious, or more prioritised, programme has been devised. Not only has the minimum core argument failed to attract the support of the CC in the two leading socio-economic rights cases (*Grootboom* and *TAC*),[54] but prospects for success on this score in future were dealt a further (and seemingly final) blow by the outgoing chief justice at the 3rd Dullah Omar memorial lecture held at the University of the Western Cape in June 2006. On that occasion, Justice Chaskalson said that as the Court had rejected arguments in favour of defining a minimum core content of specific socio-economic rights on each occasion that this had been raised, there was little purpose in pursuing this discussion. Reasonableness, he opined, was the prescribed standard of review.[55]

Third, there is nothing intrinsic in the language of s 28(1)(c) to support the revisionist interpretation, which comes tantalisingly close to a "heightened scrutiny" standard of review. The plain language of the section eschews mention of the review standard, instead obliging the duty-bearer to provide the "basic" means of survival to children. (The term "duty-bearer" is used deliberately in deference to the *Grootboom* rationale that the primary obligation for the fulfilment of the rights enumerated in s 28(1)(c) lies upon parents and care-givers, and that the State incurs only subsidiary liability for fulfilment of the rights.[56])

The question to be posed, therefore, is, given the apparently unqualified formulation of the rights accorded children in s 28(1)(c), what can nevertheless be achieved for children's rights in the next decade of constitutional democracy? The following sections of this article look more closely at prospects for advancing the jurisprudence of s 28(1)(c) positively, but within the strictures of the existing socio-economic rights debates. As a starting point, the discussion assumes that the minimum core content debate is over, which in turn means that the issue of the contents of the rights in s 28(1)(c) may have to be approached from another vantage point. We have also deliberately chosen not to focus on international law and jurisprudence, not because we think it irrelevant, but because in the past, the Constitutional Court has not been persuaded by this law and jurisprudence.[57] However, we rely on certain principles of international law and policy in support of some of the arguments that we put forward.

4 1 Children removed from or lacking family or parental care

The CC has clearly articulated the responsibility of the State for the fulfilment of children's socio-economic rights where they have been removed from parental

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54 See, for further discussion of the rejection by the CC of minimum core arguments, Davis "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'" 2006 *SAJHR* 301. See also Bilchitz "Giving socio-economic rights teeth: The minimum core and its importance" 2002 *SALJ* 484–501, and Roux "Legitimating transformation: Political resource allocation in the South African Constitutional Court" 2003 *Democratization* 92–111.

55 The authors were present at the delivery of the lecture. The comments were, however, explicitly linked to s 26 and s 27 socio-economic rights, and the former Chief Justice did clarify that his paper did not include a review of the normative content of the s 28 rights.

56 See, too, Liebenberg 2004 *ESR Review* 3.

57 Davis 2006 *SAJHR* 301.

care, have been abandoned, or otherwise lack a family environment. Although there are well-articulated adverse policy implications arising from arguments based on the premise that these children should be primary beneficiaries of the rights enumerated in s 28(1)(c),[58] there is, nevertheless, some possible advantage to be gained in examining more closely the contents of the State's duty towards these vulnerable children. A useful recent example of illustrating the possible benefit of pursuing this avenue is to be found in the (as yet unreported) judgment in *The Centre for Child Law and Others v MEC for Education and Others* (the *Luckhoff* case).[59]

This case concerned the JW Luckhoff High School, a school of industry for children placed there after a children's court inquiry had found them to be in need of care and thus falling within the ambit of the s 15(1)(d) of the Child Care Act 74 of 1983. The hostels in which the children were housed were in a state of deterioration. Most dormitories had no windows, the floors were in poor condition and there were neither cubicles to provide privacy in the showers nor doors to the toilets. The lack of ceiling boards and window glass meant that the children were exposed to freezing weather conditions in their sleeping quarters. There was no heating in the dormitories, and, in some instances, no electricity. The children's beds consisted of old dirty foam mattresses, with one (sometimes two) thin grey blankets similar to those used in prisons. Some of the children did not have proper clothing, because they had sold their clothes to outsiders to obtain money to buy drugs, facilitated by the lack of access control and monitoring in the facility. Moreover, there was a complete absence of proper psychological support and therapeutic services at the school. The children were freezing cold, and understandably miserable.[60]

The applicants requested that the children, who numbered about 150, each be provided with a sleeping bag at night, have the conditions in the building improved for them, and be provided with proper therapeutic services. The Respondent, the MEC for Education of the Province, argued that the problem was created because of budget constraints. The State further contended that providing sleeping bags for the children would be violating the equality principle of the Constitution, lest others similarly denied their rights should seek the same remedy at a very significant cost to the State. The relevant Department undertook, however,

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58 In particular, the argument that removal of children (or incentivising their abandonment) might be an undesirable consequence of policies that favour resource allocation to these children, countering the accepted international principle that children are better off growing up in a family environment. In addition, available research on HIV/AIDS and orphans indicates that vulnerability cannot be "read off" from a child's status as an orphan, and indeed that the vast majority of children orphaned by HIV/AIDS are cared for to some or other degree in a family-like or community setting. See Streak in *IDASA Occasional Papers* (2005) 11–12 and the sources cited there.

59 Case No. 19559/06 (30 June 2006).

60 This case reminds us of the intolerable conditions in mental patients' institutions, some of them involving children, which sparked a wave of litigation in the United States in the 1970s and 1980s. The government departments had been recalcitrant, which forced the courts to take an activist approach by assuming administrative tasks and describing, in great detail, what was to be done to bring about reform; see for instance *Wyatt v Stickney* 325 F Supp 781 (MD Ala 1971), 334 F Supp 1341 (MD Ala 1971), 344 F Supp 373 (MD Ala 1972).

to seek donor or NGO funding, in order to assist it to fulfil its responsibilities towards the children.

After considering the relevant provisions of the Constitution and Child Care Act, the Court recorded that:

> "[W]hat is notable about the children's rights in comparison to other socio-economic rights is that section 28 contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation, but the absence of any internal limitation entrenches the rights as unqualified and immediate."[61]

The Court consequently gave an order compelling the authorities to provide each child with a sleeping bag, and to put in place proper access control and psychological support structures. It also ordered the MEC for Education, the first respondent, to be directed to make immediate arrangements for the school to be subjected to a developmental quality assurance (DQA) process to address the poor functioning of the institution. The Court noted that psychological and social support is a critical ingredient of state care where parental support is absent, and found that the lack of such a service is unacceptable. Documentation on record supported the evidence that some of the children had become disturbed, depressed and even suicidal, yet had been denied access to therapy or family support. This the Court also characterised as a lack of access to basic health care. The Court questioned what message is sent to children when they are removed from their parents because they deserve better care, and yet, the authorities concerned then neglect wholly to provide that care.

Regarding the idea of approaching donors and NGO's, the judgment was scathing. According to the Court:

> "The respondents proposal that efforts will be undertaken to raise funds from the Red Cross and the non-governmental sector is way off the mark and reflects a fundamental misunderstanding of its constitutional duty. The duty to provide care and social services to children removed from the family environment rests upon the State. The government must provide appropriate facilities and meet the children's basic needs. The duty cannot be restricted to pleading on behalf of children with private interests to furnish it with resources."[62]

Noting further that six years of correspondence from the principal of the school to the Department in an attempt to redress the problems had been met with bureaucratic inertia, the Judge ordered that, given the dilatory and lackadaisical approach taken by the Department, the court would retain a supervisory role to ensure progress, especially in respect of the DQA process.[63]

This case is interesting in several respects, even though it is a decision of a single judge at High Court level rather than of the CC itself, and even though, by

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61 Page 7, lines 13–20 of the judgment. Acknowledging the budgetary implications of the decision, the Court noted that "our Constitution recognises, particularly in relation to children's rights and the right to a fair trial, and that budgetary implications ought not to compromise the justiciability of the rights. Each case must be looked at on its own merits, with proper consideration of the circumstances and the potential for negative or irreconcilable resource allocations. The minimal costs or budgetary allocation problems in this instance are far outweighed by the urgent need to advance the children's interests in accordance with our constitutional values" (7–8).

62 Page 8, line 22 to page 9, line 4.

63 Page 11, lines 7–9.

the Judge's own disclaimer, the judgment was handed down as a matter of urgency. First, it targets the overall deficit in the care needs of this group of children, *in casu* their need for warmth and social and therapeutic support, providing a more nuanced understanding of what children's developmental interests are. The Court proceeds from the assumption that children's survival into healthy adulthood requires a wide-ranging and extended series of services. This point, as indeed the concept of children's developmental interests, is well supported in international children's rights jurisprudence, programming and practice.[64]

Second, although on the face of it the decision resurrects a minimum core content type of approach insofar as the provisions of deliverables is concerned (for example, sleeping bags, reminiscent of the rudimentary shelter that formed the basis of the High Court order in the *Grootboom* case, which was subsequently overturned by the Constitutional Court), the judgment can rather be construed as a response to the need for emergency relief for those in desperate need, namely children in a state institution who are unable to help themselves.[65] This reading is consistent with the implications of the CC's reasoning in the *Grootboom* case,[66] and arguably, when viewed on this basis, does not infringe our contention that the "minimum core argument" must be avoided. This point is further reinforced by the fact that the provision of sleeping bags was only one part of the order sought, the ultimate aim being a complete overhaul of the care – physical and otherwise – provided at the facility.[67]

Third, this robust application of s 28(1)(c) creates the potential for the further development of the notion that s 28 rights are more about protection than they are about the progressive realisation of socio-economic deliverables.[68] Child

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64 For instance, see Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* 2 ed (2002) 95–106. Under the Guidelines for Periodic Reports, while reporting under article 6 of the CRC, State parties are expected to "describe specific measures taken to guarantee the child's right to life and to create an environment conducive to ensuring to the maximum extent possible the survival and development of the child, including physical, mental, spiritual, moral, psychological and social development, in a manner compatible with human dignity, and to prepare the child for an individual life in a free society".

65 See the subsequent case of *EN v Minister of Correctional Services* (Natal Provincial Division, October 2006, as yet unreported) concerning an order compelling the provision of anti-retrovirals to prisoners dying of HIV/Aids. See, too, *Centre for Child Law v Minister of Home Affairs & Others* (*Lindela children* case, Transvaal Provincial Division, case no 22866/04, as yet unreported) which dealt with the conditions under unaccompanied non-South African children facing deportation and detained at the Lindela Repatriation Centre were being held. The Court held that the duty on the State to ensure basic socio-economic provision for children who lack family care extends to unaccompanied foreign children, and based the State's violation on the failure to provide protection needed by the children in the circumstances.

66 The CC held that for a programme to pass as reasonable it must take care of short, medium and long term needs simultaneously and must have a component that responds to the needs of those in desperate need: *Grootboom* (CC) para 44.

67 Personal communication with the applicant.

68 Pierre de Vos notes that the reasoning in *Grootboom* supports, in respect of children who are in parental care, the argument that the State nevertheless has the obligation "to provide the legal and administrative infrastructure necessary to ensure that children are accorded the *protection* contemplated by section 28" (emphasis added). See De Vos "The right to

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protection[69] is a well-known and often used term of art in international children's rights programming and policy, and has been said to form one of the organising values of the 1989 UN Convention on the Rights of the Child.[70]

If s 28(1) came to be accorded the status of a protective measure (and one which is complemented by the provisions of s 28(1)(d) providing for the protection of children against abuse, neglect, maltreatment and degradation), rather than being viewed merely as a "mini" socio-economic rights provision, we contend that there is more scope than exists at present for a nuanced debate about the implementation of s 28(1)(c). We suggest, too, that the view that s 28 is primarily about child protection, and that it should be interpreted through a child protection lens, would appear to accord with the intention of the drafters of the Constitution to single out a most vulnerable group – children – for specific consideration in relation to constitutional rights,[71] and that this ties in with many remaining s 28 rights which relate to protection (for instance, that from exploitative labour and from armed conflict).

Such a reading also explains why s 28 (unusually) provides for the child's rights to social services, loosely defined as the services designed to give vulnerable and marginalised persons, groups and communities the ability to meet their basic needs and achieve their potential. (This definition has been formulated within the new concept of developmental social services as articulated in the 1997 White Paper on Social Welfare.[72]) The child's right to social services, we

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housing" in Brand and Heyns (eds) *Socio-economic rights in South Africa* (2005) 105. See also *Grootboom* (CC) para 78.

69 "Protection", as used in this case, and as we use it further in this article, should be distinguished from the protection contemplated for everyone, including children, under s 7(2) of the Constitution. The protection that this section contemplates has been interpreted to mean protection against violation of the rights by third parties who may not be connected to the State. See *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, adopted by a group of experts at Maastricht, 22–26 January 1997, para 6. The case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC) is an example of how the State can discharge this duty. We use protection here to mean all the things that have to be undertaken by the State to ensure child well-being and to advance their psychological, social and physical development. It could include protection from violations by third parties, but is not limited to this.

70 Van Bueren *The International Law on the Rights of the Child* (1995), along with the other "p's": prevention, participation and provision, which describe the range of CRC articles.

71 See *Cachalia et al Fundamental Rights in the New Constitution* for sources related to the drafting process.

72 Streak in *IDASA Occasional Papers* (2005) 8. She notes further that within the social development sector, this excludes social security, and that it covers the kinds of services provided to vulnerable children such as interventions via the children's court where children are at risk of abuse or neglect, the running of children's homes, adoption services, services to provide assistance to children living or working on the street, family reunification and counselling services, service for children living in child-headed households, and foster care placement. See, for a recent and substantial analysis of children's right to social services, Dutschke "Defining children's constitutional rights to social services" (Children's Institute, University of Cape Town, July 2006), where the concept is defined as "interventions that help people deal with social problems arising from social, economic or political change . . . [That is] that social services are one arm of a welfare system" (4). She points out further that the equivalent of s 28(1)(c) was contained in the Interim Constitution of 1993, but that that document did not, at that stage, include socio-economic rights generally (49).

suggest, is not traditionally a socio-economic right, but pre-eminently involves child protection, which reinforces the contention that the other rights in s 28(1)(c) relate to child protection.[73] The potential value of a "protection" lens through which s 28 is further interpreted will be explained more fully with reference to children's rights to basic nutrition in part 4 3 below, but suffice it to say that the central theme of child protection jurisprudence relates to the likelihood of significant harm being experienced by the child, which then not only justifies, but indeed requires, State intervention.[74]

Furthermore, in the *Luckhoff* case the potential harm in question was extremely significant, extending beyond living conditions characterised by poverty and extreme discomfort, to the prospects of death itself. This standard of harm finds an expression in those parts of the judgment detailing the children's depression and possible suicide because of the absence of implementation of the children's basic (mental) health care services, which threatened the children's survival.[75] It is therefore our assertion that where children's intrinsic developmental interests are at stake, policies or programmes which leave out of the reckoning children living in parental care, but whose parents lack the means of implementing their parental responsibilities, would be unreasonable and hence, constitutionally suspect. This is the basis of our suggestion, to be discussed in the next section, that the meaning of the notion "parental care" ought to be revisited.

4 2 Understanding the phrase "implementation of parental or family care"

It is very important in the context of the decisions of the CC that one understands what the Court means by "parental care". In *Grootboom*, the Court held that the State only incurs an obligation when children "are removed from their families".[76] The children were considered to be in the care of their parents because of the physical attachment that existed: "they are not in the care of the care of the State, in any alternative care, or abandoned".[77] The ruling in the *TAC* case that the State incurs a primary responsibility as regards basic health care for children when "the implementation of parental or family care is lacking" potentially extends the concept of "parental care" beyond mere custody. It also presupposes a heightened State interventionist role in certain circumstances. This approach, developed significantly since the 1970s, contradicts assumptions based on a *laissez faire* attitude, one which maintains that state intervention should be limited so as to preserve the parents' rights to autonomy.[78]

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73 See Sloth-Nielsen "The child's right to social service, the right to social security and the primary prevention of child abuse: some conclusions in the aftermath of Grootboom" 2001 *SAJHR* 210 227–230.

74 See, for example, the European Court decision in *Z v United Kingdom* (Application no 29392/95, judgment 10 May 2001) for a ruling against the government of the United Kingdom for failing to intervene to protect four siblings when they were at risk of significant harm.

75 Article 6 of the Convention on the Rights of the Child provides for the child's right to survival and development, and has been identified as one of the four pillars of the Convention by the Committee on the Rights of the Child. Country reports have to reflect on the four pillars in relation to the implementation of all other rights in the Convention.

76 *Grootboom* (CC) para 77.

77 *Grootboom* (CC) para 79.

78 See Freeman *The Moral Status of Children: Essays on the Rights of the Child* (1997) 24. Overemphasis on parental autonomy rights has been criticised for failing to protect the

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Further, what is encompassed within the scope of "parental care" may be important. The care function extends to support for an entire range of children's developmental interests, from the mere physical care of a child (for instance by bathing and feeding a baby and changing its diapers), to guiding and directing the child's education, behaviour and moral development. The nature of "care" varies from child to child; different children have different physical care needs, which needs are dependent partly on age and evolving maturity, but also on such other factors as disability or special-needs requirements. At this more elaborate level, parental care comprises the overall duty to provide for the wellbeing of the child, which entails the provision of the child's necessities of life, such as shelter, food, clothing and medical care.[79]

In respect of parental care as defined above, the capacity on the part of the parents to fulfil this duty varies to the extent that it is shaped by a parent's economic status and other factors such as their parenting skills. Ideally, every parent should be able to provide, at the very minimum, for a child's necessities of life, but in reality, poverty makes this hard. Although there are cases of wilful neglect to maintain children, cases of unintentional neglect caused by poverty are far more common.[80] But, whatever the motivation for neglect, when the provision of parental care or aspects thereof are lacking to the degree that the child's developmental potential is seriously threatened, it is submitted that this justifies some form of state intervention.

In addition, there are aspects of "care" that may simply be beyond the control of the parents, but are within the control of the State (such as the parental responsibility to provide health care), which may involve services that are expensive, or require costly equipment, infrastructure and expertise. These resources are beyond the reach of a great many parents, especially the economically disadvantaged. By contrast, the state has the capacity, both in terms of resources and expertise, to ensure that these services are provided effectively and efficiently. In relation to nutrition, at an essential level of parental care, the parent may be able to feed a child well-prepared food, but such a parent may not be able to determine the safety of the food he or she purchases. This may require skills beyond the reach of the parent, but which may be within State reach. In all above situations we argue that it is incumbent upon the State to intervene and provide the "missing" element of parental care, as it were, without having to remove the child from parental custody.

Our broad understanding of the term "parental care" accords with the definition of the term "care" in the Children's Act 38 of 2005, which in s 1 is defined to mean more than custodial care. It includes psychological and moral aspects of child care, such as guiding children's behaviour, as well as the provision of socio-economic necessities such as shelter, health, wellbeing and financial support.[81] We suggest that an expanded concept of parental care (linked to

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dignity of children; instead, it places undue weight on the private space and "dignity" of the parents.

79 Van Schalkwyk "Maintenance for children" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 41.

80 See Van Bueren *The International Law on the Rights of the Child* 88.

81 Section 1 provides that "'care', in relation to a child, includes, where appropriate – (a) within available means, providing the child with: (i) a suitable place to live; (ii) living

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the substantial risk factor, or that there are threats to children's survival and development) may be able to assist us to identify when the "implementation of parental care is lacking", and, hence, when the State obligation arises.

4 3 Negative obligations

Next, we submit that the CC has arguably treated the negative aspect of the obligation incurred in respect of socio-economic rights more favourably than it has claims based on demands for positive fulfilment. In his recent address, as alluded to above, Justice Chaskalson appeared to confirm this, noting too that the positive component of rights called for a somewhat different approach. The most obvious applications of the Court's more interventionist response to negative violations of socio-economic rights is evident in the areas of evictions and in respect of termination of access to water.[82] The orders in the *TAC* case also provide evidence of this approach, insofar as the Court ordered that the State remove the restrictions that prevented Nevirapine from being made more widely available.[83]

In the children's rights arena, challenging negative violations relating to s 28 rights might be a fruitful line of enquiry, such as where children's access to social services is diminished or removed (as was cogently argued by the non-governmental sector to resist attempts to close the specialised child protection units in the South African Police Services a few years ago). Of particular note in regard to evictions and children's rights, and which has been established in recent research, is the exposure of children to violence and abuse during eviction processes.[84] This highlights the link between the protection of children from

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conditions that are conducive to the child's health, well-being and development; and (iii) the necessary financial support; (b) safeguarding and promoting the well-being of the child; (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards; (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act; (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development; (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development; (g) guiding the behaviour of the child in a humane manner; (h) maintaining a sound relationship with the child; (i) accommodating any special needs that the child may have; and (j) generally ensuring that the best interests of the child is the paramount concern in all matters affecting the child."

82 See *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC); *Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W); and *Jaftha v Schoeman* 2005 1 BCLR 78 (CC). See too Davis 2006 *SAJHR* 301.

83 *TAC* para 135.

84 See Centre for Housing Rights and Evictions (Geneva) "Defending the Housing Rights of Children" June 2006 www.crin.org/resources.inforDetail.asp?ID+10289&flagreport (accessed 21-09-2006), citing studies that found that "[e]viction implies violence. During the event of a demolition, children are exposed to violence and abuse…" (59). A perusal of the records of our courts show that children are involved in almost all eviction cases. What is clear from the cases, however, is that focus is directed at the adults involved, without any special consideration of the vulnerable position of children faced with eviction. One reason for this could be the *Grootboom* case's ultimate reluctance to treat children as a special group, as the needs of the children were considered together with those of the adults. One

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negative violations of s 28(1)(c) rights, and the nature of the State obligation under s 28(1)(d), which requires their protection by the State from abuse, maltreatment and degradation.[85] A further avenue of thought relates to the elaboration of the role of the best interests standard (in s 28(2)) in the context of protection of children from negative violations, as our constitutional standard requires that the best interest be considered of paramount importance in all matters concerning a child.[86]

The relevance of the child's best interest (also a pillar of the Convention on the Rights of the Child, as set out in Article 2) in the context of evictions has been regarded as including: consultation with families and children where eviction is threatened; avoidance of the use of force; taking efforts to ensure the minimisation of trauma and disruption to children during evictions which are deemed to be justified; avoiding evictions taking place at night, or during bad weather, or when children are home alone, or at a time when children's schooling would be disrupted.[87] Further, it is suggested that the best interests standard requires that legal remedies should be made freely available to affected children, including, wherever possible, the provision of free legal aid.[88] We aver that in the context of resisting negative intrusions in the delivery of children's basic needs, their individual best interests are surely relevant to the reasonableness enquiry.

4 4 Re-examining the concept of "overlap"

The Grootboom case has rather decisively ruled that there is an evident overlap between the right to shelter in s 28(1)(c) and the right to housing in s 26. The question we pose here is whether the rights to nutrition in s 28 and the right to sufficient food and water in s 26, and right to health care in s 27 also overlap or are co-terminous. As has been argued above, there is at least one other distinctive aspect of s 28, namely, the right to social services accorded children, a right which is not co-terminous with the rights of everyone to have access to social

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could argue, however, that possibilities for children being given special consideration are to be found even within the provisions of s 26(3) of the Constitution, and the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which proscribes eviction from one's home without a court order given after considering all the relevant circumstances. Section 4(6) of PIE requires consideration of the needs of such vulnerable groups as children as one of the relevant circumstances that has to be considered: see *Port Elizabeth Municipality v Various Occupiers* para 30.

85 And, as has been previously noted, this right is not subject to internal limitations or qualifications.

86 See further the Children's Act 38 of 2005, which in s 7 describes a comprehensive package of factors to be considered "whenever a provision of this Act requires the best interests of the child standard to be applied" (s 7(1)), including amongst these: the child's physical and emotional security and his or her intellectual, emotional social and cultural development (s 7(h)); the need to protect the child from any physical or psychological harm that may be caused by subjecting the child to maltreatment abuse, neglect, exploitation or degradation or other harmful behaviour or by exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards any other person (s 7(l)); and affirming the need for children to be brought up within a stable family environment wherever possible (s 7(k)) as constituting an important element of the child's best interests.

87 Centre for Housing Rights and Evictions (Geneva) "Defending the Housing Rights of Children" 74–75.

88 *Ibid*.

security,[89] and it has been argued that this is therefore a s 28(1)(c) right exclusively accorded to children.

Traditionally, "nutrition" has a specific and well-established scientific meaning in relation to children's rights, and it hardly needs emphasising that children's nutritional needs differ from those of adults, because they are developing physically, and because lack of requisite nutrients may result in lasting physical and mental consequences which cannot be overcome later in life. Evidence of the scientific meaning of nutrition in the context of a child's birth weight, and thereafter the child's weight and height growth indicators, has been authoritatively established by health professionals.[90] There has been acknowledgement of the different nutritional requirements of children in South African legal documents (the Correctional Services Act 111 of 1998, for example, provides for different nutritional formulae for prisoners who are children). Nutrition, moreover, is not simply about sufficient food and water. It calls into play specific kinds of food, in the correct quantities, and of the correct type of food for growing infants and children of different age-groups. It also requires that the diet ingested be capable of being nutritious, for example, that ingestion is not thwarted by infestation of parasites or by infection.

Malnutrition, as the Committee on the Rights of the Child has pointed out, results in the likelihood of children failing to make any significant progress in their physical, mental, spiritual, moral and social development, hence malnutrition remains at the top of the list of priorities for children.[91] Malnutrition is not simply an absence of sufficient food, we contend, but a potentially significant threat to survival and development (particularly where the under the age five years are concerned, as is recognised by Millenium Development Goal No 4, which seeks to reduce mortality in this age bracket by two thirds by 2015). In this regard, we reiterate the *TAC* statement linking the adjudication of children's socio-economic rights to the extent of harm they might otherwise suffer.

In regard to children's rights to basic nutrition, even in the absence of a minimum core content line of reasoning, it is arguable that in situations where children fall below the accepted weight-for-age indicators (to the extent that they are diagnosed as malnourished, as has occurred in South Africa especially in poorer rural areas), one is not dealing with a positive fulfilment (subject to progressive realisation) issue. Rather, the issue is one of a negative violation of their basic rights, as nutritionally they have dropped below all acceptable norms. Even if the State were to show the existence of a reasonable policy in regard to alleviation of child poverty and malnutrition generally, such as the availability of the child support grant, this cannot suffice as justification, as the children's care-givers may already be in receipt of the grant, yet be ignorant as to how to utilise it to combat malnutrition, or might be mis-spending it, or might be stretching it to accommodate a large household in need. This is rightly a child protection issue, in relation

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89 See note 72 above.

90 See, for example, *The WHO Child Growth Standards* www.who.int/childgrowth/standards/en (accessed 21-09-2006); http://www.sahealthinfo.org (accessed 21-09-2006); www.webhost.sun.ac.za/nicus/links.htm (accessed 21-09-2006).

91 See Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* 396.

to which the State bears the primary obligation, even where a reasonable programme to give effect to the right to poor children generally is in place.[92]

Although we feel obliged to concede the overlap between shelter and housing, it could, we suggest, be argued that children's health needs are quite different, in many respects, from those of adults, and that the basic health care services they require calls into play resources and interventions which differ from those necessary for adults "to have access to health care". Children are vastly more susceptible to death from preventable and immunisable diseases such as polio, tetanus, whooping cough, cholera, malaria and diphtheria, when compared to adults.[93] These and other health risks to which children are exposed, may well dictate that a more child-specific content be accorded to the "child's right to basic health care".[94] As stated above, in international law, there is a close linkage between both the child's rights to nutrition and to health care, and the right to survival and development.[95] In respect of aspects of children's rights to basic health care services, what is at stake for children is ensuring their survival and development. The same cannot necessarily be said about the right of access to health care services in s 27(1) of the Constitution, as this potentially covers the entire range of health interventions, from primary to tertiary levels. There may thus be a point at which the "overlap" suggested in the *Grootboom* case disappears.

5 CONCLUSIONS

The first decade of constitutional rights for children has delivered a rich jurisprudence and considerable, laudable efforts at improving legislative provisions, programmes and policies protecting children and giving effect to their rights.[96] On assessment, this progress has probably been more marked in the arena of civil and political rights, given the apparent worsening indicators of child poverty and their link to the fulfilment of children's socio-economic rights. South Africa is one of very few countries that is actually experiencing an increase in its child mortality rate.[97] It is well known that child mortality rates are heavily influenced by poverty.[98] There is thus empirical evidence for the proposition that in some

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92 Whether that remedy is the provision of education on nutrition to care-givers, or other more direct forms of intervention.

93 See "Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s" para 9 http://www.unicef.org/wsc/plan.htm# Child (accessed 21-09-2006).

94 Jacobs "Children's health and the law" 2004 *ESR Review* 7–9.

95 See Van Bueren *The International Law on the Rights of the Child* 293, where she submits that both the right of the child to enjoy the highest attainable standard of health and to enjoy nutritious food, clean drinking water and adequate standing of living can be subsumed under the duty of the state to ensure, to the maximum extent possible, the survival and development of a child. She submits further that each aspect of survival and development is important as it would, for example, be nonsensical to provide children with access to immunization against potentially lethal diseases, whilst not providing nutrition.

96 Sloth-Nielsen "Harmonisation of the Law in South African with the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" (2006, forthcoming, African Child Policy Forum, Addis Ababa).

97 Health Systems Trust *Big rise in child mortality rate in SA* http://www.hst.org.za/news/20040558 (accessed 22-09-2006).

98 See UNICEF Child mortality www.childinfo.org/areas/childmortality/ (accessed 22-09-2006).

respects, implementation of children's access to socio-economic rights is going backwards, and not forwards. However, we have tried to show that there remains scope for a more progressive approach to the rights enumerated for children in s 28(1) of the Constitution, especially if s 28(1)(c) is approached primarily as a child protection provision, rather than a tautologous repetition of the more substantive constitutional provisions in ss 26 and 27. We believe that emphasising the role of the State in child protection can provide a vehicle for an alternative jurisprudence around s 28(1)(c) to develop.

Finding the Boundary – The Role of the Courts in Giving Effect to Socio-Economic Rights in South Africa

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> "There is a time to be cautious and a time to be bold, a time for discretion to be the better part of valour and a time for valour to be the better part of discretion. And it would appear that there is no logic intrinsic to the judicial function itself that can tell us when the clock strikes for valour and when for caution. The question becomes not one of whether but when; I would love to see of theory of when . . ." Justice Albie Sachs[1]

1 PROLOGUE: ROBERTS AND OTHERS v THE MINISTER OF SOCIAL DEVELOPMENT AND OTHERS[2]

Christian Roberts is 63 years old and is married in community of property. He and his wife, in addition to supporting themselves, currently support one of their children and five grandchildren, all of whom reside with them in their house. The adult child who resides with them is unemployed and suffers from tuberculosis. Due to the fact that their expenses exceed their income they allege that they are struggling to make ends meet. As Mr Roberts is not yet 65 years of age, he does not qualify for an older persons' social grant and is unemployed. The unemployment rate in the area in which the Robertses reside is high and many of the adults living in the area are without an income and poverty stricken. Mr Roberts relies mainly upon the social grant for the aged received by his wife, and a grant received for one minor school-going grandchild who has been placed in their foster care.

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1 "Book Review" 2001 *Univ Toronto LJ* 87, as quoted by Lenta "Judicial Restraint and Overreach" 2004 *SAJHR* 544 555.

2 Case No. 32838/05. The case is scheduled to be argued before the Transvaal Provincial Division of the High Court on 11 September 2007. For a more thorough discussion regarding the background to this case and the historical basis for distinguishing between men and women in providing old age grants, see Kruger "'Come Back When You Are 65, Sir!': Discrimination in Respect of Access to Social Assistance for the Elderly" 2006 *Law, Democracy and Development* 70–81.

Mr Roberts avers that he used to work as a labourer until being retrenched in 1990. When he was retrenched he received a pension payout of approximately R7 000, which was used to make improvements to his house, and a few months' unemployment benefits. Since his retrenchment Mr Roberts has been casually employed from time to time but alleges that as he becomes older it is more difficult to obtain casual jobs and he has become fully reliant on his wife for support. The Robertses reside in a so-called "council house", which they submit is valued at approximately R22 000.

Mr Roberts and three other applicants have instituted proceedings in the Transvaal Provincial Division of the High Court, seeking to challenge the constitutionality of law that excludes them, as men between the ages of 60 and 65, from an older persons' grant to which they would otherwise be entitled.[3] The applicants allege that certain legislative provisions discriminate against them and, in particular, infringe their constitutional rights to equality, dignity and social security. The respondents, including the Minister of Finance and the Minister of Social Development, oppose the application, *inter alia* on the basis that the State cannot afford to spend what it will cost to extend social assistance by allowing men to access the grant from the age of 60 – an approximate amount of R3.3 billion. The respective ministries also argue that they are not discriminating unfairly against the applicants and other men in the position of the applicants in that, they submit, women (as a group in general) have been more disadvantaged than men and tend to use the grant more selflessly than men do so that it is of benefit to the entire family.

We shall return to this case in our concluding submissions.

2 THE ROLE OF THE JUDICIARY IN A CONSTITUTIONAL DEMOCRACY

One of the most vexing questions in post-apartheid South Africa has been what the proper role of the courts and the judiciary is in our new constitutional democracy, particularly with regard to their role as interpreters of the law. It is trite that the Constitution[4] is a transformative document. It promises to heal the divisions and remedy the injustices of the past, and looks towards a better future in which all South Africans can share equally.[5] It promises the creation of a new order. The question that is pertinent to this paper is the boundary of the role the judiciary should play in the transformation of society, in general, and the creation of a new order as envisaged in the Constitution, in particular. In this regard, their judicial role as interpreters of the law is particularly significant. Under the constitutional dispensation before 1994, Parliament was sovereign. The courts did not have a general testing right, and could only enquire into the validity of delegated legislation in terms of administrative review. Judges were regarded as mere mechanical interpreters of the law. Their function was to ascertain the

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3 In terms of s 10 of the Social Assistance Act 13 of 2004, women are able to access the older persons' grant from the age of 60 if they meet the other requirements.

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

5 See the judgment of Mahomed J in *S v Makwanyane* 1995 3 SA 391 (CC) para 262, where he outlines the transformative vision of the Constitution.

intention of the legislature through the text of legislation.[6] Judges could only employ other limited interpretational aids in the event of ambiguity, inconsistency, or if adherence to the ordinary meaning of the text would result in an absurdity. Any modifications, corrections or additions to the text were left to the legislature as the government branch responsible for making law. Value judgments of the content of a statute were irrelevant.

With the enactment of the Interim Constitution,[7] the orthodox approach to interpretation needed to change. The new constitutional dispensation provided for a constitutional system in which the Constitution was supreme, and not Parliament. As such, the entire foundation of the courts' approach to interpretation essentially fell away.[8] The constitutional revolution required a fundamental paradigm shift on the part of judges. Because of the chequered judicial history of the country, it was crucial that judges gained a proper understanding of their new role and function in a constitutional democracy with a justiciable bill of rights. A judiciary that had developed a reputation as executive-minded and conservative, now had to become the guardians of the Constitution and the protectors of the citizenry against abuse by the other branches of government. Judges who had been mechanical interpreters of the law, and who had been instrumental in maintaining the apartheid legal order, now had the constitutional obligation to promote the values which underlie an open and democratic society based on freedom and equality.[9] To this end, judges holding office at the time had to take a new oath to uphold and protect the Constitution and the fundamental rights entrenched therein.[10] Courts were now required to engage not only in the interpretation of statutes, but also interpretation of a supreme constitution with a justiciable bill of rights. The Constitution essentially sanctions a value-based approach to interpretation:

> "The interpretation of the Constitution will be directed at ascertaining the foundational *values* inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental *values* or principles of the Constitution. Constitutional interpretation in this sense is thus primarily concerned with the recognition and application of constitutional *values* and not with a search to find the literal meaning of statutes."[11]

These values are expressed in general terms, as they are of general application. The Constitution provides that it is the role of the judiciary to give specific content to these values in given situations through interpretation.[12] The inevitable

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6 *Bulawayo Municipality v Bulawayo Waterworks Ltd* 1915 CPD 435 445: "The intention of the legislature can alone be gathered from what it has actually said, and not from what it may have intended to say, but has not said."

7 Act 200 of 1993.

8 See *Matiso v Commanding Officer, PE Prison* 1994 3 BCLR 80 (SE) 87F: "The interpretative notion of ascertaining 'the intention of the Legislature' does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature. This means that both the purpose and method of statutory interpretation in our law should be different from what it was before the commencement of the Constitution On 27 April 1994."

9 Section 35(1) (Interim Constitution).

10 Section 241(7) (Interim Constitution) & Schedule 3 (Interim Constitution).

11 *Matiso* 87G–H.

12 Section 35 (Interim Constitution) & s 39. See Mokgoro J's judgment in *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) para 171.

result is judicial lawmaking. Whenever there is any discussion of judicial lawmaking, reference is made to the Roman maxim *iudicis est ius dicere non facere.*[13] It is indeed a sound principle of law that the role of a judge is to speak (interpret) the law, and not to make it. It is a corollary of the well-known doctrine of separation of powers, which forms the basis of the South African constitutional system.[14] In accordance with this doctrine, the branch of government responsible for lawmaking is the legislature, while the judiciary construes, and the executive enforces, the law.[15] The Constitution provides that the judiciary, like the executive, the legislature and all organs of state, is bound by the Bill of Rights.[16] All the branches of government, including the judiciary, must therefore heed the provisions of the Bill of Rights in the exercise of their powers and functions. The courts' responsibility is to some extent more onerous because the courts have the power of constitutional review.[17] The judiciary therefore acts as the conscience of the other branches of government and the organs of state. But what do the functions of the judiciary entail? A crucial question is what role, if any, they should play in the transformation of South African society. Considering historical context, there can be no doubt that the judiciary has an important role to play in the transformation of society. The real question to be addressed is the extent of their involvement. In other words, how creative should judges be in ensuring that certain universally accepted notions are respected by those holding legislative and executive power?[18]

Enoch Dumbutshena, a former Chief Justice of Zimbabwe, argues that the judiciary in a developing country should play an activist role in the transformation of society:

> "The judiciary has the opportunity to create social justice in societies . . . Judges can help to transform disadvantaged sectors of society into advantaged ones. They can do so if they accept judicial activism as a way of promoting justice, equality and social justice. Judges can create new concepts of justice which will enable disadvantaged societies to live full lives and to share the benefits of a new technological world."[19]

As Chief Justice, Dumbutshena actively encouraged the Zimbabwean judiciary to play an activist role in effecting social change through their rulings. A well-known example is the case of *Zimnat Insurance Co Ltd v Chawanda*,[20] where the court highlighted the special role of the judiciary in developing countries:

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13 Tr: "It is the function of the judge to state the law and not make it."

14 For an analysis of the doctrine of separation of powers, see Van der Vyver "The separation of powers" 1993 *SAPL* 177.

15 See generally Hosten *et al Introduction to South African Law and Legal Theory* 2 ed (1995) 428. Section 165 of the Constitution provides that the judicial authority of South Africa is vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply without fear, favour or prejudice.

16 Section 8 of the Constitution.

17 Section 172 of the Constitution states that when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency and may make any order that is just and equitable.

18 Sachs *The Free Diary of Albie Sachs* (2004) 168, 180.

19 Dumbutshena "Judicial Activism in the Quest for Justice and Equity" in Ajibola & Van Zyl (eds) *The Judiciary in Africa* (1998) 188.

20 1991 2 SA 825 (ZSC).

> "Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The judiciary can and must operate the law so as to fulfil the necessary role of effecting such development. It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the Judiciary than by the Legislature. This is because Judges have a certain amount of freedom or latitude in the process of interpretation and the application of the law. It is now acknowledged that Judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process."[21]

Traditionalists would argue that the role of judges should not be typified as that of lawmakers, as their primary role is to interpret the law. The fear is that such a role for the judiciary would see them intruding on the domain of the legislative branch. But the reality is that judges inevitably make law in the new constitutional dispensation. The Constitution gives recognition to this.[22] It is important, though, to note that judicial lawmaking in the form of judicial review is substantially different from the lawmaking function of the legislature. The legislature's lawmaking function is essentially governed by political considerations and preferences as they are ultimately accountable to the electorate. By contrast, a court needs to make a determination as to whether in any given situation, particular law or conduct is permitted by the Constitution, or not. They are accountable to the Constitution, not the electorate. Mahomed J (as he then was) characterised this difference between the judicial and legislative functions as follows in *S v Makwanyane*:

> "The difference between a political election made by a legislative organ and decisions reached by a judicial organ, such as the Constitutional Court, is crucial. The legislative organ exercises a political discretion, taking into account the *political preferences* of the electorate which votes political decision-makers into office. Public opinion therefore legitimately plays a significant, sometimes even decisive, role in the resolution of a public issue such as the death penalty. The judicial process is entirely different. What the Constitutional Court is required to do in order to resolve an issue is to examine the relevant provisions of the Constitution, their text and their context; the interplay between the different provisions; legal precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution; factual and historical considerations bearing on the problem; the significance and meaning of the language used in the relevant provisions; the content and the sweep of the ethos expressed in the structure of the Constitution; the balance to be struck between different and sometimes potentially conflicting considerations reflected in the text; and by a judicious interpretation and assessment of all these factors to determine what the *Constitution* permits and what it prohibits."[23]

Dumbutshena argues that the South African judiciary is uniquely placed to play an important role as social reformers, but that they must be activist in their interpretations of law in order to fulfil this role:

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21 Dumbutshena in *The Judiciary in Africa* 194.

22 Section 173 of the Constitution, for example, gives the higher courts the inherent power to protect and regulate their own process and to develop the common law while taking into account the interests of justice.

23 *S v Makwanyane* para 266. See also *Matiso* 88C–H.

> "[J]udges must use their judicial power in order to give social justice to the poor and economically and socially disadvantaged. South Africa is best equipped to do this. Its bill of rights contains social and economic rights. In interpreting those provisions which protect social and economic rights, judges should remember that they cannot remain aloof from the social and economic needs of the disadvantaged. Through their activism, judges can nudge their governments so that they move forward and improve the social and economic conditions of the poor. In South Africa the bill of rights is, without interpretation, activist in its own right. However, it requires activist judges to make its provisions living realities."[24]

Does the South African judiciary need to be activist, as Dumbutshena contends, in order to give effect to constitutional rights? It is widely acknowledged that the Constitution is a very liberal and an activist document in itself. It affords great power to the judiciary as the guardians of the Constitution to ensure that legislation and conduct of the other branches of government do not stray beyond the boundaries of what the Constitution allows.[25] The Constitutional Court has frequently engaged in the rhetoric of restraint and has clearly expressed its deference to the legislature and executive with regard to policy decisions.[26] This appears to be primarily to allay fears that they may usurp the political functions of the other branches of government. There are compelling reasons why the different functions of each branch of government should be kept separate. The judiciary generally lacks the knowledge, experience, and expertise necessary to decide matters reserved for the legislature or the executive. As explained by Sachs J in *Du Plessis v De Klerk*:

> "The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/ enforcement capacities, implementation strategies and budgetary priority decisions, which appropriate decision-making on social, economic and political questions requires. Nor does it permit the kinds of pluralistic public interventions, press scrutiny, periods for reflection and the possibility of later amendments, which are part and parcel of Parliamentary procedure. How best to achieve the realization of the values articulated by the Constitution, is something far better left in the hands of those elected by and accountable to the general public, than placed in the lap of the courts."[27]

The danger with this situation is that it inevitably amounts to a judgement call on the part of the court as to whether a particular matter falls within the purview of the judiciary, or the legislature or the executive, which in itself is a politically loaded decision:

> "The question, then, is . . . what spheres of decision-making belong in the first place to Parliament, and what to ourselves. This is therefore a question of separate but complementary powers as well as one of separate but complementary judicial functions. Should we be in effect legislating on matters of great social and political

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24 Dumbutshena in *The Judiciary in Africa* 188.

25 See Howie "Judges and Law Reform: Judicial Creativity or Judicial Activism" (2005) paper presented at the Association of Law Reform Agencies of Eastern and Southern Africa www.doj.gov.za/alraesa/conferences/papers/s3A_howie.pdf (accessed 10-08-2007).

26 On the question of deference in the context of remedies for the breach of constitutional rights and obligations see Budlender "Remedying Breaches of the Constitution" in Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006) 91.

27 1996 5 BCLR 658 (CC) para 178.

> concern, leaving it to Parliament to fill in the gaps between our judgments, or should Parliament have the principal task of deciding on appropriate legal rights and duties, with ourselves basically standing as sentinels to ensure that Parliament does not stray beyond the framework within which the Constitution requires it to function?"[28]

Any judiciary that "legislates" and leaves it to Parliament to "fill in the gaps", to paraphrase Sachs J, is an activist judiciary.[29] The problem with an activist judiciary is that it essentially usurps the political functions of the legislature:

> "The Constitution contemplates a democracy functioning within a constitutional framework, not a dikastocracy within which Parliament has certain residual powers. The role of the courts is not effectively to usurp the functions of the legislature, but to scrutinize the acts of the legislature. It should not establish new, positive rights and remedies on its own. The function of the courts, I believe, is, in the first place, to ensure that legislation does not violate fundamental rights, secondly, to interpret legislation in a manner that furthers the values expressed in the Constitution, and, thirdly, to ensure that common law and custom outside of the legislative sphere is developed in such a manner as to harmonise with the Constitution. In this way, the appropriate balance between the legislature and the judiciary is maintained."[30]

When interpreting socio-economic rights in line with the framework described above, exactly when should a court override the legislature and prevent them from pursuing the policy of their choice in order to facilitate the transformation of society?[31] As Lenta puts it, this question cannot be answered "solely by reflection on the role of the judiciary, because such reflection would take place at a level of generality and abstraction whose distance from the political urgencies of particular cases would render it insufficient for this purpose".[32] This in essence means that a determination as to whether a matter falls within the purview of the judiciary or not is a matter to be decided on a case by case basis without a "theory of when".[33] This, however, could potentially result in judicial pragmatism, whereby matters are decided on an individualistic basis without proper regard being had to the doctrine of judicial precedent.[34] The Constitutional Court has avoided answering the "when question" by confirming that the Constitution

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28 *Du Plessis v De Klerk* para 180. See also *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) para 155: "[T]he Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary." See also Ackermann "Opening Remarks on the Conference Theme" in Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2005) 8–12 on whether the real question is one of "balance" or, in fact, "delineation".

29 *Du Plessis v De Klerk* para 178.

30 *Du Plessis v De Klerk* para 181.

31 See, in general, Liebenberg "The Judicial Enforcement of Social Security Rights in South Africa" *Social Security as a Human Right* (2007) 69–90.

32 Lenta 2004 *SAJHR* 555.

33 See fn 1 above.

34 In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), the court held that the question of how socio-economic rights can be enforced is a difficult one which should be decided on a case-by-case basis and that to do so, it is necessary first to consider the terms and context of the relevant constitutional provisions and their application to the circumstances of the case (para 20).

envisages a "restrained and focused role for the Courts", whereby the courts would evaluate the reasonableness of the measures taken by the State to meet its constitutional obligations.[35]

3 EVALUATING REASONABLENESS

A great deal has been written about South Africa's landmark Constitutional Court cases dealing with the rights to emergency medical treatment, housing, health care and social assistance.[36] It is not necessary to repeat all the facts of these cases although some of the legal principles which have emanated from them are vital for a consideration of the argument presented.

The Constitutional Court laid the foundations for its future adjudication of socio-economic rights in the *Grootboom* case, and it is the *ratio decidendi* of this case which informed the decisions in both the *TAC* and *Khosa* cases.[37] The obligation of the State, according to the Court, is to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.[38] The real question in terms of the Constitution is whether the measures taken by the State to realise the right are reasonable.

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. A wide range of possible measures could be adopted by the State to meet its obligations, many of which would meet the requirement of reasonableness.[39] The legislative measures have to be implemented and with due regard to the urgency of the situation it is intended to address.[40] Those in desperate need are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives.[41] Furthermore, in order to achieve effective implementation, it is essential that a reasonable part of the budget be devoted to this, but the precise allocation is for national government to decide in the first instance.[42]

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35 *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 38.

36 These cases are *Grootboom*, *TAC*, *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 1 SA 765 (CC), and *Khosa v Minister of Social Development* 2004 6 BCLR 569 (CC). See, for example, Liebenberg "South Africa's Evolving Jurisprudence on Socio-Economic Rights" 2002 *Law Democracy and Development* 159; Wesson "*Grootboom* and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court" 2004 *SAJHR* 284; Brand "Between Availability and Entitlement: The Constitution, *Grootboom*" 2003 *Law Democracy and Development* 1; Heywood "Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health" 2003 *SAJHR* 278; Welz "Judicial Restraint and the Enforcement of Socio-economic Rights in the Constitutional Court: A Comment on *Minister of Health and Others v Treatment Action Campaign and Others*" 2002 *Speculum Juris* 312; Pillay "Implementation of *Grootboom*: Implications for Enforcement of Socio-Economic Rights" 2002 *Law Democracy and Development* 255.

37 Wesson 2004 *SAJHR* 285.

38 *Grootboom* para 24.

39 *Grootboom* para 41, quoted with approval in *Transnet Ltd t/a Metrorail and Others v Rail Commuters Action Group and Others; Rail Commuters Action Group and Others v Minister of Safety and Security and Another* 2003 4 All SA 228 (SCA).

40 *Grootboom* para 67.

41 *Grootboom* para 44.

42 *Grootboom* para 66.

Both the content of the obligation in relation to the rate at which it is achieved, as well as the reasonableness of the measures employed to achieve the result, are governed by the availability of resources. There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.[43]

It is submitted that in attempting to answer the posed question of "when" courts are likely to find the State's conduct to be unjustifiably unreasonable, the issues of desperateness and the budgetary implications of an application pressing for the realisation of socio-economic rights assume additional importance. As a prelude and aid to considering this argument, it is relevant to consider *how* courts often come to their findings in these difficult cases.

4 HOW DO JUDGES DECIDE?

How do judges in fact make the difficult decisions which academics and others perpetually agonise about and debate? Is it always the case that judges analyse all the facts and the law before coming to a finding which they then put to paper or, in reality, is it that they make an initial "gut-feel" judgment and then look for arguments, evidence and law to substantiate their feeling? Can judges deny that they are, on occasion, swayed by the desperateness of the plight of the applicants before them and that this plays a role in their ultimate finding?[44]

Legal realists have argued from the 1920s that, contrary to legal formalist beliefs, judges do not primarily decide cases on the basis of legal rules or principles.[45] What is decisive is actually how the facts of the case strike the judge and what seems just or adequate on this basis.[46] Later studies have apparently

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43 *Grootboom* para 46.

44 It is by means of judicial activism (through the allowance of public interest litigation) and a broad interpretation of the fundamental right to life (by indirectly reading directive principles into this right) that the Supreme Court in India has been able to give effect to the more important directive principles contained in their constitution in certain cases. But the distinction between cases where the courts have deemed it fit to grant applicants relief and the cases where remedies have been rejected is also a fine and controversial one. What causes Indian courts to apply directive principles in circumstances where they do not have to? One part of the answer to this question is that some cases of injustice are so serious that they clearly require judicial intervention. The Indian courts appear to be more than happy to oblige with a favourable judgment in such cases, using whichever section of the Constitution is most appropriate (often coupled with extensive and lucid commentary on the pertinent issues). If this argument is accepted, then the crux of the matter becomes deciding *which cases require serious judicial intervention*? What is beyond dispute is that it is the judges in India who are deciding the outcome of this question in each and every case. See Govindjee "Lessons for South African Social Assistance Law from India: Part 1 – The Ties that Bind: The Indian Constitution and Reasons for Comparing South Africa with India" 2005 *Obiter* 575 594.

45 Leiter "Legal Realism" in Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (1996) 261–279, as quoted in Gloppen "Social Rights Litigation as Transformation: South African Perspectives" in Jones and Stokke (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 155.

46 *Ibid*. According to Gloppen, which strategy a judge or bench opts for depends partly on the nature of the case, how it is argued, and on how the judge perceives the issue at stake in terms of the facts and the law. Cf Sachs *The Free Diary of Albie Sachs* 171, 206 who argues that judges do not simply follow their personal preferences in answering difficult human rights questions, but rely on a number of objective guides, starting with the text of

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documented the importance of a judge's class, race and gender, for example, as determinants of legal practices.[47]

Judges will not easily admit to taking strategic or practical considerations into account in drawing their conclusions. Roux argues that, on the basis of the Constitutional Court's position *vis-à-vis* political society, we might expect judgments to continue generally affirming and supporting the political position of the government on the one hand, while containing limited, yet highly visible, challenges to State policies on the other.[48]

According to Justice Anthony Kennedy of the United States Supreme Court, when writing an opinion, judges convert their initial judgment into words and then see if what has been written is logical, reasonable and compatible with law and with their conscience as a judge. It would appear that Justice Kennedy writes his opinion "in the light of his ultimate conviction of what is right".[49] In socio-economic rights cases, where it is not easy to decide what is right, and where the boundary of the courts' willingness to interfere with State policy is being reached, it may increasingly be this "ultimate conviction" of the judge which becomes decisive and around which reasons are formulated, arguments developed and evidence accepted, rather than the other way around. It is precisely at this juncture that the role played by the desperateness of the case and the budgetary impact of a judgment in favour of the applicants may be more influential than the other factors mentioned above in helping a court to decide what is reasonable where it is difficult to balance the needs of people with the limited resources of the State.

5 BALANCING THE BUDGET IN CASES OF DESPERATE NEED

It must be argued that the test for reasonableness would be meaningless if judicial assessment of budgetary allocation was not allowed, and if all budgetary matters were left completely in the hands of Parliament. The boundary of the court's role must extend at least beyond this. It is also arguable that the situation may arise in the future that the allocation by a government ignores the founding principles of the Constitution, and this will require the court to act as an effective check from the outset. This involves a judicial assessment of budgetary allocation and should be defendable as part of the test of reasonableness because of South Africa's *constitutional* democracy – the State, when making budgetary determinations must act constitutionally or be sanctioned by the court. Guidelines drawn up in the wake of budget constraints must be reasonable.[50]

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the Constitution and other legal instruments and, further, that the judicial way can never be an arbitrary, self-invented one, but is in fact mapped out by the judicial will which is something guided by "time-honoured and constantly evolving principles of justice".

47 Baumgartner "The Sociology of Law" in Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (1996) 406–420, as quoted in Gloppen "Social Rights Litigation as Transformation: South African Perspectives" in Jones and Stokke (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 155.

48 Roux "Understanding *Grootboom* – A Response to Cass R. Sunstein" *Constitutional Forum* 12 as quoted in Gloppen "Social Rights Litigation as Transformation: South African Perspectives" in Jones and Stokke (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* 173.

49 As quoted in Sachs *The Free Diary of Albie Sachs* 197.

50 Olivier, Smit & Kailula *Social Security: A Legal Analysis* (2003) 94.

Similarly, Liebenberg has questioned the extent to which the courts' decisions will be allowed to impact on budgets.[51] She correctly identifies this as being a critical question in situations where litigants challenge the absence of a programme that they contend is essential to the realisation of a particular socio-economic right.[52] Importantly, such a challenge is possible within the framework of the test set in *Grootboom*, namely that such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets.[53] In other words, the argument does not seek to suggest that the judiciary is in a better position to determine budgetary allocation.[54] The point is rather that judges should be able to pronounce upon the constitutional invalidity of a specific allocation and direct the State to reconsider the policy in question.[55] Where courts are evaluating the reasonableness of State policies relating to housing, health services, food, water and social security, the Constitution itself mandates the court to consider whether progressive realisation is occurring in the light of the resources available to the State.[56]

In *Soobramoney*,[57] the court held that the obligations imposed on the State by ss 26 and 27 of the Constitution dealing with the right of access to housing, health care, food, water and social security were dependent upon the resources available for such purposes, and the corresponding rights themselves were limited by reason of the lack of resources.[58] Given this lack of resources and the significant demands made on them by high levels of unemployment, inadequate social security and a widespread lack of access to clean water or to adequate health services, an unqualified obligation to meet these needs was considered to be incapable of being fulfilled at the time of the case.[59]

It is also clear from *Soobramoney* that the financial burden of providing health care services to "everyone", as mandated by the Constitution, weighed heavily with the court.[60] The cost of the State treating one chronically ill patient by means of renal dialysis was in the region of R60 000 per annum. As a result, it had to be accepted that if all people in South Africa who suffered from chronic renal failure were provided with dialysis treatment, the cost of doing so would make substantial inroads into the health budget. Furthermore, if this principle was applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have had to increase to the prejudice of

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51 Liebenberg "South Africa's Evolving Jurisprudence on Socio-Economic Rights" 2002 *Law Democracy and Development* 159 179.

52 *Ibid*.

53 *Grootboom* para 38.

54 States have the right to decide where and how they allocate their resources in the first instance: *Grootboom* para 66.

55 Fabre *Social Rights under the Constitution: Government and the Decent Life* (2000) 185. The distinction on which this argument rests is an important one, according to Fabre. Giving the courts the power to tell the government to do "x" does not entail giving them the power to tell them how to do it. In other words, for the government to be under a duty to do "x" does not imply that the government is under a duty to do "x" in a certain way.

56 Section 26(2) and s 27(2).

57 1998 1 SA 765 (CC).

58 Para 31.

59 Para 11.

60 Para 28.

other needs which the State had to meet.[61] Consequently, the Court rejected the argument that everyone requiring life-saving treatment that was unable to pay for such treatment was entitled to have the treatment provided at a State hospital without charge.[62]

While the situation of the applicant in *Soobramoney* was clearly extremely urgent in that it involved the applicant's life, the court was able to overrule this consideration with reference to the budgetary factors described above. Giving *everyone* adequate housing in *Grootboom* would have had catastrophic budgetary implications, and was not even an option seriously considered by the court. However, the desperate need of the respondents, caused by the "lamentable" conditions in which they lived, may have played a greater role in this case:

> "The housing situation is desperate. The problem is compounded by rampant unemployment and poverty. As was pointed out earlier in this judgment, a quarter of the households in Wallacedene had no income at all, and more than two-thirds earned less than R500 per month during 1997. As stated above, many of the families living in Wallacedene are living in intolerable conditions. In some cases, their shacks are permanently flooded during the winter rains, others are severely overcrowded and some are perilously close to busy roads. There is no suggestion that Wallacedene is unusual in this respect. It is these conditions which ultimately forced the respondents to leave their homes there."[63]

Despite this, the Court refused to allow the "special circumstances" of the respondents to result in a finding that they be entitled to some form of temporary housing relief:

> "Although the conditions in which the respondents lived in Wallacedene were admittedly intolerable and although it is difficult to level any criticism against them for leaving the Wallacedene shack settlement, it is a painful reality that their circumstances were no worse than those of thousands of other people, including young children, who remained at Wallacedene. It cannot be said, on the evidence before us, that the respondents moved out of the Wallacedene settlement and occupied the land earmarked for low-cost housing development as a deliberate strategy to gain preference in the allocation of housing resources over thousands of other people who remained in intolerable conditions and who were also in urgent need of housing relief. It must be borne in mind, however, that the effect of any order that constitutes a special dispensation for the respondents on account of their extraordinary circumstances is to accord that preference."[64]

Whether or not this finding was based, at least in part, on the budgetary impact such an order would have had, is unclear from the judgment. Assuming that the court followed the approach mentioned by Kennedy in coming to an "ultimate conviction" to help the respondents (due to the desperateness of their situation) before substantiating this "gut feeling", it may be argued that the finding that the State housing programme in the area of the Cape Metropolitan Council was unreasonable followed a decision to award a remedy which did not contain massive budgetary implications.[65]

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61 Para 28.
62 Para 14.
63 *Grootboom* para 59.
64 Paras 80 and 81.
65 The court must consider the effect of its order on society at large: De Waal & Currie *The Bill of Rights Handbook* (2005) 195.

A good illustration of the suggested relationship between desperate need and budgetary impact is in the *TAC* case.[66] In this case, the cost of Nevirapine for preventing mother-to-child transmission of HIV was not an issue and was admittedly within the resources of the State:

> "In evaluating government's policy, regard must be had to the fact that this case is concerned with newborn babies whose lives might be saved by the administration of Nevirapine to mother and child at the time of birth. The safety and efficacy of Nevirapine for this purpose have been established and the drug is being provided by government itself to mothers and babies at the pilot sites in every province. The administration of Nevirapine is a simple procedure. Where counselling and testing facilities exist, the administration of Nevirapine is well within the available resources of the State and, in such circumstances, the provision of a single dose of Nevirapine to mother and child where medically indicated is a simple, cheap and potentially lifesaving medical intervention."[67]

The seriousness of the HIV/AIDS pandemic and the plight of those children affected clearly outweighed any cost implications. According to the Court:

> "The provision of a single dose of Nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential. Their needs are 'most urgent' and their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are 'most in peril' as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to Nevirapine."[68]

In *Khosa*'s case, the court held that where the declaration of invalidity of impugned legislation could have significant budgetary and administrative implications for the State, the necessary evidence was to be placed by the government before the courts, failing which the constitutional scheme itself was placed at risk.[69]

The government argued, *inter alia*, that it held a financial concern in limiting the cost of social welfare. This was highlighted by way of an affidavit deposed to by the Chief Director of Social Services in the National Treasury, which indicated that the additional annual cost of including permanent residents in the receipt of grants in terms of the relevant sections could range between R243 million and R672 million.[70] With respect to this argument, although the Court accepted the concern that non-citizens may become a financial burden on the country as being *bona fide*, it drew a distinction between non-citizens who had become part of society in South Africa (and who qualified as permanent residents) and those who had not made their permanent homes in this country and who could validly be excluded from State protection in the event of need. Despite there being no clear evidence to illustrate the extent of the additional

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66 2002 5 SA 721 (CC).

67 *TAC* paras 71–73. At the time the proceedings were instituted, the provincial health authorities charged with the responsibility of implementing the programme for testing and counselling attributed their failure to do this to constraints relating to capacity. The question whether budgetary constraints provided a legitimate reason for not implementing a comprehensive policy for the use of Nevirapine, including testing and counselling, was disputed but the court did not deal with this issue: para 116.

68 Para 78.

69 *Khosa* para 19.

70 *Khosa* para 60.

cost of providing social assistance to aged and disabled permanent residents, the majority utilised the speculative figures provided by the State to find, on the State's own version, that there was no support for the contention that there would be an unreasonable cost in making provision for permanent residents.[71]

The applicants in this case were destitute and would have qualified for social assistance under the Social Assistance Act[72] but for the fact that they were not South African citizens.[73] Mokgoro J held, on behalf of the majority, that:

> "As far as the applicants are concerned, the denial of the right is total and the consequences of the denial are grave. They are relegated to the margins of society and are deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution. Denying them their right under s 27(1) therefore affects them in a most fundamental way. In my view this denial is unfair."[74]

The court's judgment may again be understood solely by weighing the competing considerations of the circumstances of the applicants against the budgetary implications of an order extending provisions of the Social Assistance Act to permanent residents.

6 CONCLUSION

Because of the nature of the Constitution, it is not necessary for the South African judiciary to be activist in order to give effect to socio-economic rights. On the contrary, the difficult cases which have policy and budgetary implications (and which courts generally try to avoid where possible) are rightly coming before South African courts because of the delineation of functions mandated by the Constitution itself and because this may be the only available forum for applicants, desperately in need, to obtain some relief. Although courts may preach that they need to show restraint and deference to the other branches of government when faced with such matters, when appropriate they have taken up the practice of declaring law and conduct inconsistent with the Constitution to be invalid, thereby facilitating the transformation of society. Predicting the boundary of this involvement requires answering the question as to precisely when a court should override the legislature and prevent them from pursuing the policy of their choice and when it cannot do so.

Sachs asks whether the twenty-first century will be the one when the judiciary ensures that both the executive and Parliament function within the parameters of basic constitutional values and norms.[75] He argues that the reality is often that institutions of democracy do not serve the purposes for which they were created and that this results in courts having to make very difficult decisions which the legislature, for example, is unable to align with the Constitution.[76]

It must be appreciated that a determination as to whether a matter falls within the purview of the judiciary or not is a matter to be decided on a case by case

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71 *Khosa* para 62. Once the unconstitutionality of the citizenship requirement in respect of child grants had been conceded, the figures before the Court indicated an increase of less than 2% on the cost of social grants on the State's higher estimate.

72 Act 59 of 1992.

73 *Khosa* para 3.

74 *Khosa* para 77.

75 Sachs *The Free Diary of Albie Sachs* 206–207.

76 *Ibid*.

basis without a "theory of when". To establish their legitimacy as a legal institution *vis-à-vis* the political authorities, courts have had to strike a balance – neither giving up on social rights nor meddling unduly in policy issues.[77] It may appear that a court ruling which, in effect, tells the State how to allocate its budget would intrude on the legislature's domain in an unacceptable way which threatened the separation of powers. However, undue reliance on the doctrine of formal separation of powers is problematic when it comes to finding the balance amongst the rights of different groups:

> "[I]t will be the democratic institutions that will try to achieve an appropriate balance. But frequently these institutions will exercise their powers in a disproportionate way, overbalancing towards the state and going well beyond what is necessary to serve a legitimate public interest. They will limit the fundamental rights of individuals and communities far more than good government and the public interest really require. In these cases the courts will intervene, not to prevent the democratic institutions from doing their constitutionally mandated work, but to ensure that they exercise their powers within the limits that the Constitution requires."[78]

The Constitutional Court has settled on evaluating the reasonableness of measures taken by the State to realise socio-economic rights as an aid to deciding whether the clock should strike for valour or caution in these cases.[79]

Grootboom provides a number of factors which should be considered in evaluating reasonableness.[80] The availability of resources and the budgetary implications of an application pressing for the realisation of socio-economic rights, together with the desperateness or urgency of the applicants' position, may assume greater importance in these cases – especially if it is accepted that judges often do decide difficult issues with reference to their "ultimate conviction of what is right".

According to Bilchitz, preference should be given to those whose mere survival is threatened, based upon the simple premise that people who are desperately in trouble require assistance from the government as a matter of priority.[81] Bilchitz uses "urgency" as a method of differentiating between cases where a court should assist an applicant and cases where it cannot due to resource constraints.[82] A paradigm developed by Bollyky may assist this argument. According to Bollyky, if a remedy (R) requires extensive policy (P) and budgetary choices (B), the court will only make them for a constitutional violation (C) which is proportionately extensive – described algebraically as R if $C > P + B$.[83] Similarly, it may be argued that courts are more likely to find legislative or other measures designed to give effect to socio-economic rights to be unreasonable if

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77 Gloppen in Jones and Stokke (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* 171.

78 Sachs *The Free Diary of Albie Sachs* 207.

79 See Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" 2003 *SAJHR* 1.

80 Also see Wesson 2004 *SAJHR* 284; Brand 2003 *Law Democracy and Development* 1.

81 Bilchitz 2003 *SAJHR* 1.

82 *Ibid*.

83 Bollyky "R if C > P + B: A Paradigm for Judicial Remedies of Socio-Economic Rights Violations" 2002 *SAJHR* 161–201.

the desperateness of the situation faced by the applicants challenging these measures outweighs the budgetary implications of the remedy sought.[84]

The Constitutional Court seems to have used similar methodology in reaching its decision in *Khosa*. In this case, the court had little hesitation in holding that the importance of providing access to social assistance to all who lived permanently in South Africa (and the impact upon life and dignity that a denial of such access has) "far outweighs the financial and immigration considerations on which the state relies".[85] This case is a good example of the court rejecting the State's argument that budgetary constraints prevent it from complying with a socio-economic constitutional obligation. In this way, the court has effectively directed the State to re-allocate or "find" some resources to comply with its orders, notably in cases where the applicants were urgently in need of some relief. Conversely, in *Soobramoney* the court's view has been seen as supporting the premise that matters with significant budgetary implications belong in the political domain, rather than under the court's jurisdiction.[86] Finding the boundary between these situations is the difficulty.

The case of Christian Roberts, leaving aside the challenge on the right to equality, will turn on whether the State has taken reasonable measures, within its available resources to achieve the progressive realisation of the applicants' rights to social assistance. In favour of the applicants' argument will be the averment that the State's current social assistance programme excludes a "significant segment of society" – to wit, males between the ages of 60 and 65. Adopting the approach outlined above, however, a perceived lack of desperate need on the part of the applicants (who may be unable to claim that they form part of a group of people "most urgently" in need) and, more importantly, the massive budgetary implication the remedy sought entails, will count against the court finding the State programme to be unreasonable.[87] The State also appears to have learnt a lesson from the *Khosa* case, and has placed abundant evidence before the Court supporting its inability to meet the financial consequences of a judgment in favour of the applicants. Therefore, the case of Christian Roberts may, like the *Soobramoney* case, fall beyond the boundary of the Court's willingness to make judgments which have budgetary implications and which accelerate social change.[88]

O'Regan J, speaking at a World Jurist Association conference in 1998, makes it clear that the law, and by implication the judiciary, can contribute to social change, but that there are many other factors that also influence changes in

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84 The importance of the choice of remedy is well explained by Budlender in the context of the court's reticence on this issue in the *TAC* case, probably as a result of concern about political over-reaching: Budlender "Remedying Breaches of the Constitution" in Klaaren (ed) *A Delicate Balance* 97.

85 *Khosa* para 82.

86 Gloppen in Jones and Stokke (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* 167.

87 See Wesson 2004 *SAJHR* 97, 102.

88 Budlender refers to the excessive deference shown by the courts to the state in the *TAC* case (as far as the choice of remedy was concerned) as being caused by political concern on the part of the court that it had "gone as far as its strategic view would permit" and was "indeed seeking to find a delicate balance": Budlender "Remedying Breaches of the Constitution" in Klaaren (ed) *A Delicate Balance* 97.

society.[89] Every branch of government must do its fair share in honouring its constitutional obligations. In her own words:

> "In recognising that the courts have the power to determine whether their [the legislature's and the executive's] actions are in breach of the Bill of Rights or not, sight must not be lost of the importance of members of the legislature and the executive honouring their own constitutional obligations with integrity. To focus entirely upon the courts' development of constitutional rights is to focus upon the pathology of constitutionalism. A sound constitutional state must be based upon a daily recognition of their constitutional commitments by all who exercise public power."[90]

The implication is that meaningful change as envisaged in the Constitution will only be effected if each branch of government complies with its constitutional commitments and obligations. Although the courts, in particular the Constitutional Court, have an important role to play as agents of societal transformation, it is not their primary function. In the final analysis, what happens in the courts is ultimately not determinative of social reality.[91] The involvement of all the other branches of government and all of society is necessary to effect the changes that the Constitution and South African society so clearly wants and desperately needs. The buck, ultimately, does not stop with the judiciary. The responsibility for the success of the constitutional experiment is, in the final analysis, a collaborative venture between the branches of government and society in general.

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89 O'Regan "The Enforcement and Protection of Human Rights: The Role of the Constitutional Court in South Africa" in Ajibola & Van Zyl (eds) *The Judiciary in Africa*.

90 O'Regan in *The Judiciary in Africa* 14.

91 O'Regan in *The Judiciary in Africa* 16.

Conceptions and Misconceptions of Justice in the Administration of Law: A Reflection on Contextual, Procedural and Substantive Issues

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1 INTRODUCTION

The adoption of the Constitution[1] heralded the beginning of a new social and political order for South Africa, and closed one of the darkest chapters in the history of this nation, and humanity in general. Twelve years have passed since its adoption, but this is a relatively short period for the legacy of the past to be completely eradicated and a new democratic culture to emerge. The apartheid system which prevailed for almost half a century, reminded the Truth and Reconciliation Commission,[2] was "evil, inhumane and degrading . . . amongst its many crimes, perhaps its greatest was the power to humiliate, to denigrate, and to remove the self-confidence, self-esteem and dignity of millions of its victims". Therefore, our democracy and various institutions founded on it remain fragile and need to be carefully nurtured and understood. A Constitution is a legal framework: it does not build houses; it does not provide welfare or education; but it does provide an important consensus on how society should be organised, and how it should be governed and transformed. In the much celebrated words of the late Ismael Mahomed, then Judge of the Constitutional Court:

> "All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the national ethos which define and regulate that exercise; and the moral and ethical direction which that nation has identified for its future."[3]

Through the Constitution, we have, together as South Africans, defined the goals and aspirations as to:

- Heal the division of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Improve the quality of life of all citizens and free the potential of each person; and

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1 Constitution of the Republic of South Africa, 1996.
2 See *Final Report of the Truth and Reconciliation Commission* Vol 1, Chapter Two (1998) para 44.
3 *S v Makwanyane* 1995 6 BCLR 665 (CC) para 262.

- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.[4]

We have also defined our values as:

- Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- Non-racialism and non-sexism.
- Supremacy of the Constitution and the Rule of Law.
- Universal adult suffrage, a national common voter's roll, regular elections and multi-party system of democratic government to ensure accountability, responsiveness and openness.[5]

These values are made more explicit in Chapter 10 of the Constitution, under the heading "Basic Values and Principles governing Public Administration".

The centre piece of our Constitution is the Bill of Rights[6] and the institutions engineered to support this Bill and democracy as a whole.[7] The Constitution, and the Bill of Rights in particular, will continue to have profound effect and influence on our life and actions and therefore its content and context must be understood by all South Africans, particularly those charged with the responsibility of the administration of justice.

Signs are beginning to emerge of various challenges that beset the task of building the new democratic society, as well as threats to the respect for law and the legitimacy of the legal system itself. This situation is likely to be exacerbated if the application and interpretation of the law is not sensitive and responsive to the needs and aspirations of a transforming society, and if society does not transform fast enough.

The intensity of legislation and the spate of qualitatively new laws passed since the adoption of the Constitution affect every sphere of life of every South African. In addition to legislation passed to give breadth and depth to the principles enunciated in the Constitution, such as equality,[8] fairness in administrative actions,[9] and access to information,[10] legislation has been effected in the domestic sphere[11] and in the workplace.[12] The application of this new breed of legislation requires a new reorientation and judicial mind that is sensitive to the aims of justice, having regard to our own peculiar past history. Indeed, justice requires not only the application of the law to a particular set of facts, however logical the legal reasoning may be, but a carefully considered view of whether the application of the law would ultimately lead to justice.

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4 Preamble to the Constitution.
5 Section 1 of the Constitution.
6 Chapter 2 of the Constitution.
7 These are referred to as "Chapter 9 institutions", and consist of: the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission.
8 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
9 Promotion of Administrative Justice Act 3 of 2000.
10 Promotion of Access to Information Act 2 of 2000.
11 Domestic Violence Act 116 of 1998.
12 Employment Equity Act 55 of 1998.

2 CONCEPTIONS AND MISCONCEPTIONS OF JUSTICE

In an article entitled "White Laws Black People", John Goldring[13] describes how the application of oppressive laws to the Australian aborigines led to feelings of injustice and discontent, and affected the political system. Black aboriginal people were used as an instrument of social control and quite often abused. The control was used in order to require the black people to conform to the social and moral norms of the white society, which makes the laws. Goldring argued that if the white society is racist, this racism will undoubtedly be expressed both in the substance of the laws and in their operation. Undoubtedly, the same situation prevailed in South Africa.

South Africa is a society in transition from a repressive racist regime to a democratic dispensation were the laws as outlined above affirm dignity, equality, non discrimination and non-sexism. However, intervention by legislation alone is neither sufficient to guarantee justice nor restore the trust, confidence and respect for the law and the legal institutions involved in the administration of justice. This is due to a number of reasons. First, law is but one form of social phenomenon; power, politics and religion may not always exist in harmony with the imperatives of the law. Secondly, the continued existence of the legacy of the past apartheid era frustrates transformation and the attainment of substantive equality. This is aptly captured by the Constitutional Court[14] in these words:

> "It is necessary to comment on the nature of substantive equality, a contested expression which is not found in either of our Constitutions. Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."

In South Africa today, we too often witness the resurgence of increasing incidences of both nascent and blatant racism, discrimination, xenophobia and intolerance very much reminiscent of the apartheid era, and this is leading to disenchantment in many South African communities. Similarly, the high levels of crime that many South Africans face raise difficult legal, political and social problems that are not always adequately addressed. Recently, in a much televised address, Archbishop Desmond Tutu, a revered peace laureate, made some scathing remarks about disrespect for the law by many South Africans and that the country was losing its "moral leadership".[15]

Writing on this same dilemma, Philbin, in an article entitled "Justice: A Lady in Distress" states:

> "The vexatious and even insipid equality, if not the quantum, of community disenchantment may be appreciated by a perusal of some of the simplistic criticisms being hurled at our Lady. Some carping voices chorus that She is blindfolded because She cannot bear to witness the injustice perpetrated in Her name, while others claim that Her eyes are not merely covered but She is completely blind to the machinations and manipulations of corrupt opportunists operating under Her

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13 1973 *The Australian Quarterly* 5.
14 *NCGL v Minister of Justice* CCT 11/98 para 61.
15 CNN News, September 2006.

> very nose. Some idealists believe that Her sword is used to smite the wicked, while the antithetical viewpoint is simultaneously voiced that She uses her cutlery only to skewer the common man and to protect monolithic vested interests. Legal abstractionists believe that She carries the scales to symbolize the balancing of policy interests and the weighing of evidence for the universal good. But bitter invective is also audible claiming that Her scales are used to direct judgments in favor of those who deposit the greatest amount of gold in the balance."[16]

The second challenge arises from the intensity of litigation. Democracy has opened the doors of freedom and space to all South Africans, something which was hitherto a preserve of the white minority. The language of rights is a powerful language, as it carries the passion of justice, equality, and the hope for a better and more secure life. If not carefully directed or if abused, the rights discourse can be a dangerous weapon and may work against the very ends of justice. Rights must be advanced sensibly with duties and responsibilities given equal prominence. In the same vein, the exercise of rights may be limited in the interest of protecting the rights of others or of society. What should or should not be recognised as "rights" protected by law or the Constitution creates difficulty for the judiciary and wider society as many interests masquerade or vie for recognition as "rights". For example, the right to terminate pregnancy or same-sex marriages may touch on deep seated cultural, moral or ethical considerations and the debate on these issues is far from being settled.

Not so long ago, the *Sunday Times*[17] carried a lead article on the front page titled: "Cats, dogs and budgies to get a Bill of Rights". A cartoon accompanying the article had a caged animal telling another one that was peeping from outside: "I demand to speak to my lawyers." Britain wanted to introduce at that time legislation that would have effectively given rights to animals and simultaneously imposed a duty of care on their owners – and, perhaps even more troubling, the courts would have found themselves having to administer the law to new legal *personae*!

A rapidly transforming society requires policy and corresponding legislative intervention in many economic and social spheres. In this process, law must be carefully directed, controlled and administered otherwise it would be rendered ineffective and will not be respected. However, law is essentially conservative, *status quo* oriented and maintained by a culture of its own through the training and attitudes of judges and by the legal system and procedures administered. The law therefore tends to resist changes which disrupt the *status quo*, property and vested interests, and this is amply demonstrated by the land question in South Africa. In legal parlance, change must be peaceful and gradual: it must ensure stability, and conform to the "Rule of Law" and the principle of "legality."[18] But in the process of dislodging systemic inequalities and racial discrimination, attitudes and practices deeply embedded in legal structures over four centuries, the Rule of Law and legality may have to suffer. Equally, judges may face difficulties in reconciling the principle of "legality" and policy requirements, and this may invite friction with the executive and legislative arms of government. This friction has lately surfaced over a number of court cases such as those involving

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16 1973 *San Diego LR* 280.

17 *Sunday Times* (London) 28-04-2002 2.

18 See Rembe "Law and Transformation of Society: The Use of Law in Tanzania's Socialist Development" *Symposium on Knowledge of Law in Africa* (1983) 267.

the administration of neviripine and the implementation of various court orders in the Eastern Cape Province.[19] In the case of *Minister of Health v Treatment Action Campaign*,[20] the Court ruled:

> "South African Courts have a wide range of powers at their disposal to ensure the Constitution is upheld. These include mandatory and structured interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the Legislature and the Executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, Courts may and, if need be, must use their wide powers to make orders that affect policy as well as legislation."

Disrespect for the legal system is the dagger of national suicide, and according to some, is entrenched by two major manifestations: firstly, by criticism that the courts are too lenient with criminals, placing their rights above those of society; and secondly, by overt acts of disobedience using coercion to enforce alleged rights and selectively obeying only "just laws".[21]

In South Africa there is a growing public outrage over lenient sentences passed by magistrates and judges for serious crimes such as murder, rape, or those perceived to be racially motivated. An 18 year prison sentence passed against the rugby players for the murder of Tshepo Motloha comes to mind. On the other hand, communities are enraged by "ridiculous sentences that are being meted out against the poor" such as this headline which attracted the front page of *The City Press*: "10 Years for Stealing R80. Women get long prison terms for crimes of desperation."[22] Other cases highlighted in the article include: a woman sentenced to four months in prison with the option of a R2 000 fine for stealing deodorant worth R16; a woman sentenced to six months in prison without the option of a fine for branding someone a witch; a woman sentenced to six months in prison without the option of a fine for calling someone a lizard; and a woman sentenced to thirty days in prison with an option of a R500 fine, for stealing 1kg of washing powder.

These and other examples breed perceptions which do not bode well for a nation in need of healing and reconciliation and thus other alternatives such as self-help are often resorted to. Already community outrage and feelings are finding expression in demonstrations and night vigils outside the courts during the trial of particular cases. Failure to act professionally or in a way that is sensitive to community feelings may invite the government, political parties, and pressure groups in civil society to take the judiciary to task. According to Philbin:

> "[T]his community malaise stems from a feeling of exclusion from the legal process, an inability to partake in the cabalistic rituals of the professional initiates, and a suspicion that the public is merely required to pay the bill for the privilege of being the expendable pawns in a game designed by and for a continued legal aristocracy. In short, pervasive public ignorance of the methods, the objectives, and forms is the tap-root of indifference, hostility, and public desuetude."[23]

Bridging this gap – explaining to the lay person, to many of those who are illiterate and unfamiliar with the legal process what good the judicial system can

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19 On this see "Judges in revolt take on the laws for the sake of justice" *Sunday Times* 26-09-2004 18.
20 2002 5 SA 721 (CC) paras 113–114.
21 Philbin 1973 *San Diego LR* 280.
22 *City Press* 15-05-2005 1.
23 Philbin 1973 *San Diego LR* 284.

do to them, or why it is doing something perceived to be unjust to them – is a challenge that we all must face and bear responsibility as academics and practitioners. This can be met by educating and demonstrating to communities that justice not only exists but it is also applied even-handedly, and in a way in which the complainant and the accused, the plaintiff and the defendant can understand and, hopefully, accept the court's judgment. But how many of the magistrates and judges, for example, take the opportunity in the court room to educate and inform rather than just deliver a judgment?

Thirdly is the challenge posed by equity, redress and sensitivity to our social context. A transforming South African society has the past to overcome and the future to lay its foundation. Nowhere is this challenge a talk of the town more than in the very institutions which are supposed to protect the individual against the injustices and violations of the law. On this account, the Lord Chief Justice of the United Kingdom had this to say:

> "The Cardinal Principle that underlies the [Judicial] oath is that of equality before the law. In deciding guilt or innocence or in weighing the merits of claims between private individuals or between individuals and the state, judges must have reference only to the facts (so far as they can be established), the merits of each party's position and the relevant law. *But this does not mean that judges should ignore factors such as ethnic origin, gender or disability. On the contrary, justice requires that judges must understand all the factors relevant to the factual situation they are considering, including those which may affect the way those present in the court room behave or perceive the court process*."[24]

Justice is not a mechanical exercise or the mere application of rules, however logical the flow of legal reasoning behind it may be. In 1982, a judge in a criminal court in Manhattan, New York, tossed a coin to determine the length of a prison sentence in a pick pocketing case.[25] The accused in that case was given a rare privilege to flip a coin provided by the judge (the judge borrowed the coin from the defense lawyer but failed to return it!) and as luck turned on his side, the accused escaped with a 20 day sentence. While many reacted to the action of the judge as ridiculous and outrageous, others welcomed it: why is there so much discrepancy in sentencing for the same offence – in one state it is capital punishment yet in another a mere jail sentence; in one case suspended sentence but in another long term imprisonment. And why not be tried by machines and experience judicial simplification. In reacting to this judgment Joseph J. Neuschatz lamented:

> "I can foresee the day when Las-Vegas-type one armed judges will determine jail terms for the ready-to-gamble convicts. Words like 'Freedom, One Day, One Week, One Month, One Life,' will be carefully engraved on the spinning wheels. Maximum sentence: three lives; Jackpot; three freedoms. The money deposited in the machines will be donated to the Criminal Court Judges Unemployment Fund."[26]

The above remarks were made against a criminal justice system stripped of the illusion of fairness. While this example drawn from the United States may baffle

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24 Lord Bingham of Cornwall, in his Foreword to the *Equality Treatment Bench Book* (1999) (my emphasis).

25 Blair, "Flip of Coin Decides Jail Term in a Manhattan Criminal Case" *New York Times* 02-02-1982 A1:1-2 & p. D24:1-2. The same judge had been censured a year before by the State Commission on Judicial Conduct for releasing a woman charged with murder on her own recognizance and then inviting her to stay overnight in his home in Brooklyn.

26 "For Whom the Coin is Tossed" *New York Times* 13-02-1982 A24:3-4.

those who have been brought up to admire the American judicial system, it should not be seen as remote to the South African situation. We can no longer neglect the growing public disenchantment about justice, more particularly the slow pace of transformation of the judiciary, insensitivity to issues of gender; race; religion; language; HIV status and children's rights. What the public and the media[27] say about the judiciary, about law and the administration of justice twelve years into our democracy continues to create misconceptions about our legal system and democracy, and our sincerity to achieve those objectives and aspirations that underpin our Constitution. It reveals that transformation is a complex and multi-faceted process that requires a thorough prognosis, unwavering political will in which all sectors of society pull together.

Equally important is the challenge of professionalism. The work of the judiciary requires the highest professionalism, ethical and moral consideration and responsibility. The expectation that the public places in judges and magistrates and other judicial officers (as the most educated, independent and impartial) imposes enormous responsibility on the shoulders of judicial officers both in their personal and professional life. It requires them to be role models and respectable members of the community in which they serve or live. An Editorial of the *Guardian* puts it succinctly: "[T]he search for justice is an honourable venture and as such it needs men (sic) of integrity, of transparent honesty, of devout devotion to the cause of justice, in short, it needs men (sic) who are also honourable."[28] Although many are dedicated and professionals who discharge their duties well, there are others who are unethical and often violate the law they administer. Reported cases of astonishing unprofessional conduct of magistrates in and out of the court room,[29] of corruption[30] or drunkenness have the potential to besmirch the judicial system, and diminish the esteem and integrity of magistrates and judges in the eyes of the public.

Lastly, there is the challenge posed by expanding jurisprudence and the need for broader legal and continuing education. Since the adoption of the Constitution, the jurisprudence of the Constitutional Court, the Supreme Court of Appeal and other courts has been admirable, and continues to grow. It has given meaning and interpretation to the Constitution and the Bill of Rights and laid down standards and procedures consistent with the aspirations of the new democratic society. A cursory examination of some of the judgments indicates that our

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27 "Judges in Revolt Take on the Law for the Sake of Justice" *Sunday Times*26-09-2004 18; "Judge urges end to 'White Law'" *Sunday Times* 3-10-2004 12; "Racist Judges Slammed" *City Press* 13-02-2005 1; "ANC threatens Judges: Change your mind-set of face the wrath of the masses, white judges warned" *Sunday Times* 06-01-2005 1; "Minister set on reforming judiciary: judges believe their powers will be undermined" *City Press* 21-05-2006 7; "Racism in Courts Under Spotlight: Transformation of the South African judiciary requires concerted effort to rid it of all racism" *City Press* 07-11-2004. The latter carries a photograph of Judges of the South African High Court taken with President Thabo Mbeki, with this caption: "White Man's Justice? . . . Does the composition reflect true judicial transformation?"

28 *The Guardian* 29-05-1986.

29 For example, *Sunday Times* 04-09-2005 7, reported on a Queenstown magistrate who used the most vulgar language in court when sentencing an accused for sodomosing a fellow prisoner.

30 "10 magistrates in firing line for crimes. Nine face expulsion if found unfit for office" *City Press* 04-09-2005 8.

Constitution has widened our sources of law, for it is no longer sufficient to look at only domestic sources and precedents, particularly with regard to human rights disputes. For those who were not schooled in human rights and public international law, work must now begin. This is what s 39 of the Bill of Rights requires – for us to consider international law and also take cognizance of foreign law. If the Constitution of South Africa has been presented as one of the most modern and human rights friendly, so is the emerging jurisprudence, particularly from the Constitutional Court.

3 CONCLUSION

The task of building a culture of democracy and human rights, in which society submits and permits itself to be governed by law, is central to any democracy. In this long and painful process, society must move together and those professionally placed must bear the search light. In a period of transition to democracy where standards have to be laid down, a professional, dedicated and committed judiciary is needed. This is imperative where there is often no harmony and consistency between policy and legislative intervention, or where official attitude is ambivalent or politically expedient. It must also be recognised that the environment in which justice is dispensed needs to be constantly scrutinised. A quotation from an article entitled "Weep not Judges", in which eminent Nigerian judges and advocates (Gani Fawehinmi, Emmanuel Fanikayode, Graham Douglas and Andrew Obaseki)[31] discuss a similar situation in their country, illustrates how difficult and challenging the environment in which the administration of justice takes place is.

> "Judges do not have writing papers in many cases. Many of the courts are dilapidated. The ceilings in some of the courts have given way. Computer technology that has united the world is not in Nigerian Courts."
>
> "The Court-room situation in which Judges preside over cases and administer justice is to say the least a monument of neglect and a wanton disregard of the well being of the judiciary and the comfort of both Judges and litigants."
>
> "In some of the states, it is even claimed that some courts have no toilets, which means a judge pressed to answer the call of nature may have to adjourn pending cases or in turn call for a break to ease himself (sic) out of the court premises."
>
> "The take home pay of the Judges is more scandalous. They work under tedious circumstances, take peanuts home as salaries at the end of the month and retire into penury."
>
> "When you are subjected to financial harassment and the harassment influences your thinking that warrants a miscarriage of justice. That is why judges should be adequately remunerated."

If the new South Africa is to have an efficient system of administration of justice that commands respect, acceptance and the trust of all the citizens, then there must be a transformed judiciary and a vigilant legal profession, including the entire echelon of other officials involved in one way or the other in the administration of law. Judges, magistrates, the legal profession, police and correctional services personnel, among others, must demonstrate the passion to stand for justice, to fight for the under-privileged and for those whom the power of the elite does not fight for, nor social movements and pressure groups reach. It requires

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31 Farewell address by the Hon Justice Adenekan Ademola, Lagos, September 4, 1991.

that the government and its bureaucracy submit to and respect the law and the judgments of the courts, even when decisions embarrass them personally or officially.[32] This also requires a society-conscious and society-oriented judiciary that is imaginative and creative. To quote Makame J:[33]

> "I am now thinking aloud. I am interpreting the law as it is, but there is that other role – the one His Excellency Shridath S Ramphal . . . calls a lawyer's creative social role which one would argue involves also the task of identifying and pointing out to Society, such areas in the law as 'the People', in their great wisdom, might wish to introduce appropriate changes in, without necessarily opening the flood-gates."

The environment under which respect for the law and justice can be realised requires nurturing conditions necessary for attaining equality and social justice. Existing disparities in education, income and levels of poverty among South Africans mean that those who know the rules or have the economic power can take advantage of others. This debases justice and human rights to a commodity that can be traded. Transformation should therefore embrace broader issues of redress, inclusion, access, gender representation and language. It requires that the legal system, which had deep roots in the Roman-Dutch law and tainted by apartheid, be constantly brought in line with the imperatives of the Constitution and the cultural and moral values of the majority of the South African society. South Africa should not fall prey to apartheid, oppression or the injustices of the past. The future, as this extract from Albert Camus, "Letters to a German Friend" suggests, lies in the love for justice:

> "The greatness of my country is beyond price. Anything is good that contributes to its greatness. And in a world where everything has lost its meaning, those who . . . are lucky enough to find destiny in our nation must sacrifice everything else . . . And I should like to be able to love my country and still love justice. I don't want just any greatness for it, particularly a greatness born of blood and falsehood. I want to keep it alive, by keeping justice alive."[34]

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32 Rembe "Reflections on Ten Years of South Africa's Democracy: Celebrating Achievements, Awakening to Future Challenges" in *Collection of 100 Study Papers and Essays 2001–2005. Bulletin 6/7,UNESCO Chairs on Peace, Human Rights and Democracy* (2005) 195.

33 See Rembe "Law and Transformation of Society: The Use of Law in Tanzania's Socialist Development" *Symposium on Knowledge of Law in Africa* 267.

34 The Hon YV Chandrachud "Fundamental Rights in their Economic, Social, and Cultural Context" in *Developing Human Rights Jurisprudence* Vol 3 (1991) 147–148.

How Fragile is Constitutional Democracy in South Africa? Assessing (Aspects of) the Fourteenth Amendment Debate/ Debacle – Part 1: Constitutional Guarantees of the Separation of Powers and the Independence of the Judiciary in South Africa

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1 INTRODUCTORY OBSERVATIONS

In the *New York Times* of 23 September 2006 an article entitled "A Stormy Test for Democracy in South Africa"[1] deals with the Jacob Zuma debacle. This premature presidential succession wrangle, is said to be "a struggle . . . that could foretell just how robust South Africa's young democracy is". How robust, how strong, how alive and well is our constitutional democracy in South Africa? This question may also be posed with reference to the recent Constitution Fourteenth Amendment Bill debate/debacle – after meat mustard, some may object, for the proponents of the Bill have been sent back to the drawing board. However, with a few laudable exceptions, there has been rather little level-headed debate about the proposed amendments,[2] and it may be useful, now that President Thabo Mbeki himself has intervened to pour oil on troubled waters, to reconsider what possible lessons can be learnt from the debate/debacle given the course it took.

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* Part 2 of this article, entitled "How Fragile is Constitutional Democracy in South Africa? Assessing (Aspects of) the Fourteenth Amendment Debate/Debacle – Part 2: Suspension of the Commencement of Legislation and the Constitutional Court as Apex Court" will appear in the first part of the 2008 *Speculum Juris*.

1 www.nytimes.com/2006/09/23/world/africa/23africa.html?_r=1&th&emc=th&oref=slogin.

2 Among the laudably level-headed contributions to this debate are those of Theunis Roux "Deliberate, don't litigate" *Mail and Guardian online* www.mg.co.za/articlePage.aspx?articleid=266044&area=/insight/insight__comment_and_analysis/# (accessed 08-03-2006), and *The Superior Courts Bill: Does the Draft Constitution Fourteenth Amendment Bill Pose a Threat to our Democracy?* in Open Society Foundation for South Africa/ Goedgedacht Forum for Social Reflection *The Superior Courts Bill: Does the Draft Constitution Fourteenth Amendment Bill Pose a Threat to our Democracy*? Summary Notes from a Debate of 24 February 2006, which stand in stark contrast with, for instance, the less than guarded outburst of Dennis Davis in his *Response to Theunis Roux's Paper* in Open Society Foundation for South Africa/Goedgedacht Forum for Social Reflection *The Superior Courts Bill: Does the Draft Constitution Fourteenth Amendment Bill pose a Threat to our Democracy*? Summary Notes from a Debate of 24 February 2006.

Such lessons will undoubtedly be political. This I acknowledge, posing the crucial question articulated above in a decidedly non-triumphalist vein; *not* asking how *robust* or strong our constitutional democracy is, but rather how *fragile*, how easily *breakable* or how *vulnerable* it is. A constitutional democracy may be robust today and spring into oblivion tomorrow because the crucial conditions for its continued existence have been left uncared for or have been compromised through sheer inanity or, worse, through measured malevolence.

I shall ask, on a holistic (or contextual) and purposive (or teleological) reading of the constitutional text,[3] what possible legal effect(s) the three most controversial (constitutional) amendments could have (had). These amendments are:

(A) the insertion in the Constitution of two subsections (165(6) and (7)) to demarcate and distinguish the judicial and administrative functions of courts, and to assign responsibility for these functions to the Chief Justice, as head of the judicial authority, and to the Minister of Justice and Constitutional Development, as the Cabinet member responsible for the administration of justice, respectively (hereinafter "Amendment A");

(B) an insertion precluding any court from hearing an application for or making an order effecting the suspension of the commencement of an Act of Parliament or a provincial Act ("Amendment B");

(C) an upward adaptation of the jurisdiction of the Constitutional Court to make it South Africa's highest or "apex" court *when the interests of justice so require* ("Amendment C").

Some conceivable implications of Amendment A (in the context of constitutional guarantees of the horizontal separation of powers or *trias politica*) will be considered in this article and possible implications of Amendments B and C in Part 2 (in the next issue).

The Constitution Fourteenth Amendment Bill also proposes debatable changes in the procedures pertaining to certain judicial appointments and furthermore seeks to convert (by and large uncontroversially) the various (separate and individual) High Courts (creatures of the 1996 Constitution) into a single High Court of South Africa. The proposed constitutional amendments are the visible manifestations of an exercise aimed at rationalising and reorganising courts and court structures in South Africa for the first time since the advent of constitutional democracy in 1994, and they are supported by proposed statutory amendments embodied mainly in the Superior Courts Bill of 2003. Some of these proposed statutory amendments are shrouded in controversy too, but they can of course only go as far as the Constitution allows them to, and they are therefore of secondary significance (at most) in assaying the likely impact of the Fourteenth Amendment exercise on constitutional democracy in South Africa.

It is imaginable that constitutional amendments, such as those envisaged in the Fourteenth Amendment Bill could, each in its own small way, chip away at the rudiments of our (still) settling democracy, with potentially devastating cumulative effect.[4] However, in the absence of profound research (as opposed to

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3 That is, the Constitution of the Republic of South Africa, 1996.

4 That such "chipping away" will be a likely consequence of the implementation of the proposed amendments (with devastating cumulative effect), seems to be a recurring concern

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surmise – albeit "informed") plausibly demonstrating that this can and will probably be the case, it may confidently be assumed that reasonably foreseeable constructions of the three crucial amendments (A–C) described above actually hold the key to what might become of the separation of powers, judicial independence and, eventually, constitutional democracy in South Africa, should the amendments *as proposed* become (constitutional) law (which, at this stage, seems unlikely at any rate). The purpose of the present contribution is not mainly, or even mostly, to assess the appropriateness of – or make arguments for or against – the proposed amendments (though this cannot entirely be avoided), but rather to show that there is a preferred constitutional reading-strategy that can optimise "the good" in the constitutional text to such an extent that *text-wise* it will be very difficult to design amendments to the South African Constitution capable of harming the already entrenched rudiments of constitutional democracy beyond repair. The same applies to amendments that may inadvertently (be allowed to) slip through. What is written in(-to) the constitutional text cannot of course guarantee that antidemocratic (political) forces will inevitably fail to manoeuvre the construction and implementation of constitutional provisions, but if our appropriately constructed constitutional text is construed to optimise "the good" in it, it can and will go a long way to counter and eventually enervate "mischievous" forces.

The preferred strategy (proposed in this article) for reading the South African Constitution (with the proposed amendments) is neither unusual (or esoteric) nor particularly adventurous (or ground-breaking). First, it is a *holistic* or *systematic* reading commensurate with the recognised and established *ex visceribus actus* approach to the construction of enacted law-texts,[5] in other words, interpretation from the bowels or guts of the instrument as a whole.[6] Secondly, it is *purposive interpretation*.[7] I use the buzzwords "purposive interpretation" with precautionary prudence, because of their all too recurrent (over-)use as expletives depicting unconventional modes of statutory and constitutional interpretation (in the South African context mostly interpretive approaches other than literalism and/or intentionalism).[8] In my book purposive (including teleological)[9] interpretation is a

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informing the General Council of the Bar of South Africa's (or GCB's) *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Constitution Fourteenth Amendment Bill 2005 and the Superior Courts Bill 2003* (2006) www.legalbrief.co.za/filemgmt_data/files/GCB%20justice%20bills%20submissions.pdf (cf also GCB "Abbreviated submissions to the Portfolio Committee on Justice and Constitutional Development on behalf of the General Council of the Bar of South Africa" August 2006 *Advocate* 25–32). To draw credible conclusions in this regard will, however, require a study more extensive than the one that was undertaken in preparation of the said submissions (or, for that matter, than the one on which the present contribution is based).

5 That is, the Constitution and statutes. For a depiction of the said reading strategy as a form of "contextualism", cf du Plessis *Re-Interpretation of Statutes* (2002) 112–113.

6 *S v Looij* 1975 4 SA 703 (RA) 705C–D; *Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council* 1972 1 SA 88 (W) 94F–G. Cf also *New Mines Ltd v Commissioner for Inland Revenue* 1938 AD 455; *Hleka v Johannesburg City Council* 1949 1 SA 842 (A) 852–853; *City Deep Ltd v Silicosis Board* 1950 1 SA 696 (A) 702; *Soja (Pty) Ltd v Tuckers Land and Development Corp (Pty) Ltd* 1981 3 SA 314 (A) 321H.

7 On "purposivism" in general, see Du Plessis *Re-Interpretation of Statutes* 115–117.

8 Du Plessis "The (Re-)systematization of the Canons and Aids to Statutory Interpretation" 2005 *SALJ* 591 607–608. Cf also Devenish "Review of D van Wyk, J Dugard, B de

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modern-day manifestation of the *mischief rule*, first coined in *Heydon's case*,[10] an English case dating from the late sixteenth century and predating the South African (and English) versions of literalism and intentionalism by at least two and a half centuries. I shall find it very hard to succumb to the temptation of literalist and/or intentionalist (or "clear and unambiguous language") interpretation, but I am nonetheless convinced that the interpretive approach I shall propose, ultimately (also) serves the "language of the Constitution" best.

My concluding observations in Part 2 will highlight –

- the (dys-)functionality of the constitutional amendments as proposed, and
- the dilemmas besetting the judiciary's (and individual judge's) participation in the debate on the desirability of these amendments: judicial officers who, in public debate, expressed strong views in opposition to certain amendments, may in time and in duty be bound to cast a judicial die on the implementation of (some of) those amendments.

2 SEPARATION OF POWERS (*TRIAS POLITICA*)

Amendments A–C all have potential impact on the independence of the judiciary which, in its turn, is rooted in the functional separation of legislative, executive and judicial authority in the state (or *trias politica*). It must thus first be considered how – and how strongly – the Constitution entrenches *trias politica*[11] and what implications this has for judicial independence.

Schedule 4 to the 1993 (transitional or interim) Constitution of the Republic of South Africa[12] contained XXXIV Constitutional Principles (CPs) with which the (text of the) final Constitution was required to comply, and it was an integral part of the constitution-making process that the Constitutional Court had to certify such compliance.[13] The Constitutional Principles dealing with *trias politica* and the independence of the judiciary were especially the following three:

> "V
>
> The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.
>
> VI
>
> There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

Villiers and D Davis (eds) *Rights and Constitutionalism – the New South African Legal Order*, Cape Town/Wetton/Johannesburg Juta 1995" 1995 *TSAR* 597; "Basic Questions of Constitutional Concretisation" 1999 *Stellenbosch LR* 269 275–276; Müller *Juristische Methodik* 8 ed (2002) 278–279; and *Qozoleni v Minister of Law and Order* 1994 1 BCLR 75 (E) 80D.

9 On "*teleological* interpretation", see Du Plessis 2005 *SALJ* 607–608.

10 (1584) 3 Co Rep 7a 7b.

11 For a succinct yet helpful overview of *trias politica* in the Constitution and in the jurisprudence of the Constitutional Court, see Langa "The Separation of Powers in the South African Constitution" 2006 *SAJHR* 2.

12 Act 200 of 1993.

13 Sections 71(1)(a), (2) and (3) of the transitional Constitution.

VII

> The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights."

In *In re: Certification of the Constitution of the Republic of South Africa, 1996*[14] ("the *First Certification Judgment*") the Constitutional Court, articulating its findings about whether the text of the Constitution first submitted to it for certification[15] complied with CP VI, observed that:

> "There is . . . no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute."[16]

The court eventually concluded that:

> "CP VI requires . . . that there be a separation of powers between the legislature, executive and judiciary. It does not prescribe what form that separation should take . . . [T]he CPs must not be interpreted with technical rigidity."[17]

Somewhere between the two *dicta* just quoted the court made certain observations that met with significant response in its later separation-of-powers jurisprudence:

> "NT 43 vests the legislative authority of government in the national sphere in Parliament and in the provincial sphere in the provincial legislatures. NT 85 and 125 vest the executive power of the Republic in the President and the executive power of the provinces in the Premiers, respectively. NT 165 vests the judicial authority of the Republic in the courts. This constitutional separation of powers has important consequences for the way in which and the institutions by which power can be exercised . . . As the separation of powers doctrine is not a fixed or rigid constitutional doctrine, it is given expression in many different forms and made subject to checks and balances of many kinds."[18]

In *South African Association of Personal Injury Lawyers v Heath*[19] the Constitutional Court recognised *trias politica* as an *implicit* or *implied* – as opposed to a *tacit* – provision of the Constitution (referring back to, amongst others, the *First Certification Judgment* and pointing out more explicitly that the structure of the Constitution prompts the conclusion that *trias politica* is entrenched): [20]

> "I cannot accept that an implicit provision of the Constitution has any less force than an express provision. In *Fedsure*[21] this Court held that the principle of legality was implicit in the interim Constitution, and that legislation which violated that principle would be inconsistent with the Constitution and invalid.
>
> The constitutions of the United States and Australia, like ours, make provision for the separation of powers by vesting the legislative authority in the legislature, the executive authority in the executive, and the judicial authority in the courts. The doctrine of separation of powers as applied in the United States is based on inferences

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14 1996 10 BCLR 1253 (CC), 1996 4 SA 744 (CC) paras 106–113.
15 In the judgement this text is referred to as "NT".
16 *In re: Certification of the Constitution of the Republic of South Africa, 1996* para 108.
17 *In re: Certification of the Constitution of the Republic of South Africa, 1996* para 113.
18 *In re: Certification of the Constitution of the Republic of South Africa, 1996* paras 110–111.
19 2001 1 BCLR 77 (CC) paras 20–26.
20 *In re: Certification of the Constitution of the Republic of South Africa, 1996* paras 106–113.
21 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC), 1999 1 SA 374 (CC) para 58.

> drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle. In this respect, our Constitution is no different.
>
> In the first certification judgment this Court held that the provisions of our Constitution are structured in a way that makes provision for a separation of powers . . . There can be no doubt that our Constitution provides for such a separation, and that laws inconsistent with what the Constitution requires in that regard, are invalid."[22]

Chaskalson P drew the distinction between tacit and implicit/implied provisions of the Constitution by analogy with unexpressed but operative terms of a contract,[23] explaining his preference for the adjective(s) "implicit/implied" to depict such not explicitly articulated constitutional provisions as follows:

> "In the law of contract a distinction is drawn between tacit and implied terms. The former refers to terms that the parties intended but failed to express in the language of the contract, and the latter, to terms implied by law. The making of such a distinction in this judgment might be understood as endorsing the doctrine of original intent, which this Court has never done. I prefer, therefore, to refer to unexpressed terms as being 'implied' or 'implicit'."[24]

By which "law" is *trias politica* implied? First, of course, by the Constitution itself, and *indicia* authorising (and indeed obliging) a separation of powers can be gleaned from the constitutional text. The Constitutional Court has, for instance, deduced such "law" from "the structure and provisions" (and one might add: *the structuring of the provisions*) of the Constitution. As will be pointed out when Amendment A is dealt with below, there are similar *indicia* in the constitutional text that affirm the independence of the judiciary. Secondly, law facilitating the interpretation of the Constitution can also be "law" requiring the separation of powers by implication. Here the *Certification Judgments*[25] (and the *First Certification Judgment* in particular) immediately come to mind. The Constitutional Court indeed held, in the *First Certification Judgment*,[26] that a future court should approach any provision of the 1996 Constitution on the basis that the interpretation which the Constitutional Court placed on it for certification purposes is the correct interpretation of that provision which should not be departed from except in the most compelling circumstances. This also applies to constitutional provisions regarding *trias politica* and judicial independence.

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22 *South African Association of Personal Injury Lawyers v Heath* 2001 1 BCLR 77 (CC) paras 20–22. Other leading case law authorities on *trias politica* are *Bernstein v Bester and Others NNO* 1996 2 SA 751 (CC), 1996 4 BCLR 449 (CC) para 105 and *De Lange v Smuts NO* 1998 3 SA 785 (CC), 1998 7 BCLR 779 (CC).

23 As to the law of contract in this regard, see *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 526C–F and Salmond & Williams *Principles of the Law of Contracts* 2 ed (1945) 37–40. The issue was recently (re-)considered by the Supreme Court of Appeal in *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* 2005 2 All SA 256 (SCA). For a discussion of the latter judgment see Cornelius "The Unexpressed Terms of a Contract [Discussion of the judgment of Lewis JA in *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* [2005] 2 All SA 256 (SCA)]" 2006 *Stellenbosch LR* 494.

24 *South African Association of Personal Injury Lawyers v Heath* para 19.

25 *Certification of the Constitution of the Republic of South Africa, 1996, In re: Ex parte Chairperson of the Constitutional Assembly* 1996 10 BCLR 1253 (CC), 1996 (4) SA 744 (CC) ("the *First Certification Judgement*") and *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, In re: Ex parte Chairperson of the Constitutional Assembly* 1997 1 BCLR 1 (CC), 1997 2 SA 97 (CC) ("the *Second Certification Judgement*").

26 The *First Certification Judgment* para 43.

The implicit entrenchment of the separation of powers in the Constitution is arguably "stronger" and more difficult to undo than an explicit entrenchment along the lines of, for instance, CP VI would have been. A scrapping or, less drastically, an amendment of the wording of the latter can compromise its operational force directly and immediately, whereas tampering with an implied provision of the Constitution, deriving from (for instance) the structure of the text as a whole, will require tampering with the said structure as well, and this is much more difficult to achieve.

Trias politica is the *fons et origo* of (amongst others), independence of the judiciary, mentioned with varying degrees of explicitness in the constitutional text (as will be shown when Amendment A is dealt with below). Because – and insofar as – judicial independence is a manifestation of *trias politica*, the Constitutional Court's articulation of the former in the *First Certification Judgment* is *on par* with the court's pronouncements on the latter, prompting the following conclusion:

> "An essential part of the separation of powers is that there be an independent judiciary . . . What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive. NT 165 is directed to this end. It vests the judicial authority in the courts and protects the courts against any interference with that authority. Constitutionally, therefore, all judges are independent."[27]

In *South African Association of Personal Injury Lawyers v Heath*[28] the Constitutional Court elaborated on the observations above:

> "The separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. Although parliament has a wide power to delegate legislative authority to the executive, there are limits to that power. Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.
>
> The separation required by the Constitution between the legislature and executive on the one hand, and the courts on the other, must be upheld otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights, and other provisions of the Constitution, will be undermined. The Constitution recognises this and imposes a positive obligation on the state to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice.[29] No organ of state or other person may interfere with the functioning of the courts,[30] and all organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness."[31]

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27 The *First Certification Judgment* para 123.
28 The *First Certification Judgment* paras 25–26.
29 Section 165(2) of the Constitution.
30 Section 165(3).
31 Section 165(4).

In practical terms judicial independence, according to the Constitutional Court,[32] manifests in (i) the process of judicial appointments, (ii) the rules relating to judicial tenure, including procedures for the removal of judges, (iii) the remuneration of judges and, in particular, whether the executive has the power to reduce or suspend judicial salaries, and (iv) the degree of institutional independence enjoyed by the courts.

Fears about the Fourteenth Amendment's potential to thwart judicial independence seem to pertain mainly to aspect (iv) above, that is, the institutional independence of the courts as enshrined in s 165 – subsec 2 in particular – and s 173 of the Constitution,[33] and this puts Amendment A in the spotlight.

3 AMENDMENT A: JUDICIAL INDEPENDENCE AND COURT GOVERNANCE

Should Amendment A eventually become (constitutional) law, s 165 which arguably is the textual foundation for an independent judiciary in the South African Constitution, will look as follows (with the inserted amendments italicised):

"CHAPTER 8

COURTS AND ADMINISTRATION OF JUSTICE (ss 165–180)

165 Judicial authority

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) *The Chief Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law.*

(7) *The Cabinet member responsible for the administration of justice exercises authority over the administration and budget of all courts.*"

Looked at holistically, in the context of the constitutional text as a whole, s 165 is the section most explicitly providing for – but by no means the only constitutional provision sustaining – the independence of South Africa's courts. Examples of more implicit (yet no less potent) guarantees of judicial independence are the following:

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32 In *De Lange v Smuts NO* 1998 7 BCLR 779 (CC), 1998 (3) SA 785 (CC) paras 70–72 and *Van Rooyen v The State (General Council of the Bar Intervening)* 2002 8 BCLR 810 (CC), 2002 5 SA 246 (CC) paras 19–35 with reference to *R v Valente* (1985) 24 DLR (4th) 161 (SCC).

33 Cf Roux *The Superior Courts Bill: Does the draft Constitution Fourteenth Amendment Bill Pose a Threat to our Democracy?* in Open Society Foundation for South Africa/Goedgedacht Forum for Social Reflection *The Superior Courts Bill: Does the Draft Constitution Fourteenth Amendment Bill Pose a Threat to our Democracy*? Summary Notes from a Debate of 24 February 2006 4.

1 The s 173 entrenchment of higher courts' "inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice", presupposes the independence of those courts.

2 Section 1(c) of the Constitution proclaims "[s]upremacy of the Constitution and the rule of law" to be two of the founding values on which the Republic of South Africa is founded. These two values, each on its own, but especially also in conjunction with each other, are consistent *only* with a constitutional dispensation in which the independence of the judiciary prevails (and bear in mind that amendment of the provision entrenching these values requires a 75% majority in the National Assembly and the support of six out of the nine provinces in the National Council of Provinces[34]).

3 The "open and democratic society" benchmarking the interpretation[35] and limitation[36] of rights in the Bill of Rights[37] can be nothing but a society in which independent courts exercise judicial authority.

4 Section 37(3) of the Constitution entrusts "any competent court" with the power to review the declaration and an extension of – as well as legislation and administrative action consequent upon – a state of emergency. This is a far-reaching constitutional acknowledgment of – and normative clarion call for – an intensely independent judiciary.

5 Section 233 of the Constitution decrees preference for a reasonable interpretation of legislation consistent with international law over any interpretation not thus consistent. This makes for an observation of international law standards which, in its turn, is likely to result in statutory interpretation conducive to judicial independence.

6 Oddly – and significantly – the definition clause in the Constitution[38] expressly provides that "a court or a judicial officer" is not an "organ of state" – even though "organ of state" also means any functionary or institution exercising a (public) power or performing a (public) function in terms of the Constitution, a provincial constitution or legislation. Not putting courts and judicial officers on a par with organs of state, is most likely an instance of precautionary, definitional deference to judicial independence.

The six textual indicia above prompt the conclusion that, just like *trias politica* in general, independence of the judiciary may (also) be deduced from the structure and provisions of the Constitution, and since it is inextricably tied up with founding provisions of the Constitution, it is firmly embedded in (and co-constitutes) a constitutional value system.

While the constitutional text is silent about the particularities and concrete manifestations of *trias politica* s 165, after having invested "the courts" with the judicial authority of the Republic (in subsec 1), mentions judicial independence by the name, not mincing words about its force and concrete effect(s).

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34 Section 74(1) of the Constitution.
35 Section 39(1)(a) of the Constitution.
36 Section 36(1) of the Constitution.
37 Chapter 2 of the Constitution.
38 Section 239.

Subsection 2 declaims, with supreme constitutional authority, the independence of the courts in rather expansive and peremptory language. Subsection 3, *ex abundandi cautela*, (re-)iterates the subsec 2 assertion of judicial independence in a *trias-politica* vein, stating that "[n]o person or organ of state may interfere with the functioning of the courts". However, from subsec 4 it appears that proscription of interference with the functioning of the courts does not release organs of state from the duty "to assist and protect the courts . . . through legislative and other measures" to ensure their "independence, impartiality, dignity, accessibility and effectiveness". The significance of this provision for the Fourteenth Amendment debate can hardly be overstated, for it provides for legislative and administrative action affecting the courts, but an organ of state is allowed to perform such action *only* if it is to assist the courts in maintaining their independence and performing in a manner that becomes a judiciary in a constitutional democracy.

Subsection 5 concludes s 165 as it presently stands, spelling out a most significant effect of – but also a precondition to – the independence of the courts,[39] namely that "[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies".

Duly contextualised, the proposed subsecs 6 and 7, as (sub-)provisions of s 165, will have to be construed not only to be compatible with, but also to serve the ends of the powerful, explicit affirmations of the independence of the courts in (the rest of) s 165 itself, buttressed by other (not so explicit, and yet significant) constitutional guarantees of judicial independence (and *trias politica*) elsewhere in (and throughout) the Constitution. Thus, read-in-context, what can subsecs 6 and 7 mean? It is easiest to start with subsec 7, stating what it most likely cannot mean (and what the cabinet member responsible for the administration of justice is most likely not authorised to do). The said member/minister may not exercise her/his authority over the administration and budget of the courts in such a manner that:

- (s)he interferes with the independence (s 165(2)) and/or functioning (s 165(3)) of the courts;
- (s)he encroaches on the inherent power of High Courts to regulate their own process and develop the common law (1 above);
- it is incompatible with the exigencies of the rule of law (2 above) as it is observed in an open and democratic society (3 above) or with standards of international law (5 above), and
- courts are treated as if they were organs of state (6 above).

Positively (and purposively) speaking the cabinet member's subsec 7 authority will have to be exercised (only) to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness (s 165(4)). And then, finally and most importantly, the exercise of such ministerial authority will be justiciable and any order or decision of a court adjudicating it will bind the minister (s 165(5)). The courts themselves will, in other words, be the arbiters (and the Constitutional Court the final arbiter) of the manner in which subsec 7

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39 Which, as pointed out above, is mentioned by name twice (in the preceding subsecs 2 and 4) and by necessary implication once (in subsec 3).

authority over the administration and budget of the courts is exercised. The track record of our courts (with the Constitutional Court at the helm) shows that they tend to err rather on the side of overprotecting *trias politica* and the independence of the judiciary.[40] In *South African Association of Personal Injury Lawyers v Heath*[41] the Constitutional Court, for instance, held that legislation providing for the appointment of a High Court judge as head of a special unit investigating corruption, was unconstitutional because it was in conflict with the constitutional requirement of separation of powers between the executive and the judiciary. In constitutional democracies where official investigations into criminal misdemeanours are inquisitorial and not, as in South Africa, accusatorial in nature, legislation authorising the appointment of a judicial officer to head investigations into corruption will probably pass constitutional muster.

Thus, with an impressive constitutional network of safeguards against undue interference with judicial authority in place, and with courts duly alert to their own independence on guard duty, it is hard to imagine how a construction of the proposed s 165(7) allowing for any ministerial action that compromises the courts' independence, might slip through. To raise the spectre of a subsec 7 gratuitously (or substantially) interfering with judicial independence, is a denial of the integrity and quality of the constitutional text and of the judiciary's resolve (and resourcefulness) to construe that value laden text in a manner entrenching and giving optimal effect to the rudiments of constitutional democracy.

The proposed s 165(6) states that the Chief Justice is the head of the judicial authority. The General Council of the Bar (GCB) in its submission on the Constitution Fourteenth Amendment Bill makes much of the fact that there is "no such entity as 'the judicial authority'".[42] There is of course nothing in the mere wording of the proposed subsec 6 to suggest that "judicial authority" ought to be understood as denoting "an entity": s 43 of the Constitution deals with "the legislative authority" in the Republic (vested in legislatures in the national, provincial and local spheres of government) and s 85(1) states that "the executive authority of the Republic is vested in the President" and there is no reason to assume that these two "authorities" are (meant to be) "entities". In typical *trias politica* language, "authority" in these instances denotes "arm" or "branch" (or perhaps even "mode") of government. The Constitution as it presently stands contains no provision to the effect that the Chief Justice somehow heads the judiciary – it only states that (s)he is a member – and presumably the head – of the Constitutional Court,[43] and furthermore provides for the election of the Chief Justice[44] –

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40 Cf eg *Bernstein v Bester and Others NNO* 1996 4 BCLR 449 (CC), 1996 2 SA 751 (CC); *De Lange v Smuts NO* 1998 7 BCLR 779 (CC), 1998 3 SA 785 (CC) and *Van Rooyen v The State (General Council of the Bar Intervening)* 2002 8 BCLR 810 (CC), 2002 5 SA 246 (CC).

41 2001 1 BCLR 77 (CC).

42 GCB *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Constitution Fourteenth Amendment Bill 2005 and the Superior Courts Bill 2003* (2006) www.legalbrief.co.za/filemgmt_data/files/GCB%20justice%20bills%20submissions.pdf 8–11 (cf also GCB "Abbreviated submissions to the Portfolio Committee on Justice and Constitutional Development on behalf of the General Council of the Bar of South Africa" August 2006 *Advocate* 26).

43 Section 167(1) of the Constitution.

44 Section 174(3) of the Constitution.

and for the rest the Constitution requires the Chief Justice to fulfil certain ceremonial and other functions. The GCB is of the opinion that it is so well beyond question that the Chief Justice is the head of the judiciary in South Africa, that it "has never required any statement in the Constitution".[45] The GCB, however, cites no authority for this obvious state of affairs – and it would be interesting to hear on which authority the Chief Justice's leadership of the judiciary is put beyond question. Surely it cannot be an authority higher than the supreme Constitution? And this makes one think that it is not wholly ridiculous to state explicitly in the Constitution that the Chief Justice is head of the judiciary. Be that as it may, as far as the safeguarding of constitutional democracy in South Africa is concerned the inclusion in, or exclusion from, the Constitution of such a statement is really neither here nor there. What is more questionable is whether, as the proposed amendment seems to suggest, headship of the judiciary only entails responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, and if not, whether anything of significance has then been left unsaid. It would probably be preferable simply to state that the Chief Justice is head of the judiciary/judicial authority and then leave it to relevant interpretive endeavours to give more detailed content to this headship of the judiciary.

The amendment as it stands at any rate explicitly (and significantly) states that the Chief Justice's exercise of responsibility as head of the judicial authority is not to interfere with the adjudication of any matter before a court of law. This means that individual courts' adjudicative independence is duly honoured in a manner that becomes (and hallmarks) a constitutional democracy.

A feasible way to assess the possible (negative or positive) effects of the proposed subsecs 6 and 7 for the independence of the courts, is to ask what impact they could have on court governance. For this purpose, three broad models (or, perhaps more accurately, modes) of court governance may be distinguished, to wit (i) decidedly judicial self-governance, (ii) decidedly executive hetero-governance, and (iii) decidedly integrated (judicial and executive) co-governance. Various mutations of (i), (ii) and especially (iii) are possible,[46] but for present purposes it will suffice to work with the broad distinctions only.

The unwavering assertions of judicial independence in s 165 as it presently stands – bolstered by other constitutional affirmations to the same effect – close the door to (ii), but probably also to (i), since s 165(4) requires the involvement of organs of state ("[o]rgans of state . . . must") to assist and protect the courts to

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45 GCB *Submissions to the Portfolio Committee on Justice and Constitutional Development: The Constitution Fourteenth Amendment Bill 2005 and the Superior Courts Bill 2003* (2006) www.legalbrief.co.za/filemgmt_data/files/GCB%20justice%20bills%20submissions.pdf 8–9 (cf also GCB "Abbreviated submissions to the Portfolio Committee on Justice and Constitutional Development on behalf of the General Council of the Bar of South Africa" August 2006 *Advocate* 26).

46 Cf eg Canadian Judicial Council *Alternative Models of Court Administration* 2005 www.cjc-ccm.gc.ca/cmslib/general/models-e.pdf 87–112. Research done by an LLB student of the University of Stellenbosch, Gustav Müller, for his LLB dissertation entitled *The Constitution Fourteenth Amendment Bill – Trusting Judicial Independence* (which was completed under my supervision), was helpful in construing the three broad models of court governance on which I am relying to assist with the assessment of the possible impact of the proposed subsections 6 and 7 on judicial independence.

ensure their independence, impartiality, dignity, accessibility and effectiveness. In this regard a reminder of the Constitutional Court in *S v Mamabolo* (*E TV, Business Day and Freedom of Expression Institute intervening*)[47] (per Kriegler J) is apt:

> "In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the state."

Trias politica's separation of powers is no *isolation* of powers. The "moral authority" of the courts is co-dependent on support of organs of state (and of the executive in particular). Section 165(4) thus calls for these organs' appropriate involvement in court governance, and the proposed subsecs 6 and 7 will have to be construed against this background, holding the Chief Justice and Minister of Justice responsible for different dimensions of court governance, *but with the same objective,* namely to uphold the moral authority of the courts, instantiated in subsec 4 and preconditioned by judicial independence. The preferred construction of the proposed subsecs 6 and 7 cannot but result in preference for (iii) above, that is, a model or mode of decidedly integrated (judicial and executive) co-governance of the courts – which is also the model/mode most consistent with s 165 as it presently stands. The proposed subsections (aptly construed) will therefore neither subtract from nor necessarily add value to constitutional democracy in South Africa as manifested in (allowable and preferred) models/modes of court governance.

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47 2001 7 BCLR 685 (CC), 2001 3 SA 893 (CC) para 16.

Colonial Rule and the Transformation of Chieftaincy in Southern Africa: A Case Study on Lesotho

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1 INTRODUCTION

The institution of chieftaincy, borena or bokhosi in Sesotho, otherwise styled "traditional leadership" in contemporary South African statutory parlance, is well established in virtually all countries of Southern Africa. To many, it represents the resilience of pre-colonial traditional forms of governance and perhaps an alternative paradigm from Western-inherited models that, notwithstanding their dominance, have not been very successful in galvanising and animating the mass of the people. To others, chieftaincy is a ubiquitous, but also anachronistic institution that is unable to co-exist with modern life styles, where men and women see themselves as autonomous individuals existing independently of the shackles of collective or quasi-feudal strictures. The democratic credentials of chieftaincy, as an institution rooted in prescriptive norms of birth and patriarchy, are said to be incompatible with, if not in fact directly in conflict with, the nature of modern democracy. Notwithstanding this, chieftaincy in all the countries of the region has fought back attempts to relegate it in the emergent post-colonial democratic dispensations. It is argued on behalf of the institution that its relevance and democratic disposition must be determined not through the prism of alien norms that may have formal, but not substantive, significance, but by its resilience embedded in its daily touch with the experiences of the common folk.

There can be little doubt that the institution is at the cutting edge of debates in respect of its place, role and relevance in contemporary society. What constitutional and political scholars on either side of the debate have seldom done is to understand the institution by grappling with its golden age in the pre-colonial era and to reflect whether the institution we see today is in any way the same. If on the other hand it has morphed, as indeed all institutions are modelled and reshaped by the context of their existence, has this occurred to attune it to the circumstances of contemporary society?

This article is dedicated mainly to the study of the impact of colonial rule on the chieftaincy in Lesotho. In that sense its observations and conclusions are specific. But there can be little doubt that, barring specific details here and there, historical trends impacting on the institution were more or less the same in the rest of the region. The article is divided into four sections: the first part looks at what can be regarded as the ideal state of chieftaincy as a system of government. In general the characteristics analysed here traverse the period before and during the early part of colonial rule. The second section focuses discussion on the impact of colonial rule on chieftaincy during the period stretching from 1871 to 1938. In the third part, the article highlights the new model of governance

established by the Colonial Administration aimed at assuming control over chieftaincy, and critiques its implications on the institution. The final part undertakes an overview of similarities of developments impacting on the institution in a sample of Southern African countries in the post-independence era.

2 GOVERNANCE THE TRADITIONAL WAY

Historically, the Basotho chieftaincy operated against the background of an intricate system of checks and balances. The system was not predicated on the notion of separation of powers, although it was arguably no less efficacious in checking chiefly personal power. As an institution, chieftaincy encompassed in the same breadth executive, legislative, judicial authority and more. Elsewhere, Schapera describes a chief in terms that more or less correctly capture the institution in most nineteenth century Southern African communities as being "at once ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and magician of the people".[1] On the face of it these were extensive and awesome powers to invest in one person or institution.

In practice, however, chieftaincy was less about the personal power of the incumbent chief, and more about a system of government. Almost every role-function of a chief was a participatory collective endeavour of members of one or the other of a labyrinthine set of institutions. Elsewhere I have discussed in relative detail the roles of the pitso (public assembly) and the lekhotla[2] (court or council) as key institutions within which chieftaincy authority expressed its political, administrative and judicial functions.[3] A single overarching feature of these institutions was their participatory democratic character. Thus, writing about the pitso, Casalis, a missionary of the Paris Evangelical Missionary Society who lived at Thaba Bosiu during King Moshoeshoe I's reign, comments that while the assemblies were of deliberative character as no voting was conducted, they showed which side public opinion leaned and the chiefs knew that they could not act independently of that opinion.[4]

For its part, the lekhotla referred to one or the other of two institutions presided over by the chief, namely a court of law discharging adjudicative responsibilities, or a council which discharged administrative responsibilities. This nuanced distinction between the two was not always apparent to Westerners, as reflected by the following statement by Casalis: "Other important personages are present daily at these deliberations, and they perform the functions of jurymen in civil and criminal cases. They are called Banna ba khotla; literally, men of the court."[5] A lekhotla in the sense of a more or less closed body of the important men of the realm known as baeletsi was a political-administrative council, some sort of cabinet, and not a court of law. In contradistinction to such exclusiveness, lekhotla in the sense of a judicial court was open to all men of the realm, including visitors, who had full rights of participating at all levels of the process to assist the court in arriving at a fair and just decision.

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1 Schapera Handbook on *Tswana Law and Custom* (1934) 62.
2 In the South African authography the word would be spelt "lekgotla".
3 Mahao "Chieftancy and the search for relevant constitutional and institutional models in Lesotho" 1993 *Lesotho LJ* 1.
4 Casalis *The Basutos* (1861) 236.
5 Casalis 222.

While the pitso and the lekhotla institutions are the better known, they were, nonetheless, by no means the only ones designed to furnish a framework within which chieftaincy as a system discharged public roles and made decisions affecting the public. Chief Matete, an authority on the Basotho traditional system of government, adds about five other structures that played varying but important roles as anchors of the chieftaincy.[6] A much more discreet organ also mentioned by Chief Matete was that of baholisi or batataisi (guardians). Often manned by one or more persons, this organ was established for the chief upon his investiture or on being "placed".[7] Typical incumbents, according to Chief Matete, were always older in age to their charges – an important factor because of the experience and wisdom presumed to be concomitant with age. Assigned this role by the chief's father after consultations with his own councillors, the incumbent stood *in loco parentis* to the chief. His diffuse authority was to be exercised adroitly such as not to overshadow the chief. It involved the right not only to oversee, guide and counsel the latter, but also to punish him when circumstances dictated.

Thus, both individually and collectively, these institutions defined how chieftaincy as a system of government was conceived, institutionalised and functioned. The chief always had to act *in-council* through those institutions, which not only trammeled his discretionary powers, but also informed the exercise of chiefly prerogatives. In the unlikely event of "the genie jumping out of the bottle" – the chief unjustifiably acting or making pronouncements contrary to the decisions of the institutions – he would be called to order and the infraction nullified. Smith underscores how Europeans who had to deal with King Moshoeshoe I never quite understood that his powers were circumscribed by the will of his people:

> "In all affairs, legislative, judicial or executive, he acted by the advice and with the consent of Council. On occasions of great import a Pitso 'folk-moot', or national assembly was called . . . In all matters of importance he could not act without first learning their (the people's) will."[8]

The system predicated on key constitutional principles that ensured a multiplicity of control mechanisms at various levels. The roles of the pitso, the lekhotla, the baeletsi and the baholisi captured, in one form or another, the essence associated with a myriad of Western constitutional principles such as direct democracy, representative government, and checks and balances.

3 CHIEFTAINCY CHALLENGED

Cape rule in Lesotho ensued between 1871 and 1880, and was marked by a tempestuous and contradictory relationship between the chieftaincy and the colonial state. Prior to that, in 1868, the year Britain annexed Lesotho, a French missionary named Rolland, who later resigned his calling to become a colonial magistrate in Mafeteng, authored a memorandum detailing proposals to restructure the

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6 Unpublished notes on the Qachas Nek chieftaincy prepared by Chief Mphosi Matete (2005).

7 Placing was a system of allocating a person to a chieftaincy that seems to have developed during the nineteenth century, and became extravagantly used by chiefs to assign their sons under colonial rule.

8 Smith *The Mabilles of Basutoland* (1967) 39.

indigenous political, social and economic order.[9] He proposed that the principal target of the colonial administration should be the dislodging of the powers of the chiefs. Rolland suggested that in order to weaken the chief's grip on the Basotho society the source of their powers, namely: the control of land; polygamy; the matsema (communal working parties); and so forth, should be targeted for dismantling. He proposed that the colonial administration should punish bigamy, confer hereditary titles in land and encourage and protect commoners' right to own property. However Rolland cautioned that the campaign should be conducted, "if possible in such a way as not to excite the jealousy or embitter the prejudice of the native".[10]

When in 1871 the Colonial Office in London placed Lesotho under the Cape Colony, the latter moved with alacrity to implement Rolland's recommendations, envisaging the emasculation of the powers of the chiefs. Thus the regulations instituted in 1871 sought to oust the powers of the chiefs in the critical areas such as land allocation, the trying of cases and the enforcement of judgments, and the control of the burgeoning commercial trade.[11] The regulations struck at the very heart of the material sustenance of the chieftaincy and its source of prestige, a fact acknowledged by the then High Commissioner, who commented in a dispatch to the Secretary of State for Colonies:

> "They (provisions of the regulations) may at first strike your Grace as imperfect and peculiar but they are sufficient to strike at the root of some of the most objectionable native customs, and I may assure you go quite as far as ever the Missionaries expected or thought desirable."[12]

The chiefs were later to protest indignantly that "[o]nly we are sorry to not see mentioned the rights and the authority left to our chiefs, who are the captains of the Queen and those that leaved (sic) us to her".[13] Needless to say, the powers whittled away from the chiefs were transferred to the magistrates, structures established as part and parcel of the colonial state apparatus.

But the assault on the powers and authority of the chiefs was also fraught with contradictions. While the colonial administration's strategic social and political objective was ultimately to emasculate the chieftaincy, other colonial imperatives impelled the establishment of new roles for the institution. Of critical consideration for this purpose was the fact that colonial rule in Lesotho was expressly premised on Basotho picking up the costs for their subjugation. To this end tax, initially in the form of hut tax, had to be collected from each household, an activity that on implementation proved particularly problematic. Burman notes:

> "Hut tax was paid on the number of huts – and therefore principally the number of wives – in a kraal (sic), so the number would obviously have varied from year to year and been difficult for the administration to ascertain without seeing the kraal or hearing evidence on the status of its various members".[14]

Once the administration had realised that the expansion of the commodity and money economy it was fostering also provided the chiefs with new avenues and

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9 Rolland Notes on the *Political and Social Position of the Basotho Tribe* (1868).
10 *Ibid*.
11 See Basutoland Proclamation No 74, 1871.
12 Dispatch from the High Commissioner to the Secretary of State for Colonies, May 2, 1868.
13 Letter from Basutoland chiefs to the Governor's Agent, December 22, 1880 (Cape Archives).
14 Burman Chiefdom *Politics and Alien Law* (1981) 70.

modes of private accumulation of wealth, it drafted chiefs as its extended organs for tax collection. As a lure, a percentage of the collected tax would be retained by the chief. A majority of the chiefs seized the opportunity, seeing it as a way of enriching themselves.

Secondly, since the Basotho were still somewhat resistant to their new colonial status, the maintenance of law and order was also a critical imperative for the Colonial Administration. Without a significant police force and administrators at the local level throughout the country, it was impelled by these circumstances also to secure the co-operation of the chiefs in enforcing a semblance of good government. Of necessity this expanded, rather than having the effect of shrinking, the prerogatives of the chiefs. Burman highlights the exacting demands made of the chiefs, which included obligations to inform magistrates if they held public meetings, fortified positions, or sent or received ambassadors or messengers from inside or outside the country, and to report on any other matter of importance.[15] Thus Kimble correctly observes that "somewhat ironically, colonial rule served to expand the activities of the precolonial state apparatus it was supposed to replace".[16]

Notwithstanding the tentative co-operation with the chiefs, the objective of weakening the Basotho polity continued unabated. A crunch came when the Cape government irregularly sought to enforce in Lesotho the cynically named Peace Preservation Act, which was designed to disarm African kingdoms in Natal and Eastern Cape. The Act was seen as a handy instrument to break "the chiefs' powers of military organisation".[17] The attempt was a grave miscalculation that was to be resolved in a two-year confrontation in the battlefield in the famous Ntoa ea Lithunya (Gun War) from 1880 to 1881. Basotho chiefs broke into two groups: those who co-operated in handing in their arms; and the mabelete (rebels) lead by Lerotholi, heir-apparent to the throne and his uncle Masopha Moshoeshoe, who refused to surrender their arms and led a rebellion. The war resulted not only in military defeat for the Cape Forces, but precipitated the collapse of Cape rule in Lesotho. Britain was forced by these developments to resume direct rule over Lesotho after attempts to re-constitute magisterial rule were firmly rebuffed by leaders of the mabelete.[18]

4 DEMOCRACTIC NORMS AND CHECKS IN DEMISE

After the British resumed direct control of Lesotho in the aftermath of Ntoa ea Lithunya, it became the policy of incumbent Resident Commissioners to repair the damaged relationship between the colonial state and the chieftaincy. In fact, while Cape magisterial rule had attempted to emasculate the chieftaincy, Resident Commissioners premised their rule on appeasement. The thrust of their policy was to strengthen the position and powers of the chiefs, and especially to bolster the authority of the Basotho monarchs. It became the standard policy of

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15 Burman 71.

16 Kimble "Clinging to the Chiefs" in Bernstein and Campbell (eds) *Contradictions of Accumulation in Africa* (1985) 37.

17 Kimble 38.

18 Through the Disannexation Act, 1884, the Cape Parliament nullified its mandate in Lesotho and the High Commissioner promulgated Proclamation No 756 of 1884 to provide for direct British rule over the unruly colony.

the colonial administration to strengthen the position of the monarchs vis-à-vis the other layers of chieftaincy, and that of the chiefs against people of inferior ranks. Sir Marshall Clarke, the first Resident Commissioner, took the initiative of restoring the pre-eminence of King Letsie I (officially called the Paramount Chief), whom the Cape Administration and dynastic feuds had reduced to a mere *primus inter pares*.[19] This policy was to remain in force for the duration of colonial rule in Lesotho. Applied to lower levels of the indigenous government structure, it had the effect of bolstering the authority of whoever had power, against those with less power. Ashton observed that it "inevitably meant that where there was political trouble or rebellion against the chief, the administration tended not to look too closely into the merits of the case, and, in the interest of peace, to give the recognized chief a free hand – and sometimes, material assistance, to quell such disturbance".[20]

4 1 Planting the seeds of a top-down authoritarian governance

In their endeavours to back the authority of the chieftaincy to the hilt, Resident Commissioners often encouraged the former to resort to authoritarian means to assert themselves. Clarke tersely revealed this approach in a dispatch to the High Commissioner, stating that: "I had previously impressed upon the Paramount Chief the desirability of asserting his authority for the maintenance of order, and observed to him that such action from within the territory was calculated to have more beneficial effect than coercive action from without."[21] In its desire to maintain order and stability, the colonial Administration condoned or even instigated the use of force where the objective was to subdue a perceived challenge either to itself or to its junior partner, the chieftaincy. Such was the case when in 1898 Paramount Chief Lerotholi invaded and overpowered his uncle, Chief Masopha, for a long time perceived as a rallying force against colonial domination and a threat to the consolidation of the authority of the paramountcy.[22]

The case of the chief of the Baphuthi, Mocheko Moorosi, is another example of how the Basotho monarchy and the colonial authorities co-operated to strengthen the hand of the former. In this matter, Lerotholi had decided to "place" his son, Griffith, in Chief Mocheko's ward, thus provoking the latter to question the authority of the new chief over him. To demonstrate his disenchantment, Mocheko migrated into the Cape Colony, from whence he was sent back to Lesotho and tried for offences ranging from resistance to lawful authority and breach of peace, to endangering the peace of neighbouring territories. The Paramount Chief's Court, notably attended by the Resident Commissioner, not only deposed Mocheko as chief, but also banished him, and ordered him never to return to his home until his death.[23] When the High Commissioner visited the territory in 1906, Mocheko pleaded for the review of his plight. In a report to the

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19 Machobane *Government and Change in Lesotho 1800–1966* (1990) 75; See also Kimble 38.

20 Ashton "Democracy and Indirect Rule" 1952 *Journal of the International African Institute* 243.

21 Letter from Sir M Clarke, Resident Commissioner of Basutoland to the High Commissioner, dated March 18, 1885 (Lesotho Government Archives).

22 Burman 183.

23 Proceedings of this case were reported in the Leselinyana la Lesotho, April, 1903 (Morija Museum and Archives).

Secretary of State for Colonies the High Commissioner, who labelled Mocheko "a source of trouble to the Administration for many years", wrote that he "gave Mocheko to understand that he must acknowledge not only the authority of the Paramount Chief but also the authority of Letsie's representative in the district".[24] Cases such as these emphasise how the monarchs were granted free rein, with which they built unfettered prerogatives for themselves. Chiefs at lower levels of the system emulated these examples, comforted by the knowledge that the Administration would not constrain their indiscretions.

In this situation, where the interdependence between the chiefs and the commoners steadily dissolved, it became necessary for the former to rationalise their right to rule on criteria that asserted prerogatives but not responsibilities. Weisfelder notes that "[g]reater emphasis was now placed on prescriptive dimensions such as hereditary rights to rule and the necessity of obedience to any legally established authority".[25]

4 2 The Pitso relegated and emasculated

The establishment of the National Council (NC) in 1903 further reinforced Paramount Chiefs' powers and authority.[26] This body provided for a hundred members, five of whom were appointed by the Resident Commissioner, who was also the President of the Council. Ninety-four members, the overwhelming majority, were to be chiefs and headmen nominated by the Paramount Chief. The power of nomination gave the Paramount Chief immense authority and ensured that chiefs and headmen looked to him for the favour. More so, the Paramount Chief's precedence over all members of the Council was illustrated by his title of "Chief Councillor".

Whether by design or default, the establishment of the NC accelerated the social and political alienation of the chieftaincy. For long periods the chiefs were away in Maseru, the colonial capital, and regular contact with the people waned. Significantly, the creation of this body was linked to the demise of the national pitso that had largely fallen into disuse. In fact, when it was convened, the national pitso no longer performed its role of a forum of robust debates, having degenerated to a mere conveyer-belt of colonial decisions. Neither did the democratic features of the national pitso transfer to the NC. In contrast, the NC suffered from several discernible defects: Firstly, the institution was not established to be a legislative body.The Resident Commissioner unequivocally underlined this fact at its first meeting:

> "I think it is well to remind you again that the Council is not a legislative meeting. It is not given the power to make laws – this power is for the High Commissioner. But the Council is for the purpose of consultation and advice. It enables you to show each other and to the government what are (sic) your opinions and desires and suggestions for the improvement of the condition of the people."[27]

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24 Report of the High Commissioner on his visit to Basutoland and the Bechuanaland Protectorate, March 24, 1906, Annual Reports, (Lesotho Government Archives). By 1906 Letsie II had succeeded Lerotholi as Paramount Chief, hence the High Commissioner's reference to Letsie in his remarks.

25 Weisfelder *The Basotho Monarchy: A Spent or Dynamic Political Force?* (1972) 38.

26 Proclamation No 7 formalised the Basutoland National Council's establishment in 1910.

27 Report of the proceedings of the Basutoland National Council, 1908, (Lesotho Government Archives).

Secondly, given the NC's narrow class composition and non-elective procedure of appointing its members, it was not democratic in any sense of the word. That its overwhelming membership consisted of chiefs served largely to advance the exclusive interests of this class. As one Resident Commissioner noted: "In plain point of fact it [the NC] is a body swayed by a large majority who have at bottom only one main object in view, namely the upholding of what they call their own rights and positions."[28] In this atmosphere, chiefs increasingly mistook their own concerns for those of the people and the bonds that held the two groups together steadily declined.

4 3 Judicial power abused

A significant departure from Cape rule introduced by direct British rule was the restoration of judicial powers to the chieftaincy. Hence, Proclamation No 2B of 1884 envisaged Rules and Regulations that would restore the judicial powers of the chiefs in all cases involving Africans in the territory. Section 4 proclaimed that:

> "It shall be lawful for any Native chief in the said territory, appointed by the Resident Commissioner, to adjudicate upon and try such cases, criminal and civil, and to exercise jurisdiction in such a manner and within such limits, as may be defined by any rules established by the authority of the Resident Commissioner."[29]

A critical backdrop, however, was the substantially changed context in which the resurrected powers were to be exercised, where the traditional check systems were, by-and-large, losing their hold and relevance. It should be remembered that before colonial rule, the fear of a rebellion or desertion, the existence of a weak central state, the effectiveness of the pitso and lekhotla institutions and the fact that chiefs had to look inwardly to the labour of their people for generating their wealth, served as constraining considerations on the exercise of chiefs' powers. In the new situation these considerations were no longer critically important to the chiefs. Weisfelder summarises the social and political context that had developed thus:

> "Rapid population increasingly doomed the pitso as a viable deliberative assembly and raised the economic and social costs of abandoning a despotic chief. Massive, regularized immigration of Basotho to jobs in South Africa destroyed the everyday face to face communication and sense of communal participation in the lekgotla, leaving village activities to the aged, the infirm, or generally those least able to resist the ambitious chiefs. The monetization of relationships meant that the chiefs were no longer the sole providers of the community and were swiftly tempted to disregard their other obligations to the citizenry."[30]

While this development was part of the internal dynamics within the Basotho society, it was also fostered by the colonial regime, if not deliberately, at least as an indirect consequence of some of the legal and political measures it institutionalised. To avoid the rebellion of a Ntoa ea Lithunya type, the colonial administration had to be extremely cautious in its handling of the chiefs. That caution was the *raison d'etre* for a despondent attitude towards the chiefs that allowed them a great deal of latitude. This would soon become the source of concern as

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28 Resident Commissioner JC Strurrock, quoted by Edgar *Prophets with Honour* (1985) 5.
29 Proclamation No 2B of 1884.
30 Weisfelder *The Basotho Monarchy: A Spent or Dynamic Political Force*? 37.

they became increasingly corrupt and negligent of their duties. A situation developed where chiefs were neither controlled from below by the people, nor from above by the Administration.[31]

This was the backdrop that furnished chiefs with the opportunity to assert their personal prerogatives, increasingly to dispense with consultative processes, and to conceive themselves not bound by opinions of their courtiers. Judicial processes became exposed to this new context and transformed by it. Shorn of popular participation and transparency, judicial decisions become susceptible to all manner of profligacy such as bribery, nepotism and favouritism. Massive abuses in the chiefs' courts in the 1920s and 1930s were to become a source of grave concern.

Weisfelder observes that these patterns were not accidental, but a consequence of the Colonial Administration's *laissez-faire* approach to the monarchy and chieftaincy, which "allowed a total, if unintentional, recasting of patterns of authority and responsibility . . . by making possible for successive monarchs gradually to transform the previously responsive, 'pyramidal' structure of chieftainship into a more authoritarian, 'hierarchical' format". "It is not surprising," he contends, "that the pitso and lekhotla, institutions geared to the earlier interdependent, reciprocal relationship between the rulers and the ruled, became far less significant when demand for the redress of grievances could be treated as illegal disruption of the accepted political fabric."[32] Meanwhile organisations such as the Lekhotla la Tsoelopele (Basutoland Progressive Association), a platform of the emergent missionary educated elite, the Lekhotla la Bafo (Commoners' League) and the general public relentlessly put pressure on the colonial authorities to do something about the degeneration.

In 1928 the colonial authorities attempted to promulgate a proclamation reforming the chieftaincy in response to the pressures. The NC shot down the initiative, expressing the view that any attempt to interfere with the authority of the chiefs was contrary to the spirit underlying British "protection". One member eloquently admonished the Resident Commissioner for the initiative in very strong words thus:

> "The Resident Commissioner should not make Native laws, he should advise and confirm the chiefs of Basutoland who are appointed by God, by birth, and who were confirmed by Queen Victoria, King Edward, King George, The Prince of Wales and the Duke of Connaught, and many Governors. All the Resident Commissioners have confirmed the chieftainship of Basutoland. The above gentlemen have left to Moshesh (sic) the making of his own domestic laws. The subject is surprising, that we have you making our domestic laws. Advise and see if it will be rejected . . . Give advice, that is why you are (sic) sent here by the Imperial Government."[33]

The statement adequately captured the measure of independence the chiefs had accumulated, and their resolve to defend what they considered to be their birth right prerogatives. In the event, the reforms had to wait for another ten years before they could be instituted.

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31 Pim *Report on the Financial and Economic Position of Basutoland* (1935) 48.
32 Weisfelder *The Basotho Monarchy: A Spent or Dynamic Political Force*? 36.
33 Quoted in Pim's Report 26.

5 AN ALIEN MODEL IMPOSED

The period between 1884 and 1938 is often classified as one of *laissez-faire* or "parallel rule" to underscore the fact that, instead of asserting its authority over the chieftaincy, the Colonial Administration in Lesotho ruled side-by-side with it. 1938 signified a turning point in the relationship as a result of the recommendations of a Commission headed by Sir A Pim.[34] Sir Pim's report threw into sharp relief the chaotic situation that ensued in the trail of unchecked chiefly prerogatives, and gave birth to the reforms proclaimed in 1938.

The reforms assumed two dimensions: On the one hand through the Native Courts Proclamation, 1938, judicial powers were removed from the chiefs and vested in remunerated court presidents. On the other hand, the Native Administration Proclamation, 1938 sought to streamline the structure of the chieftaincy and formally to place it under the authority of the Colonial Administration and the Paramount Chief. Towards this end, the power of recognising and de-recognising chiefs was created and vested in the High Commissioner, who could delegate such powers to the Resident Commissioner.[35] For his part, as the junior partner of the Administration, the Paramount Chief was required to give his consent to every act of recognition or de-recognition of a chief or headman.[36] Thus, the Proclamation introduced a principle whereby accession to chieftaincy and the retention of this office depended on the discretion of the Resident Commissioner and the Paramount Chief. It marked a deliberate policy on the part of the colonial state to assume control over the chieftaincy, and was a drastic departure from custom enshrined in a code known as the Laws of Lerotholi, according to which accession to chieftaincy was by right of birth.[37] In this manner, the colonial state arrogated unto itself the authority not only to determine who could accede to a chieftaincy, but also who could hold the office. By creating the right for the Paramount Chief to give or withhold consent to a chieftaincy appointment, it strengthened the authority of this office over all chiefs in the country.

Coupled with the introduction of remuneration for gazetted chiefs, the reforms fully integrated the chieftaincy into the colonial state apparatuses and effectively supplanted its political and social autonomy. While chiefs were opposed to the reforms, the struggle for the succession to the throne between Princes Seeiso and Bereng after the death of their father, Paramount Chief Griffith, in 1939 furnished the Colonial Administration with the opportunity to coax Seeiso to endorse the reforms, in return for him being recognised as the new monarch.

Armed with the Native Administration Proclamation, the Administration proceeded to de-recognise some chiefs and headmen, many of whom had proliferated over the years as a result of the over use and abuse of "the placing" procedure. The Administration nonetheless remained discreet in its use of the statutory power to appoint candidates of its own choice to the chieftaincies. However, when Paramount Chief Seeiso died in 1940, it relied on this statutory power to influence the choice of Chieftainess 'Mants'ebo, Seeiso's principal wife, as the

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34 Pim's Report *ibid*.
35 See s 3(1) and (2) read with sub-s (3).
36 Section 3(1).
37 Customary law succession is described in Section 2 of the Laws of Lerotholi.

successor to the throne.[38] This debacle was replayed in the courts of law, where the community of interest shared by the executive and judicial arms of government was thrown into sharp relief by two contradictory judgments dealing with essentially identical principles.

In *Bereng Griffith v 'M'ants'ebo Seeiso Griffith*,[39] the plaintiff petitioned the High Court to set aside the decision to appoint the defendant as Regent and Acting Paramount Chief. The gist of the plaintiff's case was that under Sesotho law and custom a woman (whether maiden, wife or widow) was a perpetual minor entirely under the control of either her husband, father-in-law or male head of her husband's family. He contended that as such a woman would never control property or be appointed as chief. The court ruled that, whereas the position as stated correctly reflected early Sesotho custom, a practice had evolved, particularly among the chiefly class, whereby women had become chieftainesses during the minority of their husbands' heirs-apparent. It ruled that it would be inconsistent with that position that such a woman should be subject to the control of some male person who would administer her property. In the words of the judge: "[I]n the case of a woman chief or headman the official position has always carried with it the guardianship of her children and the control and administration of the property of her House, subject of course, to the limitation that the heir of such property is the son for whom she is acting as regent." This ruling confirmed the appointment of 'M'ant'sebo as the Regent and put to rest Bereng's quest for the throne.

The purported principle in the above ruling was however surreptitiously reversed and jettisoned in *'M'abereng Seeiso v 'M'ants'ebo Seeiso*.[40] Both the litigants in this case were widows of the late Paramount Chief Seeiso. Chieftainess 'M'abereng, the second wife of Seeiso, was the biological mother of the minor heir-apparent, Bereng Seeiso. She petitioned the court to grant her the right to inspect the records of the estate of the late Seeiso, to determine whether they were correctly administered on behalf of her son.[41] Aware of the implications of the case for the Regency, the High Court took a different interpretation of the law, holding that "[t]here is not the slightest doubt that under Basotho Law no woman relative has ever had any authority in the matter" of inspecting the records of her husband's estate unaided by her son's paternal uncles. The decision turned on the principle that women were perpetual minors who, unassisted, did not have *locus standi in judicio.* While it may appear surprising that

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38 Since the Paramount Chief had left a three year old heir-apparent, his brother, Chief Bereng Griffith, the erstwhile contender for the throne, was according to custom a logical choice for appointment as Regent. It is claimed that colonial officials, who were not disposed towards Bereng because of his perceived hostility to the colonial regime, discreetly manipulated Seeiso's former Councillors and members of the royal family to frustrate Bereng's appointment in favour of Chieftainess 'M'ants'ebo.

39 (1926-53) HCTLR 50.

40 (1926-53) HCTLR 212.

41 The political undercurrent of this action was that, as the biological mother of the heir-apparent, 'M'abereng wanted to be appointed as administrator of the estate of the late Paramount Chief on behalf of her son. If she succeeded on that aspect, there would be no reason why she would not later assert one of her ambitions – to be appointed as Regent and Acting Paramount Chieftainess in the place of 'M'ant'sebo. There was also no doubt that her suit had been influenced by the ruling in *Bereng Griffith v 'M'ants'ebo Bereng Griffith*.

the rulings in the two cases were different, it is quite clear that the judge sensed that sticking to the principle upheld in the earlier case would destabilise the Regency.

The 1938 Proclamations were not the last set of reforms to directly affect the chieftaincy. In 1948 the Basutoland Council Proclamation was promulgated, directly impacting on the privileges of the chieftaincy. Among other things, it reduced the number of chiefs and headmen nominated by the Paramount Chief to the reformed Basutoland Council by almost twenty-five.

The poignancy of these reforms is that while they asserted the authority of the colonial state over the chieftaincy, they did little to restore the control of the people over these institutions. This model of governance did little to reverse the culture of authoritarianism, then deeply ingrained in the workings of these institutions. Thus, judged against this trend, which took root in about fifty years, the reforms of the 1930s and 1940s have rightly been classified as "a revolution introduced by the Government and designed to transform into a 'Native Administration' of the Lugard-Cameron model, the political system of the Basuto".[42]

The impact of the reforms was without doubt dramatic, not only upon the entire system of governance, but also on the authority, self-esteem and confidence of the chieftaincy; a chieftaincy that had definitely entered its twilight phase. The institution was also harmed by the outbreak of liretlo (ritual murders) in which many chiefs were allegedly involved. The most senior chief in the territory, and *de facto* head of the royal dynasty, Bereng Griffith, and the former acting Paramount Chief, Gabashane Masopha, were among those convicted and sentenced to death for their involvement in liretlo.[43] There is little doubt that the recourse to the superstition of liretlo was a direct consequence of the uncertainties and pressures wrought by the 1930's and 1940's reforms concerning the chieftaincy.[44] An institution that for decades had considered itself too strong to be touched by the colonial state, even as it enjoyed the protection and patronage of the latter, woke up towards the end of colonial rule to find its powers clipped, its prestige diminished and the prospects of decolonisation set to emasculate it still further.

6 POST-INDEPENDENCE REGIONAL PATTERNS: DOWN A SLIPPERY SLOPE

The inexorable trajectory of relegation of chieftaincy set in motion by colonial rule in Lesotho, and similar developments in all Southern African countries, was not halted, but instead reached its culmination at independence in the 1960s and later, when the region freed itself from colonial rule and Apartheid. This development assumed two constitutional directions: Firstly, by-and-large the chieftaincy was pushed still further away from exercising legislative powers, either in its own right or through parliaments, the contemporary repository of these powers. Secondly, chieftaincy in all countries appears to have been completely "tamed" and irrevocably subordinated to the authority of the modern state, and now such chieftaincies operate as the latter's extension.

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42 Jones *A Report of the Recent Outbreak of "Diretlo" Murders in Basutoland* (1951) 40.

43 *Bereng Griffith Lerotholi and Others v The King* (Privy Council Criminal Appeal) (1926-53) HCTLR 149.

44 Jones *A Report of the Recent Outbreak of "Diretlo" Murders in Basutoland*.

6 1 A tenuous legislative role

In the post-colonial period, the dominant role once enjoyed by the chieftaincy in the proto-legislative organs of colonial government is now largely perceived to be inconsistent with the concept of democracy based on non-prescriptive elective principles. This perspective is institutionalised through varying degrees of exclusion of the institution from the hub of legislative power, ostensibly because its role would dilute the "democratic" element of the emergent elected dispensation. This trend took the form of creating a separate "upper" House, styled "the Senate" for the senior layers of the chieftaincy in Lesotho.[45] The role of the Senate is that of a subsidiary House, with powers to scrutinise and delay legislation, but without either authority to initiate or veto Bills from the National Assembly, the elected "lower" House.

Botswana and South Africa opted for a model that put chieftaincy representation wholly outside Parliament. Thus, the House of Chiefs or the Council of Traditional Leaders are not Houses of Parliament, but act as sounding boards, each to be consulted by the National Assembly or to make recommendations to the national government only on matters that may alter the powers of the chieftaincy, the organisation, powers or administration of customary courts, customary law or tribal organisation or tribal property.[46] A third model recently adopted by post-colonial Zimbabwe is arguably one of a few exceptions where the President enjoys the prerogative to nominate a number of chiefs directly into the National Assembly.[47]

6 2 An adjunct of the State

The other direction of post-colonial constitutional development is characterised by the consolidation of the annexation of the chieftaincy as an adjunct of the modern state, a process also historically set in train under colonial rule. In this regard, three broad principles seem to operate. First, the Chieftainship Acts contain provisions that place the chieftaincy under the administrative oversight authority of a cabinet minister.[48] Secondly, while designation to succeed to a chieftaincy is characteristically left to be determined in accordance with the customary law, it ultimately falls to a cabinet minister to give the final stamp of approval for the designation.[49] Thirdly, as with the colonial state, the post-independence authorities have appreciated the importance of retaining for the chiefs limited residual powers of maintaining law and order, crime prevention

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45 In terms of s 55 of Constitution of Lesotho, principal chiefs *are ex officio* members of the Senate. The Council of State advises the King on the nomination of eleven additional members of the Senate.

46 See s 88(2)(a), (b), (c) and (d) of the Botswana Constitution, and s 7(2) of the South African Council of Traditional Leaders Act 10 of 1997.

47 This arrangement is otherwise criticised as a ruse to allow the President to dilute the results of popular elections in favour of his party in the event of the latter failing to secure the necessary majority.

48 See generally the provisions of Part II of the Botswana Chieftainship Act of 1966; provisions of Part VI of the Lesotho Chieftainship of 1968.

49 See s 4(b) of the Botswana Chieftainship Act. The essence is retained in s 5 of the Lesotho Act, which provides that the succession shall be subject to the approval of the King acting on the advice of the Minister. Section 111(1) and (2) of the Constitution of Zimbabwe similarly confers the authority to recognise designation to a chieftaincy to the President.

and the promotion of the welfare of the people under their respective jurisdictions.[50] These residual administrative functions are subject to revocation or extension, as the post-colonial authorities may deem expedient.

In South Africa, a far more revolutionary challenge to the conceptualisation of chieftaincy/traditional leadership as it has historically evolved turns around the change of the rule of succession. Historically, succession is informed in a majority of communities by the principle of male primogeniture, or female primogeniture in a minority of others.[51] Central to the challenge is the apparent conflict between the principle of primogeniture and the constitutional ethos of equality and non-discrimination. In the watershed case of *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the RSA* the Constitutional Court ruled that the principle of primogeniture violated critical pillars of the Bill of Rights especially the provisions of equality, human dignity and the rights of children.[52] A chorus of critics and interest groups has assumed that the ruling applies *mutatis mutandis* to render the primogeniture principle in the context of chieftaincy succession unconstitutional.[53] It could be argued that the jury is still out, as the ruling was indeed limited to the issue of inheritance in the private sphere, rather than succession to a chieftaincy, which is public office. Indeed, it may well be that when the courts are eventually called upon to make a determination on the consistency of chieftaincy succession with the provisions of the Constitution, the key question to resolve would be whether or not it is discriminatory *per se* to reserve accession to a public office to members of a particular class, identified as such by their birth. It is apparent therefore that the issue in chieftaincy succession vis-à-vis the provisions of the constitution raises broader constitutional questions than the primogeniture principle.

The landscape portrayed by constitutional developments directly impacting on the chieftaincy in the countries surveyed above bears testimony to one consistent trend: that notwithstanding the commonplace belief that de-colonisation would restore African culture and the institutions around which it is anchored, the pattern of events points in the opposite direction. In almost all these countries, the post-colonial state has intermittently continued the role initiated by the colonial state of upstaging the chieftaincy as the centre of governance and placing it under the strictures of its control. Its future has never been more uncertain.

7 CONCLUSION

Chieftaincy was the central organ of government in traditional African society. While it operated in a complex and indeed different manner from the Western

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50 See ss 6 and 7 (Lesotho Act) and ss 15 and 17 (Botswana Act). The South African Traditional Leadership and Governance Framework (Amendment) Act 41 of 2003 provides that traditional leaders shall discharge functions accruing to them under customary law and custom.

51 The Balubedu in the Limpopo Province are a good example of a community whose chieftaincy succession is based on the female primogeniture principle.

52 2005 1 SA 580 (CC).

53 It is contended, however, that this interpretation is misguided in the sense that it fails to make an important distinction between the primogeniture principle in customary law as it applies to private inheritance, as against its application in the public succession sphere. This distinction between inheritance and succession under customary law was eloquently articulated in the minority judgment of the court delivered by Ngcobo J in the case.

concept of separation of powers, it was nonetheless embedded in effective systems of checks and balance and also functioned in a highly democratic and responsive manner. With colonial Lesotho as an example this article has attempted to give an historical perspective of how the institution shed these characteristics. Rather than seeing the transformation as one in which the institution was solely an object manipulated by the colonial state, the article highlights how over a period of fifty years, chieftaincy was equally responsible for the social circumstances that over time created constitutional developments leading to its steady decline and marginalised role in society.

In the end, the article provides an overview of the institution's position in the post-independence dispensations of the region. A salient feature that emerges from this overview is of an institution that has indeed entered its twilight age. Post-colonial regimes have further accentuated its marginal role in the critical area of legislative processes. While it retains some administrative roles, there is little doubt that it does this at the behest of the modern state, perhaps only because the latter is yet to develop an alternative, equally effective apparatus of rural governance. It can be speculated with a degree of certainty that when such an apparatus emerges and has proven its capacity to serve the State's writ, chieftaincy's fate will have been sealed.

Exploring the Impact of Breach of Contract on Contemporary Fixed-Term Contracts

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1 INTRODUCTION

A fixed-term contract is a contract that is concluded between an employer and an employee in terms of which the latter is employed for a specific period of time. Parties to a fixed-term contract undertake to bind themselves for a certain period of time, as opposed to indefinitely.[1] A fixed-term contract is also regarded as an atypical form of employment that deviates from the usual construction of a modern employment relationship in the sense that the latter envisages a continuous relationship between an employer and employee.[2] The duration of an employment relationship is regulated in terms of the employment contract and effect has to be given to its provisions.[3] The result is that the parties in a fixed-term contract are required to honour and perform their reciprocal obligations for the duration of such a contract, and to plan their lives accordingly with the assurance that their reciprocal obligations will be performed in the absence of a material breach of their contract. In terms of the common law, a fixed-term contract is automatically terminated upon the expiry of the period it was concluded for, except when the parties agree to renew it.[4]

However, too often circumstances at the workplace or in the personal lives of the contracting parties change, with the effect that a fixed-term contract may

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1 *Buthelezi v Municipal Demarcation Board* 2005 2 BLLR 115 (LAC) 118I–119C.

2 Olivier "Contractual Control of the Employment Relationship: Perspectives from the New Labour Relations Act (2) – Temporary Employment" 1997 *De Rebus* 624 625.

3 See eg *Johnson/JC Masikhanye Projects CC* 2005 6 BALR 598 (MEIBC) where it was held that the employee was not dismissed but instead appointed on a fixed-term contract that ended when the work for which he had been employed was completed; *Dladla and On-Time Labour Hire CC* 2006 27 *ILJ* 216 (BCA), holding that the employee was not dismissed but that his fixed-term contract had instead expired; *Noble/SARU* 2006 2 BALR 134 (CCMA), holding that expiry of a fixed-term contract does not constitute a dismissal.

4 Brassey *Employment and Labour Law Vol 3: Commentary on the Labour Relations Act* (1999) A8:9; also *SA Rugby (Pty) Ltd v CCMA* 2006 1 BLLR 27 (LC) 29E; *Noble/SARU* 141C, holding that once the period or task has ended there is no need for either party to end the contract because it ends automatically; *Buthelezi v Municipal Demarcation Board* 120C–D, holding that a fixed-term contract usually endures for the period for it was concluded except in cases of impossibility of performance or a material breach of the contract; *Swart/Department of Justice* 2003 7 BALR 802 (GPSSBC), holding that an employee employed on a temporary basis until a post is permanently filled does not acquire a reasonable expectation that he should be appointed in that position.

very well not survive its full period. This article aims to consider the impact of the material breach of a fixed-term contract by either of the contractual parties as a valid reason for terminating such a contract prematurely. I shall also touch on the interaction between germane contractual principles and statutory provisions that are applicable in this context, albeit briefly.

2 TERMINATING A FIXED-TERM CONTRACT

I have explained in the introduction that the terms of any employment contract, including an employment contract with a fixed-term, usually determine its duration. A contract concluded for a particular period of time should thus only terminate when this period lapses. This principle is often referred to as a fixed-term contract being terminated through the effluxion of time.[5]

Accordingly, based on purely contractual principles, an employment contract with a fixed period terminates through the effluxion of time and is not cancelled. This point was taken in *Ndaba v Board of Trustrees, Norwood Pre-School*,[6] where the Court held that the services of a teacher who was employed on a temporary basis for a fixed period of twelve months, automatically ended at the end of the period indicated in her contract, and that it was not necessary to terminate the contract. More recently, it was stated in *Seforo and Brinant Security Services*[7] that "[a]t common law a fixed-term contract of employment expires automatically when the time period comes to an end or when the specific project is completed".

However, presently this position applies only in the situation where an employee does not have a reasonable expectation that his fixed-term contract will be renewed, if indeed, the statutory provisions of the Labour Relations Act[8] apply.[9] Similarly, if an employment contract is renewed for another fixed term, the contract terminates automatically only at the end of the second fixed period, if the employee does not have a reasonable expectation of renewal.[10]

An employment contract that contains a clause which entitles either of the parties at any time during the duration of the contract to give the other party one month's written notice to terminate the contract is not regarded as a real fixed-

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5 *Smith v American International School of Johannesburg* 1994 15 *ILJ* 817 (IC) 820A–B; *Malandoh v SA Broadcasting Corporation* 1997 18 *ILJ* 544 (LC) 547H–J, holding that until the time an employer gives an employee notice that he does not intend to renew the fixed-term contract, the employment relationship is regulated in terms of the contract.

6 1996 17 ILJ 504 (Tk) 509G–H; 510B–D.

7 2006 27 *ILJ* 855 (CCMA) 859A–B.

8 Act 66 of 1995, hereinafter "the Labour Relations Act".

9 In terms of s 186(1)(b). See eg *Malandoh v SA Broadcasting Corporation* 547D–E, 549A–C; *University of South Africa v Dierks* 1999 4 BLLR 304 (LC) 324J; *McInnes v Technikon Natal* 2000 6 BLLR 701 (LC) 706A; *Biggs v Rand Water* 2003 24 ILJ 1957 (LC) 1961A–B; *Swanepoel/Department of Water Affairs and Forestry* 2005 12 BALR 1272 (GPSSBC) 1282C–E; *SARPA obo Bands & Others/SA Rugby (Pty) Ltd* 2005 2 BALR 209 (CCMA) 222A–C; *Van Wyngaardt/Unisa* 2006 1 BALR 91 (CCMA) 102G–J; *Yebe/University of KwaZulu-Natal (Durban)* 2007 1 BALR 77 (CCMA) 91B–D; *Nyama/Twala's Construction* 2007 2 BALR 166 (CCMA) 171F.

10 See generally Kerr "Cancellation, Termination, Rescission or Discharge of Contracts and the Effect Thereof" 1980 *SALJ* 374 376; also Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* Service Issue 11 (2006) para 297.

term contract, but rather as a contract of maximum duration.[11] It follows that it is at all times important to determine whether a contract is in fact a real fixed-term contract first, before considering the consequences of terminating a particular contract prematurely.

3 PREMATURE TERMINATION

3 1 General observations

It is from the outset important to recognise that contractual principles continue to feature in aspects relating to employment contracts, regardless of the fact that many aspects of these contracts are impacted upon by statutory provisions.[12]

A breach of an employment contract occurs when either of the contracting parties acts in breach of a contractual duty[13] or a term of the contract.[14] So not surprisingly, in the event of a term of an employment contract being breached, for example, a term indicating the duration of an employment contract with a fixed-term, relevant contractual principles bearing on breach of contract come into play and should be considered.

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11 *Mafihla v Govan Mbeki Munipality* 2005 4 BLLR 334 (LC) 342B, 343B. Todd AJ explained *in casu* that a fixed-term contract with a clause that entitles either of the parties to terminate the contract at any time during its period by giving one month's written notice is not a "true" fixed-term contract, but rather a contract that may be described as a "maximum duration" or "maximum term" contract. Although such a contract is not regarded as a "true" fixed-term contract, it is nevertheless a type of employment contract. The effect thereof is that the usual statutory provisions pertaining to other employment contracts with fixed-terms apply. See further 346D–E and G–H. This means *inter alia* that the provisions of the Labour Relations Act prevail over the so called "maximum duration employment contracts" and contracts with limited durations. See with regard to limited duration contracts *SACCAWU v Priserv ACB Recruitment Pty Ltd* 2007 1 BLLR 78 (LC) 81H–I, 82B and D–E.

12 See eg *Fedlife Assurance Ltd v Wolfaardt* 2001 22 *ILJ* 2407 (SCA) 2414E, holding that the Labour Relations Act does not abrogate common-law rights; *Denel (Pty) Ltd v Vorster* 2005 4 BLLR 313 (SCA) 318H–I, holding that the Constitution does not deprive contractual terms of their effect; *Jonker v Okhahlamba Muncipality* 2005 6 BLLR 564 (LC) 569A, holding that the interface between the Constitution, labour legislation and the common law depends on the right claimed and how it is pleaded; also Bosch "Implied Term of Trust and Confidence in South African Labour Law" 2006 27 *ILJ* 28 45 who states that court decisions confirm that an employee may base a claim on the common law when it comes to the termination of an employment contract.

13 Grogan *Workplace Law* 8 ed (2005) 52. See for example *Wyeth SA (Pty) Ltd v Manqule* 2005 6 BLLR 523 (LAC) 527B where the breach of a contractual duty in an employment context is explained in the following terms: "An employee in a contract of employment commits a breach thereof . . . he reneges on his duty . . . The employer . . . breaches the contract . . . if he reneges on his undertaking . . ."

14 Note that a contractual term is not by implication automatically similar to a contractual duty because a term, either express or implied, does not automatically encompass a duty on the side of either party. However, a contractual duty features as either an implied or an express contractual term of an employment contract. With regard to contractual terms, see generally *Ingwane v Med-Afrique* 1997 2 BLLR 210 (CCMA), where it was held that if an employer reneges on an agreement to employ an employee, a contractual term that is similarly a contractual duty, his conduct amounts to a repudiation of the employment agreement. Likewise, in *Schoeman v Kalil Nissan* 1999 20 ILJ 1353 (CCMA) 1374D–F, 1383G–H the commissioner stated that repudiation of an employment contract is an aspect which should be considered when an employer, through his conduct, prevents an employee from taking up his employment as agreed.

3 2 Material breach of contract and fault

It is generally accepted that when a party to an employment contract is guilty of a fundamental (material) breach of the contract, the contract does not end *per se*, but rather provides the other party with an election to either uphold the contract or to terminate it.[15] Note, however, that the requirement of "materiality" in respect of a breach before a contractual party may cancel the contract has been criticised as "doomed" to fail. This criticism is based on the idea that it is impossible to find a general test to determine which instances of material breach of a contract justify its cancellation.[16] Fault is apparently no longer a requirement for contractual liability.[17] So, although reference is sometimes made to the parties in an employment relationship in the context of contractual breach as the "innocent" party and the "guilty" party respectively, it does not imply that guilt or rather "fault" *per se* is a requirement for contractual liability. In fact, it has been suggested that fault as a requirement for breach of contract may presently be regarded as *terra incognita* (unknown territory).[18] Stoop opines that because the remark by Van Heerden JA in *Administrator, Natal v Edouard* was made *obiter*, the common-law position should still apply. The author suggests that breach of contract should be defined as an act by a person which in a wrongful and culpable way causes damage to another contracting party.[19]

It is submitted that although Stoop's limited definition of breach of contract has merits in some situations, it should be entertained cautiously in the context of breach of any employment contract, including one with a fixed term. Although fault on the part of either the contracting parties may be present in some instances where fixed-term employment contracts are breached, breach of these contracts is often not based on "wrongful and culpable" conduct.[20]

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15 *Myers v Abramson* 1952 3 SA 121 (C) 123F–H, holding that a material breach of contract provides the innocent party with a choice, namely to hold the other party to the contract or to terminate it. See also *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 2 SA 943 (A) 952A, where Jansen JA explained that when a fundamental breach of an employment contract takes place, the contract does not end *per se*. The innocent party, *in casu* an employee, is vested with an election to stand by the contract or to terminate it.

16 Naudé & Lubbe "Cancellation for Material or Fundamental Breach: A Comparative Analysis of South African Law, the UN Convention on Contracts for the International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts" 2001 *Stell LR* 371 393.

17 Per Van Heerden JA in *Administrator, Natal v Edouard* 1990 3 SA 581 (A) 597E–F who remarked *obiter* that fault is not a requirement for a claim for damages based upon a breach of contract.

18 Stoop "Contractual Liability in the Roman and Modern South African Law of Contract" in Van Wyk & Van Oosten *Nihil Obstat Feesbundel vir WJ Hosten* (1996) 163 176–177.

19 Stoop in Van Wyk & Van Oosten *Feesbundel vir WJ Hosten* 178.

20 See generally *Marshall v Vistech Communications (Pty) Ltd* 1994 15 *ILJ* 1365 (IC) 1369J–1370D, holding that although the employer repudiated the applicant's contract by refusing to allow her to perform, he acted fairly because he had a sound reason for refusing to allow the applicant to resume working; *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* 1997 18 *ILJ* 361 (LAC) 364C–F, 366C–D, holding that although the employer breached the contract by changing the employee's remuneration package, there was a valid commercial rationale for it.

3 3 Repudiation and termination

Repudiation of a contract is not the same as termination of the contract.[21] A contract is only terminated after the innocent party has accepted the repudiation of the contract.[22] Whether or not a party to an employment contract has repudiated the contract should be determined by applying the following test, namely "whether conduct amounts to such a repudiation (as justifies cancellation) is fairly interpreted . . . it exhibits a deliberate and unequivocal intention no longer to be bound".[23]

It follows that if either of the contracting parties terminates a fixed-term contract prematurely, the innocent party has a choice. Firstly, he may accept the other party's repudiation of the contract, with the effect that the contractual relationship between the parties comes to an end, and claim damages in terms of the ordinary contract-law principles. In a recent decision, *Monei and Manning Rangers Football Club*,[24] contractual damages were awarded to an employee, a professional football player, after his employer, a soccer club, unilaterally terminated his fixed-term contract before its expiry. The arbitrator explained that by dispensing with the applicant's services, the employer had expressed a deliberate and unequivocal intention not to be bound by the fixed-term contract.[25] This conduct constituted repudiation of the fixed-term contract which was accepted by the employee. The employee then elected to claim contractual damages, which were awarded.[26] Secondly, the innocent party may elect to hold the other party to the contract by claiming specific performance.[27]

3 4 Premature termination by an employer

From a strictly contractual point of view an employer is in breach of the contract if he fails to comply with a contractual provision. This means that an employer acts in breach of a fixed-term contract when he terminates such a contract prematurely. In *Mafihla v Govan Mbeki Municipality*,[28] Todd AJ explained that if an employer terminates an employment contract that the parties regarded as a fixed-term contract with immediate effect and without notice on the grounds of

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21 *Khanyile v Telkom SA Ltd* 1999 20 *ILJ* 2470 (CCMA) 2474A–E.

22 Ward J stated in *Yodiaken v Angehrn & Piel* 1914 TPD 254 at 262 that "unless there was a reason to repudiate, or the breach goes to the root of the contract, I do not think the other party is entitled to rescind [terminate]". See also *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 3 *ILJ* 285 (A) 289H, 291A where Van Dijkhorst J held, firstly, that as a general rule, an innocent party to a contract which was wrongfully rescinded by the other party can hold that party to the contract if he so elects, and secondly, that there is no reason why this general rule should not also be applicable to employment contracts. See too *Khanyile v Telkom SA Ltd* 2474F–H, where the commissioner observed that it is possible that the legislature intended in certain situations that the repudiation does not have to be accepted by the other party in order to effect termination of the contract.

23 *Streek v Dublin* 1961 2 SA 4 (W) 10, later approved in *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 2 SA 835 (A) 844, and also applied in *Schoeman v Kalil Nissan* 1374E–F.

24 2006 27 *ILJ* 242 (ARB).

25 244A–C.

26 244B and G.

27 See generally Mischke "Return of the Employment Contract" 2002 *Contemporary Labour Law* 58; see further below.

28 2005 4 BLLR 334 (LC).

alleged material breach by the employee, or, as *in casu*, on the grounds of a mistaken belief that continued employment violated the provisions of a statute which regulated the employment relationship, the employer commits a material breach of the contract in the form of repudiation of the contract.[29] One of the problems *in casu* pertained to the validity of the particular contract. It was contended on behalf of the employer that s 57(1)(a) of the Municipal Systems Act[30] required that an employee must be employed in terms of a written contract. The employer claimed that the contract between the parties was not a written signed one, and it informed the employee that his employment relationship with the Municipality had been terminated on operational grounds, because the employer was not willing to remain in breach of statutory provisions.[31] Todd AJ disagreed with the employer's interpretation of the said statute, and held that although the written contract was not signed by both parties, it was sufficient that the written document was adopted and acted upon by the parties.[32]

Next, Todd AJ explained the contractual position following the employer's repudiation of the contract. The employer's repudiation did not terminate a contract, but rather provided the employee with an election, namely to accept the repudiation and to cancel the contract, or to refuse to accept the repudiation and to seek enforcement of the contract by means of a claim for specific performance. The contract would only have been terminated if the employee decided to accept the repudiation and elected to cancel the contract.[33]

However, in the *Mafihla* decision the employee chose to seek specific performance. Although a claim for specific performance is always subject to the court's discretion, there is no rule in law that specific performance of employment contracts may not be granted.[34] Based on the circumstances of *Mafihla*, Todd AJ granted an order in terms of which the employer had to comply with the terms of the contract until such time as the contract was lawfully terminated.[35] It was accordingly sufficient to confirm an employee's contractual rights in this case, as opposed to dealing with the matter by application of the applicable statutory provisions.

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29 344B–E.

30 Act 32 of 2000.

31 In terms of s 188(1)(a)(ii) of the Labour Relations Act, which makes provision for termination of employment based on an employer's operational requirements.

32 341D–H.

33 344E–F. See also *Monei and Manning Rangers Football Club* 244A–C, holding that if an employer repudiates an employee's fixed-term contract by dispensing with his services before the period of the fixed-term contract lapses, the employer clearly and deliberately expresses the intention not to be bound to the contract; generally Christie *The Law of Contract* 5 ed (2006) 538–542.

34 *National Union of Textile Workers v Stag Packings (Pty) Ltd* 291A, where a full bench of the High Court held that there is no general reason why this contractual remedy should not be applicable to employment contracts.

35 346B–347A. Note that Todd AJ did not elaborate further on what the position would have been if the applicant did not base his primary claim on contractual principles, but instead on the alternative claim based on an unfair dismissal. This aspect was not addressed because the applicant sought an order to direct his employer to allow him to perform his duties in terms of his contract.

A few years earlier, in *Fedlife Assurance Ltd v Wolfaardt*,[36] the availability of contractual remedies in an area of labour law where statutory provisions usually prevail was confirmed.[37] Briefly, in the *Fedlife* decision an employee claimed damages for breach of his fixed-term employment contract after he was dismissed. The employee's contract was prematurely terminated because his position had become redundant. The employer thus terminated the contract by effecting a dismissal based on its operational requirements. Nugent AJA held firstly that the Labour Relations Act does not expressly or by implication abrogate an employee's common-law entitlement to enforce contractual rights. The clear purpose of legislation is to supplement the common law rights of an employee whose employment might be lawfully terminated at the will of an employer, whether this was through giving notice or by means of summary termination for breach of contract.[38] Put another way, the purpose of legislation is to provide an additional right to an employee whose employment might be terminated lawfully, but under the circumstances was nevertheless unfair.[39] The effect thereof is that the Labour Relations Act does not deprive an employee from his common law right to enforce a contractual claim for damages, provided the contract has been breached on the ordinary principles of the common law.[40]

Secondly, although the Labour Relations Act refers to fixed-term contracts in s 186(1)(b), it does not define the premature termination of such a contract as a dismissal. The reason is that the common-law right to enforce a particular term in a fixed-term contract remained intact, and it was thus not necessary to declare a premature termination to be an unfair dismissal.[41]

Similarly, the court held in a more recent decision that a fixed-term contract is terminated unlawfully when an employer dismisses an employee based on its operational requirements, irrespective of the fact that the employer had valid operational reasons to do so.[42] This point is important because the Labour Relations Act allows for the termination of an employment relationship based on an employer's operational requirements.[43] Jafta AJA stated that an employer may

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36 2001 22 *ILJ* 2407 (SCA).

37 For a discussion of the *Fedlife* decision, see Geldenhuys "Premature Termination of a Fixed-term Employment Contract: Unlawful Termination or Unfair Dismissal" 2002 *SA Merc LJ* 765.

38 2414E–F.

39 2414F. Note that Froneman AJA disagreed in a minority judgment from the majority on this point, by stating that the Labour Relations Act deals comprehensively with issues regarding unlawful breach of contract through its provisions pertaining to unfair dismissals. Froneman AJA stated at 2423H–I that "[d]ismissal upon an unlawful breach of contract . . . is an unfair dismissal . . . the Act deals fully with the consequences of an unfair dismissal". Therefore Froneman AJA held that the employee was required to utilise the statutory avenue based on an unfair dismissal as opposed to basing his claim on contractual principles.

40 2415E–F and H–I, 2417D–E, 2417C–F. The effect thereof is that an employee is entitled to claim contractual damages for the premature termination of his fixed-term employment contract provided that he bases this claim on the terms of his contract. If an employee claims in the alternative that the breach of his contract established an unfair dismissal and he chooses to proceed on this basis, his claim will be entertained as one for statutory compensation based on an unfair dismissal.

41 2415H–2416A.

42 *Buthelezi v Municipal Demarcation Board* 119H–120B.

43 Section 188(1)(a)(ii); s 189 of the Labour Relations Act.

not terminate a fixed-term contract prematurely (ie before expiry of the period for which it was concluded), irrespective of its operational requirements. If an employer terminates such a contract prematurely, a material breach of the contract is established.[44] It is not unfair to keep an employer to the contract because the latter could have concluded an indefinite employment contract instead.[45] So, by implication an indefinite employment contract may be terminated fairly based on an employer's operational requirements as opposed to one with a fixed-term. Interestingly, Jafta AJA also found it necessary to observe that the Labour Relations Act did not change the common-law rules pertaining to premature termination of a fixed-term contract in this regard.[46]

There is one situation where an employer is allowed to terminate a fixed-term contract prematurely, namely in the event of a material breach by the employee.[47] A material breach of a contract by an employee transpires where the latter, for example, fails to comply with the reasonable instructions of his employer,[48] refuses to work,[49] acts grossly dishonestly,[50] or fails to act in good faith.[51] A decision in point is *Carter v Value Truck Rental (Pty) Ltd*,[52] where the court acknowledged that "both at common law and under the equitable dispensation created by the LRA [Labour Relations Act]" the employment relationship is regarded as one of the highest good faith.[53] The effect thereof is that conduct contrary to good faith is regarded in such a serious light that it may justify

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44 At 119I–120A; 121I–122E. In statutory terms it means that the employee's employment contract was terminated by means of an unfair dismissal.

45 At 119J–120A.

46 At 120C; similar to the observation in the *Fedlife* decision at 2414E–F.

47 *Buthelezi v Municipal Demarcation Board* 119B–C. See also Grogan "Premature Dismissal Termination of Fixed-Term Contracts" 2005 April *Employment Law* 15; Mischke "Breach of Contract and Constructive Dismissal Buthelezi v Municipal Demarcation Board 2005 2 BLLR 115 (LAC)" Oct 2005 *Contemporary Labour Law* 99.

48 See eg *Gcabashe/University of Zululand* 2006 4 BALR 382 (CCMA), holding that by ignoring a rule in respect of the use of notes during an examination the employee breached his employment contract, it went to the root of the employment relationship, and it justified his dismissal for misconduct; *Metrorail Services and United Transport & Allied Trade Union on behalf of Ndou* 2002 23 ILJ 1649 (BCA), holding that ignoring a rule relating to speeding justified dismissal for misconduct.

49 See eg *Simba (Pty) Ltd v Food & Allied Workers Union* 1998 19 *ILJ* 1593 (LC) 1596A–B concerning a collective refusal to obey a lawful instruction; *Nkuthu & Others v Fuel Gas Installations (Pty) Ltd* 2000 21 *ILJ* 218 (LC) 229B–C concerning participation in unprotected strike action; *Volkswagen SA (Pty) Ltd v Brand NO* 2001 22 *ILJ* 993 (LC) 1012C–D concerning the refusal of employees to return to work.

50 See eg *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration* 2000 21 *ILJ* 1051 (LAC) 1058J–1059A; *Toyota SA Motors (Pty) Ltd v Radebe* 2000 21 *ILJ* 340 (LAC) 343D–F, holding that the conduct of an employee, who had an accident with a company car and pretended that the car was hijacked, constituted fraudulent and gross dishonest behaviour.

51 See eg *Council for Scientific and Industrial Research v Fijen* 1996 6 BLLR 685 (A), holding that conduct that is clearly inconsistent with trust and confidence constitutes a repudiation of an employment contract. See also *JD Group Ltd v De Beer* 1996 17 *ILJ* 1103 (LAC) 1112–1113*; Sappi Novoboard (Pty) Ltd v Bolleurs* 1998 19 *ILJ* 784 (LAC) 787D; *Carter v Value Truck Rental (Pty) Ltd* 2005 1 BLLR 88 (SE) 100E–F; *Wheeler/Technikon Pretoria* 2006 4 BALR 439 (CCMA) 456G–I.

52 2005 1 BLLR 88 (SE).

53 100C–D.

termination of a fixed-term employment contract.[54] Grogan AJ stated that the only relevant question *in casu* was whether there was a fair reason for dismissing the employee, which in turn was determined by considering the principles of the Labour Relations Act's *Code of Good Practice: Dismissal*.[55] If, however, the facts in a particular matter concerning misconduct either fail to indicate a fair reason for the dismissal, or if dismissal is an inappropriate response to the facts, the employer must be deemed to have unlawfully repudiated the employee's employment contract.[56] Grogan AJ held *in casu* that the employer had terminated the fixed-term contract lawfully before its expiry date based on the employee's misconduct.[57]

Thus, in the absence of a material breach of the contract in the form of serious misconduct, an employer may not terminate a fixed-term contract prematurely.[58] It has been suggested that an employer who intends to employ an employee on a fixed-term contract should consider providing for the termination of such a contract under certain circumstances by simply inserting a contractual term to the effect.[59]

3 5 Premature termination by an employee

Like an employer, an employee may terminate an employment contract in the event of a material breach of the contract by the former[60] by accepting the

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54 102E–F. *In casu* the employer was held to be entitled to terminate an employee's fixed-term contract prematurely "in law and fairness" based on the latter's dishonest conduct, irrespective of the alleged "once-off" nature of the conduct.

55 In Schedule 8 of the Labour Relations Act, hereinafter referred to as "*the Code of Good Practice: Dismissal*". See items 3(4) and 4(1), which provide guidelines for effecting a dismissal fairly based on misconduct.

56 91D–E. See also *Li Ying/Proton Textile CC* 2005 7 BALR 747 (CCMA) 752G–H, where the commissioner held that no evidence existed that the employee acted contrary to her fiduciary duty in competition with her employer in order to justify the latter's decision to terminate her fixed-term contract prematurely.

57 102E–F. It was held that the fixed-term contract was lawfully terminated by reason of misconduct, being a fair reason to effect a statutory dismissal in terms of s 188(1)(a)(i) of the Labour Relations Act; see generally items 4 and 5 of the *Code of Good Practice: Dismissal*.

58 Whether or not an employer may terminate a fixed-term contract prematurely by effecting a statutory dismissal based on the employee's incapacity seems unclear. Jafta AJA stated in *Buthelezi* 120C–D that "labour legislation . . . has amended the common law in certain respects. However, it has not amended the general principles that a fixed-term contract may not be cancelled unilaterally during its currency in the absence of a material breach . . .". Jafta AJA held further at 122E that "operational requirements . . . did not in law give the [employer] the right to terminate the contract . . . between the parties". Whether this ratio implies that incapacity should also "in law" not allow for the premature termination of a fixed-term contract, is arguable. Case law is silent in this specific regard, save for the decision of *Buthelezi*. It is submitted that an employer should be able to terminate a fixed-term contract prematurely based on contractual impossibility, in the sense that an employee is unable to meet his contractual obligations based on his incapacity.

59 Mischke "Fixed-Term Contracts and Unfair Dismissals" 2005 *Contemporary Labour Law* 77 80. The effect thereof is that the parties should agree, irrespective of the period of the contract, that the contract may be terminated in the event of misconduct *and* operational requirements or incapacity as provided for by s 188 and s 189 of the Labour Relations Act; items 2–4, 7 and 9–11 of the *Code of Good Practice: Dismissal*; items 3–7 and 9–10 of the *Code of Good Practice on Dismissal based on Operational Requirements* GN 1517 in *GG* 20254 of 16 July 1999.

60 *Lourens v Baisch Engineering (Pty) Ltd* 2006 5 BLLR 518 (T) 519I–520A.

repudiation of the contract.[61] An employee may also decide to hold the employer to the contract by claiming specific performance.[62] This contractual position of an employee was aptly explained in *Jooste v Transnet Ltd t/a South African Airways*[63] as follows:

> "[I]f the employer repudiates the contract . . . the employee is put to an election. He may accept the repudiation, thereby terminating the contract, and claim damages . . . The usual form that the acceptance of the repudiation of the contract by an employee takes is a resignation."

So, similar to the position of an employer, an employee acquires the right to resile from an employment contract with a fixed-term if the former acts in breach of a material term of the contract.[64]

Depending on the circumstances of the particular matter, an employee may have two avenues for redress if he decides to terminate the contract. Firstly, an employee may terminate the fixed-term contract and claim contractual damages based on the breach of the material term. Secondly, the employee may avail himself of a statutory option by claiming that the material breach by the employer left him with no other option but to terminate the contract. This claim is referred to as a constructive dismissal,[65] and should be exercised with caution based on the fact that such a dismissal is not always an unfair dismissal.[66]

Nevertheless, in the absence of a material breach of the contract by the employer, an employee who terminates a fixed-term contract prematurely, acts in breach of contract, and affords his employer a choice. The employer may elect to either accept the breach and claim damages, or to hold the employee to his contractual obligations until the period for the contract expires by claiming specific performance.[67]

A number of years ago the Industrial Court held in *Penrose Holdings (Pty) Ltd v Clark*[68] that employers and employees are expected to abide by the employment contracts voluntarily entered into between them because it "is fundamental to the well-being of our society and our economy that valid contracts . . . be honoured". However, *in casu* the court refused to grant an order for specific performance based on the inherent difficulties such an order would have caused in

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61 *Monei and Manning Rangers Football Club* 244A–B.

62 *Stewart Wrightson (Pty) Ltd v Thorpe* 952; *Sun Packagings (Pty) Ltd v Vreulink* 1996 17 *ILJ* 633 (A) 640F. See further Oliver "Die Grense van die Dienskontrak: Die Ordening van Arbeids- en Sosiale Sekerheidsreg" 1999 *TSAR* 754 759.

63 1995 5 BLLR 1 (LAC) 7E.

64 See eg *O'Connell v Flischman* 1948 TPD 191 195, holding that the failure to remunerate an employee establishes breach of the contract that is regarded as of such a serious nature that the employee is entitled to terminate the contract; *Info DB Computers v Newby* 1996 17 *ILJ* 32 (W) 36A, where Goldblatt J stated that "[a] summary dismissal and a repudiation of the contract by an employer are only different ways of saying the same things, ie . . . the employer refuses to continue to employ the employee in terms of the contract".

65 In terms of s 186(1)(e) of the Labour Relations Act. See eg *Dawtry & Another/BBR Security (Pty) Ltd* 1998 8 BALR 988 (CCMA) as regards the failure to pay salary; *Vermaak/Allied Amusement Eastern Cape* 2002 7 BALR 780 (CCMA) as regards forcing an employee to resign to avoid criminal charges being brought against the latter.

66 See eg *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* 367D–E.

67 *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 23 *ILJ* 2001 (C) 2008C–E.

68 1993 14 *ILJ* 1558 (IC) 1565B–C.

the particular case. Instead the employee was interdicted from rendering services to another employer, and he was held to his contract until such time that he could lawfully terminate it. If an employee refuses to return to his employer's service despite a court order, or refuses to carry out his work to the satisfaction of his employer, various remedies are available to the employer.[69]

More recently, in *Nationwide Airlines (Pty) Ltd v Roediger & Another*,[70] the court was prepared to hold an employee to the contractual provisions of his employment contract. *In casu*, the defendant, a pilot, breached his employment contract by resigning without giving three months' written notice as required by his employment contract. The plaintiff (employer) applied for an order for specific performance for the purpose of compelling the employee to comply with the provisions of his employment contract. Horn J was prepared to exercise his discretion to grant an order of specific performance[71] after taking into consideration, among other things, the potential harm that the employer would have suffered if the employee was not held to his three-month notice period. Although this decision did not concern breach of the provisions of a fixed-term contract, the similarities between terminating the latter contract prematurely and the failure to give the required notice in the case of an indefinite employment contract are obvious. In both situations an employee acts in breach of the contractual provisions which in turn allows the employer to turn to the usual contractual remedies.

4 CONCLUSION

There are many good reasons for concluding an employment contract for a fixed-term only, but it may serve the contracting parties well to be aware of the downside of such a contract, especially if the period of the contract is rather long. Despite a change of circumstances the parties are confined to the period of the contract, except of course in the event of a material breach by either of the parties. The usual contractual remedies remain available to either an employer or an employee who is faced with a situation where the other party has terminated the contract prematurely. Regardless of the fact that the Labour Relations Act allows an employer to terminate an employment contract in particular circumstances fairly by effecting a statutory dismissal, these provisions seemingly apply in many ways only to employment contracts with indefinite periods.[72] Two observations are important. Firstly, it follows that a material breach of an employment contract with a fixed-term provides the innocent party with justification to terminate such a contract prematurely.[73] Secondly, the impact of the contractual

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69 Foxcroft J explained in *Santos Professional Football Club (Pty) Ltd v Igesund* 2013H–J that the employer may either stop paying the salary of his employee, or bring an application to cancel the contract.

70 2006 27 *ILJ* 1469 (W).

71 1476B–E.

72 Keep in mind that a material breach of a fixed-term contract by an employee may justify the latter's dismissal based on misconduct as provided for by s 188 of the Labour Relations Act.

73 Note, however, that impossibility of performance or reasonable mistake may also be utilised to terminate a fixed-term contract prematurely, although termination for these reasons appears to be rather rare in the context of fixed-term contracts. I could only find one decision where a fixed-term contract was fairly terminated for contractual mistake. See

continued on next page

concept "material breach of contract" remains of pivotal value in contemporary fixed-term contracts simply because the innocent party is provided with the opportunity to utilise germane contractual remedies, as opposed to claiming any of the statutory remedies as provided for by the Labour Relations Act.[74]

Kumbeleni/Tricor Marketing 2001 10 BALR 1088 (CCMA) 1090D–F where neither premature termination of the concerned fixed-term contract nor dismissal of the worker was proved because a valid contract did not exist between the parties based on reasonable mistake (*justus error*). See also in this regard the comments made in fn 58 pertaining to incapacity.

74 See the statutory remedies listed in s 193(1) and (3) of the Labour Relations Act. These remedies may be utilised by an employee if a fixed-term contract is terminated by an employer by means of an unfair dismissal. See further s 158(1) of the Labour Relations Act, which provides statutory remedies to, for example, an employer in the event that an employee decides to terminate his fixed-term contract prematurely, irrespective of the absence of material breach of the contract by the employer.

Governmental Liability for Acts and Omissions of Police Officers in Contemporary South African Public Law

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1 INTRODUCTION

The extent to which the State should be held accountable in damages for the wrongful or negligent conduct of police officers in the performing of their duties to: maintain law and order; investigate offences; and prevent crime has been, and still is, a thorny issue in public law, not only in South Africa[1] but also in the Commonwealth.[2] The question with which the courts have been faced in these circumstances is: do the police owe a legal duty to the public, the suspect or the victim of a particular crime not to conduct their constitutional and statutory duties in such a manner as to injure anyone who may be affected by their acts or omissions in the discharge of those duties?

At common law, the answer to the question posed would depend at any given time on the prevailing judicial conception of public policy. Over the years, the courts have tended to attribute policy as dictating whether to permit or refuse the extension of a legal duty in South African law or for determining whether the defendant owed the plaintiff a duty of care in English law.[3] Policy in this sense

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1 E.g. *Minister of Safety & Security v De Lima* 2005 5 SA 575 (SCA); *Minister of Safety & Security v Rudman* 2005 2 SA 680 (SCA); *Minister of Safety & Security v Carmichele* 2004 2 BCLR 133 (SCA) *(Carmichele 2); Minister of Safety & Security v Hamilton* 2004 2 SA 216 (SCA); *Minister of Safety & Security v Geldenhuys* 2004 1 SA 515 (SCA); *Seema v Lid van die Uitvoerende Raad vir Gesondheid, Gauteng* 2002 1 SA 771 (T); *Van der Spuy v Minister of Correctional Services* 2004 2 SA 463 (SE).

2 See eg *England: Brooks v Commissioner of Police for the Metropolis & Others* 2005 1 WLR 1495 (HL); *Wainwright v Home Office* 2004 2 AC 406 (HL); *Australia: Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) CLR 211; *Canada: Odhavji Estate v Woodhouse* (2003) 233 DLR 193 (SCC); *Hill v Hamilton-Wentworth Police* (2006) 259 DLR (4th) 676 (Ont CA); *Sulz v Canada (Attorney General)* (2006) 263 DLR 58 (BCSC); *Roy v Canada (Attorney General)* (2005) 251 DLR (4th) 233 (BCCA); *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 160 DLR (4th) 697 (Ont HC); *New Zealand: Fyfe v O'Fee* 2003 NZAR 662 (HC).

3 Public policy in the form of whether it is fair, just or reasonable to hold a party liable in a particular situation has been a major factor in the development of the principle of duty of care in English law since the celebrated judgment of the majority of the House of Lords in *Donoghue v Stevenson* 1932 AC 562 (HL); the extension of those principles by another majority of the House of Lords to negligent misstatement in *Hedley Byrne & Co Ltd v Heller & Partner Ltd* 1964 AC 465; and their further incorporation into public authority liability by yet another majority of the House of Lords in *Dorset Yacht Co Ltd v Home Office* 1970 AC 1004, 1970 2 All ER 294 (HL). On the negative side, it is that same public

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merges with the expression "public policy", a call to what is in the interests of justice, and to which common law courts resort whenever they are faced with a new fact-situation in the absence of precedent or in an endeavour to resolve a matter with a view to advancing the law in a particular direction to achieve a certain result in the interests of justice.[4]

That public policy equally plays a vital role in determining whether liability should, or should not be imposed on the State could be seen through the prism of recent developments of the law of delict in South Africa. The unanimous decision of the Supreme Court of Appeal in *Carmichele (1)*,[5] where the legal convictions of the community were held not to favour imposing liability on the government for the omissions of the police and prosecutors, shows how pervasive a role public policy can play in apparently under-developing this branch of the law.[6] Significantly, however, the Constitutional Court's decision in *Carmichele v Minister of Safety & Security*[7] was a direction to the Supreme Court of Appeal positively to rethink the concept of "policy" applicable to the law of governmental liability in the light of the mandatory constitutional imperative in s 39(2) of the 1996 Constitution.[8] It was in that light that the Supreme Court of Appeal assessed the liability of the police authorities, having re-formulated the legal convictions of the community in *Minister of Safety & Security v Van Duivenboden*;[9] *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust, as Amicus Curiae)*;[10] *Minister of Safety & Security v Hamilton*,[11] and *Carmichele v Minister of Safety & Security (2)*.[12]

Insofar as English and South African courts share in common the resort to policy in determining liability in tort, on the one hand, and delict, on the other, there is a meeting point. But in respect of the contemporary application of policy

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policy that a unanimous House of Lords resorted to in restricting liability against the police in *Hill v Chief Constable of West Yorkshire* 1989 1 AC 53, 1988 2 All ER 238 (HL) and quite recently, in *Brooks v Commissioner of Police for the Metropolis* 2005 1 WLR 1495 (HL). The majority judgments in *D v East Berkshire Community Health NHS Trust* 2005 2 WLR 993 (HL), when compared with the dissenting opinion of Lord Bingham, shows how the policy element could motivate a court to arrive at conflicting decisions given the same set of facts.

4 See Okpaluba "Justiciability, constitutional adjudication and the political question in a nascent democracy: South Africa (part 2)" 2004 *SAPL* 114 117 fn 82.

5 *Carmichele v Minister of Safety & Security* 2001 1 SA 489 (SCA).

6 See to the same effect *K v Minister of Safety & Security* 2005 26 *ILJ* 681 (SCA), 2005 3 SA 179 (SCA), 2005 3 All SA 519 (SCA), where the same Court, applying the then prevailing principles of vicarious liability of the employer in respect of intentional or criminal wrongs of employees in the course of their employment in the so-called deviation cases, held that it was contrary to public policy to hold government liable in such circumstances.

7 2001 10 BCLR 995 (CC), 2001 4 SA 938 (CC) para 56.

8 In obedience to this same injunction, the Constitutional Court not only reversed the decision of the Supreme Court of Appeal, but also went ahead to reformulate the test for determining vicarious liability of government for the intentional wrong of public officers to reflect the spirit and objects of the Bill of Rights in *K v Minister of Safety & Security* 2005 9 BCLR 835 (CC), 2005 6 SA 419 (CC). For the sake of space, this article does not deal with the intentional, criminal and deliberate wrongs of public officers.

9 2002 6 SA 431 (SCA).

10 2003 1 SA 389 (SCA).

11 2004 2 SA 216 (SCA).

12 2004 2 SA 133 (SCA).

in the development of the law of public authority liability in both jurisdictions, there is a definite parting of ways. The law in both jurisdictions has developed from opposing angles. While the courts in England absolve the police from liability in negligence in their investigative duties,[13] the courts in South Africa hold them liable for negligent performance of such duties.[14] Notwithstanding its demonstrated awareness[15] of the emerging jurisprudence from the Constitutional Court of South Africa,[16] the European Court of Human Rights,[17] the approach of the Canadian Courts,[18] and its own more flexible approach in *Barrett v Enfield London Borough Council*,[19] the House of Lords nonetheless proceeded to affirm the public policy immunity principle in its recent decision in *Brooks v Commissioner of Police for the Metropolis*.[20]

In effect, the piece-meal extension or non-extension of the duty of care in the English jurisdiction has remained at the level of dictate of public policy. Unlike in South Africa, that judicial exercise is unaided and uninspired by a Bill of Rights. This is because the Human Rights Act 1998 (UK) does not have a similar pervasive effect on the subject of tortious liability. The horizontal application of

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13 Since *Hill v Chief Constable of West Yorkshire* 1989 1 AC 53 (HL), 1988 2 All ER 238, the House of Lords has maintained that public policy would not support a situation whereby police efficiency and effectiveness is impeded in the performance of their duties by imposing liability upon them by way of damages for alleged negligent conduct in criminal investigation and suppression of crime. See also *Brooks v Commissioner of Police for the Metropolis* 2005 1 WLR 1495 (HL).

14 See the cases cited in notes 9, 10, 11 and 12 above.

15 Per Lord Steyn in *Brooks v Commissioner of Police for the Metropolis* 2005 1 WLR 1495 (HL) paras 24 & 25.

16 For example *Carmichele v Minister of Safety & Security & Another (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC); *Minister of Safety & Security v Hamilton* 2004 2 SA 216 (SCA).

17 *Osman v UK* (2000) 29 EHRR 245 para 142; *Z v UK* (2001) 10 BHRC 384 para 111.

18 *Odhavji Estate et al v Woodhouse* (2004) 233 DLR (4th) 193 (SCC); *Doe (Jane) v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 160 DLR (4th) 697 (Ont Ct GD).

19 1999 3 All ER 193 at 199d–j.

20 2005 1 WLR 1495 (HL). See also *Elguzouli-Daf v Commissioner of Police of the Metropolis* 1995 QB 335 (CA). The approach of the House of Lords accords with their lordships' systematic denigration of the simpler but more positive test for liability in bureaucratic negligence – the general theory approach – enunciated by Lord Wilberforce in *Anns v Merton LBC* 1977 2 All ER 492 498f/g–h/j, based on *Donoghue v Stevenson* 1932 AC 562 (HL); *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] 1 AC 465, 1963 2 All ER 575; and *Home Office v Dorset Yacht Co Ltd* 1970 2 All ER 294 (HL). In place of *Anns*, the House substituted a more tedious and cumbersome three-way test – the so-called incremental approach – laid down by Lord Bridge in *Caparo Industries plc v Dickman* 1990 1 All ER 568 (HL) 573j–574a/b. *Caparo* and *Murphy v Brentwood DC* 1990 2 All ER 908 (HL) therefore epitomise their Lordships' desire to cut back on the massive extension of liability in negligence to new fact-situations by making it more difficult to establish that public authorities owe a duty of care to the citizen notwithstanding Lord Macmillan's injunction that the categories of negligence are never closed – *Donoghue v Stevenson* 1932 AC 562 619. The consequence of this is that claimants against the police in England have had difficulty in convincing the courts that police officers owe them as members of the wider society a duty of care in the investigation and suppression of crime. See generally Okpaluba "The law of bureaucratic negligence in South Africa: A comparative Commonwealth perspective" 2006 *Acta Juridica* 117 122–140.

that Act has been a major source of controversy in that country,[21] while the recent case of *Wainwright v Home Office*[22] has put paid to any gainsaying the fact that the Act might assist a claimant for damages for breach by the police of a Convention right. The problem of the claimant under English law may further be compounded, as the Wainwright family discovered, by the absence of a nominate tort – for although a right might be protected from infraction as a Convention right, damages may not be recoverable if the act or omission complained of cannot be linked to a cognisable species of tort.[23] The principle that there is "no damage in the absence of a recognised tort" is the prevailing adjudicative norm in the English legal system. On the contrary, what launches a successful claim in negligence in South Africa is not that the plaintiff must show the existence of a nominate tort. It is whether the plaintiff can prove that the act or omission of the defendant was wrongful in that it constituted a breach of a legal duty; that the breach was negligent; and that it caused the damage complained of.[24]

This paper investigates the recent developments of the law of governmental accountability by way of damages for the wrongful performance of the law enforcement duties of the police in South Africa. Incidentally, a study of the case law involving police liability in the past twelve years of the democratic dispensation automatically entails tracing the genesis of the constitutional framework that gave impetus to the judicial revolution in respect of the law of public authority liability through the Constitutional Court decision in *Carmichele (1)*.[25] It similarly means, at least, a brief discussion of those police cases that led to the inevitable reformulation of the basis for delictual liability that followed that judgment. [26] Again, a study of the case law that had carried into effect the new approach to the determination of the legal duty is in effect a study of the entire law of public authority liability given the volume of cases involving the negligence of police officers. It is a statement of fact that the liability of the police has dominated the jurisprudence of public authority liability and, in the process, has

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21 Among the avalanche of literature that had trailed the enactment of this Act in connection with the hot issue of the horizontal application or otherwise of that Act, see eg Hunt "The 'horizontal effect' of the Human Rights Act" 1998 *PL* 423; Phillipson "Human Rights Act, 'horizontal effect' and the common law: A bang or a whimper?" 1999 *MLR* 824; and especially, Beyleveld & Pattinson "Horizontal applicability and horizontal effect" 2002 *LQR* 623.

22 2004 2 AC 406 (HL).

23 In *Wainwright v Home Office* 2004 2 AC 406 prison officers had violated the plaintiffs right to privacy, a Convention right. But the decision was not based on the application or construction of the Human Rights Act 1998. Yet, their Lordships had expressed the view that the Act would have made no difference to their findings. What was crucial, held their Lordships, was that there was no protection in English law for the invasion of the right to privacy even though it is one of the rights guaranteed by the European Convention. Accordingly, the prison authorities in *Wainwright* were not liable in damages for a tort that was not known to the common law.

24 *Minister of Safety & Security v Van Duivenboden* 2002 6 SA 431 (SCA) 441–442; *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA) 396; *Gouda Boerdery Bk v Transnet* 2005 5 SA 490 (SCA) 498–499. See also Neethling, Potgeiter & Visser, *Law of Delict* 4 ed (2001) 35.

25 *Carmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC).

26 Okpaluba 2006 *Acta Juridica* 144–155.

dictated the trend the developments of this branch of modern South African constitutional and administrative law have taken.

In assessing the impact of the constitutional norms on the law of governmental liability it becomes obvious from the judgments of the Supreme Court of Appeal that governmental accountability features prominently. The critical message from the evolving jurisprudence is that policy, originally the omniscient factor for determining liability in this regard, has been relegated to the background. Accordingly, constitutional values and fundamental rights have become the dominant considerations for determining the existence or otherwise of legal duty.[27] The pervasive nature of the Constitution on this branch of South African law becomes even clearer when the matter is assessed with reference to the case law from other Commonwealth jurisdictions. For this purpose, comparative materials are drawn from the English jurisdiction to illustrate that the South African law is heavily weighted towards the protection of the human rights of the victims of improper exercise of police duties and the police failure to act. Among other things, this study demonstrates that the English experience, whereby the police are immune from liability in negligence, is quite the opposite of what South African case law represents. On the other hand, Canadian law had tended to develop along similar lines to South African law – both tilt on the side of protection of the rights of the human person, human dignity and the personal security of the individual.[28]

2 THE GENESIS OF THE SOUTH AFRICAN REVOLUTIONARY TREND

Up to the time *Kadir*[29] and *Knop*[30] were decided by the Appellate Division in the twilight of Apartheid, and the first *Carmichele*[31] judgment was handed down by the Supreme Court of Appeal in 2000, the problems encountered by litigants attempting to recover damages against public authorities for the acts and omissions of their officers including the police were accentuated by two main stumbling blocks. The first was the problem of establishing that a legal duty existed, and that the conduct of the public officer was wrongful. The second was the role

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27 Policy, however, remains the dominant consideration insofar as liability is to be determined on the basis of the common law: *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 1 All SA 478 (SCA), 2006 3 SA 151 (SCA); *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of South Africa* 2006 1 All SA 6 (SCA), 2006 1 SA 461 (SCA); *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA).

28 Surprisingly, these fundamental rights issues were not considered in *Brooks v Commissioner of Police for the Metropolis* 2005 1 WLR 1495 (HL), a case described by Lord Bingham as "the most notorious racist killing which our law has ever known" and which "exposed a litany of derelictions of duty and failures in the police investigations" including the police treatment of Brooks, the survivor of the vicious racist attack.

29 It was held in *Minister of Law & Order v Kadir* 1995 1 SA 303 (A) 321H/I–322A that, viewed objectively, society would take account of the fact that the functions of the police in terms of the Police Act relate to criminal matters and were not designed for the purpose of assisting civil litigants and therefore society would baulk at the idea of holding policemen personally liable for damages arising from what was a relatively insignificant dereliction of duty.

30 *Knop v Johannesburg City Council* 1995 2 SA 1 (A).

31 *Carmichele v Minister of Safety & Security* 2001 1 SA 489 (SCA).

played by the judicial conception of the legal convictions of the community, legal policy or public policy. It is thus imperative in the present context to examine how these common law hurdles became in-operational with the coming of the Constitution of the Republic of South Africa, 1996.[32]

2 1 The constitutional framework

The starting point in the discussion of the rights of the individual and the corresponding duty of a public institution in present day South Africa is to look at the constitutional framework. In that regard it is important to bear in mind that the Constitution is the supreme law, the apex norm in a hierarchy of legal norms, such that every other law or conduct must take queue from the force of this supreme instrument.[33] Another point is that the Constitution has established substantive and procedural rights by way of a Bill of Rights. It creates obligations that "must be fulfilled" by organs of State.[34] These apart, there are other provisions of the Constitution that impel the discussion of the elements of constitutionalism even in a pure private law matter. One such provision is that the State must respect, promote and fulfil the rights in the Bill of Rights expressly declared by the Constitution as the "cornerstone of democracy in South Africa".[35]

The next vital point is that the Constitution binds all three departments of government (the Legislature, Executive and Judiciary) including all organs of state.[36] This necessarily imposes an obligation on the State to live up to the dictates of the Constitution. One such obligation directed towards the courts is the injunction that they must develop the common law so as to reflect the spirit, purport or objects of the Bill of Rights.[37] This is further strengthened by s 173, whereby the Constitution vests inherent powers in the superior courts, and enjoins them to develop the common law having regard to the interests of justice. The Bill of Rights entrenches, among others,[38] the right to the protection of the

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32 See the historical development of the law of police liability prior to the coming of the constitutional dispensation, see Dendy "When the force frolics: A South African history of state liability for the delicts of the police" 1989 *Acta Juridica* 20–43.

33 Section 2 of the Constitution; *Van Eeden v Minister of Safety & Security* 2003 1 SA 389 (SCA) para 12.

34 Section 2 of the Constitution.

35 Sections 7(1) & (2) of the Constitution.

36 Section 8 of the Constitution.

37 Section 39(2) of the Constitution. The overarching relevance of this provision was underscored by O'Regan J in *K v Minister of Safety & Security* 2005 9 BCLR 835 (CC), 2005 6 SA 419 (CC) para 17 when she stated: "The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution are relevant are therefore also bound by the terms of section 39(2). The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rules is in issue."

38 One or the other or a combination of several of these rights formed the bases for liability in the following cases: *Minister of Safety & Security & Another v De Lima* 2005 5 SA 575 (SCA); *Minister of Safety & Security v Rudman* 2005 2 SA 680 (SCA); *Carmichele v*

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security of the person including the right to be free from all forms of violence from either public or private sources;[39] the right to life;[40] the right to human dignity;[41] the right to privacy;[42] the right to equality before the law and the prohibition against unfair discrimination based on a number of enumerated grounds including race, gender, sex or sexual orientation.[43]

It is within this matrix of constitutional fortification of rights and governmental accountability that the police officer functions. As a branch of the Executive arm recognised in the Constitution as a security service, the police force is an important institution in modern society. Its powers and functions are stipulated in national legislation. In terms of s 205(3) of the Constitution, "the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and other property, and to uphold and enforce the law". For purposes of political accountability, a member of Cabinet, namely the Minister of Safety & Security, is responsible for policing polices. The national legislation regulating the police service is the South African Police Act 68 of 1995, s 5 of which is worded in similar terms to s 205(3) of the Constitution. It is in the light of these constitutional and statutory provisions that the powers and functions of the police must be viewed and discussed whenever the issue of their liability in damages is raised.

2 2 *Carmichele (1)*[44]

It is beyond debate that the modern law of governmental delictual liability in South Africa began its developmental journey with the Constitutional Court judgment in *Carmichele (1)*.[45] The plaintiff in that case was a victim of a vicious sexual attack. She had claimed that the police investigators and prosecutors who did not oppose her assailant's bail application were negligent in not doing so, even though they were aware of his criminal propensity, especially towards sexual offences. She argued that they owed her and the public the legal duty to protect them from dangerous criminals and that they had negligently failed in that duty. The trial judge, Chetty J, and the Supreme Court of Appeal, dismissed the action and held that no liability accrued as the acts of the police and prosecutors were not wrongful. There was no legal duty owed by the police to the complainant to prevent the type of harm alleged. Both courts had adopted the existing common law attitude embedded in decided cases to the effect that the existence

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Minister of Safety & Security (2) 2004 2 SA 133 (SCA); *Minister of Safety & Security v Hamilton* 2004 2 SA 216 (SCA); *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA); *Minister of Safety & Security v Van Duivenboden* 2002 6 SA 431 (SCA).

39 Section 12(1) of the Constitution.

40 Section 11 of the Constitution.

41 Section 10 of the Constitution.

42 Section 14 of the Constitution.

43 Section 9 of the Constitution.

44 *Charmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC).

45 A good summary of this judgment has been supplied by Neethling, Potgieter & Visser *Law of Delict* 67 fn 140. See also the discussions in Leinius & Midgley "The impact of the Constitution on the law of delict" 2002 119 *SALJ* 17; Pieterse "The right to be free from public or private violence after Carmichele" 2002 *SALJ* 27.

of a legal duty to avoid or prevent loss was a conclusion of law that depended upon a consideration of all the circumstances of each particular case and on the interplay of many factors.[46] The issue was one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the court.[47] In effect, both courts assumed that the pre-constitutional test for determining the wrongfulness of omissions in Aquilian liability was applicable. To that extent, the Constitutional Court held that they were wrong. They had "overlooked the demands of s 39(2)".[48]

The Constitutional Court did not hold that the test for establishing legal duty in respect of delictual liability as existed before the Constitution was no longer in effect, or that the statement of the law by the Supreme Court of Appeal was defective. Indeed, it accepted the far-reaching intellectual articulation of the test for determining wrongfulness proffered by Hefer JA in *Minister of Law & Order v Kadir*,[49] and Vivier JA in *Carmichele v Minister of Safety & Security*,[50] both of whom adapted substantially Corbett CJ's pre-constitutional postulation in that regard.[51] It is that the imposition of liability by the courts for wrongfulness as to the existence of legal duty in cases where there were no legal principles or precedents covering the matter, depended largely on policy decisions and value judgments (to be made by the court) which "shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people". What the Constitutional Court laid down was that the test must now be refocused having regard to the spirit, purport and objects of the Bill of Rights.

Expressly approving the opinion of Hefer JA that the determination whether there was a legal duty on the police officers to act, would involve striking a balance between the interests of the parties and the conflicting interests of the community, the Constitutional Court held that this was the proportionality exercise with liability depending upon the interplay of various factors. However, this proportionality exercise must now be carried out in obedience to the s 39(2) mandate, in terms of which the spirit, purport and objects of the Bill of Rights "must be weighed in the context of a constitutional State founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values".[52] Since the Constitution was not merely a formal

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46 In *Moses v Minister of Safety & Security* 2000 3 SA 106 (C) 114B–D Van Reenen J expatiated on these factors when he held that whether a failure to act positively in a particular circumstance was wrongful had to be judged with reference to the different interests of the parties, their relationship with one another and the social consequences of imposing liability in the kind of case in question. The learned judge gave examples of such factors that must be balanced as the possible extent of harm; the degree of risk of the harm materialising; the interests of the defendant and the community; the availability of reasonably practicable preventive measures and the chances of their being successful; and whether the cost involved in obviating it was reasonably proportional to the harm.

47 2001 1 SA 489 (SCA) para 7.

48 2001 4 SA 938 (CC) para 37.

49 1995 1 SA 303 (A) 318E–H.

50 2001 1 SA 489 (SCA).

51 Corbett "Aspects of the role of policy in the evolution of the common law" 1988 *SALJ* 52 67.

52 2001 4 SA 938 (CC) para 43.

document regulating public power but one embodying "an objective normative value system", and since the influence of fundamental constitutional values on the common law was obligatory in terms of s 39(2) of the Constitution, it was "within the matrix of this objective normative value system that the common law must be developed".[53] In discrediting those impediments to the growth of the law borrowed from English law, the court stated:

> "Fears expressed about the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the requirements of foreseeability and proximity. This exercise in appropriate cases will establish limits to the delictual liability of public officials. A public interest immunity excusing the respondents from liability that they might otherwise have in the circumstances of the present case, would be inconsistent with our Constitution and its values. Liability in this case must be determined on the basis of the law and its application to the facts of the case, and not because of an immunity against such claim granted to the respondents."[54]

It was further held that the constitutional and statutory duties of the police clearly impose positive obligations on members of the police force to prevent crime, thereby maintaining the dignity, freedom and security of the person entrenched in the Constitution. What could be "more important to women than freedom from the threat of sexual violence"?[55] South Africa had a duty under international law to prohibit gender-based discrimination[56] and the police was one of the primary agencies of the State responsible for the protection of the public in general, and women in particular, against the invasion of their fundamental rights by perpetrators of violent crime.[57] The question the High Court and the Supreme Court of Appeal did not, but ought to have considered, was whether, given the facts of the case and the constitutional provisions, the police investigator's advice to the prosecutor (that the rapist be released on his own recognisance) had been unlawful. Similarly, they had to consider whether the prosecutor had a duty to place before the magistrate information relevant to the exercise of the discretion to grant or not to grant bail. Since that was not done in this case, the issue that remained to be resolved was whether the alleged failure on the part of the officers was wrongful? Furthermore, it also had to be determined whether this was negligent, and whether the negligent act caused the damage?[58] Since these questions were unanswered, the trial judge was wrong to have dismissed the action at the instance. Accordingly, the Constitutional Court ordered that the

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53 Para 54.

54 Para 49.

55 Para 62.

56 See The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) of 1979.

57 Para 62.

58 Indeed, the court stated (para 74): "There seems no reason in principle why a prosecutor who has reliable information, for example, that an accused person is violent, has a grudge against a complainant and has threatened to do violence to her if released on bail should not be held liable for the consequences of a negligent failure to bring such information to the attention of the court. If such negligence results in the release of the accused on bail who then proceeds to implement the threat made, a strong case could be made out for holding the prosecutor liable for damages suffered by the complainant."

matter be referred back to the High Court for it to continue with the trial on its merits.[59]

3 THE EVOLVING JURISPRUDENCE[60]

Now that previous obstacles constructed by the courts, and which had rendered delictual damages against the police authorities practically unrealisable in the past, had been removed by the Constitutional Court, it was for the High Court and the Supreme Court of Appeal to begin to develop the common law, taking into account the constitutional values and norms. And, as Professor Neethling has pointed out, these fundamental values could, and have indeed, been implemented by the courts to good effect "as important policy considerations in the determination of wrongfulness, legal causation and negligence".[61]

Among the many cases involving improper or alleged wrongful performance of police duties, *Minister of Safety & Security v Van Duivenboden*[62] and *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust, as Amicus Curiae)*[63] stand out for special mention. Although the two judgments overlap in many respects, the Supreme Court of Appeal laid down the basis for delictual liability in the new South Africa by having regard to the Bill of Rights as directed by the Constitutional Court in *Carmichele (1)*.[64] The Supreme Court of Appeal defined the extent to which the constitutional provisions affected the erstwhile concept of wrongfulness, the entry point in the enquiry as to whether

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59 The judgments of the High Court in *Carmichele v Minister of Safety & Security (2)* 2002 10 BCLR 1100 (C) and the Supreme Court of Appeal 2004 2 SA 133 (SCA) paras 43–44 were the results of that further deliberation. The issues for determination in the Supreme Court of Appeal were not dissimilar to those before the trial court. It was in the nature of the usual questions asked in establishing liability for negligent acts, to wit, whether: (a) the police and prosecutors had owed a legal duty to the respondent to protect her by opposing the bail application of Coetzee, who had subsequently raped her, and by taking steps to have him kept in custody; (b) the police and prosecutors had acted in breach of such duty; (c) they acted negligently; and (d) there was a causal connection between such negligent breach of duty and the damage suffered by the respondent. Answering these questions in the affirmative as the trial court did, the Supreme Court of Appeal held that the question whether the appellants owed a legal duty to the respondent lay in the recognition of the general norm of accountability: the State was liable for the failure to perform the duties imposed upon it by the Constitution unless it could be shown that there was compelling reason to deviate from that norm. Such a deviation might be warranted where it would not be in the public interest to inhibit the police (and, by parity of that reasoning, the prosecution) in the proper performance of their duty. On the facts of this case, however, there was no reason to depart from the general principle that the State would be liable for its failure to comply with its constitutional duty to protect a person such as the respondent. On the contrary, the respondent was pre-eminently a person who required the State's protection.

60 See also Neethling "Delictual protection of the right to bodily integrity and security of the person against omissions by the state" 2005 *SALJ* 572, where some of the cases summarised here are discussed in detail.

61 Neethling 2005 *SALJ* 574.

62 2002 6 SA 431 (SCA).

63 2003 1 SA 389 (SCA).

64 These three cases have been analysed by Carpenter: "The Carmichele legacy – enhanced curial protection of the right to physical safety: a note on *Carmichele v Minister of Safety & Security; Minister of Safety & Security v Van Duivenboden; and Van Eeden v Minister of Safety & Security* 2003 *SAPL* 252.

liability should be imposed in any given circumstance. Indeed, the cases decided since *Van Duivenboden and Van Eeden* (including *Carmichele (2))* had built on the foundations laid in these two cases in resolving various issues. At best, current articulations of the concept of wrongfulness and its relationship with negligence in South African law of delict are modifications and refinements of the pronouncements in these two cases.[65]

Again, these cases carried through and expanded the reasons earlier advanced in *Carmichele (1)* by the Constitutional Court for rejecting certain fundamental but flawed assumptions originating from the English tort law as justifications for absolving the police from liability in the circumstances postulated in this paper. In both cases, the Supreme Court of Appeal held that the convictions of the community must now be informed by the norms and values of modern South African society as embodied in the Constitution. This must be taken into account in determining the current law of negligence, where a negligent act is not necessarily actionable unless it occurred in circumstances that the law recognises as unlawful.[66]

Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful,[67] but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm.[68] It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty, it does not follow that an omission will necessarily mean that liability will follow. Such an omission will attract liability only if the omission was also culpable as determined by the application of the separate test enunciated in *Kruger v Coetzee*,[69] and consistently applied by the court: whether a reasonable person in the position of the defendant would have foreseen the harm and would also have acted to avert it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised),[70] nevertheless, in order to avoid conflating these two separate elements of liability, it might often be helpful to

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65 In addition, there are two recent cases where lucid expressions were given to the distinction between wrongfulness and negligence and the proper test for establishing negligent omissions (*Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) paras 18–20, per Brand JA) and wrongfulness as a requirement for Aquilian action and the test thereof and the relevance of the distinction between negligence and wrongfulness (*Gouda Boerdery Bpk v Transnet* 2005 5 SA 490 (SCA) para 12, per Scott JA).

66 *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A); *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A) 568B–C; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 24D–F; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) 837G; Boberg *The Law of Delict* 30–34.

67 *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 497B–C; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 26F.

68 Cf *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 1 All SA 478 (SCA), 2006 3 SA 151 (SCA); *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of South Africa* 2006 1 All SA 6 (SCA), 2006 1 SA 461 (SCA); *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA).

69 1966 2 SA 428 (A) 430E–F.

70 See also *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) paras 25 and 26.

assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable.[71]

In *Minister of Safety & Security v Van Duivenboden*,[72] the police had failed to take the necessary legal steps to revoke the firearm licence of a man known to them to be fond of alcohol and guns. They were aware that he was also prone to violence. Indeed, this action arose as a result of injury he inflicted on the respondent during a shooting spree in which he killed both his wife and daughter. It was held that the police were negligent. The harm was reasonably foreseeable. There was a direct and probable chain of causation between the failure of the police to initiate an enquiry into the fitness of the licence holder to possess a firearm and the history behind him. In the absence of any norm or consideration of public policy outweighing holding the State accountable, the constitutional norm of accountability required that a legal duty be recognised. Accordingly, the negligent conduct of the police was actionable and the State was held to be vicariously liable for the consequences of such negligence. In a dissent in part, Marais JA held that in the particular circumstances of this case, the police were under a legal duty to act even on an application of the traditional test for delictual wrongfulness and that it was not necessary to have recourse to the Constitution.[73]

In *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust, as Amicus Curiae)*[74] the Supreme Court of Appeal continued where it left off in *Van Duivenboden* in determining the test of the legal convictions of the community *vis-à-vis* the imposition of liability for harm done to the individual by the wrongful act or omission of a public authority in the exercise of governmental powers. It was held that the legal convictions of the community test was not "concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community, such as the Legislature and Judges".[75] Construed from the point of view of the Constitution, the concept of legal convictions of the community must necessarily incorporate the norms, values and principles contained therein. The court hastened to point out that the Constitution "cannot, however, be regarded as the exclusive embodiment of the delictual criterion of the legal convictions of the community, nor does it mean that this criterion will

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71 Per Nugent JA in *Minister of Safety & Security v Van Duivenboden* 2002 6 SA 431 (SCA) paras 12 and 16. See also *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust, as Amicus Curiae* 2003 1 SA 389 (SCA) para 9; *Minister of Safety & Security v Hamilton* 2004 2 SA 216 (SCA) para 16; *Carmichele v Minister of Safety & Security* 2001 1 SA 489 (SCA) para 7; *Cape Town Municipal Council v Bakkerud* 2000 3 SA 1049 (SCA) paras 14–17; *Cape Metropolitan Council v Graham* 2001 1 SA 1197 (SCA) para 6; *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA) paras 11 and 13; *BOE Bank Ltd v Ries* 2002 2 SA 39 (SCA) para 13; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 24H.

72 2002 6 SA 431 (SCA).

73 2002 6 SA 431 (SCA) paras 35 & 36. See also comment by Mukheibir "The impact of the constitutional imperative of the State to avoid harm on delictual liability for an omission" 2003 *Obiter* 498.

74 2003 1 SA 389 (SCA).

75 2003 1 SA 389 (SCA) para 10.

lose its status as an agent in shaping and improving the law of delict to deal with new challenges".[76] At the same time, it had to be recognised that the "entrenched fundamental rights and values in the Bill of Rights . . . enhances their protection and affords them a higher status in that all law, State actions, court decisions and even conduct of natural and juristic persons may be tested against them and all private law rules, principles or norms, including those regulating the law of delict, are subjected to, and thus given content in the light of the basic values in the Bill of Rights".[77]

The plaintiff, a 19 year-old girl was sexually assaulted,[78] raped and robbed by a known dangerous criminal and serial rapist who had escaped from police custody through an unlocked gate. She claimed that the police owed her a legal duty to take reasonable steps to prevent the dangerous prisoner from escaping and harming her and they negligently failed in that duty. The respondent conceded vicarious liability, negligence and causation. The only issue for the court to determine was whether the police had owed the appellant the legal duty she claimed. This was further narrowed down by the respondent's admission that at the time of the prisoner's escape, the police had realised that he was a dangerous criminal who was likely to commit further sexual offences; that his continued detention was necessary for the protection of the general public and their personal rights and property; that his escape could easily have been prevented; and that the police regarded escapes from police custody and sexual attacks on women as "policing priorities".

Although the court would not be drawn into deciding in this case whether the right to be free from violence constituted a separate entitlement, or whether it was merely an explicit element of the right to freedom and security of the person, it was convinced that freedom from violence was recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms.[79] It was sufficient for the court in deciding the case to bear in mind that the fundamental values enshrined in the Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racism and non-sexism. It was held that reading s 12(1)(c) alongside s 205(3) of the Constitution,

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76 2003 1 SA 389 (SCA) para 12. See also Midgley in Joubert (ed) *The Law of South Africa* vol 8 part 1 (first re-issue) para 52; Visser "Some remarks on the relevance of the Bill of Rights in the field of delict" 1998 *TSAR* 529 535.

77 2003 1 SA 389 (SCA) para 12. See also Neethling, Potgieter & Visser *Law of Delict* 21–23.

78 Sexual assault could be committed where a surgeon undertakes an operation on reproductive or sexual organ without any lawful authority: *E (D) (Guardian ad litem) v BC* (2005) 252 DLR (4th) 689 (BCCA) (Donald & Huddart JJA, Saunders JA dissenting). Similarly, the Ontario Court of Appeal held the employers vicariously liable in *Weingerl v Seo et al* (20050 256 DLR (4th) 1 (Ont CA), where the technologist who conducted an abdominal ultrasound on the plaintiff sexually assaulted her by performing unauthorised tests and surreptitiously videotaping her while she disrobed.

79 2003 1 SA 389 (SCA) para 13. See also *S v Baloyi (Minister of Justice & Another Intervening)* 2000 2 SA 425 (CC) para 13; De Waal, Currie & Erasmus *The Bill of Rights Handbook* (2001) 258; Combrinck "Positive state duties to protect women from violence: Recent South African developments" 1998 *HRQ* 666 683; Carpenter "The right to physical safety as a constitutionally protected human right" in *Suprema Lex: Essays on the Constitution presented to Marinus Wiechers* (1998) 139 144; Pieterse "The right to be free from public and private violence after *Carmichele*" 2002 *SALJ* 27 29.

a strong indication emerges that a legal duty rests on the police to act positively to prevent crime. Similarly, the reading of the Police Service Act 68 of 1995 shows that the essential function of the police was the maintenance of law and order including the prevention of crime.[80] Thus, the police service was one of the primary agencies of the State responsible for the discharge of its constitutional duty to protect the public in general, and women in particular, against invasion of their fundamental rights by perpetrators of violent crimes. In a matter such as this, where no other practical and effective remedy was available to the victim of violent crime, it was of vital importance that the courts must recognise the State's delictual liability.[81]

3 1 Rejection of *Hill* and its principles

Since the test for determining the existence of legal duty in South African law of delict differs from the questions asked in the English law of tort to ascertain the existence of the duty of care, the courts in South Africa are not disposed to adopt the English approach in framing the question for determination as to whether a legal duty exists in a given case.[82] In addition, they have similarly rejected three seemingly unreliable assumptions in the English law of public authority negligence which, if imported into modern South African law of bureaucratic negligence, would have the effect of stalling its development. That clearly emerged from the judgment of the Constitutional Court in *Carmichele (1)*, where it was indicated that the English tort route was not the path the development of modern South African law of public authority liability should tread. [83]

It should be noted that the said assumptions arose from the House of Lords decision in *Hill v Chief Constable of West Yorkshire*.[84] The first is the so-called "public interest immunity", whereby it was stated that it would not be in the interest of the community as a whole to impose liability in tort on public authorities such as the police for negligent performance of their investigative and crime suppression functions. Such imposition would lead to defensive policing and a diversion of resources available for combating crime. The Supreme Court of Appeal would prefer the "more flexible approach to delictual claims against public authorities" as had emerged in the subsequent House of Lords decision in *Barrett v Enfield London Borough Council*,[85] and the European Court of Human Rights in *Osman v UK*[86] and *Z & Others v UK*,[87] where the "public interest immunity" approach was rejected in circumstances similar to those in *Van Eeden.* Undoubtedly, a public interest immunity approach would not succeed in

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80 2003 1 SA 389 (SCA) para 16.
81 2003 1 SA 389 (SCA) para 19.
82 *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) paras 18–22, per Brand JA; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of South Africa* 2006 1 SA 461 (SCA) paras 12 & 14, per Harms JA; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 1 All SA 478 (SCA), 2006 3 SA 151 (SCA) paras 14–16, per Harms JA.
83 2001 4 SA 938 (CC) para 49.
84 1988 2 All ER 238 243h–j & 244b–c.
85 1999 3 All ER 193 199d–j.
86 (2000) 29 EHRR 245 para 142.
87 (2001) 10 BHRC 384 para 111.

the face of the constitutional principle of legality in modern South African public law.[88]

The second notion floored by the Supreme Court of Appeal is that of the "floodgate" argument;[89] an assumption that the imposition of liability of a legal duty on the police could lead to limitless liability on public authorities and functionaries.[90] It was held that the courts do not confine liability for an omission to

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88 2003 1 SA 389 (SCA) para 20. Although the House of Lords was not prepared to endorse the length and breadth of what was laid down in *Hill*, it nonetheless proceeded in *Brooks v Commissioner of Police of the Metropolis* 2005 1 WLR 1495 (HL) 1499H to deny liability against the Metropolitan Police Authority in circumstances where liability in negligence and misfeasance in public office could easily have been upheld. Two black youths, S & B, were viciously attacked by a band of white thugs for no other reason than that they were black. S died from stab wounds less than an hour later. The police treated B as a witness but not as a victim. A Commission of Enquiry appointed to investigate the incidents exposed "a litany of derelictions of duty and failures in police investigations". For instance, the Commission reported that B was someone who "saw his friend murdered, dying on the pavement, and dead as he was carried into the hospital. And he has had to endure that night, and the whole course of the failed investigation. He was a primary victim of the racist attack. He is also the victim of all that has followed, including the conduct of the case and the treatment of himself as a witness and not as a victim." Concluding its findings on the failings of the police, the Commission stated: "We are driven to the conclusion that Mr Brooks was stereotyped as a young black man exhibiting unpleasant hostility and agitation, who could not be expected to help, and whose condition and status simply did not need further examination and understanding. We believe that Mr Brook's colour and such stereotyping played their part in the collective failure of those involved to treat him properly and according to his needs." Frustrated that public prosecution of two youths for the murder of S was discontinued, and the attempt at private prosecution by the family of S having failed, B brought this action alleging negligence, false imprisonment and misfeasance in public office against the police authorities. The only issue before the House of Lords was whether, assuming the facts pleaded by the respondent to be true, the Commissioner of Police and the officers for whom he was responsible arguably owed the respondent a common law duty to: (1) take reasonable steps to assess whether the respondent was a victim of crime and then accord him reasonably appropriate protection, support, assistance and treatment if he was so assessed; (2) take reasonable steps to afford the respondent the protection, support, and assistance commonly afforded to a key eyewitness to a serious crime of violence; (3) afford reasonable weight to the account that the respondent gave and to act upon it accordingly. One could not imagine an instance where the breaches of the rights to life, personal liberty and equality before the law by a government agency could be more evident than in this case. Yet, the House of Lords did not advert to the human rights breaches involved as it unanimously held that as a matter of public policy the police generally owed no duty of care to victims or witnesses in respect of their activities when investigating suspected crimes; and that, since the duties of care alleged by the claimant had been inextricably bound up with the investigation of a crime, his claim based on those duties should be struck out.

89 See the judgment of Lords Keith and Templeman in *Hill v Chief Constable of West Yorkshire* 1989 1 AC 53 63D & 65B–D respectively. For a detailed discussion of this aspect of the judgment, see Okpaluba "Delictual liability of public authorities: Pitching the constitutional norm of accountability against the 'floodgates' argument" 2006 *Speculum Juris* 248.

90 This argument was also rejected in *Aucamp v University of Stellenbosch* 2002 4 SA 544 (C) para 95, where the Aquilian action for disappointed beneficiaries was extended beyond the traditional legal adviser-client relationship to include employer-employee relationship, and in doing that, Van Zyl J did not believe it would "open the floodgates" and "give rise to a multiplicity of analogous claims or to uncertain and indeterminate liability with dire socio-economic consequences." On the contrary, the judge held: "[I]t is perfectly consonant . . .

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certain stereotypes but adopt an open-ended and flexible approach to the question whether a particular omission to act should be deemed unlawful or not. In deciding that question, the requirements for establishing negligence and causation provide sufficient practical scope for limiting liability.[91] The Supreme Court of Appeal indicated that the policy/operational dichotomy was another measure for checking the so-called flurry of litigation in this field. By this principle, the courts do not impose delictual liability for policy issues as against matters in the operational sphere of the administration.[92] The Canadian Supreme Court, which finds this principle "an extremely important feature" that must be taken into account,[93] has further explained that:

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with the values of justice, fairness and reasonableness. It likewise accords with the considerations of good faith and good morals constituting the all-important public policy that reflects the ever changing and adapting legal convictions of the community."

91 2003 1 SA 389 (CC) para 22. See also *Minister of Safety & Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 19.

92 The policy/operational dichotomy is one area of the law of governmental liability that craves for a separate and independent research. The scope of operation of this concept is unclear and its true meaning has not been universally accepted. And matters were not helped by the judgment of Lord Wilberforce in *Anns* where policy was likened to discretion (1978 AC 728 754). Thus, the distinction between the terms operational and policy remain fine and confusing; they are not easily subjected to a clear formulation hence Lord Nicholls "have reservations about any attempt to draw a sharp-edged distinction between 'policy' decisions and 'operations' decisions": *Phelps v London Borough of Hillingdon* 2000 4 All ER 504 528j. The Law Lord had earlier stated his reasons in *Stovin v Wise* 1996 AC 923 938G: "In practice the two approaches will usually reach the same conclusion. My preference is for the more open-ended approach. The exclusionary approach presupposes an identifiable boundary, between policy and other decisions, corresponding to a perceived impossibility for the court to handle policy decisions. But the boundary is elusive, because the distinction is artificial, and an area of blanket immunity seems undesirable and unnecessary." In *X (Minors) v Bedfordshire CC* 1995 3 WLR 152 172H–173A, Lord Browne-Wilkinson explained the applicable principles of the policy/operational divide likening them to justiciability and deference when he stated as follows: "Where Parliament has conferred a statutory discretion on a public authority, it is for that authority, not for the courts, to exercise the discretion: nothing which the authority does within the ambit of the discretion can be actionable at common law. If the decision complained of falls outside the statutory discretion, it can (but not necessarily will) give rise to common law liability. However, if the factors relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate on such policy matters and therefore cannot reach the conclusion that the decision was outside the ambit of the statutory discretion. Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist." See also per Lord Slynn in *Barrett v Enfield London Borough Council* 1999 3 All ER 193 (HL) 211a–212a; Lord Keith in *Rowling v Takaro Properties Ltd* 1988 1 All ER 163 172. Mason J said in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 34–35 that the standard of negligence applied by the courts in determining whether a duty of care has been breached cannot be applied to a policy decision, but it can be applied to operational decisions. Mason J went on further to say: "The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care." See also Gleeson CJ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 556.

93 (2001) 206 DLR (4th) 193 para 38.

> "It prevents the courts from usurping the proper authority of elected representatives and officials. At the same time, however, the principle ensures that in the operational area, i.e., in implementing their policy decisions, public officials will be exposed to the same liability as other people if they fail in discharging their duty to take reasonable care to avoid injury to their neighbours."[94]

Finally, the court rejected a submission based on the requirement of a special relationship between a plaintiff and defendant as an absolute prerequisite for imposing a legal duty. Like the foregoing, this argument could no longer be supported in the light of the State's constitutional imperatives, otherwise the common law would fall short of reflecting adequately the spirit, purport and objects of the Bill of Rights.[95] The so-called special relationship, according to Harms JA, is akin to what is known as "proximity" in English law[96] – an ingredient of the duty of care. But, in South African law, Harms JA explained, it is not "a self-standing requirement for wrongfulness".[97] While proximity was not an independent requirement for wrongfulness, it "must surely reinforce the claim that the State should be held liable for a culpable failure to comply with its duties". On the other hand, foreseeability of harm was another factor to be taken into account in determining wrongfulness.

> "The greater the foreseeability, the greater the possibility of a legal duty to prevent harm existing. This can be compared to the development in English law in relation to the tort known as misfeasance by a public officer. An element of this tort, in our terms, *dolus directus* or *eventualis*: if a public officer knows that his unlawful conduct will probably injure another or a class of persons, the State may be liable for the consequences."[98]

3 2 Other instances where legal duty was held to exist

In addition to *Van Duivenboden*, *Van Eeden* and *Carmichele (2)*, plaintiffs alleging wrongful acts and omissions on the part of the police have successfully urged the courts to find liability against the Minister of Safety & Security in a number of circumstances. Applying the principles established in these cases, the police authorities have been held liable in the following instances:

- Where the police had taken no steps to investigate the veracity of the information supplied by an applicant for a firearm licence[99] or the extent to which the admission by an applicant to intemperate behaviour could render him unfit to possess a firearm.[100]

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94 Per Wilson J in *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641 674. See also *Just v The Queen in right of British Columbia* (1990) 64 DLR (4th) 689; *Brown v The Queen in right of British Columbia; Attorney General of Canada, Intervener* (1994) 112 DLR (4th) 1.

95 2003 1 SA 389 (SCA) para 23.

96 See for example *Caparo plc v Dickman* 1990 1 All ER 569 (HL) 578–581; *Stovin v Wise* 1996 AC 923 (HL) 931; *D v East Berkshire Community Health NHS Trust* 2005 2 WLR 993 (HL).

97 Per Harms JA in *Minister of Safety & Security & Another v Carmichele* 2004 2 BCLR 133 (SCA) para 41. In the light of this judgment and that of *Van Eeden*, it is clear that the finding of the existence of a legal duty based literally singularly on there being a special relationship between the parties in *Saaiman v Minister of Safety & Security* 2003 3 SA 496 (O) paras 14 & 16 is of doubtful authority.

98 Per Harms JA in *Minister of Safety & Security v Carmichele* 2004 2 BCLR 133 (SCA) (Carmichele 2) para 44.

99 *Minister of Safety & Security v Hamilton* 2004 2 SA 216 (SCA).

100 *Minister of Safety & Security v De Lima* 2005 5 SA 575 (SCA).

- Where the police authority and/or other security agency failed to protect the public from dangerous offenders in custody who escape and injure third parties,[101] or where a bystander sustained gunshot wounds from escaping prisoners.[102]
- Where a police officer arrived at a near-drowning scene where a toddler had fallen into a swimming pool and, owing to the policeman's ignorance, ordered that the attempt to resuscitate the child by means of CPR be stopped, because, again in his ignorance, he thought the child was dead;[103] or where a police officer answered a call for a suspected housebreaking, proceeded to the scene unaccompanied by another officer and, in further disregard of police regulations, single-handedly attempted to arrest a suspect without handcuffs, was over-powered and, in the ensuing shootout, the suspect injured a bystander with the officer's service pistol.[104]

3 3 Instances where no legal duty existed[105]

In the true nature of the judicial process, it has not been one-way traffic for litigants: some have failed to establish legal duty and hence wrongfulness in their

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101 *Seema v Lid van die Uitvoerende Raad vir Gesondheid, Gauteng* 2002 1 SA 771 (T).

102 *Van der Spuy v Minister of Correctional Services* 2004 2 SA 463 (SE).

103 *Minister of Safety & Security v Rudman* 2005 2 SA 680 (SCA). This was a majority judgment (Farlam JA, Mpati DP concurring). Although the Minister was not held liable for all the damage the child suffered from the time of his immersion in the swimming pool, he was nonetheless held liable for the negligence of the police officer who, knowing that his knowledge of CPR was limited, nonetheless interfered. Non-interference would have minimised the danger of the extensive brain damage sustained by the child. Van Heerden AJA dissented (para 63) because there were "compelling public policy considerations" which militated against imposing upon police officers liability in the circumstances of this case. Relying on *Kadir* (321F), the Justice of Appeal held that the functions of the police under the 1995 Act were similarly to maintain law and order and to prevent crime. Contrasting *Van Duivenboden* and *Hamilton,* Van Heerden AJA held that "the recognition of a legal duty on the police to save people from drowning or to attempt to resuscitate near-drowning victims would indeed . . . have the potential to disrupt the effective functioning of the police and would require the provision of substantial additional training and resources". Van Heerden AJA did not consider that the legal convictions of the community demanded that the policeman's failure to attempt to perform CPR on the child ought to be regarded as unlawful.

104 *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T).

105 Although there are no South African decisions on the point, there appears to be an emerging trend from the jurisprudence emanating from Australia and New Zealand to the effect that where the police act from a mistaken premise, the standard of care seems to be relaxed such that the police were not held liable for negligence on that account. In the cases for our attention, the police had made mistakes in carrying out their crime suppression and investigative duties and the courts had denied that a duty of care existed. "Foreseeability" was the principal basis upon which duty of care was denied in *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 (HCA). The plaintiff was involved in a car accident. At the time of the accident, she had a nil blood alcohol level but the investigating police officer mistakenly recorded her blood alcohol level as 0.14. Although the error was discovered and apologies rendered to her by the Police Department, and the insurer confirmed admission of liability for the accident, the plaintiff had become obsessed with the mistake and had ultimately developed a psychiatric disorder. The High Court of Australia held that the police officer did not owe her a duty to take reasonable care to avoid psychiatric injury, and that it was not reasonably foreseeable that a person in her position would sustain a recognisable psychiatric injury or

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circumstances. For instance, the Supreme Court of Appeal overturned the judgment of Davis J in *Geldenhuys v Minister of Safety & Security*.[106] Davis J held that had the police acted in good time when they arrested the plaintiff for drunken and disorderly behaviour by investigating the nature and extent of the plaintiff's injuries or his physical condition, they would have called for medical assistance. The plaintiff's health deteriorated as a result of this omission and they were held liable in damages for their negligence. Davis J reasoned:

> "As a member of the South African community plaintiff was deserving of the utmost concern and respect from a critical custodian of our constitutional order, the police in whose care he had been placed. The internal rules of the police mandate an hourly cell inspection. It is not too much to expect that the police officer mandated with this task should spend but few seconds longer to ascertain the health and welfare of her captives. This in itself is a complete answer to any suggestion that such a delictual obligation will impose excessive burdens upon the police or may result in a flood of litigation whose benefits would then be far exceeded by the costs of unnecessary litigation."[107]

The Supreme Court of Appeal held that the police would have been under an obligation to summon medical assistance for the plaintiff were they aware that it was required.[108] Thus, they would have been negligent if a reasonable policeman would have realised that the conditions of the plaintiff were not merely attributed to intoxication. The element of negligence was therefore lacking to justify the findings of the trial judge. Even though the element of negligence was lacking, the issue of causation ought also to have been considered. The question was whether the claimants had been able to prove that, had the police summoned medical assistance at an earlier stage, the intoxicated man would not have suffered the mental and physical incapacity that had resulted from brain injuries.[109] This question would have to be answered by reference to the medical evidence.

Take another illustration from the decision of Rampai J in *Saaiman v Minister of Safety & Security*.[110] It was alleged that the police failed to provide signboards

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illness as a result of the erroneous recording of her blood alcohol level in the accident report. The Wellington High Court judgment in *Fyfe v O'Fee* [2003] NZAR 662 (HC) was even of more doubtful quality. The police had arrested and detained a Scottish couple holidaying in New Zealand, having mistaken the man for a wanted and dangerous criminal. Durie J held that the police were not careless in relying on the information they had. In any event, the police owed no duty of care to the couple in the circumstances

106 2002 4 SA 719 (C).

107 729 C–D.

108 *Minister of Safety & Security v Geldenhuys* 2004 1 SA 515 (SCA).

109 See the judgment of Van Reenen J in *Moses v Minister of Safety & Security* 2002 3 SA 106 (C) to similar effect. Here, a person arrested for intoxication and violent behaviour was assaulted by cellmates and died of injuries sustained from the assault. The trial judge had no doubt that the police were under an obligation to perform their duties and functions in a manner reasonable in the circumstances, and with due regard to the fundamental rights of the person in a police cell. In this instance, however, the deceased, in his state of inebriation, had been placed in a cell set aside for the detention of persons arrested for drunkenness and disorderly behaviour, but there was no evidence that the police were aware of the violent nature or tendencies of his cellmates. There was also no evidence that the 25-minute periodic inspection of the cells by the police was inadequate to prevent such occurrences. In the circumstances, the police were held not liable for the injuries suffered by the deceased and the *sequelae* thereof.

110 2003 3 SA 496 (O) 512.

and/or have them erected to warn the public of the routes that were used by vehicles transporting money, such vehicles being at risk of being robbed, and for not promulgating legislation which would regulate the transportation of money so that preventive measures could be taken for such transportation, they were negligent. After carefully and judicially analysing the numerous factors and carrying out a delicate balancing of competing interests involved in the claim, the trial judge dismissed the action. Apart from the finding that there existed no special relationship between the parties, the judge held that Parliament, the representatives of the beneficiaries of the police service, did not consider it appropriate that members of the police force should be held delictually liable to every member of the public who suffered damages on account of any omission on the part of any member of the police service who neglected a public duty. Since the public recognises that the police service operates with limited financial and human resources, it expects them to perform their policing duties with reasonable diligence, but not necessarily with absolute perfection.[111]

It was further held that as the risk of crime in society was something facing every member of the public, it was not particular or peculiar to the cash carriers. There was therefore nothing extraordinary in the circumstances of the case to evoke the legal convictions of the community to demand that the defendant, in discharging its constitutional mandate and statutory duties, should have prevented the crime in question. It was equally difficult to see how the measures contended for by the plaintiffs would absolutely have prevented the robbery or the injury to them. In the final analysis, the court held that public policy militated against the recognition of a legal duty in favour of the plaintiffs. The existence of a legal duty in a case such as this would expose the police authorities to widespread civil claims. It was therefore not just, fair and reasonable that the law should impose a duty of care of unlimited scope on the police for the benefits of an individual member of the public who was injured or harmed by a criminal in the course of a cash-in-transit robbery. Further, that the plaintiff's particulars of claim were not capable of supporting a judicial finding that the police owed a legal duty to them in order to prevent harm in the circumstances.[112]

3 3 1 Canadian experience

In Canada, the combination of: the enforcement of Charter rights; the application of the simpler and more straightforward test in *Anns v Merton London Borough Council*[113] followed consistently by the Canadian courts[114] for determining the

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111 Paras 17 and 18.

112 Para 24.

113 1978 AC 728 (HL) 751–752.

114 *Kamloops (City of) v Nielsen* (1984) 10 DLR (4th) 641 (SCC); *BDC Ltd v Hoftstrand Farms Ltd* (1986) 26 DLR (4th) 1 (SCC); *Canadian National Railway Co v Norsk Pacific Steamship Co* (1992) 91 DLR (4th) 289 (SCC); *London Drugs Ltd v Keuhne & Nagel International Ltd* (1992) 97 DLR (4th) 261 (SCC); *Winnipeg Condominium Corporation No. 36 v Bird Construction* Co (1995) 121 DLR (4th) 193; *Cooper v Hobart* (2001) 206 DLR (4th) 193 (SCC). In spite of the modifications brought to the *Anns* two-way test by the Supreme Court in *Cooper v Hobart,* Canadian courts continue to apply the test as modified. See eg *Odhavji Estate v Woodhouse* (2003) 233 DLR 193 (SCC); *Young v Bella* (2006) 261 DLR 516 (SCC); *Keeping v Canada* (2003) 226 DLR (4th) 285

continued on next page

existence of duty of care to new circumstances; the rejection of the *Hill* immunity principle in absolving the police from liability in damages;[115] and the construction of the statutes authorising the police to act in a particular manner in a given circumstance, have enabled the courts to consider the liability of the police on a case by case basis.[116]

This has meant that the courts in Canada do not hesitate to entertain such claims in the enforcement of guaranteed rights and/or to extend the duty of care to new areas of liability insofar as the *Anns* test is satisfied. In that regard, they have held that a duty of care existed between the police officer conducting the criminal investigation and the suspect. In the Canadian law of torts, action would lie in negligence where the injured party was a suspect[117] or the victim of a crime,[118] where the police bungled the criminal investigation. A case in point is *Odhavji Estate v Woodhouse*.[119] The Supreme Court of Canada held that there was a sufficient relationship of proximity between the Chief of Police and the family of the victim of a police shooting to make it just and fair to impose liability.[120] This case is also authority for saying that Canadian courts would also

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(BCCA); *Exploits Valley Air Services v College of North Atlantic* (2006) 258 DLR (4th) 66 (Nfld CA).

115 *Hill v Hamilton-Wentworth Police* (2006) 259 DLR (4th) 576 (Ont CA); *Doe v Board of Commissioners of Police for Metro Toronto et al.* (1989) 58 DLR (4th) 396 (Ont HC).

116 In *Sulz v Canada (Attorney General)* (2006) 263 DLR 58 (BCSC), for example, the plaintiff had alleged that her supervisor had negligently and sexually harassed her as a result of which she had to take an early discharge from the police. Although the commander involved was personally protected from liability under s 21 of the Police Act 1996, the plaintiff had a valid claim against the province on the basis of vicarious liability. Lamperson J held that there was no provision in either the Canadian Human Rights Act 1985 or the Royal Canadian Mounted Police Act 1985 expressly limiting the plaintiff's ability to pursue a civil action for damages against the police authority. It was also held that as much as there was insufficient evidence of direct liability for negligence on the part of the provincial government, the government was however vicariously liable for the tort of the commander. That the commander had a duty of care to ensure that the plaintiff could work in a harassment-free environment, and he breached the standard of care he owed to the plaintiff. The harassment was a proximate cause of the plaintiff's depression that led to her leaving her position with the Canadian Mounted Police.

117 *Nelles v Ontario* (1989) 60 DLR (4th) 609 (SCC); *Beckstead v Ottawa (City)* (1997) 155 DLR (4th) 382 (Ont CA).

118 *Doe v Board of Commissioners of Police for Metro Toronto et al.* (1989) 58 DLR (4th) 396 (Ont HC); *Jane Doe v Metro Toronto Commissioners of Police* (1990) 72 DLR (4th) 580 (Ont DC); *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 160 DLR (4th) 697 (Ont Ct (GD)).

119 (2004) 233 DLR (4th) 193 (SCC).

120 Iacobucci J had held (para 57) that: "A second factor that strengthens the nexus between the Chief and the Odhavjis is the fact that members of the public reasonably expect a chief of police to be mindful of the injuries that might arise as a consequence of police misconduct. Although the vast majority of police officers in our country exercise their powers responsibly, members of the force have a significant capacity to affect members of the public adversely through improper conduct in the exercise of police functions. It is only reasonable that members of the public vulnerable to the consequences of police misconduct would expect that a chief of police would take reasonable care to prevent, or at least to discourage, members of the force from injuring members of the public through improper conduct in the exercise of police functions." The first factor that supported the Court's finding of proximity was the "relatively direct causal link between the alleged misconduct and the complained-of harm" (para 56).

resort to the tort of misfeasance in public office to accommodate governmental liability (including the police) in those cases involving intentional torts or abuse of office.

On the negative side[121] is the case of *Roy v Canada (Attorney General).*[122] The facts of, and conclusions reached by, the British Columbia Court of Appeal in this case were on all fours with those of the South African Supreme Court of Appeal in *Geldenhuys.* In *Roy,* two policemen had arrested an incoherent and intoxicated man and had placed him in a cell for drunks. Shortly thereafter, a guard discovered that the man was not breathing and by the time he was rushed to the hospital within 40 to 50 minutes of his arrest, he was pronounced dead. The cause of death was acute alcohol ingestion. The police operational policy was that a person who was of questionable consciousness at the time of arrest was not to be placed in a jail cell unless medically examined and found fit to be incarcerated. Like in the South African case, the trial judge found for the plaintiff. It was held that as the man was exhibiting signs of severe intoxication, the policemen had a duty to determine whether he required medical attention. Having failed to order medical assessment, the officers were negligent, although the deceased contributed 50% to the cause of his death.

By a majority of 4–1, the Court of Appeal held that a police officer owed a duty to his prisoner to take reasonable care for the prisoner's safety, but he was not an insurer. It always depends on the standard required of the profession, and the skill associated therewith. An error committed by a person acting with ordinary care may not be negligent if the action expected of him demanded a special skill.[123] But in this case, the question was whether a police officer, acting reasonably according to the standards of their profession, would recognise that a man said to have "passed out" was of "questionable consciousness" rather than that of

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121 There is the split decision of the Ontario Court of Appeal in support of this new trend. In *Hill v Hamilton-Wentworth Police* (2006) 259 DLR (4th) 676 (Ont CA) the police had misidentified an Aboriginal plaintiff as a suspect in robberies. They had arrested the plaintiff based on his resemblance to surveillance photographs, tips, and tentative identification by eyewitnesses who made the identification on the basis of a photograph line-up prepared by the police that included the plaintiff's picture and 11 photographs of Caucasians. The Ontario Court of Appeal (MacPherson, Goudge & MacFarland JJA) upheld the trial judge to the effect that the standard of care exercised by the police was that which a reasonable police officer in similar circumstances as the defendant would do. However, Feldman & LaFrome JJA dissenting, held that the police were negligent in their investigation of the robberies; and their negligence caused or contributed to the misidentification of the plaintiff by several witnesses, and therefore to his wrongful prosecution. A photographic line-up where the target suspect was the only Aboriginal person among a group of Caucasians, even where the people could be viewed generally as similar in appearance, permeated the appearance of unfairness. Negligent investigation was not pleaded in *Crampton v Walton et al* (2005) 250 DLR (4th) 292 (Alta CA), so, no finding was made in that regard. However, the Alberta Court of Appeal held that the police were at fault in obtaining a sealed warrant, as a result of which they mistakenly went to the wrong suspect in a drug investigation. They were therefore unable to establish the reasonableness of their grounds that the plaintiff was involved in illegal drug dealings. Not only that, they used unnecessary force to apprehend the "suspect" when there was no evidence that force was required to control the plaintiff.

122 (2005) 251 DLR (4th) 233 (BCCA).

123 *Whitehouse v Jordan* 1981 1 All ER 267 (CA) 281; *Smith v British Columbia (Attorney General)* (1988) 30 BCLR (2d) 356 (BCCA) 363.

the usual passed-out drunk. In the absence of evidence to indicate that police officers in Canada generally knew the difference, and were expected to recognise the difference, between a person obviously inebriated who was merely "passed out" and such a person who was at the verge of central nervous system failure, it was improper for the trial judge to have imposed such a duty of care on the police.[124]

The provisions of the operational policy of the police force were not determinative in setting the standard of care a police officer had to observe; they were not to be treated as if they were a statute imposing civil obligations.[125] Southin JA concluded:

> "I think it right that we remind ourselves of what the principal duty of a peace officer is. It is to keep the Queen's peace, an obligation which includes the prevention of crime and detection of criminals. Peace officers are not emergency services personnel and cannot be held, unless and until they receive similar training, to a standard which would be appropriate for such persons."[126]

It was thus held that there was no breach of the standard of care expected of the policemen in this instance. Concurring in the judgment of Southin JA that the case be dismissed, Hall JA held there was nothing to indicate that the deceased had suffered an injury at the time of arrest such as would have alerted the arresting officers that he was in danger. Accordingly, in the absence of apparent injury, what the police officers did was not a negligent performance of duty.[127] The Justice of Appeal distinguished the earlier case of Fortey (*Guardian ad litem of) v Canada (Attorney General)*,[128] where the British Columbia Court of Appeal held the police partly liable for the death of a drunk and aggressive person whom they had placed in custody instead of taking him for examination by a surgeon. This was after the ambulance attendants had suggested that he be taken to the hospital as they had noticed blood in his hair and shoulder. Although the man repeatedly refused treatment, it was held that the police officers ought to have known that the man was incapable of making any rational decision, given his state of obvious intoxication. The police were held to be liable because they were aware at the time they took the man into custody that he had a head injury serious enough to make the emergency personnel to suggest the option of taking him to hospital.

In the second case[129] cited by Hall JA, the police were also held partly liable for the damages suffered by an intoxicated man who had been taken into custody by them. The officer had gone to a scene on the roadside where a man, under the influence of drugs, had attempted to jump in front of oncoming traffic. He

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124 Per Southin JA, Saunders & Lowry JJA concurring (2005) 251 DLR (4th) 233 paras 36–39.

125 Oppal JA, dissenting (para 77), held that the trial judge had adopted a realistic standard of care in balancing the needs of the prisoner in a state of unconsciousness with the demands of heavy call loads on the police. The police had failed to conduct any adequate assessment or investigation into the deceased's state of consciousness or its cause. The stipulations of the police service policy document left no discretion to the arresting police officers to order medical examination in the circumstances.

126 (2005) 251 DLR (4th) 233 para 41.

127 (2005) 251 DLR (4th) 233 paras 53 & 54.

128 (1999) 125 BCAC 29 (BCCA).

129 *Lipcsei v Central Saanich (District)* (1994) 8 BCLR (3d) 324, (1995) WWR 582 (SC).

arrested the man, carried him to a police vehicle and subsequently dragged him to the cells. It was clear that the man could not walk or stand on his feet. He had sustained injury to his left leg when he had earlier tried to leap over a ditch after leaving a party at which he had a great deal to drink. He alleged that he had complained of leg pain when he was arrested and during his time in the cells. The judge found that the plaintiff may have experienced pain, but was unable to coherently communicate that fact to the police. The judge also found that the arresting officer had a duty to inquire about the inability of the plaintiff to stand or ambulate. It was held that it would have been appropriate for the arresting officer to ask other persons present at the roadside or to ask the plaintiff about possible injury causing his difficulty in ambulation. As a result of the severe injury to his leg and the delay in getting treatment, the plaintiff's leg was amputated. There was medical evidence that enabled the judge to arrive at the conclusion that the leg could have been saved if treated earlier. Hall JA then concluded:

> "To my mind, what distinguishes *Fortey* and *Lipcsei* from the case at bar is that in both cases, it was obvious that the intoxicated individual taken into custody had physical injuries. These were both injuries of substance: Fortey had a fairly significant head wound and Lipcsei was unable to stand or walk. The case might be very different if a plaintiff had a minor injury such as a cut lip or a scraped finger. Not every untreated visible injury on an individual will necessarily be of particular significance to the health of that individual."[130]

4 CONCLUSION

Governmental liability for acts and omissions of the police in the performance of their constitutional and statutory duties has undergone tremendous transformation given the express provisions of the Bill of Rights in the Constitution and the constructive interpretation given to those provisions by a human-rights vigilant Constitutional Court. The Bill of Rights has influenced the development of this branch of the law in two ways. First, the substantive contents of the rights protected from infringement by public bodies whether it is the right to life, the right to security of the person and personal liberty or the right to equality. Second, it had mandated the courts to develop the common law so as to bring it in line with the Bill of Rights. For its part, the Constitutional Court directed the courts that in establishing the existence of legal duty, they must bear in mind the constitutional values and norms, including that of accountability, and the spirit, purport and objects of the Bill of Rights. Given the role they have played in the interpretation of the constitutional provisions, one cannot overlook the courts as a veritable engine of massive legal transformation outside Parliament. The courts, undoubtedly, have given due weight to the rights of the individual enshrined in the Constitution and have indeed been protective of these rights as against the sometimes oppressive exercise of power by the executive arm of government. As much as the rights of the individual do not override the interests of the public in general, the truth of the matter is that it is the individual that needs protection, not the State. And, if it is accepted that delictual liability often breaks down to the question of "who should bear the loss?", one could assume that it is only fair and reasonable that the burden should rest on the shoulder best able to carry the loss.

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130 (2005) 251 DLR (4th) 233 para 52.

In this constitutionally engineered transformation of the common law, looking to the English law of negligence for assistance, riddled as it is with such anachronistic assumptions as to public interest immunity, the threat of litigation and the old-fashioned concept of lack of proximity in police/citizen relationship, would be completely misleading. The courts in South Africa are well within their rights to discredit these unreliable assumptions as inapplicable in the face of the Constitution and the Bill of Rights. Constitutional and statutory authority to provide services in the public interest does not equate to authority to injure those members of the public in whose favour those services were to be rendered. Anyone injured in the process of the exercise of such power, in so far as he or she can establish the requisite elements of wrongfulness, negligence and the causal connection between the injury and the loss is, in today's South Africa, entitled to damages.[131] It is thus clear that the Bill of Rights in the South African Constitution is designed to correct the defects and injustices that were extant in the law prior to the coming into force of the Constitution in 1994, including the complete overhaul of the law of governmental liability in line with the values brought about by the new legal regime.[132]

131 See *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) paras 23–25.

132 Ironically, even though the UK Human Rights Act incorporates the European Convention, it would appear that it is designed to achieve the opposite. According to Lord Bingham, *Brown v Stott* 2003 1 AC 681 703: it does not "offer relief from 'The heartache and the thousand natural shocks That flesh is heir to'." For Lord Steyn (707–708), the framers of the European Convention "realised only too well that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights." What it means in effect is that protection under the law of the right to equality and non-discrimination by government in the discharge of public services, the protection of the right to life and security of the person which have been afforded by the courts in South Africa cannot be vindicated by way of damages in the English jurisdiction as long as the *Brooks*-type decisions continue to adorn the English law reports.

NOTES AND COMMENTS

SOUTH AFRICAN INTERACTIVE (INTERNET) GAMBLING REGULATION – THE 2006 DEVELOPMENTS

1 Introduction

The development of interactive gambling in South Africa is part of a global expansion of this sector of the gambling industry, subject to maybe one notable exception: the USA, where recent legislation had been enacted to make interactive gambling banking more complicated (SAFE Port Act, 2006. See in general the discussion by Rose "Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analysed" 2006 *Gaming Law Review* 537). It is estimated that this sub-industry was worth about $8,2 billion a year in 2004 (Ensor "Cellphone Betting a Ringtone Away" *Business Day* (11-12-2006) 1). It is a lucrative and growing market, with dozens of countries already having legalised interactive gambling. For a discussion on interactive gambling around the world, see Carnelley ("Interactive gambling: A South African perspective (2)" 2002 *Obiter* 1) and the National Gambling Board *Report on the Regulation of Interactive Gambling* (2005) (the Report). From the outset it should be noted that lotteries and sports pools are excluded from this discussion, as these forms of gambling are regulated by the Lotteries Board in terms of the Lotteries Act 51 of 1997. There has been no indication that interactive lotteries and sport pools would be legalised in the near future. This note is limited to casino gaming.

After seven years of anticipation in South Africa, the landscape of interactive casino gambling within the Republic has become more certain with two significant developments: The High Court decision in *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board* (2006 JOL 18820 (T), 2006 JDR 0946 (T)); and the National Gambling Amendment Bill, 2007 published on 18 December 2006 (GN 1838 in GG 29489). Although neither of these two developments could be regarded as the last word on the issue, they do give some indication of the direction of thinking of both the courts and the legislature.

The current premise of the South African casino gambling industry is based on limited legalisation, and that all gambling opportunities must be effectively regulated, licensed, controlled and policed (preamble to the National Gambling Act 7 of 2007). The possibility of interactive gambling regulation of casino type games has been promising, if slow in developing. Early in 1999, the Minister of Trade and Industry requested the National Gambling Board (NGB) to advise him on the implications of interactive gambling. The National Centre for Academic Research into Gaming released their *Interim Report for the National Gambling Board "Project South Africa. Internet Gaming and South Africa: Implications, Costs & Opportunities"* in 1999. As a result hereof, the NGB recommended that interactive gambling should be regulated. In 2000 MinMEC authorised the NGB to draft a national legislative framework for interactive gambling. Global Gaming

Services (GGS-AU) was commissioned to prepare a framework and policy document to form the basis of the proposed South African legislation for interactive gambling. Although the GGS-AU report, *The Internet (e-Gambling) Gambling Policy of South Africa* (2001), was submitted to the Minister, it was never officially accredited (Buthelezi *et al* "South Africa" in Balestra (ed) *Internet Gambling Report* 6 ed (2003) 582).

The National Gambling Act, in its current format, does not legalise and regulate interactive gambling; however, it does lay the foundation for future developments. The Act provides that no person may engage in, or make available, an interactive game except as authorised in terms of this Act or any other national law (s 11). The NGB has, as provided for in the Transitional Provisions of the Act, established a Committee to consider and report on national policy to regulate interactive gambling within the country (article 5(1) of the Schedule). This Report (the *Report on the Regulation of Interactive Gambling*) was published on 10 October 2005 and sets out the regulatory objectives and philosophy as well as the approach regarding interactive gambling. The abovementioned report has since resulted in the National Gambling Amendment Bill, 2007.

Each of these developments is now discussed more fully.

2 *Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board and Others* 2006 JOL 18820 (T), 2006 JDR 0946 (T)

Casino Enterprises (the plaintiff), who own the Piggs Peak (Swaziland licensed) land-based and internet casino in the Kingdom of Swaziland, sought a declaratory order to confirm that the following do not contravene the Gauteng Gambling Act 4 of 1995: firstly, that internet gambling by gamblers in Gauteng on the Piggs Peak website, and secondly, advertisements in Gauteng promoting internet gambling with the casino (para 1). The matter arose from the Gauteng Gambling Board (GGB) informing two Gauteng radio stations, which were carrying advertisements for the plaintiff, that they were contravening the legislation and could be prosecuted. As a result of this threat the radio stations withdrew the advertising (para 4.3).

The GGB, the NGB and the Minister of Trade and Industry defended the application. It was argued by the defendants that the application did not disclose a cause of action, in that as the South African law is clear, there was no case for the defendants to answer to (para 2). Factually, it was accepted by the court that the plaintiff operated legally in Swaziland, and that gambling between it and punters in Gauteng did not contravene the Swaziland licence. It was also not in dispute that the plaintiff did not hold a South African licence issued in terms of either the Gauteng Gambling Act or the National Gambling Act (para 8).

Leaving aside the procedural issues, the crux of the matter is simple. Although their views differed drastically, both parties were supported by expert evidence (para 3). The plaintiff argued that although the gamblers are in Gauteng and although the computers are situated in Gauteng, the gambling itself nevertheless takes place in Swaziland. Put differently: as gambling on the online casino was not an interactive game in terms of the national statute, and as the gambling does not take place in the RSA, it is not unlawful in terms of the South African legislation (para 4.9). The plaintiff interpreted the legal position to mean that it did not require a South African licence (in terms of either of the statutes) to make the Swaziland gambling available in the province, or to advertise in Gauteng, as

neither of the statutes prohibited such gambling or advertising. It argued that the defendants, in causing the radio stations to discontinue its advertisements, acted unlawfully and wrongfully (para 9).

The defendants argued that the gambling took place in at least both Gauteng and Swaziland. Moreover it was argued that even if it did take place in Swaziland, it is still unlawful to make it available, or advertise it, to South African residents (para 3). Underlying the defendants' exception is the fact that as both the national and provincial governments have concurrent jurisdiction with regard to casino gaming in South Africa, both the national and the provincial legislation regulates casino gambling in Gauteng. The National Gambling Act prohibits any unlawful gambling and forbids any person to make gambling available except when licensed (s 7), and this includes interactive games (s 11). Similarly, this Act prohibits the advertising and promoting of unlawful gambling (s 19(1)(a)(ii)). The Gauteng Gambling Act also prohibits the advertising of any unlicensed gambling unless the advertiser holds a valid gambling licence (s 71(1)). The defendants argued that their exception should be upheld, as the plaintiff did not allege that it held a casino licence in terms of any of the two statutes. In addition, it did not allege that the premises in Swaziland, from which the online casino games are disseminated, were licensed premises in the RSA as required by the statutes (para 5; 4.5–4.8). They further contended that upon proper interpretation of the statutes, gambling on the online casino of the plaintiff, by persons physically in the province is prohibited thereby – as is the advertising of these services. Therefore, they argued, the court could not make an order contrary to the express condition imposed by the legislature (para 10, with reference to *IS & GM CC v Tunmer* 2003 5 SA 218 (W)).

The court accepted that the exception could only succeed if the documentation of the plaintiff did not, on any plausible explanation, disclose a cause of action (para 6). In its discussion, the court referred to the fact that the Constitution was adopted to improve the quality of life of all citizens and that the regulation of gambling was enacted to safeguard the people against the adverse effects of gambling (para 12, with reference to *Casino Hotel Polana SARL v CL Tintinger* 2003 JDR 0792 (T)). The specific aims of the legislation include that gambling must be effectively regulated, licensed, controlled and policed; that members of the public must be protected; that the society and the economy must be protected against over-stimulation of the latent demand for gambling; and, that the licensing process must be transparent, fair and equitable (para 12). Casinos are regarded, by the preamble to the Gauteng Act, as a means to generate income and to add growth to the economy (para 13). The court noted that the considerations taken into account with the promulgation of the statutes thus included the protection of individuals, as well as to generate revenue for the provinces to improve the standards of living of many (para 14).

With regard to the legal position, the court noted that s 8 of the National Gambling Act prohibits all unlicensed gambling activities. As a general rule, no one may provide or partake in such an unlicensed gambling activity, and this prohibition includes interactive gambling (s 11). The relevant exception to this rule is licensed gambling activities (para 15–17). Similarly, the Gauteng Gambling Act prohibits any person from conducting a casino without a licence (s 39(1)), and that no person may gamble on the results or contingencies with a person other than a licence holder (s 76). This Act also prohibits and criminalises the advertising of unlicensed gambling operations (s 71(1); see para 18). The

court concluded: "[T]here can be no doubt that the legislature intended to and did legislate for complete control of all casino gambling within the borders of the Republic . . . The way in which the control of the casino gambling is to be effected is that only licensed gambling is permitted." (para 19)

The plaintiff's argument was that the defendants read extraterritorial jurisdiction into the two statutes, and required the court to exercise extraterritorial jurisdiction. The defendants counteracted by stipulating that all they wanted the court to do was to adjudicate on the legitimacy of actions taking place within South Africa's borders. The court finally agreed with the defendants and noted that the fallacy of the plaintiff's argument (that Gauteng gamblers gamble in Swaziland and not Gauteng) is that if nothing happens in Gauteng, there is nothing that the court here can sanction. There would therefore be no need for a declaratory order. The court found that the plaintiff required the sanction of gambling actions within the borders of South Africa and likewise with the advertisements. The Acts clearly provide that it cannot do so without a licence. As the plaintiff does not allege that it has a South African licence to do so, the documentation was fatally flawed and the exception was upheld. The court quoted from the unreported case of *Otherchoice (Pty) Ltd v Independent Communications Authority of SA* (TPD case number 19718/2003):

> "By requiring a person who renders a service in this country to be licensed albeit that that person is in a foreign country while rendering the service, our legislature is not prescribing to that person what he or she may do in a foreign country. The legislature is prescribing what the effect of what the person does may be in the country." (para 21)

Hartzenberg J concluded that the plaintiff's actions fell within s 11 of the National Gambling Act (para 22), and that the pleadings did not disclose a cause of action. The court set the declaration aside and allowed the plaintiff time to file an amended declaration. At the request of the parties, no order as to costs was made (para 23).

From an academic point of view it is unfortunate that the court did not have to decide the issue of where interactive gambling took place. It is submitted that this issue should be clarified by the legislature. The 2005 NGB Report contains the following recommendation:

> "The Committee recommends that the vexed question of where the gambling activity takes place and when a wager occurs be answered simply, in the following manner: *gambling takes place at the location where and at the moment when, the wager is accepted (i.e. placed on record as a wager in the operating system)*, which is consistent with the age-old principles of South African law relating to offer and acceptance and the 'striking' of an agreement." (Report 6)

Ironically, this seems to be in line with the arguments of the plaintiff in the matter *in casu* (para 3). With divergent arguments all supported by expert evidence, the uncertainty will remain until it is addressed by Parliament.

It is however reassuring that the court confirmed the intention of the legislature to effect complete control of all forms of gambling within the country, and that foreign operators who are effectively providing gambling to South Africans must be licensed. With the new National Gambling Amendment Bill, this possibility could be a reality in the not too distant future. That the court reiterated the aim of the legislation (to safeguard the public against the adverse effects of gambling), and that the court declared that it would not hesitate to enforce the principles of strict regulation of the gambling industry, is praiseworthy.

3 The National Gambling Amendment Bill, 2007

It is not the intention to deal with all the amendments of the Amendment Bill in detail, but merely to provide an overview of the most important proposed changes. The crux of the Bill is that registered players, with a player account, will be able to gamble on licensed interactive gambling websites, strictly regulated by the NGB. The Act is not exhaustive, and the Minister is given the power to promulgate regulations to provide detail to the broad principles set out in the Bill (s 87(1)(g)). The Bill is discussed with reference to the 2005 NGB Report.

The main aims of the Bill are to amend the existing National Gambling Act and to provide for the regulation of interactive gambling. Such regulations are specifically intended to provide for: the registration of players and player accounts; the conditions to interactive gambling licences; the protection of minors and other vulnerable persons; the remittance of winnings to foreign nationals and external companies and matters related thereto (preamble). The primary reason for this regulation remains to protect citizens and players by providing a safe interactive gambling environment (Report 3).

Apart from the necessary definitions (*inter alia* "interactive gambling equipment", "interactive gambling software"), the existing concepts within the Act are broadened to make provision for interactive gambling activities, making it consistent with the existing legislation (Report 5). In this regard descriptions of an "interactive gambling game" (s 5(1A)) and an "interactive gambling transaction" (s 5A) are included. The last mentioned definition provides that an interactive game that miscarried because of human error or a failure in the operating or telecommunication system, would not be regarded as an interactive gambling transaction (s 5A(c)). The Bill is technology-neutral, as recommended by the Report, ensuring that the statute will not become outdated and obsolete in the near future (Report 4).

Two issues are expanded upon in much detail: payout to a player and dispute resolution. With regard to the payment of prizes and remittance of profits and winnings, it is provided that if a player in an interactive game wins a monetary prize, the interactive provider must immediately credit the amount to the player's account (s 6A(1)). With regard to a non-monetary prize, the provider must either have the prize delivered personally, by courier or by post to the player, or give the player written notice of an address within the Republic where the prize may be collected (s 6A(2)). If a non-monetary prize has not been collected within one year after notification to the winner, the interactive provider may either dispose of the prize by public auction or tender, or in some other way approved by the board, or pay the funds over to the State after a successful application to the High Court for the forfeiture of such funds (s 6A(3)). The Bill provides for the remission of prize money to a foreign destination and dividends or profits of an external interactive provider company, subject to exchange control regulations and taxation laws (s 6B).

The legislature recognised the possibility of disputes in this scenario. The onus is placed on the interactive provider to attempt immediately to resolve the claim (s 6A(4)(a) or, if that is not possible, to request the NGB to resolve the complaint (s 6A(4)(b) and s 6B(1)).

Although the basic premise of the existing statute is retained, namely that interactive gambling is unlawful unless authorised, it is reiterated in the Bill that an interactive provider may not permit a person to participate in an interactive

game unless that person is registered as a player and has nominated an account held with a licensed financial institution for the movement of funds into and out of the player account (s 11A(a)). The Bill extends the regulations of the Act to the interactive gambling scenario with regard to minors (s 12), granting of credit (s 13), excluded persons (s 14), advertising (s 15), premises, including websites, and control and supervision (s 17–18; s 56(c)).

One deviation from the existing gambling regulatory format in South Africa is the actual regulator of interactive gambling. Although other forms of gambling are regulated by the relevant provincial board, the exclusive jurisdiction of the NGB with regard to the regulation of interactive gambling operators is confirmed (s 32). It is this board (and not any provincial board (s 39)) that would invite licence applications, undertake probity investigations, and consider applications for national licences for interactive gambling (s 32(1)(a)). It is the NGB that will conduct inspections to ensure compliance (s 32(1)(b)), impose on interactive gambling licensees administrative sanctions (s 32(1)(c)), issue offence notices (s 32(1)(d)), and ensure compliance with the Financial Intelligence Centre Act (s 32(1)(e)).

The only concern with the licensing duties of the NGB is their dual role in terms of the Financial Intelligence Centre Act 38 of 2001 (FICA) being both a "Supervisory Body" and if the Bill becomes law, presumably also an "Accountable Institution" (see the discussion by Carnelley "The principle of co-operative government and the power-play between the National Gaming Board and the provincial gaming boards" 2002 *Obiter* 193).

The jurisdiction of the NGB is confirmed by adding to its existing responsibilities (s 33). This board has to ensure *inter alia* (i) that unlawful activities related to interactive gambling activities and unlicensed interactive gambling activities are prevented or detected and prosecuted; (ii) that undertakings made by licensees holding a licence to make interactive games available, are carried out to the extent required by the licences; (iii) that employees within the interactive gambling industry are licensed; (iv) that each item of interactive gambling equipment or interactive gambling software being used, or made available for use, by a licensee is registered and certified; and (v) complete and timely levying, collection and remittance of taxes, levies and fees (s 33(1)(a)). Furthermore, the NGB must approve internal control systems for licensees which must include accounting and administrative systems (s 33(1)(b)); inspect web sites at which interactive gambling is conducted and premises where interactive gambling equipment and software are located (s 33(1)(c)); inspect interactive gambling equipment and interactive gambling software (s 33(1)(d)); and generally enforce the provisions of the statute (s 33(1)(e)). The NGB thus has supervision and enforcement powers (s 33(1)(f)); reviewing powers of licences and the activities of licensees (s 33(1)(g)); and the power to suspend or revoke any national licence issued by the board (s 33(1)(h)). Each of these responsibilities of the board listed above is further provided for in the Bill. (See for example the issue relating to external probity reports (s 57(4)), the right to suspend or revoke a licence (s 43(3)) and the conditions that could be imposed on the licensee (s 48(6).)

It is proposed that an interactive gambling licence is a national licence that would include an operating licence and personal licences for employees and management staff of interactive providers (s 37(1A(a)). The provincial licensing authorities may however issue personal licences for employees and management staff of an interactive provider (s 37(1A)(b)), but it may not issue the national

licence itself (s 39). One further disqualification has been added to the already existing disqualifications as an employee or licence holder, namely where the applicant has been convicted of any computer or computer software related crime within the past 10 years (s 49(1)(g) and s 50(2)(j)).

Specific duties for interactive providers are included in the Bill, *inter alia* to establish and verify the identity of players, record the identity of players, obtain a statement confirming that a player is 18 years or older, to ensure that a player is not resident in a jurisdiction that prohibits interactive gambling, to restrict interactive gambling facilities to registered players, and to report to the board any information which the interactive provider suspects may relate to the commission of an offence (s 37(1A)(3)). Although the onus rests on the licensee (Report 5), the effect of the statement by a player that he or she is not resident in a jurisdiction that prohibits interactive gambling, is unclear. With current technology (which is apparently problematic) it becomes ineffectual in practice to ascertain where a gambler is playing from (Report 5 fn 7). There is not yet a way to ensure the truth of this statement by the player. What if the legislation of that particular jurisdiction is unclear? Who would interpret the foreign law? This issue would hopefully be addressed in the regulations.

The Bill does not exclude South African citizens from gambling on the proposed licensed interactive websites. This is in line with the 2005 Report. However, there is no indication how the impact, if any, on the existing licensed land-based gambling operations would be addressed, or whether the matter would be left to market forces. In addition, the maximum number of interactive gambling licences is not set out in the Bill, but is left to the discretion of the Minister: a decision that would be made after consultation with the Competition Commission and after consideration of several criteria. These criteria include the number and geographic location of existing licensed casinos and interactive providers operating within the Republic, and the duration of the licences under which they operate. Other considerations include the incidence and social consequences of compulsive and addictive gambling, black economic empowerment, job creation and diversity of ownership (s 37A). The Report argued that there is no need initially to limit the number of licences granted. This is so because such a restriction would have a limited bearing on the extent or intensity of interactive gambling activity that takes place among South African citizens, as any single site is accessible to an unlimited number of players at any one time. Only where there is an undue impact on gambling activities should the NGB have the power to place limits on the new licences (Report 6–7). As mentioned, this power is included in the Bill.

Other proposed amendments deal with the editorial consistency within the statute, in addition, such proposed amendments attempt to bring the objects and functions of the NGB in line with the above changes (s 65).

Apart from dealing with the issue of interactive gambling, the legislature used the opportunity to correct certain omissions in the existing statute. It inserted a detailed purpose of the Act (s 2A), and extended the interpretation of the Act by providing that consideration may be given to foreign and international law and international conventions, declarations or protocols relating to gambling (s 1A). Although it should be noted that international conventions, declarations or protocols *per se* form part of international law, this tautology is of significance. This provision goes wider than s 39 of the Constitution of the Republic of South Africa, 2006, which provides that foreign law "may", but international law "must" be considered in the interpretation of the Bill of Rights. With interactive

gambling being a global issue, the reference to foreign law would be particularly helpful, subject to the usual *caveat* that it should be considered in the light of South African legal principles.

Another interesting section that was included in the Bill deals with the relationship between the NGB and the provincial authorities. The proposed new s 66(6) provides that where the Act requires oversight and evaluation by the NGB, and where the NGB concludes, on reasonable grounds, that the provincial licensing authority is unable to perform any one function effectively, the Minister must consult with the responsible MEC of that province to determine the steps to be taken to ensure the fulfilment of that statutory obligation. Although this gives the NGB some power of interference, it still does not give them the teeth to step in and take the matter over.

In general, the provisions of the Bill are in line with the 2005 NGB Report. Although the detailed regulations would place the flesh on the skeleton of the statute, it seems *prima facie* that the ethos of strict regulation and control would continue to preserve South Africa's reputation in the world community as an upstanding and responsible global player (Report 3). The hope remains to attract reputable companies to South Africa: companies that could successfully compete for both South African and international on-line gambling customers (Report 4).

A number of issues raised in the Report are not covered in the Bill, but might subsequently be included in the regulations. These issues include possible enforcement problems (Report 5) and the licensing of the software provider (Report 7). On the issue of the duration of the interactive gambling service provider's licence, the Bill notes that the licences would be permanent (s 48(2A)) with the duration determined in the licensing conditions (s 48(6)), whilst the Report recommended an annual licence (Report 7). There is also no provision made in the Bill as to the location of the game server (Report 8), or the currency to be used (Report 8).

4 Conclusion

Both the judgment and Bill recognise the importance of strict regulation of gambling in South Africa, and the necessity of enforcement of the regulatory system to ensure the interests of the public at large. Regulation in South Africa would be futile if any foreign interactive operator could ply its (unlicensed) trade within the South African market. This would have a negative impact on the existing licensed gambling operators, the proposed new interactive gambling operators, and the playing public. Moreover, it would make a mockery of the regulatory system. Although enforcement will always be problematic in the interactive arena, it is submitted that with reputable legislation, a political will, and dedicated regulators, a lucrative and safe market could be created in South Africa for interactive gamblers. This market would then include the added benefit of tapping into a new foreign tax base to generate income for the State. In the words of Lurie & Whitesman ("An age-old debate rears its head in South Africa" *Interactive Gaming News* (15-12-2006) 1): "It is heartening that South Africa has sought to responsibly regulate online gambling activities, instead of simply prohibiting it under threat of stiff penalties, whilst the activity is absolutely bound to continue behind closed doors of private residences."

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BALANCING MALE PRIMOGENITURE, GENDER EQUALITY AND CHIEFTAINCY SUCCESSION: *NWAMITWA v PHILIA AND OTHERS* 2005 3 SA 536 (T)

1 Introduction

Central to the customary law of intestate succession in South Africa is the rule of male primogeniture. Male primogeniture is inheritance by the eldest surviving male child. Women (and extra-marital male children) are excluded. With the entrenchment of the Bill of Rights in the 1996 Constitution, however, the constitutional validity of male primogeniture has been called into question in a number of cases that have come before the courts.[1] Male primogeniture has usually been challenged because, so it is argued, it discriminates unfairly on the grounds of age, birth and, most importantly, gender.

Thus far, aspects of gender discrimination which have received judicial attention have been largely confined to intestate succession of a deceased's estate devolving in accordance with personal law or family law. Little attention, either judicial or academic, has been paid to the issue of gender discrimination as played out by the customary (constitutional) law rule of patrilineal succession in terms of which women may not hold political office.[2]

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1 It may be observed that each level of the superior court hierarchy (namely the High Court, Supreme Court of Appeal and the Constitutional Court) has had an occasion to pronounce on the constitutionality of the primogeniture rule. See in particular *Mthembu v Letsela* 1998 2 SA 675 (T), which was later upheld in *Mthembu v Letsela* 2000 3 SA 867 (SCA); *Zondi v President of the RSA* 2000 2 SA 49 (N); as well as *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the RSA* 2005 1 SA 580 (CC).

2 Vorster "The Institution of Traditional Leadership" in Bekker *et al Introduction to Legal Pluralism in South Africa Part I Customary Law* (2002) 125–138. There are a few traditional communities where an exceptional rule to patrilineal succession operates in South Africa. Two of these are in Limpopo province, while one has been identified in KwaZulu-Natal. In Limpopo, the Balobedu of Modjadji are renowned throughout Africa for their female rulers and it is generally believed that their queen has rain-making powers. Before it became customary for female rulers to reign over the Balobedu tribe, the eldest son of the tribal chief's senior wife succeeded to the throne. But since the start of the Modjadji dynasty in about 1800, with the inauguration of Modjadji I, the daughter of Kgoshi Mkoto, it has been customary for the rain queen to be succeeded by her eldest daughter. For a brief succession history of the Modjadji dynasty dating from Modjadji I (1800–1852) to Modjadji VI (2003–2005) see *Sowetan* October 24, 2006 10. See also Vorster in Bekker *Introduction to Legal Pluralism* 131 and Bennett *Customary Law in South Africa* (2004) 121 who erroneously refer to the Balobedu as "Lovedu". The Mianzwi community among the Venda also practise matrilineal succession. See Ralushai and Gray "Ruins and Traditions of the Ngona and Mbedzi among the Venda of the Northern Transvaal" 1977 *Rhodesian History* 1 8. At 6 the authors claim that "succession to the powers of rain-making and to the headmanship at Mianzwi has been matrilineal in an apparently unbroken line from Luvhimbi". According to them, the first female ruler at Mianzwi in Venda was Mufanadzo also known by the titles of Dzhenzhele Ramiholi. At 7 they categorically assert that "she was treated as a chief". Moreover, Kerr "Customary Law, Fundamental Rights, and the Constitution" 1994 *SALJ* 720 733 (in fns 52 and 53) cites a newspaper article that reported that in 1992 there

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The purpose of this case note is to examine critically how the courts have attempted to harmonise primogeniture with gender equality in chieftaincy succession disputes. To this end, the paper seeks to analyse Swart J's recent judgment in *Nwamitwa v Philia*[3] in order to provoke critical dialogue over the issues of male primogeniture, gender equality and chieftaincy succession which hitherto have not been systematically charted in our public law discourses.

2 The *Nwamitwa* decision

The discussion below is organised under the following sub-themes: (a) Facts and Legal Issues; (b) Underlying Reasons for the *Ratio*; and (c) Concluding Remarks.

2 1 Facts and Legal Issues

In *Nwamitwa v Philia*, the Pretoria High Court was invited to determine whether a woman could succeed her late father, a chief, and become the chieftainess of a traditional community. First respondent and applicant *in casu* were respectively female and male members of the royal family of the Valoyi tribe that constitutes part of the Tsonga/Shangaan nation of contemporary Limpopo province. Both contenders for the chieftainship of the tribe are cousins. Their fathers were brothers. For over five generations the appointment and succession to chieftaincy among the Valoyis have been strictly patrilineal, as determined by the organising principle of male primogeniture.[4] The immediate events culminating in this dispute originated on 26 May 1948 when *Hosi* (Chief) Fofoza Nwamitwa was enthroned as the chief. He reigned for two decades until his death on 24 February 1968. *Hosi* Fofoza was the father of the first respondent.

The first respondent was the only child born of the first wife. *Hosi* Fofoza did not have a son. In view of this, when *Hosi* Fofoza died in 1968, his younger brother, Richard, was appointed chief.[5] *Hosi* Richard Nwamitwa was the father of the applicant. The applicant is *Hosi* Richard's first-born son from his first wife. It was upon the death of *Hosi* Richard Nwamitwa in 2001 that the issue arose as to whether the applicant or the first respondent should succeed as chief of the Valoyis.[6]

Based on various resolutions adopted by the Valoyi royal family, royal council as well as the tribal authority, the Limpopo provincial government (the State) in 2002 purportedly appointed first respondent as chief "in accordance with the practices and customs of the Valoyi tribe within the meaning of the Constitution of the Republic of South Africa Act 108 of 1996."[7]

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was a woman chief who reigned among the Madlebe tribe, a group member of the Zulus in KwaZulu-Natal province.

3 2005 3 SA 536 (T). On 1 December 2006, the Supreme Court of Appeal unanimously dismissed an appeal against the High Court judgment in this case. The Supreme Court of Appeal decision, which largely upheld the reasoning of the High Court is reported as *Nwamitwa Shilubana v Nwamitwa* 2007 2 SA 432 (SCA). A further appeal against the Supreme Court of Appeal decision has been lodged with the Constitutional Court and it is cited as *Shilubana and Others v Nwamitwa* CCT 3/07, to be heard on 27 November 2007. See also a story about this case in the *Sunday Times*, 20 May 2007 14.

4 540F–G. See the narrative on the family tree of the Nwamitwa dynasty in the judgment at 540F–H.

5 541D–E. After *Hosi* Fofoza died in 1968, *Hosi* Richard was initially appointed Acting *Hosi*. Later in the same year he was appointed *Hosi*. He remained *Hosi* until his death in 2001.

6 538E

7 546D.

The applicant challenged the appointment of first respondent and prayed for an interdict from the High Court to the effect that:

- he was the heir to the Valoyi chieftaincy and had the right to succeed his late father as the chief;
- first respondent was not entitled to succeed applicant's late father as chief;
- all letters of appointment of first respondent as chief issued by the State be withdrawn; and
- the State be ordered to issue applicant with letters of appointment as chief of the Valoyis.

Swart J heard oral evidence with a view to determining, *inter alia*, three key legal issues.[8] First, the court sought to determine whether a woman could be appointed a chief, in terms of the customs and traditions of the Tsonga/Shangaan nation and, in particular the Valoyi tribe. Second, the court had to decide whether the royal family[9] acted in terms of the customs and traditions of the Valoyis when appointing first respondent as chief. Lastly, the court had to rule on the larger constitutional issue as to whether the provincial government's appointment of the first respondent as chief was in accordance with the practices and customs of the Valoyi tribe, within the meaning of the 1996 Constitution.

2 2 Underlying Reasons for the Ratio

With regard to the first issue – whether in terms of the customs and traditions of the tribal community a woman could be appointed as chief – the court concluded that a female successor could not become a chief.[10] In other words, as far as the Valoyis are concerned there was neither precedent nor evidence of a female having been appointed as chief, even if she was the first born.[11] After tracing the patrilineal succession of the Nwamitwa chieftaincy over five generations, Swart J ruled that "in terms of the customs and traditions of the Tsonga/Shangaan tribe, more particularly the Valoyi tribe, a female cannot be appointed as *Hosi* . . .".[12]

It is submitted that this *ratio decidendi* of the *Nwamitwa* judgment conforms to the principle of patrilineal succession which, according to Bennett, is regarded

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8 It is important to point out that in *Nwamitwa Shilubana v Nwamitwa* the Supreme Court of Appeal adopted these three issues as well as the reasoning and findings of the court *a quo*. For this reason, I found it expedient to confine my references only to the initial judgment of Swart J in the Pretoria High Court.

9 541F–G. References to the royal family in this paper include members of the royal family, royal council and the tribal authority since membership of these traditional governance structures seems to overlap and gravitate around the royal family. In any event, the most decisive determination as to who a chief will be is made by the royal family. The royal council and the tribal authority may formally endorse or reject a person chosen by the royal family. Thus the primary responsibility of choosing a suitable person as chief resides with the royal family and in the history of the tribe no decision of the royal family has ever been overruled by the royal council or the tribal authority. From pages 541–543 of the judgment it may be observed that before and after the death of applicant's father, most royal family meeting resolutions taken to transfer chieftaincy to first respondent were unanimously endorsed by the royal council and tribal authority.

10 539I–J.

11 540E–F.

12 541B.

as "a cardinal rule of customary law".[13] Vorster similarly points out that among the Bantu-speaking people of South Africa, traditional leadership is embedded in a social system of patriarchy.[14] According to De Beer, the import of various provisions of the 1996 Constitution recognising the institution, status and role of traditional leadership in terms of customary law is that "the customary rules determining succession to positions of traditional leadership should be applied to ensure the continuation of the institution over time".[15]

It is noteworthy that the Constitutional Court in the *Bhe* trilogy of cases clearly outlawed the primogeniture rule as one tapestry of customary law governing the inheritance of property. As the *Bhe* court put it, the exclusion of women from inheritance of property on the grounds of gender violates not only the equality rights of women,[16] but also the rights of women to human dignity.[17] But the *Bhe* court's rejection of primogeniture was not absolute. Quite apart from disputes of property inheritance, where primogeniture was found to be repugnant to the prevailing ethos of our egalitarian society, the *Bhe* court was quick to suggest that primogeniture may still be applicable in other contexts, such as chieftaincy succession. For this reason, Langa DCJ actually led the majority in posting a strong caveat that the *Bhe* judgment must not in any way be read as having determined "the constitutionality of the rule of male primogeniture in other contexts within customary law, such as *the rules which govern status and traditional leaders*".[18]

To wrap up, it may be safe to conclude the foregoing analysis by stating that the application of patrilineal succession within customary law rules regulating the institution of traditional leadership remains valid and intact, even after the

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13 Bennett *Customary Law* 120.

14 Vorster in Bekker *Introduction to Legal Pluralism* 131. According to Vorster, the criteria for determining the position of a successor include: (a) the status of the principal wife; (b) gender (male); (c) first born son (principle of primogeniture in respect of males); and (d) physical ability.

15 De Beer "Succession to Traditional Venda Leadership in a Changing Constitutional Environment in Southern Africa" 2004 *Anthropology Southern Africa* 103. At 104, the author argues, based on another academic opinion, that section 8(c) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 seeks to abolish the "entire" customary law of succession and inheritance. But he clearly overstates the actual scope of the provision, because section 8(c) merely abolishes practices rooted in patriarchy which hinder women from inheriting or succeeding to family property as distinct from succession to status and traditional leadership.

16 *Bhe* paras 91 and 95. In *Bhe*, the Constitutional Court declared male primogeniture as regards inheritance of property to be inconsistent with the Bill of Rights, since it excludes women and extra-marital children from inheriting property. To this end, the court at para 100 considered and criticised the Supreme Court of Appeal decision in *Mthembu v Letsela* 2000 3 SA 867 (SCA), which upheld primogeniture and disallowed a woman from inheriting property. For comparable foreign case law affirming gender equality, see *Ephraim v Pastory* 2001 AHLR 236 (TzHC 1990) where the High Court of Tanzania also invalidated a customary law rule which prohibited a woman from alienating clan land lawfully inherited from her deceased father. The court ruled that the customary law rule forbidding women from selling clan land was discriminatory and therefore inconsistent with the Bill of Rights enshrined in the Tanzanian constitution.

17 *Bhe* paras 92 and 95.

18 *Bhe* para 94 (my emphasis). See also Kerr "The Constitution, the Bill of Rights and the Law of Succession (2)" 2006 *Speculum Juris* 1 8.

groundbreaking *Bhe* decision. This remains the position despite the *Bhe* court's transformative approach to reconcile primogeniture (as it operates in the field of property inheritance) with women's rights to equality and human dignity guaranteed in the Bill of Rights.

Subsequent to this initial finding upholding patrilineal succession among the Valoyis, Swart J proceeded to consider the second issue – whether, by appointing first respondent as chief, the royal family acted in terms of the customs and traditions of the Valoyi tribe. The court noted that there were two critical considerations which led the royal family to resolve that the first respondent would succeed to the chieftaincy after the death of applicant's father. First, the royal family opined that the successor to the Valoyi chieftaincy was the first respondent because she was the first born of *Hosi* Fofoza Nwamitwa and his first wife, Queen Favazi.[19] Second, the royal family contended that though in the past the Valoyis did not permit a female child to be heir, the current constitutional democracy now permits a female child to succeed, since the Constitution guarantees equality between men and women[20] and forbids unfair discrimination on account of gender.

From an organisational perspective, this note adopts the same structure of Swart J's judgment by deferring the in-depth examination of the royal family's "bout of constitutional fervour"[21] until the discussion of the third and last legal issue, towards the end of this section. This conveniently brings the analysis of the first consideration adopted by the royal family into immediate focus. For three main reasons Swart J rejected first respondent's claim that she was entitled to succeed because she was the first born of her father.

First, although the court empathised with the strong desire of the royal family to restore the chieftainship to the direct Fofoza line, it noted that the Valoyi custom and tradition made no provision for the appointment of a woman as chief.[22] Secondly, the court also found that there was no precedent in the Valoyi custom for the transfer of chieftainship.[23] As a matter of fact, *Hosi* Richard Nwamitwa did not vacate the throne. He remained chief until his death, when the Fofoza line was still intact. Thirdly, it amounted to a drastic departure from Valoyi custom and tradition for the royal family simply to elect the first respondent as chief.[24] As far as the succession process is concerned, the royal family plays a formal role in that it does not elect a chief, but merely recognises and confirms one.[25] Since the appointment of the first respondent was in total disregard of the Valoyi custom and tradition, the learned judge rightly concluded that the royal family had indeed acted beyond its functions and powers.[26] Based on the above reasons, Swart J ruled:

> "A most important consideration in the Tsonga/Shangaan and Valoyi custom is that a chief of the tribe must be fathered by a chief. This has always been the practice. If a female is appointed as chief and also marries, her children would not have been

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19 *Nwamitwa* 541.
20 *Ibid.*
21 544G–H.
22 *Ibid.*
23 545B.
24 544H–J and 545F–G.
25 545E.
26 545F–G.

> fathered by a Valoyi chief, would bear a different name and would not be members of the royal family. This would lead to confusion and uncertainty in the successorship."[27]

Prior to the *Nwamitwa* judgment, another court of concurrent jurisdiction had arrived at a similar conclusion when it resolved a succession dispute by determining which one of two contesting houses was the rightful designator of a new ruler. In *Muditambi Mulaudzi (born Masia) v MEC for Local Government and Traditional Affairs*,[28] first applicant claimed that "she was the sole holder of [the] power to designate a new chief".[29] Nonetheless, the court held that since the first applicant was born of a marriage which failed to comply with all the marriage rituals laid down in Venda royal marriages,[30] she was disqualified from designating a new ruler of the Masiya dynasty. Perhaps, more pertinently, the court poignantly pointed out in an *obiter dictum* that "according to the Masiya royal custom and tradition a female may not ascen[d] to the throne".[31]

Notably, this line of reasoning adopted by the *Mulaudzi* court, and later reiterated in *Nwamitwa*, loudly resonates and celebrates the general principle of customary law that a man cannot be succeeded by a woman.[32] In short, succession to status is largely limited to males, especially those of the patrilineage.[33] As Ngcobo J, in a dissenting opinion, explained in the *Bhe* case, "the concept of succession in indigenous law must be understood in the context of indigenous law itself"[34] since succession in indigenous law entails the transmission of all the rights, duties, powers and privileges associated with status.[35]

Attention may now be drawn to an analysis of the third and final issue dealt with by the *Nwamitwa* court. As noted earlier, the final issue was whether the provincial government's official recognition and appointment of first respondent as chief was in accordance with the custom and tradition of the Valoyis within the meaning of the Constitution. Counsel for the first respondent extensively

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27 545G–H.

28 Unreported Case No 116/2001 decided on 26 November 2001 by the Thohoyandou High Court presided over by Hetisani J. The court dismissed the claim of Muditambi Mulaudzi, first applicant, who contested the Royal Council's appointment of a new chief after another woman from the first house had designated the new chief. Hetisani J found that the first house, rather than the other house of the first applicant, was the legitimate bearer of the *dzekiso* title. For this reason, it was correct that the new ruler was designated by the woman from the first house as it was the true *dzekiso* house.

29 *Mulaudzi* 4.

30 *Mulaudzi* 25–26.

31 *Mulaudzi* 21. See Koyana "Chieftainship and Headmanship are not Hereditary" 2002 *Speculum Juris* 144. At 156–158 the author cites two cases which illustrate that succession to headmanship (and chieftainship) is not rigidly based on the principle of heredity. The High Court in *Fono v Nyandeni Regional Authority and Others* (Transkei Division Case No. 1049/97 unreported) dismissed the claim of a woman for succession to the headmanship because her husband and later her son, who predeceased her, were the rightful heirs to the headmanship of the tribal area. She also contended that by reason of the Constitution her gender could not disqualify her. But her claim was rejected because succession to headmanship is not necessarily hereditary.

32 Rautenbach *et al* "Law of Succession and Inheritance" in Bekker *Introduction to Legal Pluralism* 110.

33 *Ibid*.

34 *Bhe* para 157.

35 *Bhe* para 160.

relied on various provisions of the Constitution to reinforce their various heads of argument. In the main, the first respondent's counsel invoked the application clause,[36] the equality clause,[37] the interpretation clause of the Bill of Rights,[38] as well as the constitutional provision recognising the institution of traditional leadership.[39]

First, it was contended on behalf of first respondent that the Bill of Rights applies to all law and binds all organs of State including the courts.[40] By invoking the binding effect of the Bill of Rights, first respondent's counsel was seeking to persuade the court that it was enjoined by the supreme constitutional imperative to protect and promote the rights to equality and dignity of first respondent, which were apparently compromised by primogeniture. Counsel were in effect suggesting that the overarching constitutional values of equality, human dignity and freedom must prevail over the customary law tenet of primogeniture.

Secondly, with respect to the equality clause, counsel focused specifically on the listed grounds in terms of which the Constitution explicitly prohibits unfair discrimination. Counsel argued that the Constitution outlaws unfair discrimination on one or more grounds, including gender and race,[41] and therefore such a discrimination based on first respondent's gender is presumed by law to be unfair unless the contrary is established.[42] What counsel was pressing on the court was that first respondent had been disqualified as a successor to the throne because of her gender, and that is clearly forbidden by the Constitution. Thus, the court was enjoined to be mindful of the fact that the customary practices supported by applicant are practices that are in conflict with various provisions of the Constitution, namely, the right to equality and the prohibition against discrimination on the ground of gender.[43]

Thirdly, counsel drew the attention of the court to the interpretation clause and the mandatory obligations which the Constitution imposes on courts. Counsel put it to the court that the Constitution unequivocally instructs every court to promote the values that underlie an open and democratic society based on human dignity, equality and freedom when interpreting any statute and also when developing common law or customary law. Furthermore, counsel submitted that when interpreting any legislation, and when developing the common law or customary law, every court must promote the spirit, purport and objects of the Bill of Rights.[44]

Finally, counsel argued that the Constitution recognises the institution, status and role of traditional leadership according to customary law, but subject to the Constitution.[45] In the result, counsel argued, the court was obliged to apply customary law when that law is applicable, subject to the Constitution and any

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36 Section 8 of the Constitution.
37 Section 9 of the Constitution.
38 Section 39 of the Constitution.
39 Section 211 of the Constitution.
40 *Nwamitwa* 546E–F.
41 Section 9(3) of the Constitution.
42 Section 9(5) of the Constitution.
43 *Nwamitwa* 547A–C.
44 546F–G.
45 546G–H.

legislation that specifically deals with customary law.[46] What counsel did emphasise here was that the constitutional recognition given to traditional leadership was qualified by the basic rights guaranteed under the Bill of Rights. In other words, even though the Bill of Rights recognises the existence of any other rights or freedoms conferred by customary law, it is required *sine qua non* that any such customary law rights or freedoms must be consistent with the Bill of Rights[47] in order to pass constitutional muster.

Swart J's response to the above submissions was brief and straightforward. According to the learned judge, the court had in fact

> "been enjoined to apply customary law because it is applicable. I may not do so, if doing so conflicts with the Constitution and any legislation that specifically deals with customary law. Where applying this test I do not find that the customary law as such is invalid. I am still enjoined when developing the customary law to promote the spirit, purport and objects of the Bill of Rights."[48]

Essentially, the court alluded to four main justifications for its ruling that the customary law rule of patrilineal succession, rather than gender equality, was more applicable to the resolution of this succession dispute. First, the court opined that patrilineal succession, and for that matter male primogeniture, does not conflict with the Constitution, or any legislation that specifically deals with customary law. Secondly, the court explained that primogeniture, being the applicable customary law rule, was still valid. Thirdly, the court noted that it had a constitutional duty to promote the spirit, purport and objects of the Bill of Rights when developing customary law. Finally, the court observed that the Bill of Rights recognises the existence of any other rights or freedoms conferred by customary law (*inter alia*) to the extent that they are consistent with the Bill of Rights.[49]

3 Concluding remarks

It is time to draw together the threads of this commentary, and to consider what conclusions may be drawn from the *Nwamitwa* court's decision to reject gender equality and uphold the customary law rule of male primogeniture in this chieftaincy succession dispute.

Undoubtedly, the *Nwamitwa* case highlights the apparent conflict arising out of the constitutional recognition of traditional leadership under customary law[50] on one hand, and the constitutional right to gender equality (or non-discrimination on the basis of gender),[51] on the other hand. As a matter of fact, Swart J's decision in *Nwamitwa* raises more questions than answers. Specifically, it raises three critical questions.

First, it raises the question whether the right to succeed to the chieftaincy of the Valoyi tribe, which is based on male primogeniture, is consistent with the Constitution. Second, it also questions whether it was appropriate for the royal

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46 *Ibid*.

47 *Ibid*.

48 546I.

49 546J–547A.

50 Section 211 of the Constitution, read together with the Traditional Leaders Framework Act 41 of 2003.

51 Section 9 of the Constitution.

family, in seeking to appoint a woman as an heir to the Valoyi tribe, to adapt customary law in order to make it more relevant to present times. In other words, should there be a progressive development of the customary law of primogeniture, so as to keep pace with the modern requirements of an egalitarian society? Lastly, it may also be useful to ask whether the Nwamitwa court got it right in law when it failed to develop the primogeniture rule so as to promote the spirit, purport and objects of the Bill of Rights.

Indeed Swart J had a hard case to decide in *Nwamitwa*, given the fact that the outcome was not clearly dictated by statute or precedent. Neither did counsel on both sides provide the honourable court with arguments and relevant materials on constitutional human rights which could have enriched the judgment in *Nwamitwa*. These shortcomings open the decision up to criticism.

The *Nwamitwa* decision may be criticised for the court's failure or refusal to develop the primogeniture rule, so as to promote the spirit, purport and objects of the Bill of Rights. Moreover, the decision flies in the face of the transformative agenda of the Traditional Leadership and Governance Framework Act[52] in two main senses. In the first place, the preamble of this legislation unambiguously stipulates that the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that "gender equality within the institution of traditional leadership may progressively be advanced". The *Nwamitwa* decision fails to recognise the statutory obligation imposed on traditional communities to transform and adapt customary law and customs so as to comply with the Bill of Rights, in particular by "seeking to progressively advance gender representation in the succession to traditional leadership positions".[53]

In this respect, the *Nwamitwa* decision seems to impoverish the emerging gender equality jurisprudence in particular, and in the end retards the progressive judicial development of customary law, which ought to keep pace with human rights norms. As Lehnert explains, this shortcoming may be due to the "limited understanding of customary law concepts" among judges, which result in the rigid and mechanical "application of the principle of male primogeniture without even considering the changed practices in the living [customary] law".[54] Male primogeniture, as applied in this case, embodies the blatant injustice arising from the obvious fact that if the applicant were a man, she would have succeeded her father as chief of the Valoyi tribe in 1968. But at that time, customary law classified women as minors and that was why her uncle, *Hosi* Richard, replaced her late father, and ruled until his death in 2001.

It is thus submitted that the meaning and relevance of the primogeniture rule should not be left behind in a society whose changing standards of life and ethos are continuously on the move. If the primogeniture rule is always interpreted with reference to the archaic meaning accorded to it by our ancestors, then contemporary people, especially women of the new millennium, may surely lose faith in it, and may not respect it because male primogeniture seems to be unjust and unfairly discriminatory towards women. As a matter of fact, indigenous law

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52 Act 41 of 2003.

53 Section 2(3)(c) of the Traditional Leadership and Governance Framework Act.

54 Lehnert "The Role of the Courts in the Conflict between African Customary law and Human Rights" 2005 *SAJHR* 241 264 and 266.

is a dynamic system of law that has values and norms, but which values and norms continue to change and evolve within the context of the Constitution. For this reason it is important for the rule to develop with the changing expectations of those who look to it as the embodiment of the values and aspirations of the customary law community and its citizens.

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REGISTRATION OF CUSTOMARY MARRIAGES UNDER THE TRANSKEI MARRIAGE ACT: *WORMALD NO AND OTHERS v KAMBULE* 2004 3 ALL SA 392 (E), *WORMALD NO AND OTHERS v KAMBULE* 2006 3 SA 562 (SCA), AND *KAMBULE v THE MASTER OF THE HIGH COURT AND OTHERS* 2007 4 ALL SA 898 (E)

1 Introduction

Prior to its integration in South Africa, Transkei was quasi-independent and had its own laws and legal identity. In 1978, customary marriages were given full recognition in the Transkei Marriage Act 21 of 1978,[1] two decades before the promulgation of the Recognition of Customary Marriages Act 120 of 1998 in South Africa. Unfortunately the latter Act repealed only certain provisions of the Transkei Marriage Act and thus created an opportunity for conflict, in that both pieces of legislation are applicable to marriages concluded in the Transkei.

Although the Transkei legislation attempted to place civil and customary marriages on a par,[2] many inequalities and injustices are still enshrined in this Act.[3] Over the years these have been recognised by the courts and have, to an extent, been addressed by the South African Legislature.[4] One of the recurring problems in connection with this Act is the requirement that customary marriages be registered. The interpretation of the relevant provisions in the Act has led to conflicting decisions that have not as yet been settled by the Supreme Court of Appeal. Moreover, the requirement of mandatory registration has to an extent compromised the essence of a customary marriage by diverting the focus to legislative constraints rather than living customary law.

Recently, registration of customary marriages in terms of the Transkei Marriage Act and the conflict between this Act and the Recognition of Customary Marriages Act again became the subject of judicial consideration in three cases, all based on the same set of facts: *Wormald NO and Others v Kambule*[5] (referred to as the "first *Wormald* case"), *Wormald NO and Others v Kambule*[6] (referred to as the "second *Wormald* case") and *Kambule v The Master of the High Court Others*[7] (referred to as "the *Kambule* case"). The divergent attitudes of our courts

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1 This Act legalised polygyny for both civil and customary marriages and consolidated and amended the laws relating to both civil and customary marriages in the Transkei. It is applicable to all marriages concluded there irrespective of the parties' tribal affiliation.

2 See the discussion of Mqeke "The application of choice of law rules in a succession dispute arising out of the Transkeian Marriage Act 21 of 1978: *Makhohliso v Makhohliso* case no 1364/93 (TkSC)" 1996 *THRHR* 344; Maithufi "Marriage and succession in South Africa, Bophuthatswana and Transkei: a legal pot-pourri" 1994 *TSAR* 263.

3 See the various examples highlighted by Mqeke "The Transkeian Marriage Act of 1978 and the interim Constitution" 1995 *SALJ* 343.

4 See, eg, *Prior v Battle* 1999 2 SA 850; *Nkonki v Nkonki* 2001 4 SA 790 (C); *Makholiso v Makholiso* 1997 4 SA 509 (Tk); and, most recently, the abolition of ss 3, 29, 37, 38 and 39 of the Transkei Marriage Act by the Recognition of Customary Marriages Act.

5 2004 3 All SA 392 (EC).

6 2006 3 SA 562 (SCA).

7 2007 4 All SA 898 (E).

as regards customary law in general, and specifically as regards the rights of the widow in a customary marriage, were once more illustrated by these three cases.

2 The facts

In 1956, the deceased Baduza (hereafter "the deceased"), concluded a civil marriage out of community of property with Norah Khupela Baduza (third respondent in the *Kambule* case, hereafter "Baduza") in terms of s 22(6) of the Black Administration Act 38 of 1927. In 1985, the deceased concluded a second, customary, marriage with Kambule (respondent in *Wormald* and applicant in the *Kambule* case, hereafter "Kambule") in the Transkei. Marriage goods were transferred to Kambule's parents and customary rites were performed. However, the marriage was never registered in terms of the Transkei Marriage Act.

Baduza, the civil-law wife, was aware of the customary marriage and did not approve of it. As a result of her hostility towards the customary-law wife, the deceased arranged that Kambule move from her home in Sterkspruit, Transkei, to one of his other houses, also in the Transkei. Due to deteriorating security in the area, she moved again, this time to a house purchased by Burton Queenstown CC, a close corporation of which the deceased was the sole member. In 2001, Kambule moved to yet another property in Queenstown, the Longview property, which was also purchased by the close corporation, and which was the object of the litigation in these cases. This property was subject to two mortgage bonds. The deceased shared this home with Kambule and he was residing there at the time of his illness and subsequent demise in June 2002. He made no provision for Kambule in his will.

After the deceased's death, Wormald, the executor of his estate, attempted to collect rental from Kambule, which she refused to pay. She was also offered alternative accommodation, which she refused to accept.

The case came before the court for the first time when Wormald, in his capacity as executor of the estate, and Burton Queenstown CC, owner of the Longview house, approached the Eastern Cape Division of the High Court for an order evicting Kambule from the property and declaring void her customary marriage to the deceased, from which marriage she alleged her right to occupation of the property derived. The applicants claimed that Kambule was in unlawful occupation of the property since it was owned by an entity with a separate and distinct legal personality from the deceased, and that any right that she may have had to occupy the property had been terminated on the deceased's death. In turn, Kambule contended that her occupation of the home was with the express or tacit consent of the close corporation, and it was through this close corporation that the deceased had purchase the property to provide her with accommodation.

The validity of the marriage was attacked on two grounds: first that it had not been registered in terms of the Transkei Marriage Act, and second that the civil-law wife Baduza had no knowledge of it. The court *a quo* refused to grant the application.

The case went on appeal to the Supreme Court of Appeal, which reversed the decision of the court *a quo*, but made no order regarding the validity of the customary marriage. Kambule was ordered to vacate the property.

The saga did not end there. Acting on a remark by the Supreme Court of Appeal that a valid customary marriage would in future provide the basis for claim to maintenance against the estate, Kambule instituted such a claim against

the deceased's estate in the Eastern Cape Division of the High Court in terms of the Maintenance of Surviving Spouses Act 27 of 1990.

3 Judgments and reasons

3 1 The Eastern Cape Division

Chetty J dismissed the application on the basis that all the evidence pointed to the existence of a customary marriage, that all requirements for a valid marriage had been complied with, and that a failure to register a customary marriage as prescribed in the Transkei Marriage Act did not invalidate such a marriage. He held that the impediment of non-registration has been removed by s 4(9) of the Recognition of Customary Marriages Act.

His Lordship further held that Kambule was not an unlawful occupier as envisaged in s 1 of the Prevention of Illegal Eviction from and Occupation of Land Act 19 of 1998, since the deceased had purchased the property acting in his capacity as the close corporation's sole member and in accordance with his responsibility as a husband to provide his wife with a home during the subsistence of their customary marriage.

The Court found that the close corporation had granted Kambule a servitude of "*usus*" or "*habitatio*" in respect of the property she occupied. The fact that this right had not been registered against the title deed was immaterial and consequently did not affect its binding force on the parties. In addition, the court gave recognition to the fact that customary marriages gave rise to certain rights between the parties: Kambule's right to occupy the home was one such a right and her entitlement to enforce this customary-law right derived from the Constitution. The court referred to Kerr *The Customary Law of Immovable Property and of Succession*, in which various cases were discussed which recognised this customary-law "servitude-like" real right (which does not have to be registered).[8] These findings of the Eastern Cape Division were contested in the Supreme Court of Appeal.

3 2 The Supreme Court of Appeal

This Court overturned the judgment of the Eastern Cape Division. It held that Kambule's occupation of the property had no legal basis, and she was ordered to vacate the Longview property within twelve months of the date of the Court order. By a majority, the Court declined to deal with the declaratory order concerning the validity of the customary marriage, concluding that such an order was not germane to the claim: a valid customary marriage would not provide the basis for lawful occupation of the property. The court held that although in customary law a husband or his successor ("heir") has a duty to maintain a wife or widow and to provide her with residential and agricultural land, she never acquires any real rights in such land. Ownership of such land remains in the hands of the deceased or his successor.

Maya AJA, giving reasons for the finding of the majority, explained that, first, Kambule was laying claim to property, which was subject to mortgage bonds, belonging to a third party. The concept of a mortgage bond is unknown in customary law and it is legally unsound to extend the customary-law right to

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8 See paras 7–10.

maintenance to confer a real right in respect of such property, particularly if that is against the wishes of the bondholder. Her Ladyship further held that the close corporation was not established for the purpose of providing support to Kambule, and that the property was not registered in her name: her occupation was clearly unlawful. In determining whether it would be just and equitable to grant an eviction order, the majority decided that Kambule was neither indigent, nor in dire need of accommodation. It followed that in accordance with the provisions of the Prevention of Illegal Eviction from and Occupation of Land Act, the protection of the inherent right to ownership outweighed the needs Kambule may have had.

In the minority judgment, Combrinck AJA arrived at the same decision, but for different reasons. Significantly, he held that a valid customary marriage would form the basis of lawful occupation of a residence by a widow. He agreed with the Court *a quo* that factually Kambule and the deceased had entered into a customary marriage which had been concluded in accordance with customary law; that customary law had to be applied when determining the rights of the wife to matrimonial assets on the death of her husband; and that according to customary law "the widow enjoys a type of personal servitude of *usus* or *habitatio* in respect of the residence which her husband allowed her to occupy during the subsistence of the union".[9] However, he disagreed with the finding of the Court *a quo* that the failure to register the marriage had no effect on its validity.

Combrinck JA did not analyse the cases referred to in the court *a quo* which deal with registration of customary marriages under the Transkei Marriage Act. Instead he based his finding on sections of the Act which had not been considered in those cases. His conclusions were as follows: s 33 of the Transkei Marriage Act requires that a customary marriage be registered. In terms of ss 25 and 26, civil marriages must also be registered. Section 12 determines that before a civil marriage is *solemnised* objections may be raised and if there is a lawful impediment to the marriage, the marriage officer should refuse to solemnise the marriage. Section 36 determines that objections to a customary marriage should be raised *before registration* and if there is a lawful impediment in terms of the applicable customary law, the marriage should not be registered. According to the Court, these sections clearly indicate that validity of a customary marriage is dependent on registration. Further support for this argument is furnished by s 37, which determines that a woman falls under the guardianship of her husband upon the *solemnisation* of a civil marriage and upon the *registration* of a customary marriage.

It was further held that s 4(9) of the Recognition of Customary Marriages Act, which provides that failure to register a marriage does not affect its validity, is not applicable in this present matter, since Kambule's marriage was concluded before the Act came into operation on 15 November 2000.

3 3 The Eastern Cape Division

Subsequent to the decision of the Supreme Court of Appeal, Kambule lodged a claim for maintenance in the Eastern Cape Division against the estate of the deceased in terms of s 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990.

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9 Para 25.

There was a material dispute of fact as to the existence of the customary marriage which could not be resolved on the papers. Counsel for both sides agreed that the Court should resolve whether failure to register a customary marriage in terms of the Transkei Marriage Act invalidated it and, if not, whether Kambule could be regarded as a surviving spouse in terms of the Maintenance of Surviving Spouses Act. Should the Court find that failure to register did not invalidate the marriage and that Kambule could be regarded as a survivor, the case should be referred for oral evidence to resolve whether there had in fact been a valid customary marriage.

The court (per Pickering J) found in favour of Kambule. Failure to register the marriage, it held, had no effect on its validity and if Kambule could establish that she was validly married according to customary law, she would fall within the definition of "survivor" in terms of s 2(1) of the Maintenance of Surviving Spouses Act. The issue was referred for oral evidence on the question whether Kambule was the customary-law wife of the deceased until his death.

Regarding the registration of customary marriages, the Court was referred to three decisions of the Transkei Division of the High Court in which it was found that failure to register had no effect on the validity of such marriages. These are *Shwalakhe Sokhewu v Minister of Police*,[10] *Feni v Mgudlwa*,[11] and *Nomaza Mvunelo v Minister of Home Affairs*.[12] In the last-mentioned judgment the Court pointed out that the aim of the Transkei Marriage Act was to recognise the values and *boni mores* of the Xhosa people, and that registration was to be regarded merely as a measure of control and proof of the existence of the marriage.

The Court in the *Kambule* case held that it was not necessary to determine the effect of non-registration under the Transkei Marriage Act, since the Recognition of Customary Marriages Act rectified any impediment which may have existed. Pickering J disagreed with Combrinck JA's finding that the Recognition of Customary Marriages Act applied only to marriages concluded after 15 November 2000, pointing out that the minority judgment of the Supreme Court of Appeal held only persuasive value. Further, since the civil marriage with Baduza was out of community of property, there was no impediment on the deceased to conclude a second, customary-law, marriage with Kambule.[13] Referring to *Nomaza Mvunelo v Minister of Home Affairs*, the Court held that s 10(1) of the Recognition of Customary Marriages Act, which prohibits the conclusion of another marriage by someone who is already a partner in a civil marriage, does not have retrospective effect. This view is strengthened by the fact that the Recognition of Customary Marriages Act repealed s 3 of the Transkei Marriage Act.

The Court opined that the wording of certain sections of the Recognition of Customary Marriages Act makes it clear that the Act applies also to marriages contracted before the commencement of the Act. Thus s 2(1) states that "[a] marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage", and s 4(3)(a) provides that a customary marriage "entered into before the commencement of this Act, and which is not registered in terms of any other law, must be

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10 2005 JOL 15580 (Tk).

11 Unreported case 24/02 of 5 December 2003.

12 Unreported case 744/2002 of 20 July 2005.

13 See s 3(1)(a)(iii) of the Transkei Marriage Act.

registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette". Nothing in these sections, or in the definitions of "customary law" and "customary marriage" in s 1, gives any indication that the failure to register affects the validity of customary marriages. Moreover, s 4(9) specifically enacts that the "failure to register a customary marriage does not affect the validity of that marriage". The Court therefore concluded that a finding to the contrary "would also serve to undermine the dignity of the partners to the customary marriage and offend against the guarantee of equality contained in the Constitution".

Finally, the Court found that Kambule should be regarded as a survivor in terms of s 2(1) of the Maintenance of Surviving Spouses Act. That subsection determines that:

> "If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage insofar as he is not able to provide therefore from his own means and earnings."

While s 1 of this Act defines "survivor" as the "surviving spouse in a marriage dissolved by death", there are no definitions for either "spouse" or "death". The interpretation of s 2 of the Act has come under judicial scrutiny before, and counsel referred the Court to two seminal decisions, *Daniels v Campbell NO*[14] and *Robinson v Volks NO*.[15] In the former case the Constitutional Court included parties in a monogamous Muslim marriage in the interpretation of "spouse", and in the latter case the surviving partner in a permanent life partnership was included. Also referred to was *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*)*,[16] in which it was held that there should not be a differentiation between polygynous and monogamous marriages as regards the order of the Court.

Pickering J pointed out that in the light of s 2(1) of the Recognition of Customary Marriage Act, which determines that a customary marriage is for all purposes to be regarded as a marriage, and s 2(1) of the Maintenance of Surviving Spouses Act, interpreted in an acceptable constitutional manner, there was no doubt that Kambule would fall within the definition of "surviving spouse".

Having found that failure to register has no effect on the validity of a customary marriage concluded before the Recognition of Customary Marriages Act, and that Kambule fell within the definition of survivor in the Maintenance of Surviving Spouses Act, the matter was referred for *viva voce* evidence as to whether a customary marriage in fact existed.

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14 2004 5 SA 331 (CC).

15 2004 6 SA 288 (C).

16 2005 1 SA 580 (CC). The impact of the Constitutional Court's decision on customary law of succession and the rights of the widow has been the topic of a number of academic discussions and will not be dealt with further in this article. See, eg, Van Niekerk "Succession, living indigenous law and *ubuntu* in the Constitutional Court" 2005 *Obiter* 474ff and Banda "The Constitutional Court's approach to customary law in *Bhe v Magistrate, Khayelitsha*" 2005 *Responsa Meridiana*. See too Knoetze "Inheemse erfopvolging: 'n Alternatief tot die afskaffing van die manlike eersgeboortereël" 2005 *THRHR* 594ff and, in similar vein, Knoetze "Westernization or promotion of African women's rights" 2006 *Speculum Juris* 105ff.

4 Discussion

Interesting questions regarding customary law arose in these decisions. Most importantly the status of customary marriages and the effect of registration came under scrutiny, as well as the rights of the widow in a customary marriage. The conflict of laws engendered by the applicability of customary law and the common law, as well as the co-existence of the Transkei Marriage Act and the Recognition of Customary Marriages Act exacerbated the problems that had to be solved. Significantly, the decisions of the Eastern Cape Division in the first *Wormald* case and in the *Kambule* case were more progressive than that of the Supreme Court of Appeal in the second *Wormald* case.

Since the focus of this case note is on the courts' attitude towards customary law and institutions, the living law will not be investigated. However, the impact of living customary law on legal development and law reform cannot be denied.[17] Although it is an onerous and time-consuming task to obtain a true picture of the living law, fortunately, text-based materials on living customary law in the form of monographs, theses, articles and books, abound.[18]

4 1 Registration

In the first *Wormald* case Chetty J cursorily pointed out that all the requirements for a valid marriage at customary law had been met. He referred to S*hwalakhe Sokhewu v Minister of Police*,[19] which supported the idea that the purpose of registration was not to validate a customary marriage, but to accord it a status equivalent to a civil marriage. His Lordship also mentioned that s 4(9) of the Recognition of Customary Marriages Act had removed the perceived impediment to validity.

In the second *Wormald* case, the Supreme Court of Appeal, by a majority, declined to make a declaratory order regarding the status of the unregistered customary marriage since, in its view, its existence or otherwise had no bearing on whether Kambule had a right to occupy the residence. Combrinck AJA, in his minority decision, did not share this reasoning and found that the existence of a valid customary marriage would indeed have an effect on the question whether

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17 This is increasingly recognised by the courts. See, eg, *Ramoitheki v Liberty Group Ltd t/a Liberty Corporate Benefits* 2006 JOL 18075 (W); *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC); *Mateza v Mateza* 2005 JOL 14332 (Tk); *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 460 (CC); *Mabuza v Mbatha* 2003 4 SA 218 (C); *Nkabinde v Road Accident Fund* 2001 3 All SA 611 (W); *Mabena v Letsoalo* 1998 2 SA 1068 (T). Also in academic writing the living customary law is gaining importance: See, eg, Mqeke *Customary Law and the New Millennium* (2003) 113; Fishbayn "Litigating the right to culture: Family law in the new South Africa" 1999 13 *Int J of Law, Politics and the Family* 147; Mbatha "Reforming the customary law of succession" 2002 *SAJHR* 259 269; Himonga & Bosch "The application of African customary law under the constitution of South Africa: Problems solved or just beginning?" 2000 *SALJ* 306ff.

18 See, eg, Mbatha *op cit*; Ndima *The Law of Commoners and Kings* (2004); and Watney "Customary law of succession in a rural and urban area" 1992 *CILSA* 378. A perusal of any South African University's library catalogue will yield numerous theses and LLM dissertations on living customary law in indigenous societies, based on empirical research.

19 2002 JOL 9424 (Tk), in which the Court declined to follow *Kwitshane v Magalela* 1999 3 SA 610 (Tk).

Kambule could occupy the residence. However, relying on the Transkei Marriage Act, he concluded that the unregistered marriage was invalid. He expressly stated that the Recognition of Customary Marriages Act was not applicable to marriages concluded before it came into operation.

Finally, in the *Kambule* case Pickering J found that the failure to register did not invalidate an existing customary marriage and based his decision on the Recognition of Customary marriages Act.

A perusal of recent case law affirms that the Transkei Courts are not in agreement on the effect of registration on the validity of a customary marriage. *Kwitshane v Magalela*[20] is regarded as the seminal case, in which it was held that registration of a marriage is a requirement essential to its validity in terms of the Transkei Marriage Act. This decision was also followed in *Veldtman v Ronoti*[21] and in *Tshatela and Another v Qendwana*.[22] However, in instances where this case was relied on as authority that failure to register a customary marriage invalidates the marriage, the courts did not mention that in *Kwitshane* it had explicitly been pointed out that the Transkei Marriage Act was in direct conflict with s 4(9) of the Recognition of Customary Marriages Act, which at that time had not yet come into operation.[23] The *Kwitshane* decision was referred to with approval also in *Thembisile v Thembisile*.[24] Though, in this case the Court opined that the Transkei Marriage Act had been repealed by the Recognition of Customary Marriages Act.[25]

Various decisions were referred to in the cases under discussion in which the opposite view was held.[26] In addition to these cases, mention may also be made of *Baadjies v Matubela*,[27] where the Court stated that in terms of s 4(8) of the Recognition of Customary Marriages Act, the purpose of registration is to provide *prima facie* proof of the existence of the customary marriage. A person who is not in possession of a certificate issued in terms of that Act or any other applicable Statute, may approach the court on application in terms of s 4(7)(a), which states that a court may, upon application and investigation instituted by the court, order the registration of *any* customary marriage.

Academic writers too are not in agreement on the registration of customary marriages in terms of the Transkei Marriage Act. Van Loggerenberg[28] argues that in terms of s 1(1) of the Transkei Marriage Act a customary marriage is "a marriage contracted between a man and a woman . . . in accordance with customary law *and the provisions of this Act*" (my emphasis), that reference to "provisions of this Act" indicates that validity of the marriage is dependent on

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20 1999 3 SA 610 (Tk).

21 2006 JOL 16753 (Tk).

22 2001 JOL 7672 (Tk). Interestingly, Maya J (as she then was) presided in this case too.

23 613A–B.

24 2002 2 SA 209 (T); see also the discussion of this case by Maithufi "*Thembisile v Thembisile* 2002 2 SA 209 (T)" 2003 *De Jure* 195.

25 In para 8. The court found that the validity of the marriage was not in dispute in this case and that it was accordingly not necessary to determine whether it had been registered.

26 *Shwalakhe Sokhewu v Minister of Police*, *Feni v Mgudlwa* and *Nomaza Mvunelo v Minister of Home Affairs*.

27 2002 3 SA 427 (W).

28 "The Transkei Marriage Act of 1978 – a new blend of family law" 1981 *Obiter* 3, written before the promulgation of the Recognition of Customary Marriages Act.

compliance with both customary law and the Act, and that the Act should clearly take precedence in case of conflict. Mqeke[29] and Bekker,[30] in turn, hold a different view: unregistered customary marriages are not invalidated by a failure to register, but are governed by uncodified customary law.

After the coming into operation of the Recognition of Customary Marriages Act, the decisive questions regarding the issue of registration appear to be whether that Act or the Transkei Marriage Act takes preference in regard to marriages concluded in the Transkei, and whether the Recognition of Customary Marriages Act applies to marriages concluded before it came into operation. It is necessary to bear in mind that the Recognition of Customary Marriages Act is applicable throughout the country. Further, the fact that only certain sections of the Transkei Marriage Act have been repealed by this Act is an indication that, in so far as it has not been repealed, the Transkei Marriage Act still regulates marriages contracted in the Transkei.[31] In essence, then, it has to be determined whether the Recognition of Customary Marriages Act, which specifies that a failure to register cannot invalidate a marriage, overrides the Transkei Marriage Act and has retrospective effect.

In trying to establish the intention of the Legislature in this regard, one may, as a starting point, look at the comments of the South African Law Reform Commission in its *Report on Customary Marriages*.[32] The Commission recognised that it would create great hardship for the spouses and would deprive many existing marriages of potential validity if unregistered marriages were to be declared void.[33] Accordingly, in the preamble to its proposed Bill on the Recognition of Customary Marriages, it was stated that the purpose of the Act is "[t]o make provision for the recognition of customary marriages *entered into before or after the commencement of this Act as valid marriages for all purposes in law*". The italicised phrase was not inserted in the Act, but s 2(1) states that a customary marriage which had complied with all the requirements of customary law would be regarded as a valid marriage *for all purposes* in terms of the Act. One may add here, that in view of the fact that registration is not a requirement in customary law, the lack of registration should arguably have no effect on the validity of such a marriage.

The Law Reform Commission further determined that the failure to register a customary marriage should not render such a marriage void, and that the parties should be permitted to produce other forms of proof of its existence, bearing in mind that registration is required as a means to ensure that marital status is made more certain and easier to prove. The Law Commission's recommendations eventually became law and were taken up in the Recognition of Customary Marriages Act.

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29 "The rights of widows in unregistered customary marriages in the Transkei – A disappointing decision. *Kwitshane v Magalele* 1999 (4) SA 610 (Tk)" 2000 *Obiter* 235.

30 *Seymour's Customary Law* (1989) 211.

31 See Koyana's view in "Legal pluralism in South Africa: The resilience of Transkei's separate legal status in the field of criminal law" 2005 *Obiter* 25, that the Transkei Penal Code will continue to apply until Parliament determines otherwise. This may arguably be applicable *mutatis mutandis* to the Transkei Marriage Act as well.

32 Project 90: *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* (August 1997).

33 In para 4.1.5.8.

If Combrinck JA's interpretation of the Transkei Marriage Act in the second *Wormald* case is to be accepted, this Act entrenches an unfair distinction between customary and civil marriages with regard to requirements for validity. His interpretation of the Act is that an existing customary marriage should be invalidated by a failure to register, since objections may be lodged only at registration. In other words, since objections may be lodged against such a marriage only *after* it had been *solemnised* (ie celebrated, honoured, made official, formalised, sanctified) in terms of customary law, lack of registration invalidates it. But a civil marriage which has been solemnised cannot be invalidated in this way because objections are lodged *before* the marriage is solemnised. If this is a sound interpretation of the provisions, the Transkei Marriage Act jeopardises the existence of a multitude of customary marriages. Mqeke aptly states: "One shudders to think about the effect of a judgement like this [*Kwitshane*] on the unregistered customary marriages of the unsophisticated members of the rural Transkei."[34] In contrast, in the *Kambule* case, Pickering J found that "any perceived impediment there may be to the validity of the marriage because of the fact of non-registration under the [Transkei Marriage] Act . . . has been validated by the Recognition of Customary Marriages Act".

At this juncture one should perhaps attempt to determine the status of the two Acts in terms of the rules regulating the interpretation of statutes. The Law Reform Commission could not come to a conclusion in this regard. In its *Report on Customary Marriages*, it was stated that "one lingering uncertainty is whether still valid laws, such as portions of the Transkei Marriage Act . . . are subordinate to national legislation".[35] The Recognition of Customary Marriages Act applies nationally, while the application of the Transkei Marriage Act is limited to the Transkei. But how material is the subordinate status or otherwise of the Transkei Marriage Act? It may be that the difference in this instance would be merely theoretical and that the outcome would be the same.

In terms of the common-law rules of interpretation of statutes, subsequent legislation may expressly or impliedly revoke preceding legislation of *equal* or *lower* status, where the legislation deals with the same subject matter, in as far as the provisions of the Acts are inconsistent or irreconcilable. In terms of this rule it would not matter if the two Acts are of equal status. The only material question would be the hierarchical sequence of the Acts.

If the Transkei Marriage Act is subordinate to the Customary Marriages Act, it must yield to the latter Act. Du Plessis[36] states:

> "Superordinate legislation . . . actually repeals contrary subordinate legislation in pari materia *expressly* and can do so either *specifically* (that is by specifying the subordinate legislation so repealed) or *non-specifically* (that is without specifying the subordinate legislation so repealed)."

The maxim *lex posterior priori derogat* governs revocation and it is limited by the presumption that a "statutory provision is not aimed at altering or abrogating the existing law more than necessary". "The law" refers to both the common law and statutory law.[37]

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34 2000 *Obiter* 235.

35 In para 2.1.9.

36 *Re-interpretation of Statutes* (2002) 74.

37 *Re-interpretation of Statutes* 73, 177ff.

Clearly these rules could be interpreted in favour of the application of the provisions of the Recognition of Customary Marriages Act, whether the two Acts are of equal status or not. In other words, with regard to the validity of unregistered customary marriages, the Recognition of Customary Marriages Act revokes the provisions of the Transkei Marriage Act in so far as the most prevalent judicial interpretation of the Transkei legislation is irreconcilably in conflict with the provisions of the subsequent national legislation.

It may also be argued that in terms of the presumption *generalia specialibus non derogant*, the Recognition of Customary Marriages Act, being a general Act, should not alter the Transkei Marriage Act, which is specifically applicable in the Transkei. However, there is an exception to this rule: where the subsequent general legislation extensively covers the subject matter dealt with in the preceding legislation. And this is indeed the case with the two pieces of legislation under consideration. Mention may be made here of a pertinent example, *Prior v Battle*, referred to above. In this case, too, the Court had to decide on the validity of certain sections of the Transkei Marriage Act which entrenched the common-law rule that a wife is subject to the husband's marital power, and which were in conflict with the Matrimonial Property Act 18 of 1996 that had abolished that common-law rule.

These common-law rules of the interpretation of statutes appear to support the Court's view in the *Kambule* case.

4 2 The widow's customary-law right to maintenance and accommodation

Another point of particular interest in the two *Wormald* decisions related to the customary-law widow's right to maintenance and a home. In essence this was a question involving the recognition of existing customary law. Again the decision of the Eastern Cape Division in the first *Wormald* case, and in this instance also the minority decision in the second *Wormald* case, appeared more progressive than the majority decision of the Supreme Court of Appeal.

In deciding whether Kambule was an unlawful occupant of the home she was residing in, and whether it would be just and equitable to evict her from the property in terms of the Prevention of Illegal Eviction from and Occupation of Land Act, the majority of the Court in the second *Wormald* case held that although in customary law a husband or his heir (successor) has a duty to maintain a wife or widow and provide her with residential and agricultural land, she never acquires real rights in such land. Consequently, a widow does not have a "right to demand to occupy any land of her choice".[38] Yet the Court, in its interpretation of "unlawful occupation" in terms of the Act, referring with approval to *Brisley v Drotsky*,[39] pointed out that "an owner is in law entitled to possession of his or her property and to an ejectment order against a person who unlawfully occupies the property except if that right is limited by the Constitution, another statute, a contract *or on some or other legal basis*".[40] The Court apparently did not regard a widow's customary-law rights "a legal basis".

In contrast, in the minority judgement the Supreme Court of Appeal expressly recognised the existence of such a right and its relevance to the question of

38 Para 13.

39 2002 4 SA 1 (SCA).

40 Para 11.

Kambule's occupation, but did not provide a detailed exposition of the law in this regard. Also, in the first *Wormald* case, the Court held that Kambule's occupation of the land was lawful: The close corporation had granted her a servitude of *usus* or *habitatio*. The right to occupy the land flowed from her customary marriage. It further pointed out that the application of customary law is enshrined in the Constitution.

The widow's right to accommodation and maintenance is well-established in customary law. In the literature and case law, the widow's right has been variously referred to as a usufruct or a personal servitude of use and occupation. Kerr[41] prefers to categorise it as a real right and points out that the right does not have to be registered against the title deed of the property to be enforceable against third parties. In *Bührmann v Nkosi*,[42] which was also referred to in the first *Wormald* case, the Court made it clear that although personal rights are usually binding only on the parties to a contract, in accordance with the doctrine of notice, a third party is bound if he or she is aware of the rights created (as in the case of the close corporation or the successor of the deceased).

The specific nature of the customary widow's right is not important, and it is in truth problematic to define it in terms of western law. But that does not detract from the fact that in customary law the widow has the right to occupy her husband's house after his death and that she cannot be evicted, neither by her husband's successor nor by the chief.[43] Customary-law rules in general, and particularly those of succession, are focused on the preservation and continuation of the family. Therefore, house property remains intact upon the death of the husband and is administered in consultation with his widow. In customary law a widow is not likely to move away from her husband's family, since death does not dissolve a marriage. The marriage is continued through the levirate custom which is still practised in many indigenous communities.[44]

The widow's right to stay on in the house that she occupied before her husband's death is evidenced also in the literature on the principle of ultimogeniture. In terms of this principle the youngest son of a house is responsible for the maintenance of the widow and her dependants and administers the house property in consultation with her. There are in fact cases where the successor had been evicted from the house because he had made the widow's position intolerable, failed to support her, or generally abused the trust placed in him to support the

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41 Kerr The Customary Law of Immovable Property and of Succession (1990) 90–96. See, too, Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 327ff, 400, 417ff.

42 2000 1 SA 1145 (T) 1154 A–B.

43 Pauw *Die Persone-, Sake-, en Immateriële Goedere-, Kontrakte- en Deliktereg van die imiDushane (amaXhosa) en amaBhele(amMfengu) van Ciskei* (Final Report, University of Port Elizabeth, 1985) 42ff; Hartman *Aspects of Tsonga Law* (1991) 166ff; Coertze *Die Familie-, Erf- en Opvolgingsreg van die Bafokeng van Rustenburg* (D Phil thesis, University of Pretoria, 1968) 279; Whitfield *South African Native Law* (1948) 139f; Maithufi "The constitutionality of the rule of primogeniture in customary law of intestate succession. *Mtembu v Letsela* 1997 2 SA 935 (T)" 1998 *THRHR* 142 147; Bekker & Maithufi "The law of property" in Bekker Rautenbach & Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2006) 56.

44 Koyana *Customary Law in a Changing Society* (1980) 81–85; Hartman *Aspects of Tsonga Law* 132ff; Pauw *Die Persone-, Sake-, en Immateriële Goedere-, Kontrakte- en Deliktereg van die imiDushane (amaXhosa) en amaBhele(amMfengu) van Ciskei* 42ff.

family.[45] The youngest son succeeds to the house, household property and agricultural lands of the house only after the death of the widow.[46]

5 Conclusion

Registration of customary marriages to afford *prima facie* evidence of the existence of such marriages is useful and may be in the interest of customary-law wives or widows especially as present legislation entrenches the co-existence of such marriages and civil marriages. Moreover, the process of entering into a customary marriage is a private family affair which sometimes makes proof of its existence difficult, something that may lead to hardship for members of a customary-law household. But it has to be borne in mind that registration is a concept foreign to indigenous communities that abide by "living customary law". For that very reason, it would be ludicrous to make customary marriages dependent on registration for validity. These sentiments have been heeded by the Law Reform Commission and are echoed in s 4(9) of the Recognition of Customary Marriages Act.

The finding in the *Kambule* case that the Recognition of Customary Marriages Act takes precedence over the Transkei Marriage Act regarding registration of customary marriages is commendable and will hopefully become the leading decision in this regard. In fact, it is hoped that the Supreme Court of Appeal will adopt this exposition of the law when the opportunity arises, and once and for all settle the dispute regarding the status of unregistered customary marriages in the Transkei.

With a bit of luck the bold recognition of the customary-law rights of the widow in the first *Wormald* case, and the finding in the *Kambule* case that the widow in a *de facto* polygynous marriage, was a "survivor" in terms of the Maintenance of Surviving Spouses Act, will also find approval in the Supreme Court of Appeal and will set a national precedent for further decisions in this regard. This intrepid recognition of customary law is to be commended, especially in view of the fact that the Constitutional Court in *Daniels v Campbell NO* shied away from the opportunity to afford widows in *polygynous* Muslim marriages equal status to that of widows in a civil marriages, and in *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*)* that Court abolished the customary-law rule of male primogeniture (a rule which goes to the heart of that law) rather than adapting the rule to conform to constitutional principles of equality and dignity.

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45 *Selela v Selela* 1940 NAC (C&O) 68.

46 See generally regarding ultimogeniture Rautenbach, Du Plessis & Venter "Law of succession and inheritance" in Bekker Rautenbach & Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2006) 99. See, too, Watney "Customary law of succession in a rural and an urban area" 1992 *CILSA* 378 380f; Bekker and de Kock "Adaption of the customary law of succession to changing needs" 1992 *CILSA* 367 Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 400ff; Prinsloo *Inheemse Publiekreg in Lebowa* (1983) 136.