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Dignified "Existence": Reflections on Aspects of Culture and Cultural Rights Debate in Africa

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1 INTRODUCTION

The last few decades have seen tremendous achievements being made in legal reform towards the recognition of collective rights of peoples to their languages and cultures, customary governance and legal systems, and rights to participate as groups with their own ethnic identities in national programs.[1] But such achievements have not been without challenges, frustrations and even bottlenecks. For example, there has been extreme reluctance to ratify international instruments giving effect to cultural rights generally, and recognising the rights of minority groups.[2] And even where such ratification has occurred, there has been considerable lack of domestic implementation. African states especially have done little to promote legal reforms aimed at increasing protection of cultural rights. In most states, governments have favoured the creation of administrative departments concerned with the promotion of aspects of culture considered useful to the attainment of national goals, but without encouraging any form of constitutional engineering that would firmly entrench such obligations.[3] This approach, while consistent with the immediate post-independence political rhetoric, has traditionally forced legal reformers to operate within the narrow margins of constitutional acquiescence that offers little

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1 See generally Lerner *Group Rights and Discrimination in International Law* (1991); "The Evolution of Minority Rights in International Law" in Brolman, Lefeber and Zieck (eds) *Peoples and Minorities in International Law* (1993); Sohn "The Rights of Minorities" in Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 270–289. For developments in Latin America see Dandler "Indigenous Peoples and the Rule of Law in America: Do they have a chance?" in Juan Mendez, O'Donell and Pinheiro (eds) *The (Un)Rule of Law and the Underprivileged in Latin America* (1999) 116–151; Smith "Towards a Global Culture" in Featherstone (ed) *Global Culture* (1990).

2 See Vijapur "International Protection of Minority Rights" 2006 *International Studies* 367–394; Bilder "Can Minorities Work?" in Dinstein and Tabory (eds) *The Protection of Minorities and Human Rights* (1992). See also Weller *The Rights of Minorities* (2005); Rehman *The Weakness in the International Protection of Minority Rights* (2000).

3 For example in Lesotho, the government established a department of culture within the Ministry of Tourism, Sport and Culture. The department was instrumental in drafting the national cultural policy that has called for the development of cultural institutions such libraries, museums and archives. See Shava "The Situation of the Arts in Lesotho: Perceptions, Roles, Functions and Institutional Reform" 2000 *Lesotho Law Journal* 241. Similar policies exist in other African countries. See for example *The Cultural Policy of Ghana* (2004) (available at http://www.s158663955.websitehome.co.uk/ghanaculture/privatecontent/File/CULTURAL.%20POLICY%20-%20FINAL.pdf) (accessed 20-09-2008); Ndeti *Cultural Policy in Kenya* (1975); Mbughuni *The Cultural Policy of the United Republic of Tanzania* (1974).

in terms of substantive rights, and national legal systems that are generally ambivalent to the development of a cultural rights regime. Although in the last decade, the constitutional reforms wrought by the collapse of apartheid and hegemonic one-party political systems have attempted a more substantive recognition of cultural rights, still, the exercise of these rights have remained largely restricted – with the greatest impediments being the lack of clear definition as to meaning and scope, and the absence of substantive avenues for recourse.[4]

It seems, therefore, that a debate on the possibilities for addressing the impediments to the domestic realisation of the full range of guarantees available within the international cultural rights regime is before us. This article will contribute to the debate by soliciting a relevant understanding of the nature of culture, its normative properties and its relationship with rights. Also, it will examine the nuances of perception and philosophical ideations that enshroud the issues of "group rights" as opposed to individual rights, and will outline in broad terms some of the emerging issues that are likely to shape the future of the cultural rights debate in Africa. This paper does not claim any conclusive summation of the issues involved, but hopes nevertheless, to stir interest in the subject and create grounds for further research.

2 SITUATING CULTURE WITHIN THE RIGHTS DISCOURSE

The word "culture" has no universally accepted definition. Parekh defines it as a system of "beliefs or views [which] human beings form about the meaning and significance of human life and its activities".[5] These systems, he argues, shape the practices and regulate the lives of persons in society.[6] In his view culture must be viewed as "a historically created system of . . . belief and practices in terms of which a group of human beings understand, regulate and structure their individual and collective lives. It is a way of both understanding and organising human life".[7] In other words, the manner in which society regulates its economic, social and political life will ideally depend on the level of significance it assigns to the various aspects of human endeavour. Individual members of the society may follow such regulation "either because they share . . . cultural meaning and legitimising beliefs, or because they fear the social consequences of non-conformity, or both".[8] Robert Murphy, on the other hand, views culture from a utility perspective. In his view therefore, culture evolves out of societal tradition to provide mechanisms for survival. He states:

> "[T]he body of tradition borne by a society and transmitted from generation to generation. It thus refers to the norms, values, standards by which people act and it

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4 For example, art 19 of the Namibian Constitution provides for the right to "enjoy, practice, maintain and promote culture" but without attempting a definition of what culture means. Moreover, the language of the provision seems to suggest a difference between culture, on the one hand, and language, tradition and religion on the other, thus throwing the constitutional intendment into the same definitional conundrum that has bedevilled the culture and cultural rights debate for centuries. See also Dlamini "Culture, Education and Religion" in Van Wyk *et al* (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 573.

5 Parekh *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2000) 142.

6 Parekh 143.

7 *Ibid*.

8 Parekh 146.

> includes the ways distinctive in each society of ordering the world and rendering it intelligible. Culture is . . . a set of mechanism for survival, but it provides us also with definition of reality. It is the matrix into which we are born; it is the anvil upon which our persons and destinies are forged."[9]

This utility perspective conforms to the contextual formulation articulated by Kymlicka; that culture provides context to human behaviour rather than determining it.[10] As opposed to Parekh, Kymlicka argues that human capacity to free deliberation and action is pre-existing in communities where they reside. Culture merely provides the medium through which they can exercise these abilities: "Cultures are valuable not in and of themselves but because it is only through having access to societal culture that people have access to a range of meaningful options."[11] Nonetheless, Parekh and Kymlicka share a positive view of culture, asserting its relevance to human development and demanding that those living in multicultural societies be allowed to assert a sense of cultural belonging essential to their existence as human beings. Taking both these views, one could regard culture as encapsulating those sets of principles by which humanity "respond to the conditions of their existence, creatively fashioning their experienced social relationships into diverse and structured patterns of living, thinking and feeling".[12]

Be that as it may, the overall understanding one gets from the above definitions is that culture refers to the whole complexity of material, intellectual and emotional features that reflect the distinctiveness of a social group. These features may incorporate distinctive value systems, religion, traditions and beliefs that characterise the behaviour and entire make-up of social beings in the group. Therefore, culture encapsulates what strictly makes a human being. In other words, it is the expression of culture which defines individuals and gives them an ideological shape that the external world uses to characterise their behaviour, measure their propensity and even stereotype their ability to cope with the demands of new forms of socialisation. Essentially, therefore, these definitions of culture acknowledge that an individual functions within an intricate web of identities and social linkages of which race, class, religion, gender and ethnicity are just a part. But this notwithstanding, these same factors (race, class, religion, gender) neither lend themselves to easy estimation nor cancel themselves out in the daunting process of determining the appropriateness of a cultural expression to the ethos of human rights. That is why importing the language of rights into the discourse on culture is sometimes seen as being problematic. Should individuals have the right to embrace cultural traditions or reject them as they please, without necessarily disturbing their entitlements under the human rights regime? To find an answer to this question, this article proposes to invoke the metaphor of "existence" to explain the relationship between legal rights and "humanness" as seen through the lenses of human rights. It will then attempt to discern the normative value of culture by analysing the imperatives of the cultural rights paradigm and the political dimensions in which its discourse is carried. The argument, in a nutshell, is that in a multicultural society, the regime

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9 Murphy *Culture and Social Anthropology: An Overture* (1986) 14.

10 Kymlicka *Multicultural Citizenship* (1995) 83.

11 *Ibid*.

12 See Hall "Cultural Studies: Two Paradigms" 1980 *Media Culture and Society* 33.

of rights must conform to the higher needs of human existence, which in African context should be defined to include the rights to cultural identity and culture generally. And that these rights should be available to individuals as well as cultural groups.[13]

2 1 The metaphor of "existence"

The metaphor of "existence" as used here derives from an old African mythology that perceives of human nature as symptomatic of its general purpose to do good. Simply put, human beings "exist" because it is good to do so and also, to perform good; the implication being that without goodness "existence" is meaningless.[14] But we know that this is not always the case. Africans, just like the rest of the world, experience the grim side of humanity every day. However, the idea of existence implies an understanding that, just like we are meant to do good, we should expect the same of others; the duality of existence, so to speak, which demands action (duty) and recognition (rights) at the same time. And that is how this metaphor slides into the human rights discourse. Today we understand human rights to mean those "rights" that individuals in society have, which are fundamental, inalienable, universal (depending on how one understands this), and apply equally to everyone regardless of any distinction or culture into which they are born.[15] Hans Kelsen, the German philosopher, characterised rights as interests objectively protected by law, but also as freedoms of choice objectively guaranteed by law. In his view, the legal order was divested of the connotations of John Austin's "command" theory because individual's "rights" or entitlements were not authorised by those with power to command, but possessed a normative validity subject only to the prescriptions and permissions with an "ought" character.[16] Thus, rights are not just needs, or aspirations, or the mere compulsion to do good; they are entitlements, claims of

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13 The right to "cultural identity", according to Taylor, can only be derived through interactions with members of a similar group. See Taylor *Multiculturalism: Examining the Politics of Recognition* (1992) 64.

14 In South Africa, the metaphor of existence is best captured by the concept of *ubuntu* which embodies the idea that every person is entitled to unconditional respect, dignity, value and acceptance from all members of her community. It also demands a corresponding duty to give the same respect, dignity, value and acceptance. See Langa J in *S v Makwanyane* 1995 3 SA 391 (CC) 481B. Other cases where *ubuntu* has been considered include *Khosa v Minister of Social Development* 2004 6 SA 505 (CC); *S v Mbotshwa* 1993 2 SACR 468 468J–469F; and *S v Ngcobo* 1992 2 SACR 515 (A) 515H–516A. See also Cornell and Van Marle "Exploring Ubuntu: Tentative Reflections" 2005 *African Human Rights Law Journal* 195–220; Masina "Xhosa Practices of *Ubuntu* for South Africa" in Zartman (ed) *Traditional Cures for Modern Conflicts: African Conflict "Medicine"* (2000) 169; Yvonne Mokgoro "Ubuntu and the Law in South Africa" 1998 *Buffalo Human Rights Law Review* 43.

15 This principle is articulated in many human rights instruments. It constitutes a veritable code of human rights law defining obligations and imposing responsibility on nation states as well as individuals. See Francesco Francioni *The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience in Enforcing International Human Rights in Domestic Courts* (1997); Annan "Strengthening the United Nations in the Field of Human Rights: Prospects and Priorities" 1997 *Harvard Human Rights Journal* 1; Henkin "Rights: Here and There" 1981 *Columbia Law Review* 1582.

16 Kelsen *Allgemeine Staatslehre* (1968) 64. See also *Reine Rechtslehre* 1960 (now translated as the *Pure Theory of Law* by Max Knight, 1967).

individuals that society is obligated to satisfy or enforce. Therefore, rights indicate a normative formulation of those necessary conditions that enable humanity to grow and stay human. This is how Kolm puts it:

> "[A Right] . . . is a socially defined possibility to determine an aspect of the world (or a feature, property, characteristic of the world) or the socially defined guarantee that this aspect exists. It has a right-holder, an individual, a group, or an institution and possibly others notably for respect, protective and immunity rights). A right is a right to act, to have others act or abstain, or it does not specify its means (as with simple right to have something)."[17]

The language of rights therefore defines the core parameters of human existence: the right to existence itself; the right to act and to respect the freedom of others to act; and the right to demand that the state ensures the freedom to exercise these rights. When this language is used to infer entitlements that an individual can make against the state, or other individuals, then it constitutes what has been called "subjective rights".[18] Thus, instead of saying that it is wrong to kill, one asserts the individual right to life. Subjective rights may also be conceptualised as powers of law conferred on an individual by the legal order. But from a utility angle, they are a means for the satisfaction of interests and the preservation of conditions of harmony between persons.[19] This functionalist approach is reaffirmed by Ludwig Raiser, who asserts that although subjective rights are meant to secure, "the self preservation and individual responsibility of each person within society", more is required in the form of social rights for an individual to realise the full benefits of humanity.[20] Thus, subjectivity of rights as a concept merges the radical component of civil and political rights with the less punitive economic, social and cultural rights. As a result, the concept of rights is widened to infer several legal relationships, such as: the entitlements of an individual to something as against another or the state; immunity against encroachment of certain interests; the privilege to do something; or the power to create relationships in a myriad of circumstances.[21] These relationships can only be sustained if the element of reciprocity remains sacrosanct, and persons involved, either individually or collectively, invest a tremendous amount of work to develop and improve their existence.[22] In this way, existence could be

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17 Kolm *Modern Theories of Justice* (1996) 39.

18 The idea of "subjective rights" embodies the transformation of private law so that possession of individual rights is conceived purely along functionalist lines. But liberalism, to which the rights jurisprudence owes its development, has always divorced from its corpus moral considerations and invited an interpretation of private law within the framework of capitalist economic relations. The idea of "subjective rights" can thus be seen to carry the view that "private law and the legal protection in it ultimately serves to maintain the individual's freedom in society." See Coing "Zur Geschichte des Begriffs 'subjektives Recht'" in Coing *et al* (eds) *Das subjektive Recht und der Rechtsschuttz der Persönlichkeit* (1959) 7–23.

19 See Habermas "Private Law and Public Autonomy, Human Rights and Popular Sovereignty" in Savić (ed) *The Politics of Human Rights* (1999) 50–66.

20 Raiser "Der Stand der Lehre vom subjektiven Recht im Deutschen Zivilrecht 1961" in Raiser *Die Aufgabe des Privatrechts* (1977) 98ff.

21 Hohfeld "Fundamental Legal Conceptions as Applied in Judicial Reasoning" 1913 *Yale LJ* 16. See also Waldron (ed) *Theories of Rights* (1984); Smart *Feminism and the Power of Law* (1989) 138–145; Raz "Legal Rights" 1984 *Oxford Journal of Legal Studies* 1; Tushnet "An Essay on Rights" 1984 *Texas LR* 1363.

22 But before one can function and make such investment, one needs to survive as a living organism. Individuals need food, shelter, clothing and to belong to an elementary human

continued on next page

envisaged as the social return for the individual investment and the reciprocal recognition of the subjective rights of co-operating persons.

The investment will include the development of purposeful norms, values, standards and mechanisms for survival – the sum total of human existence, so to speak. By and large, these are the same elements that human rights strive to protect. Therefore, human rights must find partnership in the articulation and appropriation of culture. Already, the Human Rights Committee, in interpreting art 27 of the UN Covenant on Civil and Political Rights (ICCPR), has acknowledged that the right of enjoyment of culture may be co-extensive with the use of natural resources occurring in territories of minority communities.[23] Moreover, cultural rights arguments have been successfully used to deny leases for oil and gas exploration and timber harvesting in Canada, and to defend the Maori fishing rights in New Zealand.[24] Similarly, claims have been made by the Sami of Finland based on art 27, against the expansion of logging and roads into their areas. Also, there is little doubt that indigenous institutions of governance (including laws) may well be protected as cultural rights. The Inter-American Court on Human Rights had equally recommended for the promulgation of a new constitutional order that would secure the cultural integrity of indigenous groups of Nicaragua's Atlantic coast region.[25] Indeed the Nicaraguan government commenced negotiations with these groups shortly afterwards. The claim to existence, as connected to the right to culture, has now moved into the intangible field of intellectual property as well. The banner of "right to cultural heritage" is increasingly providing protection to intellectual property rights over traditional knowledge that were exploited for years without any benefit to the communities who own them.[26]

3 THE NORMATIVE VALUE OF CULTURE

3 1 Culture as a normative concept

Characterisations of culture as a normative agent may attract acclaim as well as snare critique, depending on the orientation of the reader. If we take culture to mean the entire universe of human endeavour, which, according to Kroeber,

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community. That is why, in a society where economic power is unjustly distributed, individuals have no objective alternatives from which to choose. In such society, economic and cultural democracy may be hard to achieve, as individuals with meagre resources cannot build individual will since they are pressed by life's necessities. On the contrary, those economically endowed shower themselves with all the material benefits money can buy. And since money can garnish mediocrity to stardom, the availability of rights means nothing if underprivileged citizens do not have the socio-economic ability to appropriate them. It is in this regard that the idea of "existence" may be seen to correlate with the notion of social justice.

23 See General Comment No. 23, UN document CCPR/C/21/Rev.1/Add.5.

24 In the *Omiyak, Chief of the Lubicon Lake Band v. Canada* (Communication No. 267/1984, U.N. Doc. A/45/40, Annex 9(A) (1990) (views adopted March 26, 1990), the committee found that Canada had violated its obligation under international law by allowing such explorations within the ancestral land of the Gee Indians.

25 Inter-American Commission on Human Rights "Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Misikito Origin", OEA/Ser.L/V/II.62, Doc. 10 rev. 3 (1983) 78–82.

26 Brown *Who Owns Native Culture* (2003).

includes speech, knowledge, beliefs, customs, art, technology, ideal and rules,[27] and claim that culture enacts some "objective" universal values to which humanity has to accord, then we may be seen to be lending credence to the "humanist" debate that excuses ethnocentrism and biological determinism. On the other hand, if our construction of culture is appreciative of its omnibus character, but ambivalent of its value characterisation, then we must accept that all values emanating from all cultures are good and acceptable. But this equally presents a problem because we know that there are cultures that are oppressive and which generally fall short of the least acceptable standards of "humanity" however the word is defined. So how can culture be a source of norms? It is suggested here that problematising culture and examining the contradictions that arise from within is probably the best way to instigate thinking about its normative value. Indeed, the two seemingly opposing views have come together in the realm of international law, to support a non-essentialised view of culture and to promote the recognition of minority rights.

But lawyers may not be overly concerned with the contradictions and ambiguities, or the definitional conundrum to which "norm' and "culture" may be subjected by the social science epistemology. Their concern is mainly with the strategic improvement of the human condition through the introduction of rules that guide and limit behaviour, and/or impose sanctions. To what extent does culture provide such rules? To answer this concern, we should probably go back to the Marxist theory of the "cultural state", which emphasises the critical role that culture plays in stabilising societal moral values. In this theory, every state is conceived as an ethical entity whose primary function is to elevate the greater majority of its population to a cultural or moral level that corresponds with the needs of the productive forces of development.[28] This theory recognises that although the dominant cultural groups may not challenge the hegemony of the ruling class, they will, nevertheless, set the agenda for the formulation of ordinary rules of behaviour that eventually become law in the modern phase of human development. In this regard, culture is invariably associated with the realisation of moral values, some of which the society may decide to enact into definite rules of behaviour.[29] From this theory, a guarded connection could be made to the evolution of customary law in African societies. In these societies, the evolution of law has seen cognitive steps being taken to define morality close to cultural practices. The movement from "tradition to constitution" has accommodated a range of cultural practices towards the achievement of national goals. In Lesotho for example, principles of customary law have been elevated, and rules derived from the code of customary law known as the *Laws of Lerotholi* have found forceful expressions within the constitutional regime.[30] Under s 156 of the 1993 Lesotho Constitution, the legal system is enjoined to accommodate all existing customary laws with only one caveat: that they should

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27 Kroeber *Anthropology* (1948) 253.

28 According to Marx, of course, the productive forces of development are controlled by the ruling class to the detriment of the working classes. The "cultural state" is thus an edifice that champions the interests of one class against the other.

29 Selznick "Sociology and Natural Law" 1961 *Natural Law Forum* 84–108.

30 See Juma "The *Code of Lerotholi*: Using Custom as an Instrument of social and political control in Lesotho" Paper presented at the conference on African Customary Law in the 21st Century, 23-24 October 2008 at Gaborone, Botswana. (On file with the author.)

conform to the new Constitution. But an example of the extent to which the Constitution could abrogate rules of customary law, or render them unconstitutional, could be demonstrated by the exception in s 18 which removes custom from the ambit of the constitutional prohibition against discrimination.[31] Undoubtedly, what the society is saying is that they consider the maintenance of certain values ensconced in their customs and tradition more compelling than satisfying what many consider to be the objective standards of a non-discriminatory law.

A caution should be added to this analysis. When culture is associated with traditional rules then it might be characterised as a barrier to modernisation, and often, a fallback to explain why political and economic reforms are stagnating. Legal positivists, socialists and even utilitarians, have depicted culture as the justification for people clinging to irrational goals and self-destructive strategies. They have explained tradition as the safety net where unsophisticated, weak and timid minds seek refuge, and a reservoir of arsenals available to the rich and powerful to fend off challenges to their privileged positions. But the link between culture and tradition should never be viewed from an essentialist standpoint. Like all social phenomenon, cultures change, and so does tradition. As so ably surmised by An-Na'im, tradition contains the possibility of re-interpretation and re-appropriation.[32] Going back to our Lesotho example, it could very well be argued that the current status of customary law, and even the Basotho culture, may be uncomfortable with discrimination in many forms and may forge a different orientation from the spirit of the 1903 codified law. Indeed, judging from the recent moves to have the government withdraw its reservations to CEDAW, and the enactment of the Equality Act, the society may very well be poised to accommodate change on account of the transformation of its culture.[33]

3 2 Rationale for protecting culture

Whether or not the law should protect culture has been a subject of protracted debate. Some scholars have argued that cultural traditions that do not conform to certain standards, or which are unable to uphold or espouse certain values, should not be protected even if they face extinction. Such argument is very unpopular with scholars from the south who view opposition to cultural tradition of minority groups as rooted in racism and colonialism.[34] This same thinking has infiltrated a section of the feminist discourse. For example, Okin argues that women in patriarchal cultures "might be better off if the culture into which they were born were either to become extinct . . . or preferably, to be encouraged to

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31 Maope "A Note on Discrimination and Section 18 of the Constitution of Lesotho" 2001–2004 *Lesotho LJ* 395–401.

32 See An-Na'im "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment" in An-Na'im (ed) *Human Rights In Cross-Cultural Perspectives: A Quest for Consensus* (1992) 19–23.

33 On the country's challenges in accommodating international human rights standards see Acheampong "Lesotho's Ratification of the Convention for the Elimination of All Forms of Discrimination against Women" 1993 *Lesotho LJ* 79–106; Fanana "Legal Dualism and the Rights of Women: Thoughts of Law Reform in Lesotho" 2004 *Lesotho LJ* 119–150.

34 Coomaraswamy "Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women" 2002 *George Washington Int'l LR* 483.

alter itself so as to reinforce the equality of women".[35] But she does not account for the respect for human dignity that may be inherent in a woman's right to choose her cultural or religious belief.[36] Okin's reasoning illustrates the danger that discussions on multiculturalism which focus on singular aspects of culture may pose to the overall appreciation of the normative role of culture.[37] Undoubtedly, an African woman (just like her male counterpart) should have the right to take pride in her cultural heritage, even if such heritage offends the western notion of equality.

Evidently, the need to protect cultural diversity is rooted in the emerging principle of protection and promotion of cultural diversity. Indeed in 2005, UNESCO approved the Convention on Protection and Promotion of the Diversity of Cultural Expressions, where it affirmed that "cultural diversity form a common heritage of humanity and should be cherished and preserved for the benefit of all".[38] Traditionally, however, the idea that cultural diversity should acquire normative protection arose as a counterpoint to the notion of universality of values ensconced in the western conceptualisation of rights and democracy. Initially, the challenge took the form of radical cultural relativism, but its reach has since expanded into other spheres of human endeavour.[39] The realisation, for example, that some universal principles such as that of equality can never be attained in all spheres, or that different categories of people may need different treatment, have affirmed the problems that universality does face. As far as the human rights movement is concerned, there is some acknowledgement that citizens may possess certain social rights whose realisation is based on the recognition of specific diversities among individuals and groups. In plural legal societies, this recognition has been of prime importance to the broad acceptance and articulation of human rights across ethnic boundaries. Based on the realisation that enhancing the individual's capacity to appropriate rights in a multicultural environment, may be contingent upon protecting cultural diversity, the South African Constitution in s 30 grants everyone the "right to use the language and to participate in the cultural life of their choice". The right is elaborated in s 31 to include the right to enjoy culture and maintain cultural

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35 Okin "Is Multiculturalism Bad for Women?" in Cohen *et al* (eds) *Is Multiculturalism Bad for Women?* (1999) 22–23.

36 Al-Hibri "Is Western Patriarchical Feminism Good for Third World/Minority Women?" in Cohen *Is Multiculturalism Bad for Women?* 44; Parekh "A Varied Moral World" in Cohen *Is Multiculturalism Bad for Women?* 73.

37 Okin *ibid*; Shweder "What about Female Geneital Mutilation? and Why Understanding Culture Matters in the First Place" in Shweder *et al* (eds) *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies* (2002) 216.

38 Adopted by the 33rd Gen. Conf. (UNESCO) Oct. 2005, entered into force 18 March, 2007. Available at http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 10-06-2008).

39 The issue of cultural relativism has been explored in many studies. See for example, Legesse "Human Rights in African Political Culture" in Thompson (ed) *The Moral Imperatives of Human Rights: A World Survey* (1980) 130; Juma "The Legitimacy of Indigenous Legal Institutions and Human Rights Practice in Kenya: An Old Debate Revisited" 2006 *African J of Int'l and Comp L* 176, "African Customary Law and Human Rights in Kenya: In Search of a Viable Framework for Coexistence" 2002 *East African Journal of Peace and Human Rights* 53–82; Leary "The Effect of Western Perspectives on International Human Rights" in An-Na'im and Francis Deng (eds) *Human Rights in Africa: Cross-Cultural Perspectives* (1990) 15 29.

associations. These provisions affirm the state's recognition of cultural rights and its willingness to employ measures necessary for the protection of rights, so maintaining as it were, a baseline of standards recognised by the Bill of Rights. In addition, it recognises that these measures may be dictated by cultures of communities to which citizens have taken membership.

3 3 The international regime of cultural rights

When the United Nations General Assembly proclaimed and adopted the Universal Declaration of Human Rights (UDHR) in 1948, it was believed that a major step in the advancement of civilization had been taken and that a common standard of achievement had been set which every person, nation or organ of society would strive to reach.[40] These standards were to transcend all cultures, peoples and political ideologies. The idea was so powerful that even the claim to cultural relativity that sought to confront it merely constituted an affront to the encroachment of liberal capitalism, and not a claim to a more elaborate cultural rights regime. Although the two conventions, the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR) that came after it attempted a more definite recognition of cultural rights, not much was achieved in terms of defining the content of such rights. It is the work done by subsidiary organs of the United Nations, especially the UNESCO and other agencies that have propelled the cultural diversity agenda and given concretisation to the regime of cultural rights. For example, when the UN declared 1988–1997 a world decade for cultural development, its objectives were to affirm and enrich cultural identities, broaden participation in culture and promote international co-operation.[41] UNESCO was requested to play the role of a lead agency towards achieving these objectives. In 1992, the UN and UNESCO jointly established the Independent World Commission on Culture and Development (WCCD), which was tasked to prepare a world report on culture detailing the "proposals for urgent and long term action to meet cultural needs in the context of development".[42] Out of this initiative, a report entitled "Our Creative Diversity" was produced in 1995. The report contained ten recommendations, and "protecting culture as human rights" was one of them.[43] Since then considerable work has been done to elicit a comprehensive list of what constitutes such rights. For example in 1996, the "Fribourg Group", formed under the auspices of UNESCO, prepared a draft declaration on cultural rights. They listed six rights, namely: the right to cultural identity and heritage; the right to identify with cultural community; the right to participate in cultural life; the right to education and training; the right to information; and the right to participate in cultural policies and co-operation. Quite apart from the Fribourg process, which yielded a declaration last year (2007), there are many other efforts at UNESCO that are still ongoing and cannot be canvassed fully in this paper.

In terms of the normative content of cultural rights, the international regime could be categorised as giving prominence to three sets of rights. These are the

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40 GA Res 217A, UN Doc A/810 (1948) 71. See also UN Centre of Human Rights *Human Rights: A Compilation of International Instruments* U.N. Doc.ST/HR/1/Rev.5, U.N. Sales No. E.94.XIV.1 (1994), GA Res 217A, UN GAOR 3d Sess., UN Doc A/810 1948.

41 See UNGA Res/41/187 of Dec 8, 1986.

42 UNGA Res/46/158 of Dec. 19, 1991 art 2(a).

43 See Action 7.

rights to cultural identity, the right to participate in cultural life and the cultural rights of minority and indigenous groups.

3 3 1 Rights to cultural identity

The right to cultural identity refers to the recognition that all persons, as individuals or in community with others, have a choice to cultural identity in all its aspects such as religion, language heritage and traditions. And furthermore, that no one should be forced, against one's will, to assimilate another culture. The right is contained in art 27 of ICESCR and framed in the following words: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." The language of the Covenant infers that the right accrues to minorities. However, most national constitutions, including the South African Constitution, and regional instruments, have adopted this provision to provide a cross-cutting protection across national cultures. This same view resonates in several of UNESCO's documents. For example, the World Conference on Cultural Policies, held in Mexico City in 1982, advocated for the affirmation of cultural identities because the acknowledgement of the right to cultural identity "had become a permanent requirement both for individuals and groups and nations".[44] The conference recommended that member states should work towards the preservation of cultural identities by opposing any discrimination, and promoting the development of cultural identity through all appropriate means.[45] The stipulation is also similar to the UNESCO's Declaration on Race and Racial Prejudice of 1978, which provides that all individuals and groups have the right to be different, and to consider themselves as such and to be regarded a such.[46] Another instrument that recognises the right to cultural identity is the International Convention on the Rights of the Child.[47] In art 29, the Convention provides that the education of the child should be directed towards the "development of respect for the child's parents, his or her own cultural identity, language and values".[48] The instruments make no specific reference to minority groups alone.

The most recent effort to define cultural identity is the Fribourg Declaration of 2007. It defined "cultural identity" as the "sum of all references through which a person, alone or in community with others, defines or constitutes oneself, communicates and wishes to be recognised in ones dignity". The Declaration, which was finally launched in May 2007, is a culmination of a twenty year project spearheaded by the NGO platform on cultural rights, the Franciscan International, the academic community, and the UNESCO Chair on Human Rights and Democracy. The declaration prepared by the Fribourg Group affirms that "the violations of cultural rights give rise to identity-related tensions and conflicts which are one of the principal cause of violence, wars and terrorism".

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44 See Symonides "Cultural Rights: A Neglected Category of Human Rights" 1998 *Int'l Soc Sci J* 188.

45 *Ibid.*

46 *Ibid.*

47 G.A Res 25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/25 (1989), I.L.M. 1457.

48 Art 29 (c).

Cultural identity "is the treasure which vitalises mankind's possibility for self-fulfilment by encouraging every people and every group to seek nurture in the past . . . and so to continue the process of their own creation".[49]

3 3 2 Rights to participate in cultural life

The UDHR recognises the entitlement of cultural rights to "everyone as a member of society" and the freedom "to participate in the cultural life of the community".[50] The ICESCR guarantees the right of everyone "to take part in cultural life".[51] It places the rights to religion, work, protection of family and education within the ambit of cultural activities to be so protected.[52] The obligations created by these instruments are threefold. First, states should refrain from activities that prevent or obstruct the enjoyment of cultural rights. According to Asbjørn Aide, states must respect not only the rights to practice culture, but also "rights of individuals to assert other cultural orientations which may deviate from traditions" of the minority or majority.[53] Secondly, it should provide protection against interference with cultural activities despite the same being protested by other groups. This obviously is a fertile ground for internal conflicts. Asbjørn states,

> "Cultural expressions are often manifestations of cultural identity, which can become the origin of group conflicts; they can also be considered by others to violate their notions of public morality an order. Cultural assertions also extend to material claims, such as land rights …Thus, assertions and extension of cultural activities may lead to conflicts with others, which will require a protective function of the state; on the other hand it may also need to set some limits out of respect for others."[54]

Thirdly, states are required to provide a more conducive atmosphere for the exercise of the right to cultural participation. In the guidelines provided by the UN Committee on Economic, Social and Cultural Rights for reporting under art 15 of the ICESCR, states are required to indicate all measures taken, legislative or otherwise, that allows citizens to "take part in the cultural life which she or he considers pertinent". Of particular interest is the need to supply information that relates to the "establishment or maintenance of institutional infrastructure for the implementation of policies to promote popular participation in culture".[55]

3 3 3 Cultural rights of minority and indigenous groups

Classical human rights thinking has come to acknowledge that particular cultures, communities and ethnic traditions have the right, not only of existence, but also to be protected from decay, assimilation and desuetude. But what constitutes a community or group worthy of such protection has been a staple of varied intellectual and normative construction.[56] Particularly problematic in the

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49 Symonides 1998 *Int'l Soc Sci J* 188.
50 UDHR art 22 and art 27(1).
51 Art 15, para 1.
52 Art 2 para 2, art 6, para 1, art 10, para 1, and art 13, para 1.
53 See Aide "Economic, Social and Cultural Rights as Human Rights" in Aide, Krause and Rosas (eds) *Economic Social and Cultural Rights: A Textbook* (1995) 21.
54 *Ibid.*
55 *Ibid.*
56 The Permanent Court of International Justice (PICJ) in *Graeco-Bulgarian Communities* defined "community" as a "group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race,

continued on next page

realm of international law has been the construction of a universally accepted definition of minorities. The Council of Europe's Framework Convention for the Protection of National Minorities avoided placing a definition to the concept, and so have all multilateral efforts, including the UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities, drafted by the Sub-Commission on the Promotion and Protection of Human Rights.[57] The reason could be that states are generally ambivalent towards affording different treatment to cultural groups, or even granting legal status to such groups. Anaya concedes that the attention to cultural diversity may lead to differential treatment of groups.[58] But this, in his view, may be justifiable for reasons of offsetting vulnerability of minority status or for remedying past and continuous wrongs.[59] Moreover, rights injure to such groups because some of their interests lie not only in individuated domains such as personal liberty and exclusive property, but also on collective domains. That is why the right to cultural identity articulated in art 27 of ICCPR, has relevance to minority groups. Thornberry asserts the notion that the rights to identity provide the framework for the larger protection of minority groups within states. He says:

> "The right to identity which is the second right of minorities (the right to physical existence explicitly protected by the Genocide convention aside) is sometimes regarded as constituting the whole of 'minority rights'. It remains the essential right under the modern conditions of human rights . . . it is the right which reflects diversity in human nature and might also be styled the right to be different."[60]

This right is also reaffirmed in the UN General Assembly Declaration on the Rights of Minorities, which enjoins states to take measures enabling persons belonging to minorities to develop their own culture. The right to preserve culture and practice religion is also encapsulated in the same provision. As far as minority groups are concerned, the scheme of rights contained in arts 16, 20, 21 26 and 28 of the UDHR are also relevant. Article 20, which guarantees the freedom of assembly and association, together with the others that protect family life, education and authority of state, lends credence to the view that the UDHR envisioned a collectivist approach to rights.[61]

The protection of cultural rights of indigenous groups is contained in two documents – the UN Declaration on the Rights of Indigenous Peoples (UNDRIP),[62] and the International Labour Organisation (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries. It is

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religion, language and traditions, in a sentiment of solidarity, with a view of preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other". See PCIJ Advisory Opinion of 31 July 1930, Series B, No. 17:21.

57 See Capotorti *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1979); Bonoît-Rohmer *The Minority Question in Europe* (1996) 24.

58 See Anaya "On Justifying Special Ethnic Group Rights: Comments on Pooge" in Shapiro and Kymlicka (eds) *Ethnicity and Group Rights* (1997) 222.

59 Anaya *Ethnicity and Group Rights* 227.

60 See Thornbery *The UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities: Background Analysis, Observation and an Update* (1993) 41.

61 See Vijapur 2006 *International Studies* 373.

62 See UNGA Res. 61/295 on 13 Sept 2007, available at http://www.un.org/esa/socdev/unpfii/en/drip.html (accessed 20-06-2008).

generally believed that the UN declaration spells out rights expansively and has considerable possibility for widespread application to cultural groups.[63] The rights conferred by the Declaration constitute a combination of minority rights such as the right to practice and transmit distinctive norms and to provide education in the indigenous group's language, and rights to self-determination, most notably limitation on the authority of the state to take measures affecting indigenous groups without their consent.[64]

4 TRENDS, CONTESTS AND PROSPECTS

4 1 Group or individual rights: whither thither?

The appeal to cultural rights now raises a myriad of political as well as social problems. The so-called ethnic conflicts and the concomitant contests against economic discrimination and unequal distribution of wealth in divided societies portray in more proactive terms the effects of awareness of these differences. The notion invoked, be it culture, peoples, ethnic group, or minorities all point towards the question of collectivists and group rights which, in a political state, may be seen to undermine nationalism. Thus, the extent to which cultural rights is, and should be enjoyed, is far from settled. Particularly problematic is what the role of culture ought to be in a plural legal society. From a human rights standpoint, there is an enduring problem of classification of culture: whether, there is indeed a right to culture capable of being appropriated by an individual without recourse to his or her citizenship in a cultural group. The complexity of analysing and classifying cultural rights is heightened by the inconclusive nature of international instruments guaranteeing such rights. The protection to cultural rights offered by ICCPR is not available to all groups because of its narrow reference to "ethnic, religious and linguistic groups".[65] Several other treaties and regional instruments that recognise the rights to culture have inherent limitations. For example, the African Charter on Human and Peoples Rights,[66] which, in its preamble, recognises that "the right to development and that civil and political rights cannot be disassociated from economic, social, and cultural rights in their conception as well as universality" and also that "the satisfaction of economic, social, and cultural rights guaranteeing for the enjoyment of civil and political rights", does not define the content of such rights. It merely echoes art 27 of ICCPR by equally guaranteeing the right to freely take part in the cultural life of the community.[67] Perhaps its only addition is to impose duty on individuals to preserve and strengthen positive African cultural values in their relations with other members of the society in the spirit of tolerance, dialogue and consultation, and in general to contribute to the promotion and well being of society. The Charter also makes reference to rights of all peoples to their cultural development with due regard to their freedom and identity and the equal enjoyment of the common heritage of mankind.

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63 See for example, Nanda "Ethnic Conflict in Fiji and International Human Rights Law" 1992 *Cornell International LJ* 565–577; Barsh "Current Developments – Indigenous Peoples: An Emerging Object of International Law" 1986 *Am J Int'l L* 369.

64 UNDRIP arts 1, 3, 11 and 14.

65 ICCPR art 27.

66 O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981) reprinted in 21 ILM 59 (1982), 27 Rev. Intl Commission of Jurists 76 (1981).

67 Art 17.

According to Levesque, international regimes of cultural rights have "been framed in terms of individual rights". Therefore they are ill-suited for the affirmation of collective or people's rights.[68] He argues that the provision of these rights in the instruments discussed above, and even in the later ones, such as the Convention Concerning Indigenous and Tribal Peoples in Independent Countries[69] and the UN's Declaration on Rights of Indigenous Peoples, contain limitations on the exercise of collective rights based on the compatibility with "fundamental rights" as defined by the domestic and international human rights law.[70] Levesque recognises that global trends, in which the construction of human rights regime is seen as resting on the "dignity of persons and their individual human rights",[71] and the often unfavourable domestic practice, will diminish the effective propagation of cultural rights of indigenous communities.[72] This view of cultural rights embodies what could be characterised as the liberal interpretation of the international rights regimes. In contrast thereto, the regime of cultural rights has also been interpreted in a much wider sense to include several demands that may be made by individuals or collectively as a group. These are the demands for exit, self-government, poly-ethnic rights or mere representation.[73] Generally speaking, therefore, cultural rights could embody the principle that groups have right to preserve and develop their culture.[74] Such recognition departs from the contemporary liberal political thinking that has influenced the development of international human rights law.[75] Liberal theory emphasises individual rights and individual liberty. The theory asserts the primacy of the person against claims of any social collectivism and confers on individuals the same moral status irrespective of social or political differences.[76] It is also universalistic in orientation because it affirms the moral unity of all human species and accords a secondary importance to specific historic associations and cultural norms.[77]

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68 See Levesque "Sexual Use, Abuse and Exploitation of Children: Challenges in Implementing Children's and Human Rights" 1994 *Brooklyn LR* 959 971.

69 28 ILM 1382. See discussion in Herts "Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights" 1993 *Va L Rev* 691 711.

70 See for example UNDRIP art 8(2).

71 Levesque 1994 *Brooklyn LR* 974.

72 *Ibid*.

73 See generally Kymlicka *Multicultural Citizenship*; Gurr *Minorities at Risk: A Global View of Ethnopolitical Conflicts* (1993) 294–212.

74 The idea that a group has a right to its culture is a relativist argument. But this argument need not include or lead to the assertion that traditional culture is sufficient to protect human dignity and therefore universal human rights are unnecessary. As Stavanhagen has observed: "While some scholars would deny the validity of this reasoning, arguing that cultural relativism jeopardizes the concept of human rights itself, there is no denying the fact that the real world is comprised of multiplicity of culturally distict groups and peoples. Unless the debate on cultural rights acknowledges the particular issues relevant to each cultural group, we may only be talking about meaningless abstractions." See Stavanhagen "Cultural Rights: A Social Science Perspective" in Aide, Krause and Rosas (eds) *Economic Social and Cultural Rights: A Textbook* 85 94.

75 See Donnelly "Human Rights and Western Liberalism" in An-Na'im and Francis Deng (eds) *Human Rights in Africa: Cross-Cultural Perspectives* 31.

76 Contemporary liberal theorists include Plamenatz, Rawls, Pateman and Pitkin. See Van Dyke "The Individual, the State and Ethnic Communities in Political Theory" 1977 *World Politics* 343 363–364.

77 See Kurkathas "Are there any Cultural Rights" in Kymlicka (ed) *The Rights of Minority Cultures* (1996) 231.

The relevance of liberal political theory has been heavily criticised. Vernon van Dyke has argued that the emphasis on the individual has denied liberalists the opportunity to "deal adequately with the question of status and rights of ethnic communities".[78] Frances Svensson has attacked liberalism on the ground that its emphasis on the individual rights and the neglect of communitarian interests has "created a context in which no balance has been possible between claims of individuals and multidimensional communities".[79] The arguments against liberalism can be summed up in this passage from Anthony Smith's introduction to his study of the Ethnic Revival. He writes:

> "The dissolution of ethnicity. The transcendence of nationalism. The internationalisation of culture. These have been dreams and expectation of liberals and rationalists in practically every country and in practically every country they have been confounded and disappointed . . . Today the cosmopolitan ideals are in decline and rationalist expectations withered. Today liberals and socialists alike work for and with nation state and its increasingly ethnic culture, or remain voices in the wilderness."[80]

While conceding that liberalism gives no independent weight to our cultural membership, Will Kymlicka proposes a reinterpretation of liberalism that shows respect for minority rights as a viable component of liberal equality.[81] He suggests that post-war liberal clichés need to be rethought, for they misinterpret the issue and the liberal tradition itself. Kymlicka observes that liberals have been wrong to regard the idea of collective rights as theoretically incoherent and practically dangerous. In his view the idea of cultural rights could be embraced without denying the individualist premise upon which liberalists anchor their belief. The yearning to respect the individual is not necessarily in conflict with the respect for the group, he argues. The answer lies in the reconciling of the minority rights with liberal equality so as to provide individualistic justification for differential (cultural) rights. According to him therefore, membership in a cultural community becomes a relevant criterion for distributing the "benefits and burdens which are the concern of a liberal theory of justice."[82] Kymlicka's postulation supports the view that group rights can also serve individual interests and are not in conflict with the neutrality ideals inherent in the subjective conceptualisation of rights. In Africa, where the majority live in cultural communities, group rights may serve a wider range of interests and provide opportunities through which human rights can benefit the greatest number of people.

4 2 Culture and the social conflict phenomenon

Lourens du Plessis, writing on constitutional imperatives for sustaining South Africa's nascent democracy, alludes to the divergence in language, religious beliefs, and education as constituting a major source of apprehension to the privileged white minority class during the transition.[83] While recognising that

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78 See Van Dyke 1977 *World Politics* 364.

79 Svensson "Liberal Democracy and Group Rights: The Legacy of Individualism and its Impact on American Indian Tribes" 1979 *Political Studies* 421 438.

80 Smith *The Ethnic Revival* (1980) 1.

81 Kymlicka *Liberalism, Community and Culture* (1989) 152.

82 Kymlicka *Liberalism, Community and Culture* (1989) 162.

83 Du Plessis "Legal and Constitutional means Designed to facilitate the Integration of Diverse Cultures in South Africa: A Provisional Assessment" 2002 *Stellenbosch LR* 367 368.

cultural diversity in South Africa has followed the fault lines of race and ethnicity conscripted into national life by the policies of apartheid, he views the diversity as a potential threat to national cohesion. His impression of culture brings to the discourse a useful variation that should always be borne in mind: that culture carries with it the potential for an implosion.[84] So, whereas the diction of plausibility injures culture with the wide ranging attributes of humanness, community, existence and order, the danger that culture could just as well be a tool for disintegration must also be accommodated in the emerging discourse on culture and cultural rights.

Apart from the foregoing, the prevalence of internal armed conflicts in Africa has reified beliefs that claims to cultural identity may lead to state fracture and intractable armed confrontations. Recently, cultural differences have been associated with the end of humanity. Samuel Huntington's apocalyptic article in the 1993 volume of *Foreign Affairs* pronounced that the future of humanity would depend on culture. The fundamental sources of conflict, he argued, would not be economic or ideological, but cultural.[85] In the works that followed, he elaborated on this thesis by pointing to the eventual "clash of civilizations" as predicated on cultural differences. In his view, "major differences in political and economic development among civilisations are clearly rooted in cultural differences", and "cultural identities . . . are shaping the patterns of cohesion, disintegration and conflict in the post-Cold War world . . . In this new world, local politics is the politics of ethnicity; global politics is the politics of civilizations. The rivalry of the superpowers is replaced by the clash of civilizations."[86] Huntington and other scholars of western liberal tradition seem to believe that true civilization resides in only one culture and that the future of humanity rests on the survival of that culture. According to William Lind, the Cold War was probably the last of the "civilized" wars.[87] In his view, the future of global conflicts are cast in cultural terms.[88] These scholars perceive culture as no more than an expression of collective identity, the force of which predisposes a community to the belief that its sense of existence generally, and maybe justice, overrides all others, and any opposing regimes are ill-placed or merely undesirable.[89]

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84 In the South African context, this aspect of culture has attracted considerable attention. See for example Kaganas and Murray "The Contest between Culture and Gender Equality under South Africa's Interim Constitution" 1994 *Journal of Law and Society* 409–433; Fishbayn "Litigating the Right to Culture: Family Law in the New South Africa" 1999 *Int'l J of Law, Policy and Family* 147–173; Iya "Culture as a Tool of Division and Oppression: Towards a meaningful Role of Culture and Customary Law in South Africa" 1998 *CILSA* 233; Andrews "Violence Against Women in South Africa: The Role of Culture and the Limitations of Law" 1998–1999 *Temple Political and Civil Rights Law Review* 425.

85 Huntington *The Clash of Civilizations* 1993 *Foreign Affairs* 23.

86 Huntington *The Clash of Civilizations and the Remaking of the World Order* (1996) 20 28–29.

87 Lind "Defending Western Culture" (1991) *Foreign Policy* 43–44.

88 The same views are probably ensconced in Régis Debray's "Green Peril" theory. See Debray *Tous azimuts* (1990) cited in Euben *Enemy in the Mirror: Islamic Fundamentalism and the Limits of Western Rationalism. A Work of Comparative Political Theory* (1996) 6.

89 See generally Mamdani *Good Muslim, Bad Muslim: America, the Cold War and the Roots of Terror* (2004). See also Said *Cultural Imperialism* (1993). Said (22) argues that the clash is not between civilizations but within it: "To Huntington, what he calls civilization identity is a stable and undisturbed thing like a room full of furniture in the back of your house."

The cultural rights paradigm thus provides an avenue for re-examining the relative value of culture in African societies. The notion that diversity alone could be a source of conflict lacks empirical support.[90] But the idea that identities forged by radical elements seeking to create "otherness" in those who pose a threat to their political goals, is a fact of persistent reality in Africa's troubled political landscape. Such schemes thrive only in conditions where the communities have not been given the opportunity to enjoy and appropriate the rights to their culture. In the same vein, an argument could be made that through the cultural rights regime many of those claims which are often made in support of the right to self determination could also be realised, thus making threats to state cohesion much more unlikely.

4 3 Cultural transformation

Culture is a dynamic phenomenon, "always negotiable and in process of endorsement, contestation and transformation".[91] In the current age of globalisation, where there is a great deal of movement, internationalisation of production and consumption as well as integration of financial systems, cultural transformation may be taking place much more rapidly than before. This notwithstanding, communities still express attitudes and behaviour that demarcate normative boundaries, or evolve new norms altogether, within their cultures. Moreover, culture is itself an adaptive product, resulting from an individual struggle to put meaning to their life experiences. It is created when "in the struggle against alienation, man transforms the instrumental and the impersonal, the physical and the organic" into personal and tangible meanings.[92] Thus, it devolves in a mix of knowledge, belief, art, morals, law and custom, and "any other habits acquired by man as a member of society". New habits and behaviour are formed everyday, and cultures evolve in a like manner. For example, the gay and lesbian behaviour was abhorred in many societies until just recently. Persistent activism and vocal protest against old cultural order and normative regimes whose relevance has been eroded by new behavioural patterns, has changed not only the perceptions of society but also necessitated the evolution of new norms. So, the normative value of culture could be seen in its evolving character and the pressures it puts on the legal order to adopt to the changing values.

Considering that the discourse on culture has grown from a background of indifference to constitutionalism, the current trend in legal reform, which places emphasis on substantive law and not areas of procedure or legal process, indicates the greatest challenge to the development of cultural rights jurisprudence. This challenge is exacerbated by the prevailing dichotomy between written law and social realities. Evidently, most judges and lawyers understand very little of the cultural values or local circumstances that impinge on many of the disputes they are called upon to deliberate.[93] And with domestic

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90 Numerous accounts have confirmed this position. See for example Juma "Africa, its Conflicts and its Traditions: Debating a Suitable Role for Traditions in Africa Peace Initiatives" 2005 *MSU J of Int'l L* 417.

91 See Wright "The Politicization of 'Culture'" 1998 *Anthropology Today* 7–15.

92 Jaeger and Selznick "The Normative Theory of Culture" 1964 *American Sociological Review* 653–669.

93 See for example Nader *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (1990).

courts showing willingness to adopt international standards, some constituencies now question whether there should be anything like cultural rights when the regimes of Bill of Rights are expanding into those areas of private law that were hitherto regulated by religion and customary law.[94] Given these challenges, the regimes of cultural rights created by law still lack effective utilisation and enforcement throughout the world. As far as human rights is concerned, cultural rights are the least developed and contests abound any discourse that attempt any crystallisation of their content and scope. [95]

Unlike most African constitutional regimes, the South African Constitution offers a number of entry points to cultural rights litigation. Taking its cue from the international regimes, the Constitutional Court has shown willingness to accommodate demands for respect of cultural identity in its diversity. Indeed, a wealth of jurisprudence now emanating from the Constitutional Court in particular has affirmed a growth towards the achievement of international human rights standards, the deep diversity on the culture of its peoples notwithstanding. Judicial activism by Justices Mokgoro, Ngcobo and Sachs have raised the stature of cultural philosophies (for example, *ubuntu*) and affirmed that culture could just as well provide a template for deciding issues of equality, human dignity and even the content of rights to life.[96] For example, in the recent case of *MEC for Education: KwaZulu-Natal and Others v Pillay and Others*[97] the Constitutional Court affirmed that interference by a school in a learner's practice of her culture or religion amounted to discrimination. The claim by the applicant was that the rule disallowing the wearing of jewellery (a nose stud), which was part of the South Indian Tamil culture and religion, amounted to unfair discrimination that was prohibited under the Equality Act and the Constitution. Chief Justice Langa observed that the protection of cultural identity meant the freedom of individuals flowed from "belonging to a community and not from personal choice".[98] The court equally acknowledged that cultures to which an identity maybe sought are in constant flux, and undergo transformations.

Thus, the discourse on culture cannot be extant or rigidly tied to traditional edicts and customs. Otherwise, its relevance diminishes in the face of an ever expanding neo-liberal normative agenda emboldened by modern constitutional practice. Indeed in South Africa, the test for cultural diversity now resides in the articulation of a uniform standard of rights derived from the Constitution. Already, the jurisprudence emanating from the Constitutional court reflects an enduring tension between neo-liberal conception of rights and cultural norms.[99]

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94 Juma "From Repugnancy to Bill of Rights: African Customary Law and Human Rights in Lesotho and South Africa" 2007 *Speculum Juris* 88–112; Thomas and Tladi "Legal Pluralism or a New Repugnancy Clause" 1999 *CILSA* 354; Meyerson "Multiculturalism, Religion and Equality" 104–118; Donnelly *Universal Human Rights in Theory and Practice* (1989).

95 Margaret Beukes "The International (law) Dimension of Culture and Cultural Rights: Relevance for and Application in the "new" South Africa" 1995 *SAYIL* 127; Mireku "Culture and the South African Constitution: An Overview" 1999 *SA Public Law* 439.

96 For example, *S v Makwanyane*.

97 2008 2 BCLR 99 (CC).

98 *MEC for Education: KwaZulu-Natal* para 27.

99 See *Bhe v Magistrate Khayelitsha*, *Shibi v Sithole, South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) which overruled *Mthembu v Letsela* 2000 3 SA 867 (SCA). See also Juma 2007 *Speculum Juris* 110–111.

Although in the interim, the tension seems to have been resolved in favour of human rights standards, the stake for the evolution of a more elaborate cultural rights regime has certainly been raised.

4 4 The political dimensions

The politicisation of culture, as seen in the resurgence of identity conflicts in the post-Cold War period in Africa and elsewhere, has reified the belief by neo-realist thinkers that multiculturalism has its limits in fostering democracy. But the idea that democratic practice based on the rule of law was the *sine qua non* for peace and stability, as a result of which in the liberal discourse elevated constitutionalism while diminishing the role of culture, has equally not taken root in emergent states. Instead, cultural expressions have become much more visible, their structures and narratives gaining normative ground at both national and international levels. But these developments cannot certainly be attributed to the liberal discourses of the post-cold war era alone. The African neo-traditionalism of the 1960s that gained prominence in the aftermath of the fall of the European colonial rule had its own share of cultural dogmatism. African culture, though ambiguously conceptualised, was touted as a tool for social engineering and in some cases economic development.[100] But while African governments sought to promote their version of African culture, cognisable ambivalence still clouded its articulation and deprived its project of substance. Some constituencies even dismissed the claims to cultural identity as chauvinist tribalism.[101] The heavily subsidised culture and art that flourished as a result, stood in contrast to the extraordinary drabness of content. The right to culture was turned into the right of bureaucracy to decide which books, plays, movies or musical works were good for the people. Fortunately, Africa is slowly moving away from this idiocy except for some stubborn cases such as Zimbabwe. Even in South Africa, where a long period of racist acculturation should have created ambivalence towards cultural diversification, the majority now acknowledge that cultural diversity is not inimical to national development.[102] Moreover, there seems to be a realisation that transcends different political and social spectrums; that by ignoring culture we might slip out of the warm embrace of community into the cold air of fragmented existence.

5 CONCLUSION

When the Universal Declaration of Human Rights (UDHR) was created in 1948, the idea of sancrosanctity of rights was expressed as the foundation of freedom, justice and peace in the world. The belief that respecting human rights would

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100 For example, in Kenya the culture was articulated within a broad policy framework known as African socialism, which found its way into economic planning programmes through the Social Policy No. 10. The main architect of this policy was the late Tom Mboya. In Tanzania, the *Ujamaa* project was thought to be an elevation of African socialism. In both cases however, the relevance of culture has been eroded by imperatives of economic development which have, from the very beginning, increased integration of national economies to global markets. The infusion of western culture has thus become inevitable as the media and other outlets become major promoters of "business civilization" and values.

101 Fishman *The Rise and Fall of Ethnic Survival* (1985) 490.

102 Du Plessis 2002 *Stellenbosch LR* 367.

nurture "conditions for stability and well being which are necessary for peaceful and friendly relations among nations," arose from the earlier experiences of the Second World War. These same ideas had emboldened the political architecture that saw the creation of the United Nations – a world body charged with the responsibility of articulating these new beliefs and promulgating, through international consensus, the norms necessary for their preservation. Today, the human rights project encapsulates the campaign for bringing all nations of the world to the acknowledgement of the principles enunciated by the multiple regimes that have evolved since 1945, invigorating the quest for more stringent norms, and seeking sanctions against the violators of existing norms. Given the broad acceptance that human rights have acquired, it almost impossible to envision the existence of a free and democratic society that does not articulate and respect their principles. But while there may be agreement on norms, profound differences in familiarity still subsist in the ideals of human excellence and reference points by which these norms become objects of commitment to a group of persons.[103] Thus, if the human rights project is articulated in absolute terms where agreement is only acknowledged amongst those who share the complete package or moved by the same heroes, then consensus will either never come or must be forced.[104] And yet human rights values derive from and are justified by reference to philosophical constructions of human nature, cultural and religious traditions, just as much as its evolution has everything to do with "demands from civil society and international influence".[105]

Undoubtedly, the concept of cultural rights has become subsumed in the wider human rights debate. The drafting and the subsequent entry into force of treaties with profound collectivists approach to rights such as the UNDRIP has indicated a movement towards the recognition of group entitlements to certain rights. The indication has affirmed that the human rights debate may be incomplete without addressing the social conditions and factors that limit social, economic and cultural freedoms. And although the limitations in the exercise of rights, their substantive forms and the procedures for enforcement will continue to dictate the development of the human rights project, the entry into its discourse of new theoretical issues such as minority rights, homosexual and environmental issues, has indicated a movement from the emphasis on individualism to broader conceptions of group rights embodied in the social and cultural rights regimes. The role of state in this endeavour should also be acknowledged. Whereas human rights norms enacted at the multilateral level may establish universal

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103 See generally Cramston *Human Rights, Real or Supposed in Political Theory and the Rights of Man* (1967) 43 (arguing against the expansion of traditional human rights which are civil and political in nature, into social and economic rights); Dowrick *Human Rights: Problems, Perspective, and Texts*: A Series of Lectures and Seminars Papers Delivered in the University of Durham in 1978, with Supporting Texts (1979); *Human Rights: From Rhetoric to Reality* (1986) (offering an analysis of various human rights issues such as reproductive rights, medical treatment, criminal procedure and labour issues); Eide and Schou (eds) *International Protection of Human Rights: Proceeding of the Seventh Nobel Symposium*, *Oslo, September 25-27*, *1967* (1968) (acknowledging the need to deliberate an expansive implementation of human rights measures worldwide).

104 Taylor "Conditions of an Unforced Consensus on Human Rights" in Savić (ed) *The Politics of Human Rights* (1999) 111.

105 Brysk (ed) *Globalization and Human Rights* (2002) 4.

standards, the states upon which most of the burden of implementation is placed, face a myriad of problems. Some suffer weak political organisation, poor economic and infrastructural facilities and even lack of will to accommodate cultural and ethnic diversity. The promise of cultural rights speaks to the need to bolster the economic condition of all and the recognition that the basis of our existence is the respect for who we are and where we come from, irrespective of our differences.

It seems therefore that what might be needed is for contemporary scholarship to conjure a more intrusive investigation on how the rights discourse could embrace what could be referred to as the "universal humanist paradigm" – the idea that "all cultures have an equal importance to humanity" and their synthesis, the basis for a new civilization.[106] The general justification for such an undertaking is a convergence of two salient concerns that have emerged over the few last decades. First, other than fulfilling the obvious necessity of providing conceptual tools for making human rights accessible across cultures, the humanist approach has potential to re-orient the discourse towards canvassing the imperatives of cultural diversity that have a bearing on constitutional development. This article has shown that the current discourse on culture and cultural rights has not extricated itself fully from the discounted notions of incompatibility of culture to constitutional development. In conventional discourse, cultural values such as those that regulate behaviour are seen to be unrelated to issues of individual rights because "they are freely chosen . . . or thought not to impinge on individual ability to think and act rationally".[107] So, whereas the cultural rights regime indicates a rather progressive movement from dogmatic individualism, the discourse in which it is carried is still laden with subtle ambivalence to values that are communitarian in nature.[108] Secondly, the humanist approach will heighten the awareness of legal reformers to the normative value of culture that make the cultural rights debates go beyond the precepts of legal pluralism.[109] Looking at culture above the lenses of pluralism and creating objective visibility for cultural rights within the legal system absolves thinkers from the narrow and biased perspectives that often cultivate tension in the cultural rights debate, especially with regard to the right to cultural identity.[110] On the whole, this article has called for the critical assessment of relationship between culture and law, and the evolution of a discourse on culture that is sensitive to all the paradigmatic experiences of the African society.

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106 Nabudere "Towards the Study of Post-traditional Systems of justice in the Great lakes region of Africa" 2002 *East African Journal of Peace and Human Rights* 9. See also Stevens *Traditional and Informal Justice Systems in Africa, South Asia and the Caribbean: A Review of the Literature* (1998).

107 Kymlicka *Multicultural Citizenship*; Franck "Clan, Super-clan: Loyalty, Identity and Community in Law and Practice" 1996 *American Journal of International Law* 355.

108 Addis "Individualism, Communitarianism and the Rights of Ethnic Minorities" (1991) *Notre Dame LR* 615; Johnson "Native Rights as Collective Rights: A Question of Group Preservation" in Kymlicka (ed) *The Right of Minority Cultures* (1995) 179.

109 See Carens "Difference and Domination: Reflections on the Relationship between Pluralism and Equality" in Chapman and Wertheimer (eds) *Majorities and Minorities* Nomos XXXII (1990) 227 and 232.

110 See for example Galenkamp "Collective Rechten: 'Fantasierechten'?" in Groenveld (ed) *Proliferentie van Mensenrechten* (1996) 64.

The SACU-US Free Trade Agreement: Blessing or Curse?

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1 INTRODUCTION

The primary objective of the free trade agreement (FTA) negotiations between the SACU (Southern African Customs Union) and the US (United States) is to put trade relations between the two parties on a more secure footing. Up until now, market access into the US has been based on the Generalised System of Preference (GSP), which was operationalised through an instrument known as the Africa Growth and Opportunities Act (AGOA). The SACU-US FTA is also seen as an attempt to create a more competitive foothold for the US in southern Africa. The US-SACU FTA negotiations involves bilateral free trade in goods, symmetrical liberalisation in services, bilateral investment protections, strengthened intellectual property regimes, arrangements on competition policies and a series of related measures in other areas. There are no common policies within the SACU regarding trade in services and issues such as investment, intellectual property, tax harmonisation, trade and environment. Most of these areas achieve a "WTO-plus"[1] outcome in areas that are still subject to negotiation within the current WTO trade round or which have been excluded. Technical co-operation and trade capacity building will be fundamental elements of such an agreement, while the need for asymmetrical treatment for the SACU will be paramount.

Mr Robert Zoellick of the Office of the US Trade Representative informed the US Congress on 5 November 2002 that plans were underway to negotiate a FTA with the member countries of the SACU.[2] This notification occurred accordance with section 2104(a) (1) of the US Trade Act of 2002.[3] The FTA will move away from the AGOA-type trade preferences to a reciprocal free trade arrangement that links economic development strategies, foreign direct investment and regional integration. The objective of the FTA is to strengthen the growing bilateral commercial trade between the SACU and the US, which was estimated at $7.9 billion in 2002.[4] Some of the negotiating objectives of the US include

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1 This term refers to a situation where a country (WTO member) takes on obligations exceeding the existing requirements of the WTO Agreements.

2 Office of the United States Trade Representative *USTR Notifies Congress Administration Intends to Initiate Free Trade Negotiations with Sub-Saharan Nations – House Letter* (2002) 1. See www.ustr.gov/Document_Library/Letters_to_Congress/2002/USTR.

3 The US Trade Act of 2002 (P.L. 107–210) 116 Stat 933; 19 U.S.C.§3803–3805 s 2104(a)(1) was signed into law on 6 August 2002 and contains the Presidential Trade Promotion Authority that grants the US President the right to enter into FTAs.

4 See reference in fn 2 above.

addressing high barriers that the US exports face in the SACU region, overly restrictive licensing measures, inadequate protection for intellectual property rights and restrictions that US service firms face in the region.[5] The US also wants to counter the dominance that the EU has in the region by levelling the playing fields in areas where US exporters are disadvantaged by the Trade Development and Cooperation Agreement (TDCA) between the RSA (Republic of South Africa) and the EU.[6] It is also envisaged that the FTA will help to forge common objectives in the Doha Development Agenda (DDA). The US approach to new trade agreements that it is concluding with developing countries is characterised by the term "competitive liberalisation". This concept is premised on the idea that competition between large economies such as the EU and the US to negotiate preferential arrangements with smaller countries or regions will lower barriers to trade and add fresh impulse to new WTO multilateral negotiations.[7]

Negotiations were launched on 2 June 2003 in Pretoria. Since this date negotiations have had a stop-start dynamic. The fourth round of negotiations was held in Walvis Bay, Namibia from 23–26 February 2004.[8] During this round a decision was taken to structure the negotiations into two phases. The first phase would focus on market access issues – including industrial and agricultural tariffs, trade remedies, and rules of origin and customs procedures. The second phase would focus on services, investment, intellectual property, government procurement, labour and environment.[9]

2 MOTIVATION FOR NEGOTIATING A FTA: TRADE PROFILE OF SACU-US RELATIONS

2 1 Introduction

None of the FTAs that the US negotiated in the last decade was driven by purely economic reasons. In most cases there were unique political, economic or strategic concerns that made potential FTAs attractive. This was especially true for FTAs that were concluded with countries such as Israel, Jordan, Morocco and others.[10] There are concerns from various quarters that bilateral and regional FTAs may lead to confusion and serve as stumbling blocks to the development

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5 *Ibid.*

6 On 7 March 2006 the SADC EPA negotiating group presented the European Commission with a paper entitled: "A Framework for the EPA negotiations between SADC and the EU". The negotiating group proposed including the RSA in the negotiations and for a single trade deal to govern the whole SADC region. The EU reciprocated in February 2007 by accepting RSA as a negotiating party to the SADC EPA and on 4 April 2007 announced duty free and quota free access to its market for all ACP countries excluding RSA. This move will result in the provisions of the trade chapter of the TDCA being subsumed into the SADC EPA.

7 Whalley and Leith *Competitive Liberalisation and a US-SACU FTA* NBER Working Paper Series 10168 (2003) 1.

8 ICTSD "SACU-US FTA Negotiations focus on 'Phase one' Issues" (2004) *Bridges Weekly Trade News Digest* 1 available at www.ictsd.org/weekly/04-03-03/.

9 *Ibid.*

10 The first US FTA was concluded with Israel and went into effect on 1 September 1985; the second took effect on 1 January 1989 with Canada. Five years later the NAFTA took effect.

of a rules-based multilateral trading system. An important trend that has emerged from FTAs has been the inclusion of non-trade concerns in such agreements. The US, through its bilateral FTAs, has expanded levels of commitment beyond the levels found in existing WTO disciplines.

2 2 Motivation for pursuing FTAs

The US foreign policy may be regarded as one of the reasons why the FTA route has been chosen. As mentioned in the previous paragraph, none of the FTAs negotiated to date has had a purely economic objective. The 1985 FTA with Israel was of value to US entirely for foreign policy reasons.[11] FTAs with Middle Eastern countries were directed at creating stability in the region in order to foster economic development. The SACU negotiations would also have development objectives, especially with regard to the LDCs present in this grouping. [12]

Another reason why the US is pursuing FTAs is because multilateral trade negotiations have become increasingly difficult. More countries have to reach agreement in each subsequent round. The US may be using its bilateral trade policy to create some flexibility in the outcomes of the DDR, as countries resisting a compromise in the DDR would not want their exports diverted by countries with which the US negotiates FTAs. The FTAs which the US is negotiating with smaller countries will have a minimal impact on the US economy, while being of substantial benefit to such countries. The US, in line with its "competitive liberalisation" policy, is also seeking to counter the expansive bilateral system that the EU has developed over the last decade. Intra-SACU trade has been characterised by the dominance of RSA. The BLNS countries trade almost exclusively with the RSA, and the EU is the second largest partner after the RSA.[13] Outside the SACU, the EU continues to be the main export market for the SACU countries, followed by the US.[14] The US is a middle level trading partner for the RSA, but for Botswana, Namibia and Swaziland is a less relevant trading partner.[15] The SACU's economic outlook will also depend on global prospects, especially in the EU and the US, the two principal destinations for products originating in the customs area. Continued growth in certain sectors such as textiles and clothing is forecast through market-access conditions under agreements such as the AGOA, the Cotonou agreement, the EBA initiative and the TDCA between RSA and the EU. Competition between US and EU firms with the SACU market is expected to increase, especially with regard to new generation issues that have been included in negotiations under both the Economic Partnership Agreements (EPAs) and the US-SACU FTA negotiations.

The SACU's trade with the US has grown by 300% since 1994 and accounted for 10.2% of trade in 2001.[16] SACU countries are of minor importance to the US,

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11 Arnold *The Pros and Cons of Pursuing Free Trade Agreements* Congressional Budget Office, Economic and Budget Issue Brief (2003) 7.

12 *Ibid.*

13 Meyn *The TDCA and the Proposed SACU-USA FTA: Are Free Trade Agreements with Industrialised Countries Beneficial for SACU?* NEPRU Working Paper 89 (2003) 6.

14 Metzger *New Issues in Regional Monetary Coordination* (2004) 6. This is true for all SACU countries except Swaziland.

15 Meyn 9.

16 Carrim and Mashabela *SACU-United States Free Trade Area* DTI (2003) paras B.1 and B.2 available at www.dti.gov.za/fta/article.htm.

although the RSA is the largest sub-Saharan Africa (SSA) export market for the US. Individually, the various SACU countries have different interests. In 2001 the RSA shipped 8.6% of its exports to the US and received 11.9% of its imports from the US.[17] The rest of the BLNS (excluding Lesotho) receive between 0.9% and 1.8% of their imports from the US while shipping 0.7% (Botswana), 3% (Namibia) and 12.8% (Swaziland) respectively.[18] By 2007 trade between the RSA and the US reached a figure of just $9 billion while the trade surplus was $3.5 billion.[19] Even though the RSA has the most diversified trade relationship with the US, the BLNS countries are benefiting under the AGOA. The BLNS countries have achieved some success as a result of duty free entry in the US through AGOA. In 2001 and 2002, 99% of Lesotho's exports fell into the "textiles and apparel" category, of which 98% were AGO eligible.[20] By 2007, Lesotho's overall trade with the US reached $443 million, with a balance of trade of $436 million dollars. The growth for the BLNS countries has been in textiles, while the trade profile of the BLNS with the US is still heavily dominated by primary products and labour-intensive manufactured goods.[21] The RSA is the only African country benefiting from the AGOA initiative in segments other than textiles/apparels and energy related products.[22] The RSA's trade with the US is also ten times larger than that of all the other SACU members combined, with a strong interest in developing its manufacturing capacity in several sectors.[23]

The trade statistics above suggests that there is enormous potential to develop existing trade and development links with the US. The impact of AGOA has been positive for all the SACU members. However, duty free access under AGOA is neither permanent nor stable. The envisaged FTA between the SACU and the US will put trade relations on a more permanent footing.[24] The US is also pursuing FTAs with 34 other developing countries. These FTAs may pose a potential long-term competitive and market access challenge for SACU exports into the US market.[25]

3 THE PROS AND CONS OF PURSUING AN FTA WITH THE US

Improved access for the SACU into the North American market will lead to gains in conventional trade policy, though the SACU is a very small market for the US.[26] The asymmetry in size is partially offset by a substantial asymmetry in initial barriers, which are considerably higher in the SACU.[27] However, if non-agricultural tariffs in the WTO were to be eliminated by 2015, benefits from the US FTA could be short lived for the SACU members. If the SACU-US FTA is seen in context of the TDCA, the speed of reduction of the SACU's MFN tariff

17 Meyn 9.
18 *Ibid*.
19 AGO *Bilateral Trade Overview* (2008) available at www.agoa.info (accessed 21-10-2008).
20 *Ibid.*
21 Carrim and Mashabela para B.3
22 See Meyn 9. See also AGOA *Bilateral Trade Overview* under the RSA country profile.
23 Carrim and Mashabela paras B.1 and B.2.
24 Carrim and Mashabela para C.
25 *Ibid.*
26 Whalley and Leith 5.
27 *Ibid*.

barriers may hold important consequences for tariff revenue of the smaller SACU members. Increased competition in the SACU market from both US and EU firms may result in more efficient allocation of resources and may stimulate innovation. However, the fear is that it may also lead to de-industrialisation and greater levels of unemployment.[28]

The fact that different SACU members have different economic interests and are currently at different levels of economic development may water down Special Differential Treatment (SDT) to the detriment of the LDCs in this group. The TDCA experience reveals that even though asymmetry forms the basis of that Agreement, the RSA will open its agricultural markets to a larger extent (and faster than the EU) within the first five years of implementation.[29] The RSA's trade share with the EU is much higher than the EU's equivalent trade with the RSA. This leads to higher adjustment costs even in light of the asymmetry with respect to industrial product lines.[30]

If one were to gauge the economic consequences of an FTA with the US, the position of Mexico as a relatively small economy may be instructive. According to the US Congressional Budget Office[31] the North American Free Trade Agreement (NAFTA) had increased the US exports to Mexico by only 0.12 % of the US GDP, while Mexico's exports to the US increased by 0.11 % of the US GDP.[32] This increase is exceptionally modest, considering the size of the US economy and the proximity of the two countries. The conclusion one may reach from these statistics is that the proposed FTA with the SACU may be positive, but an increase in trade and investment will be extremely small. Unlike Mexico, the SACU does not share a border with the US – transportation costs for trade will be high. The same is true for neighbouring countries of the EU. Eastern European countries have lower production costs and also face lower transport costs than the SACU countries. Both the US and the EU use their neighbouring countries for outsourcing production, hence the division of labour is more likely to benefit Eastern Europe and Mexico.[33]

The range of products that may benefit from trade, as in the case with current SACU-US trade, may be limited to one or two main products with an over-reliance on primary products.

The impact of the AGOA initiative on the manufacturing sector of the SACU has been regarded as a generally positive one.[34] However, if one takes the garment and textiles industry in the BLNS countries, investment in this sector[35]

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28 Meyn 16.

29 Eurostep *The EU-South Africa Trade, Development and Co-operation Agreement: Analysis of the Negotiating Process, the Agreement and the Economic Impact* Briefing Paper (2000) 8 available at www.eurostep.org/pubs/position/trade/eusouth.htm.

30 Meyn 16.

31 Arnold 6.

32 *Ibid.*

33 Meyn 14.

34 Office of the US Trade Representative *Comprehensive Report on US Trade and Investment Policy toward Sub-Saharan Africa and Implementation of the Africa Growth and Opportunity Act* Fourth of Eight Annual Reports (2004) 16.

35 Investment in this sector has been limited to Asian firms. The SACU hopes to attract FDI when entering into the FTA with the US. However, should one look at the TDCA, even though European countries are responsible for 90% of investment in the RSA, the total FDI

continued on next page

shows no linkages to local industries. The jobs that have been created offer generally unfavourable working conditions and low salaries. The manufacturing of these products leaves only a very limited amount of "value-add" in these countries, with almost no technology or learning effects.[36] The high dependency of African countries on preferences and the limited product lines exported make it highly doubtful that AGOA has enabled the BLNS countries to expand and diversify their export base.[37] If the impending SACU-US FTA only secures market access, without the forward and backward linkages into local economies of the SACU members, no diversification of the SACU economies will occur.

The implementation of an extensive agreement covering services, intellectual property and competition policy may pose special problems for the SACU. The new SACU Agreement does not cover these areas. The BLNS countries are still in the process of developing and updating WTO compatible regimes and the likely inclusion of these areas in the FTA may give rise to complexities and inconsistencies. If the US-Chile FTA is taken as an example, liberalisation in the services sector will be highly asymmetric in some areas (banking and insurance) and may involve large concessions on the side of the SACU.[38]

The US would want to restore their competitive position in the SACU market and may give SACU some negotiating room. The current TDCA and the position of the RSA within the SADC EPA group will have a bearing on the SACU-US negotiations. The form and content of the two bilateral relationships (SACU-US and EU-SACU) will raise some issues of their joint operation. The TDCA sidesteps most of the significant non-commodity trade issues which will more than likely be raised in the SACU-US negotiations.[39] It seems that AGOA is merely a pre-stage for an extensive re-organisation of US trade relations with Africa. It is, therefore, likely that the US is interested not only in a SACU-US FTA, but in further FTAs that comprise other important partners on the continent.[40]

4 INTERACTION WITH OTHER THIRD PARTY OR EXTERNAL AGREEMENTS

As already stated, one of the objectives of the SACU-US FTA is to create a level playing field for US exporters in the SACU market. This is to occur in opposition to and in competition with preferential EU agreements. The RSA wanted full membership of the Lomé Convention due to the preferential access this agreement offered into the EU.[41] This request was turned down by the EU

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has remained low and averaged just below 1% of GDP in the period 1994–2001. It is therefore assumed that contractual agreement with developed countries is a positive but insufficient condition for reaping the benefits of FDI, while regional factors may be more decisive in this regard. See also Meyn 14.

36 Meyn 13.

37 *Ibid*.

38 Whalley and Leith 7.

39 *Ibid.*

40 Meyn 15.

41 The Lomé Convention was replaced by the Cotonou Agreement in 2000. For a good overview of the relationship between the EU and the ACP states see Verloren von Themaat and Schrijver "Principles and instruments for implementing the right to development within the European Community and in the Lomé state" in Chowdhury *et al* (eds) *The Right to Development under International Law* (1992) 89–111.

and the RSA was offered a separate deal due to its unique status and qualified membership of the Lomé Convention with exclusion from its trade chapter and access to the EDF.[42] The US has not taken the EU route by separating the RSA from the rest of the SACU.

The EU explicitly links the wider humanitarian goals that underlie its foreign policy to trade in terms of the Cotonou Agreement.[43] The TDCA does not deal centrally with services and key non-trade areas.[44] In line with the concept of "competitive liberalisation" the US strategy goes beyond the TDCA and addresses new areas to establish a US advantage. The EU's response has been to align the trade chapter of the TDCA more closely with the impending SADC EPA by including the RSA in the SADC EPA negotiations. This move has created some leeway to synchronise the TDCA with outcomes of the SADC EPA and the SADC Trade Protocol.[45] A further complicating factor is the fact that several SACU countries have bilateral agreements with regional non-members such as Zimbabwe, Malawi and Mozambique. It should also be noted that these countries, with the exception of Mozambique, are not part of the SADC EPA.

5 CONTENT OF A POSSIBLE US-SACU AGREEMENT: AREAS OF NEGOTIATIONS

5 1 Introduction

The US has an interest in improved market access into the SACU where the EU already has an existing agreement. The SACU interest lies in access into the US market, and possibly also into the greater North American market. The SACU has a keen interest in market access for agricultural products, textiles and clothing and sensitive industrial products. The US will push for concessions in non-commodity trade areas such as services, intellectual property, investment, labour and environment. The new SACU Agreement does not cover any of these areas and would have to develop common policies in this regard.

The US has concluded several FTAs with developing countries and territories, such as Chile[46] and Singapore.[47] It is expected that the general contours of the agreement will follow the broad strategy of "competitive liberalisation" prevalent in the above-mentioned agreements. The US-Chile FTA is of particular interest to the SACU as it represents one of the latest agreements that the US has concluded. Recent bilateral co-operation between the RSA and Chile, given the similar economic profiles of the countries, makes for an interesting comparison.

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42 Davies "Forging a New Relationship with the EU" in Bertelsmann-Scott *et al* (eds) *The EU-SA Agreement: South Africa, Southern Africa and the European Union* (2000) 6.

43 See Cotonou Agreement arts 1(4), 2, 35(2) and 35(3).

44 Whalley and Leith 23.

45 Kruger "EPA negotiations: An improved SADC EPA configuration?" TRALAC Discussions 30-05-2006 available at www.tralac.org.

46 The US-Chile Free Trade Agreement came into force on 1 January 2004 by Presidential Proclamation and the US Congress approved s 101(a) of the United States-Chile Free Trade Agreement Implementation Act P.L. 108–77 of 3 September 2003, available at http://ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Section_Index.html.

47 The US-Singapore Free Trade Agreement came into force on 1 January 2004. See P.L. 108–78 of 3 September 2003, available at http://ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Section_Index.html> and was the first agreement in which e-commerce was included.

5 2 Trade in goods

5 2 1 Industrial tariff lines

National treatment is provided for in Chapter 3 of the US-Chile FTA.[48] The USTR notification to Congress in 2002 already indicated that negotiations on trade in industrial goods and agriculture would be tied to certain policy objectives.[49] Elimination of tariffs and other duties on trade between the SACU countries and the US will be removed on a reciprocal basis, with a reasonable adjustment period for sensitive products.[50] If one looks at FTAs concluded with countries such as Chile,[51] the majority of the tariff lines (85% in the case of Chile) will become duty free upon signature.[52] The elimination of customs duties is linked to at least eight different categories of goods, each with its own phase-down period.[53]

Rules of origin may be a significant stumbling block as the NAFTA rules of origin are most likely to apply. These rules are extremely detailed and complex and usually act as trade exclusion devices. This may be relevant for the SACU in two areas of interest, namely clothing and textiles; and motor vehicles and parts. SACU apparel will only qualify for duty free treatment if it is made from US or SACU fibres and US-SACU yarn or yarn processed under the so-called yarn forward rule.[54] For motor vehicles and parts the 60% NAFTA local content rule will most likely apply for duty free treatment.[55]

5 2 2 Agricultural tariff lines

If the Chilean agreement is taken as a precedent, the SACU agricultural duties will most likely disappear after a four-year period, while US duties will disappear in twelve years.[56] There are concerns that this situation may exacerbate poverty in the rural sector as the expedited liberalisation of agricultural products by Chile may result in dumping of US farm products. The danger demonstrated by the Chilean example is that in a regional economy where the agricultural sector still employs a high percentage of the most vulnerable persons, accelerated liberalisation of the agricultural sector may lead to huge job losses and may increase poverty in that sector. The BLNS countries have an expressed interest in sensitive agricultural areas such as beef, maize and sugar. Export subsidies[57] will most likely be banned while agricultural safeguard measures will be implemented in order to give SACU countries some respite.[58]

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48 US-Chile FTA s 3.2.

49 USTR *House Letter* (see fn 2 above) 2.

50 *Ibid.*

51 US-Chile FTA art 1.1 establishes an FTA consistent with GATT 1994 art XXIV and GATS 1994 art V.

52 Whalley and Leith 12.

53 Annexure 3.3 in pursuance of US-Chile FTA s 3.3(2). Category A products become duty free upon signature of the agreement, whereas category H products will start phasing out after year 3 and will become duty free on 1 January of year 10.

54 Whalley and Leith 13.

55 *Ibid.*

56 *Ibid.*

57 US-Chile FTA art 3.16.1 (s F).

58 US-Chile FTA art 3.18 (s F).

5 3 Customs matters, TBT and SPS measures

The US will require that customs operations of the SACU and the SACU countries are conducted with transparency and predictability. It would also be required that customs laws, regulations and decisions of the SACU and the SACU countries are not applied in a discriminatory way.[59] Enforcement of rules of origin and the prevention of circumvention of such rules is also required by the US in order to ensure that preferential duty rates under the FTA apply only to the goods eligible to receive such treatment.[60] The SACU countries will be required to reaffirm their WTO commitments on SPS measures whilst also co-operating in relevant international bodies. TBTs are equally important in this regard. The US-Chile FTAprovides for a committee on trade in goods that will consider matters that act as barriers to trade in goods between the two countries.

5 4 Trade in services

5 4 1 Scope of services sectors where liberalisation will be requested

The Chilean example gives a good indication of what the SACU would be asked to undertake.[61] The United States Trade Representative (USTR) has made it clear that it is to pursue an ambitious approach to market access. Particular attention will be paid to the transparency and predictability of the various SACU countries' regulatory procedures regarding financial and telecommunications services.[62] The SACU will have to undertake significant commitments in liberalising areas of banking, insurance, securities, and other related services.[63] Under the US-Chile FTA, US firms have full rights to establish subsidiaries or joint ventures in Chile for all insurance sectors (life, non-life, re-insurance and brokerage).[64] Securities firms and US banks may establish branches and subsidiaries, and invest in local firms without restriction; they may offer services to Chilean citizens participating in Chile's privatised voluntary savings plan.[65] This situation may be especially unpalatable for the RSA. The e-commerce request from the US will likely require the SACU not to apply customs duties in connection with digitised products. It will also be required that the SADC not unjustifiably discriminate against products delivered electronically.[66] In the US-Chile FTA duties on e-commerce and digital products are based on the physical value (for example the disk not the music).[67] There is currently a moratorium on the levy of customs duties on the delivery of digital products.

5 4 2 Services as a special concern for the SACU members

The services arena will present special problems for the SACU, as its primary focus is on goods market integration and not on service market integration. The

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59 USTR *House Letter* (see fn 2 above) 2.
60 See also US-Chile FTA art 3.20.
61 Ch 11 of the US-Chile FTA covers cross border trade in services. Art 11.2 of said agreement requires national treatment.
62 USTR *House Letter* (see fn 2 above) 3.
63 Whalley and Leith 15.
64 See US-Chile FTA art 11.4(b) that prohibits measures that require specific legal forms or entities through which service providers do business.
65 Whalley and Leith 15.
66 USTR *House Letter* (see fn 2 above) 4.
67 Whalley and Leith 15.

SACU members have no common position on services and would have to develop such a position among them. Since the services sector is heavily regulated in each of the SACU countries, major changes need to occur within SACU and between members. Whalley and Leith[68] observe that liberalisation requested from the SACU in sectors such as banking and insurance could be heavily asymmetric. They point out that although SACU members are part of the CMA, licensing of banks and banking supervision in each SACU member is handled by the respective central banks under their own national legislation.[69] The same applies to insurance and other financial services, while most national legislation requires incorporation and capitalisation in the country where the operation will be conducted. It seems that current practices within the SACU may have to change drastically to accommodate US requests on services in the banking, telecommunication, transport and the insurance sectors.

While US-SACU trade in services are still low in comparison to goods, the barriers, which apply through licensing and other restrictions, are still high.[70] It is likely that the US will seek highly asymmetrical access into the SACU services market (in relation to banking, insurance, telecommunications and transport)[71] with little or no reciprocal access for SACU operators into the US services market. However, the agreement reached with Chile does allow for some reciprocity in "peripheral services" that include computer and related services, telecom services, audiovisual services, construction and engineering, tourism, advertising, express delivery, professional services (architects, engineers, and accountants), distribution services, adult educational training and environmental services.[72] In the absence of services arrangements in the SACU, it is effectively plunged into unilateral liberalisation in services. This may be a bitter pill for the SACU to swallow both on a political and institutional level.

5 5 Other areas of negotiations

5 5 1 Investment

The US will seek to establish rules that reduce or eliminate artificial or trade distorting barriers to US investments in the SACU countries, whilst ensuring adequate standards of protection for SACU investors in the US.[73] It is envisaged that bilateral protection of investors will be fashioned along the lines of the NAFTA. The rights that may be included may cover the rights: to establish, acquire, and operate investments in either region on an equal footing; and to due process protection and fair market compensation in the event of expropriation.[74] Local content rules, investment promotion schemes that favour citizens and BEE may be contentious issues. The TAC, a RSA based NGO, has raised concern about the so-called "investment chapter".[75]

If governments cannot regulate investments and channel such investments to distribute wealth and to promote economic growth, investment will not benefit

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68 Walley and Leith 16.
69 *Ibid.*
70 Whalley and Leith 29.
71 *Ibid.*
72 Whalley and Leith 20.
73 USTR *House Letter* (see fn 2 above) 4.
74 Whalley and Leith 16.
75 ICTSD *Bridges Weekly Trade News Digest* (2004) 1.

local industries. Governments should be able to set performance criteria that ensure that local materials are used in production (to the extent that it is possible) in order to create backward linkages in the local economy. This ensures the transfer of technology by strengthening linkages between foreign and domestic producers.[76]

Another contentious issue is that of the unrestricted repatriation of capital. The prohibition of restrictions by governments on the repatriation of capital may lead to instability if investors decide to repatriate their money. Taking account of the profile of the SACU, only Botswana has abolished exchange control, while the RSA is slowing moving to such a regime. The other BLNS countries have not yet moved that far, and this aspect may cause immense problems should repatriation of capital become unrestricted in terms of an agreement between the US and the SACU. The current world financial crisis underscores the sentiment expressed above.

The issue of expropriation and the right to "fair market value" is potentially an explosive cocktail in context of developments in southern Africa. Several SACU countries have actively pursued and considered expropriation and payment of compensation. However, the "willing-buyer/willing-seller principle" based on fair market value has not yielded results in the RSA and Namibia in the context of land reform and the redistribution of wealth. This issue is also part of other agreements that the US concluded with trading partners from the developing world.[77]

Investor-state relations have consistently featured in the US FTAs in relation to investor-state dispute settlement mechanisms. This process allows foreign investors to bring suits before international arbitration tribunals when they believe that their business interests have been impaired by government regulatory action.[78] The potential exists that such a mechanism may be used to attack regulations that are designed to protect public health, safety, the environment and other public interest objectives that enhance social welfare. The tribunals envisaged under such dispute mechanisms may lack transparency that may be afforded by normal judicial proceedings, while the terms of reference of such tribunals enable them to make awards against governments that would compensate investors directly.[79] Poor regions such as the SACU can ill afford such a dynamic without proper consultation and safeguards that may limit abuse of the dispute settlement process. Current litigation under art 38(1) of the ICSID Additional Facility Rules between the RSA and Italian investors confirms the above-mentioned dynamic.[80]

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76 De Gama and Links "NEPAD: Objectives and Implications for Investment and Trade" 2002 *Journal of Public Administration* 306 313.

77 US-Chile FTA art 10.9.

78 US-Chile FTA art 10.15.

79 US-Chile FTA art 10.25.

80 This claim was brought under two bilateral investment treaties (BITs), the RSA-Italy Bilateral Investment Treaty [17/CA84] and the RSA-Luxembourg Bilateral Investment Treaty [17/CA85]. It was referred to ICSID under case number ARB(AF)/07/1. This claim relates primarily to mining legislation that was adopted and implemented by the RSA to ensure that the social objective of black economic empowerment (BEE) was promoted into this important economic sector. The claims aver that the promulgation of various pieces of legislation that promotes BBE within the mining sector amounted to an unlawful expropriation of investments protected under the two BITs mentioned above.

Since the SACU does not have common policies regarding investment, labour or environment, US firms may seek to exploit differences in applicable regimes which may precipitate a "race to the bottom".

5 5 2 Intellectual property

The SACUA does not cover intellectual property issues. The level of protection afforded in the different SACU countries may vary. The US will seek to establish standards similar to those that are found in US law, whilst also building on the foundations of the TRIPS.[81] The US will require the SACU countries to strengthen their domestic procedures, with emphasis on criminal prosecution and the seizing of suspected pirated goods. It will most likely also seek to compel the SACU countries to introduce measures that provide for compensation in cases of infringement of intellectual property rights.[82] Specific focus will be given to the protection of copyrighted works in digital form and expanded protection for patents and trade secrets.[83]

In recent years the TRIPS has come under intense scrutiny as developing countries have noted the linkages between extended patent protection and high prices for technology and new products, including medicines. The US is proposing a "TRIPS-plus" scenario which will extend patent protection beyond what is required under TRIPS 1994, whilst also limiting public-health protections contained therein. This is contrary to the spirit of the Doha Declaration on TRIPS and Public Health[84] to which the US is a signatory. The Declaration in essence confirms the primacy of public health over protection of patent rights and requires that TRIPS be interpreted in a "pro-health" way. The recent history and experience in the RSA, given the AIDS pandemic, should be a serious warning to the SACU.

5 5 3 Government procurement

Government procurement is a particularly sensitive area not only for SACU members but also for developing countries in general. The US will require government procurement procedures and practices to be fair and transparent. The Chilean Agreement expands the WTO Agreement on Government Procurement to all regional and municipal governments in both the US and Chile. The US-SACU agreement may take the same form. This may require the abandonment of domestic preference in government procurement in the SACU member states.

5 5 4 Competition policy

The SACU will be required to install or maintain competition laws that prohibit anti-competitive business behaviour.[85] Competition policy is also extended to monopolies and state enterprises.[86] The new SACU agreement requires members to have competition laws. However, at present, laws that govern competition in

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81 USTR *House Letter* (see fn 2 above) 3.

82 *Ibid.*

83 Whalley and Leith 17.

84 WTO *Ministerial Declaration* WT/MIN(01)/DEC/1 (2001) (14 November) paras 17–19, available at http://doconline.wto.org – WT/MIN(01)/DEC/1.

85 US-Chile FTA art 16.1.1.

86 US-Chile FTA arts 16.3 and 16.4.

the SACU members are focused not so much on ensuring an open market, but mainly on preserving certain activities from outside competition. The RSA has adopted the Competition Act 89 of 1998,[87] which is loosely based on Article 81 to 89 of the amended Treaty of Rome. Since the RSA does have a functioning competition law regime with a commission and tribunal, it is likely that this model may be used as a default proxy in the absence of comprehensive regimes in the other SACU countries.

5 5 5 Labour and environment

The US has notified that the SACU countries will be required to strengthen their capacity to promote respect for core labour standards in line with ILO standards.[88] Both labour and environment is in flux at the WTO level, hence the content of these issues are less clear within the bilateral setting. Both these aspects have been included in the US-Chile FTA.[89]

6 CONCLUSION

The new SACU has only recently commenced building its own institutions, which in turn would be responsible for formulating and administering policies. The SACU has no policies dealing with significant areas such as industrial development, competition, services and other non-commodity areas. Yet, such policies are a prerequisite for negotiating an agreement with the US. This raises fears concerning the capacity of the SACU to negotiate an agreement of this magnitude at the height of the Doha round. The BLNS countries are also involved in negotiations of the SACU EPA with the EU. A substantial unfinished agenda for intra-SACU policy development, the limited intra-SACU coverage across non-trade areas, and complex bilateral arrangements will severely stretch the SACU's capacity to negotiate an agreement that strengthens development. Many of the commitments sought by the US are "WTO-plus" and go beyond the level of commitment required by the WTO. If the Chile FTA is used as an example, liberalisation in services will be highly asymmetric in some areas (banking and insurance) involving large concessions on the side of the SACU.

The SACU has a small economy and stands to benefit from enhanced access to the US market. The AGOA experience has shown that mere market access does not ensure diversification of the economies of countries that gain access to the US market. The NAFTA example also demonstrates that economic gains for Mexico from an FTA with the US and Canada have been relatively small, despite its proximity to the US. The SACU countries have a keen interest in market access for agricultural products, textiles and clothing and sensitive industrial products. The US will push for concessions in non-commodity trade areas such as services, intellectual property, investment, labour and environment. It is likely that the SACU-US FTA will reflect the interests of the predominant member of the SACU, namely that of the RSA.

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87 It covers restrictive business practices (ss 4 and 5), abuse of dominant position (ss 6, 7, 8 and 9) and merger control (s 11 *et seq*).

88 USTR *House Letter* (see fn 2 above) 5.

89 Chpts 18 and 19 respectively of the said Agreement.

A tale of two mummies. Providing a womb in South Africa: surrogacy and the legal rights of the parents within the Children's Act 38 of 2005. A brief comparative study with the United Kingdom

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1 INTRODUCTION

1 1 Overview

The Children's Act[1] contains a yet unpromulgated chapter on surrogate motherhood.[2] Prior to this statute, there has been no specific South African legislation dealing with the issue of surrogacy, although other statutes have impacted on these types of arrangements.[3] The legal regime before the Children's Act has been discussed *inter alia* by Lupton[4] and the South African Law Reform Commission[5] in its 1993 report *Verslag oor Surrogaatmoederskap*[6] and its *Discussion Paper 103 Project 110: Review of the Child Care Act.*[7] A further discussion hereof would be unnecessarily duplicative.

The history of the investigation into the legal and other implications of surrogacy commenced in 1989 with the circulation of a *Questionnaire on Surrogate Motherhood* by the South African Law Commission.[8] Two SALRC documents followed: the *Working Paper 38: Surrogate Motherhood*[9] and the *Report on Surrogate Motherhood.*[10] For a variety of reasons not relevant here, further investigations were undertaken by the Parliamentary Ad Hoc Select Committee that resulted in two further documents: an interim report and the *Report of the Ad Hoc Committee on the Report of the SA Law Commission on*

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1 Act 38 of 2005.
2 Chapter 19.
3 The now repealed Children's Status Act 82 of 1987 and the Regulations Regarding Artificial Insemination of Persons and Related Matters issued in terms of the Human Tissue Act 65 of 1983.
4 Lupton "The effect of the *Baby M* Case on Commercial Surrogacy" 1991 *TSAR* 224 229ff.
5 Hereinafter referred to as the "SALRC".
6 Chapter 4. Hereinafter referred to as the "1993 SALRC Report".
7 (2001) 161–163. Hereinafter referred to as the "2001 Discussion Paper".
8 As it was at the time, although it will be referred to herein as the SALRC.
9 Project 65 (April 1991).
10 SALRC *Report on Surrogate Motherhood* (1993).

Surrogate Motherhood.[11] The SALRC then reconsidered the issue of surrogacy within *Project 110: Review of the Child Care Act*. Two further documents followed: the 2001 Discussion Paper and the *Report: Review of the Child Care Act.*[12] All these reports were *ad idem* that surrogacy should not be banned or criminalised, but recognised and regulated through legislation. Although there was a proposal for a Surrogacy Act with mirrored provisions in the proposed Children's Act,[13] the 2002 SALRC Report[14] recommended that the issue of surrogacy be included in the proposed Children's Act. This proposal was accepted by Parliament. It should be noted that there were some inconsistencies between the various reports and these are highlighted *infra* at para 2.

After a general introduction, the focus of this article is first, to give a brief overview of the proposed legal surrogacy rules soon to be applicable in South Africa; and secondly, to provide a synopsis of the existing applicable United Kingdom (UK) statutes and to compare the proposed South African system with the UK system. Although the issues may be universal, the rationale for the choice of the UK comparative material is that, *prima facie*, both the SA and UK rules prohibit commercial surrogacy, yet regulate private agreements by statute, making a direct comparison both practical and meaningful.

Surrogacy, through artificial insemination, generally comes in two forms: first, traditional or partial surrogacy, where the surrogate mother's own gamete is used for fertilisation and she is simultaneously the genetic, gestating and birth mother of the child; and, secondly, gestational or full surrogacy where the pregnancy is a result of foreign gametes. In this case the surrogate mother is not genetically related to the child, although she is the gestational and birth mother.[15] For the various medical possibilities that constitute surrogacy see Lupton.[16]

The practice of surrogacy is controversial; some jurisdictions such as Germany, France and Norway regard it as illegal, unlawful and unethical,[17] whilst others such as the United Kingdom accept the possibility.[18] The controversy arises from the fact that surrogacy is a radical departure from the way society understands and values motherhood: "[i]t fragments parenthood, binds persons together by contract and not kin and alters the deep-rooted social and moral assumptions society has made about the relationship between parent and child".[19] Moreover, it challenges the age-old legal rules relating to motherhood by combining them with contractual issues. Furthermore, in South Africa, it incorporates constitutional issues that require a balance of the rights of the child, with the rights of the various sets of parents.

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11 February 1999. Hereinafter referred to as the "1999 *Ad Hoc* Committee Report".

12 December 2002. Hereinafter referred to as the "2002 SALRC Report".

13 2001 Discussion Paper 173.

14 2002 Discussion Paper 56.

15 Lupton "Surrogate Motherhood" in Clark (ed) *Family Law Service* (2006) J134.

16 Lupton "The right to be born: surrogacy and the legal control of human fertility" 1988 *De Jure* 36 37. See also Strauss *Doctor, Patient and the Law* (1991) 188 and Garrity "A comparative analysis of surrogacy laws in the US and Great Britain – a proposed model statute for Louisiana" 2000 *Louisiana Law Review* 809.

17 McEwen "So you're having another woman's baby: economics and exploitation in gestational surrogacy" 1999 *Vanderbilt Journal of Transnational Law* 271 282.

18 See discussion *infra*; McEwen 1999 *Vanderbilt Journal of Transnational Law* 284.

19 Lupton 1988 *De Jure* 45.

1 2 Arguments for and against surrogacy – the pros and cons

The arguments for and against surrogacy have been succinctly summarised by Herring.[20] In summary, he explains the arguments against surrogacy as follows:[21] (1) Commercial surrogacy arrangements commodify children and treat them as possessions which can be bought and sold; (2) Surrogacy has the potential to psychologically harm a child,[22] as such children could be confused as to their identity and even feel rejected.[23] Furthermore, it is undesirable for a child to be born in circumstances that are likely to result in a dispute between adults, which may well harm the child. (3) Concerns have been expressed that the child might be rejected by both the gestational mother and commissioning parents after birth, especially if the child is born disabled. (4) Surrogacy can be seen as being demeaning and exploitative towards women because they are used as little more than walking incubators.[24] Moreover, concerns have been expressed especially about poorer women who might be forced through poverty, to offer themselves as surrogate mothers.[25] (5) It has been argued that some areas of life are too intimate to be the subject of a contract and any decision to give up a child is such a complex one that it cannot validly be made until after the birth of the child. Therefore, pre-birth consent should be regarded as non-informed consent.[26] (6) Another argument against surrogacy is that it does not challenge the attitude of society towards infertility. In other words, resources are not directed towards the discovery of the causes of infertility. (7) Added hereto, some negative public attitudes still exist, with some churches expressing ethical and religious doubts.[27] In this regard, the Roman Catholic Church specifically regards surrogacy as analogous to adultery because it brings a third party into the marriage.[28]

The arguments in favour of surrogacy, highlighted by Herring,[29] are the following: (1) Surrogacy is an aspect of a woman's procreation freedom allowing her to do with her body as she wishes.[30] (2) Surrogacy provides the opportunity to a man to conceive his own genetic child where his wife or partner is unable to conceive. As such, it is more appropriate than other forms of infertility treatment. Schultz puts it as follows: "[surrogacy] enhances the

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20 Herring *Family Law* (2004).

21 Herring *Family Law* (2004) 343–344.

22 See also Wilson "Precommitment in free-market procreation: surrogacy, adoption and limits on human decision making capacity" 2005 *Journal of Legislation* 329 330.

23 See also Lupton 1988 *De Jure* 39.

24 See also Larkey "Redefining motherhood: determining legal maternity in gestational surrogacy arrangement" 2003 *Drake Law Review* 605 614 and Munyon "Protectionism and freedom of contract: the erosion of female autonomy in surrogacy decisions" 2003 *Suffolk University Law Review* 717.

25 See also Capron and Radin "Choosing family law over contract law as a paradigm for surrogate motherhood" 1988 *Journal of Law, Medicine and Ethics* 34 62; and McEwen 1999 *Vanderbilt Journal of Transnational Law* 292–296.

26 See also Larkey 2003 *Drake Law Review* 614 and Wilson 2005 *Journal of Legislation* 330. See, however, Snyder and Byrn "The use of pre-birth parentage orders in surrogacy proceedings" 2005 *Family Law Quarterly* 633 636.

27 See also Lupton 1988 *De Jure* 40.

28 For the South African Legal Perspective, see the 1993 SALRC Report paras 2.2.6 – 2.2.16.

29 Herring 344.

30 See also Shalev *Birth Power: the Case for Surrogacy* (1989) 145, Larkey 2003 *Drake Law Review* 616 and Lupton 1988 *De Jure* 38.

individual freedom, fulfilment and responsibility [of the commissioning parents][31] (3) The practice of surrogacy is inevitable with its history dating back to biblical times and is thus best regulated by law. To prohibit surrogacy would only create an unregulated black market. (4) Surrogacy, for altruistic reasons, should not only be tolerated but even admired.[32] (5) Added to the arguments by Herring is the possibility that surrogacy encourages a wide variety of family forms especially for gay partners who cannot conceive a child together. The South African constitutional protection of these families has been confirmed by several Constitutional Court judgments, most notably in *Minister of Home Affairs v Fourie*:[33] "South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one."

1 3 Four legal approaches

Whatever the pros and cons of surrogacy, it is a practice that will continue unabated for as long as infertility is a reality. The issue of surrogacy becomes especially problematic legally when the surrogacy arrangement does not proceed according to plan, *id est* where the birth mother refuses to hand the child over to the commissioning parents after birth according to the agreement. The main question is whether the surrogacy agreement should be enforceable by a court according to contractual principles of specific performance and claims for damages; or whether the contract should be unenforceable for public policy reasons. It should be emphasised that enforceability of the contract implies that the child is removed from its birth mother and handed to the commissioning parents who may or may not be its biological parents.

The crux of a surrogacy arrangement is thus the issue of parenthood. From the outset it should be noted that there are four approaches to the determination of surrogacy disputes that have crystallised worldwide.[34]

The first approach is the "intent-based theory" which places a high premium on the intention of the parties when entering into the surrogacy agreement. An example of this approach is found in the Californian case of *Johnson v Calvert*[35] where the court found that the legal parents of a child, born from a gestational surrogate mother with no genetic ties to the child, were the commissioning parents. This finding was based on the intention of the parties when entering into the surrogacy agreement.

The second approach is the "gestational birth mother preference guideline" which focuses on the gestational connection between mother and child. This approach was followed in the New Jersey case of *In re Baby M.*[36] In this matter, the arrangement was a traditional surrogacy arrangement where the surrogate

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31 Schultz "Reproductive technology and intent-based parenthood: an opportunity for gender neutrality" 1990 *Wisconsin Law Review* 297 303; and 1993 SALRC Report para 2.2.3.

32 See also Lupton 1988 *De Jure* 44.

33 2006 3 BCLR 355 (CC) para 59.

34 Larkey 2003 *Drake Law Review* 621; Sirola "Are you my mother? Defending the rights of intended parents in gestational surrogacy arrangement in Pennsylvania" 2006 *American University Journal of Gender, Social Policy and the Law* 131 135.

35 5 Cal 4th 84, 93 (1993).

36 109 NJ 396 (1988).

was also the biological mother of the child. The court invalidated the agreement and the child was regarded as that of the surrogate mother.

The third approach is the "genetic contribution-theory" where the biological connection between the child and the mother is regarded as the most important and definitive aspect. An example hereof can be found in the case of *Belsito v Clark*.[37] In this approach it is argued that the gestating surrogate mother takes on a much more significant role than the commissioning mother - whether or not she is the genetic parent of the child. In instances where she also provides the genetic material, she provides even more, namely "the common ancestry of genetic traits". According to this approach, she should be regarded as the legal mother.[38]

The last approach proposes to solve all surrogacy parental disputes by determining the best interests of the child. This was the case in *Doe v Doe*.[39] The outcome of the dispute is thus not determined by the parents, but of the interests of the child. This could mean that the legal parents could be found to be either of the sets of parents, or, according to Wallbank, both sets of parents. She argues that the court should not be compelled to make a choice between the parents.[40]

As will be discussed *infra*, South Africa seems to have adopted a combination of all four of these approaches within the Children's Act; depending on the type of surrogacy undertaken and bearing in mind the constitutional duty that the best interests of the child should remain paramount.[41]

2 THE SOUTH AFRICAN CHILDREN'S ACT 38 OF 2005

> "*Intended parents in surrogacy proceedings will always yearn for certainty regarding the outcome of the agreements in to which they enter with their selective surrogates.*"[42]

2 1 Introduction

As mentioned, surrogacy in South Africa will hopefully soon be regulated by statute. Apart from the provisions in the Children's Act, regard must also be given to the Constitution of the Republic of South Africa 1996, specifically the right to parental care[43] and the fact that the best interests of the child must be of paramount importance in all matters relating to the child.[44] What would be in the best interests of the child would depend on the facts of each matter as interpreted in light of the Children's Act[45] and in judicial precedent.

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37 644 NE 2d 760 (1994). See discussion of Plant "With a little help from my friends: the intersection of the gestational carrier surrogacy agreement, legislative inaction and medical advancement" 2003 *Alabama Law Review* 639 645–646; and Wallbank "Too many mothers? Surrogacy, kinship and the welfare of the child" 2002 *Medical Law Review* 271 292.

38 Wallbank 2002 *Medical Law Review* 292.

39 244 Conn 403, 710 A.2d 1297 (1998).

40 Wallbank 2002 *Medical Law Review* 289. See also the Canadian case of *AA v BB & CC* 2007 ONCA 2.

41 Section 28(2) of the Constitution.

42 Snyder and Byrn 2005 *Family Law Quarterly* 660.

43 Section 28(1)(a).

44 Section 28(2).

45 Section 7.

The basis of the regulation of surrogacy in chapter 19 of the Children's Act is a prescribed surrogate motherhood agreement that must be confirmed by the High Court prior to the commencement of the procedure. The main features are set out *infra*.

2 1 1 Commercial surrogacy

From the outset it should be noted that commercial surrogacy, *id est* surrogacy for profit, is prohibited by the Act.[46] The surrogate mother may not use surrogacy as a source of income. She may enter into the agreement only for altruistic reasons and not for commercial purposes.[47] Added hereto, it is prohibited to advertise for potential surrogate mothers for a reward.[48] To do so would be an offence in terms of s 305(1)(b) that could result in a fine or imprisonment not exceeding 20 years or both.[49]

2 1 2 Compensation

Although commercial surrogacy is prohibited, some compensation in cash or kind relating to a lawful surrogacy agreement is allowed and enforceable. However, such compensation is limited to the provisions in the Act and must be contained in the agreement itself.[50] The Act allows for the following compensation: first, the expenses that relate directly to the artificial fertilisation and the pregnancy itself, the birth of the child and the confirmation of the surrogate motherhood agreement.[51] Secondly, any loss of earnings suffered by the surrogate mother as a result of the agreement.[52] Thirdly, insurance to cover the surrogate mother for anything that may lead to her death or disability brought about by the pregnancy.[53]

Moreover, any person who renders a *bona fide* professional legal or medical service relating to the agreement is entitled to reasonable compensation.[54]

Apart from the above, no person may give or promise to give to any person, or receive from any person a reward or compensation in cash or kind.[55] Any compensation or promise to compensate, in contravention of this provision, amounts to a criminal offence.[56] Upon conviction of contravention of the provision, a person may be liable for payment of a fine or imprisonment not exceeding 20 years or both.[57]

2 2 Genetic link between child and commissioning parent(s)

For a surrogacy arrangement to fall within the parameters of the Act, the child must be genetically related to both the commissioning parents except where this

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46 Section 301(1).
47 Section 296(c)(iv)–(v).
48 Section 303(2).
49 Section 305(7).
50 Section 301(2).
51 Section 301(2)(a).
52 Section 301(2)(b).
53 Section 301(2)(c).
54 Section 301(3).
55 Section 301(1).
56 Section 305(1)(b).
57 Section 305(7).

is not possible for biological, medical or other valid reasons. In such a case, the gametes of at least one of the commissioning parents must be used[58] so that there is always a genetic link between the child born through a surrogate and the commissioning parent(s). Where the commissioning parent is a single person, the use of the gamete of that person is obligatory.[59]

There is no prohibition on the use of the gamete of the surrogate (as long as the semen used is that of the commissioning husband), making both partial/traditional surrogacy and full/gestational surrogacy a legal possibility.

There is no provision made for the scenario where both the commissioning parents are unable to provide gametes for biological, medical or other valid reasons. Couples, where both parties are infertile, are thus excluded from making use of surrogacy. This stipulation raises constitutional questions. It seems to be *prima facie* unconstitutional for equality reasons as the differentiation between the scenario where both spouses are infertile, as opposed to the scenario where only one spouse is infertile, could be regarded as unfair discrimination on the basis of *inter alia* disability.[60] A challenge that the differentiation amounts to unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act[61] is thus possible, as is a constitutional challenge of the Children's Act. Whether this differentiation falls within the limits of the limitation clause is debatable.[62]

2 3 Parents

The Act is formulated in such a manner that a single parent as well as spouses, civil union couples and cohabitees, be they heterosexual or same-sex, all qualify as commissioning parents, as long as one or both of the parties can provide the requisite gametes. This formulation is different from the 1993 SALRC Report that recommended that only married couples should be allowed to use surrogate motherhood.[63] However, since 1999 the possibility of surrogacy has been opened to all competent persons on constitutional grounds, irrespective of their marital status or their sexual orientation.[64]

The Children's Act provides that at least one of the commissioning parents and the surrogate mother and her husband/partner must be domiciled in the Republic.[65] The court may dispose of this requirement upon good cause being shown.[66]

Where the commissioning parent or the surrogate mother is married or in a permanent relationship, the other spouse/partner must give written consent to the agreement and must become a party to the agreement.[67] The court may however confirm the agreement where the husband/partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds consent.[68]

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58 Section 294.
59 Section 294.
60 Section 9(3) of the Constitution.
61 Act 4 of 2000.
62 This issue is, however, a topic for another article.
63 2001 Discussion Paper 165.
64 1999 Ad Hoc Committee Report 15.
65 Section 292(1)(c)–(d).
66 Section 292(2).
67 Section 293(1)–(2).
68 Section 293(3).

For the court to confirm a surrogate motherhood agreement, several requirements relating to the parties must be met relating to infertility, competency, suitability, understanding and the reasons for entering into the agreement: First, the commissioning parent(s) must not be able to give birth to a child and the condition must be permanent and irreversible.[69] Surrogacy must be the sole manner in which a couple can give birth to a child that is biologically related to at least one of them. Secondly, the commissioning parent(s) and the surrogate mother must be competent to enter into the agreement.[70] Thirdly, the commissioning parent(s) must be suitable persons to accept parenthood[71] and the surrogate mother must be suitable to act as surrogate mother.[72] Fourthly, the commissioning parent(s) and the surrogate must understand and accept the legal consequences of the agreement, the Act as well as their rights and obligations in terms thereof.[73] Fifthly, the surrogate mother may not use the surrogacy as a source of income, but must enter into it for altruistic reasons.[74] The surrogate mother must have a documented history of at least one pregnancy and viable delivery and a living child of her own.[75] This requirement is linked to the surrogate's understanding and experience of pregnancy and childbirth and to ensure that the surrogate, as a woman, is aware of the degree of care required when being pregnant. It would be more unlikely for the surrogate to change her mind about the child after birth where she is also the biological parent.[76]

There was some discussion in the reports preceding the Act about maximum age limits for both commissioning parents and surrogate mothers. These issues were not taken up in the statute, although it is presumed that the personal circumstances of the parties would be considered before the agreement is confirmed by the court.

2 4 Surrogate Motherhood Agreement

Detailed provisions are set out in the Act for the agreement to be valid and these provisions deal not only with the requirements for the various sets of parents and the child as set out *supra*, but also with the agreement itself.

The agreement is only valid if it is entered into in writing, in the Republic and is signed by all the parties.[77] The court may not confirm the agreement unless it includes adequate provisions for the contact, care, upbringing and general welfare of the child. It must confirm that the child will be born into a stable home environment. Moreover, it must include provisions on the child's position in the event of the death of the commissioning parents (or one of them), their divorce or separation before the birth of the child.[78]

It should be noted that every surrogacy arrangement is unique and, although the contract that records the surrogacy arrangement must be tailor-made to suit

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69 Section 296(a).
70 Section 296(b)(i) and s 296(c)(i).
71 Section 296(b)(ii).
72 Section 296(c)(ii).
73 Section 296(b)(iii) and s 296(c)(iii).
74 Section 295(c)(iv)–(v).
75 Section 296(c)(vi)–(vii).
76 1993 SALRC Report para 2.6.1.
77 Section 292(1)(a)–(b).
78 Section 296(d).

the agreement between the parties involved, the provisions of the Children's Act must be adhered to. It is further recommended that the conclusion of an agreement should be preceded by a psychological screening of both the surrogate and commissioning parents and a full physical evaluation of the surrogate mother.[79] It is interesting to note that these recommendations were not included in the legislation, although it is presumed that the court would not confirm the agreement unless evidence of such screening has been submitted.

2 5 Confirmation by the High Court and the best interests of the child

The agreement must be confirmed by the High Court within whose area of jurisdiction the commissioning parent(s) are domiciled or habitually reside.[80]

There is, furthermore, a duty on the court not to confirm the agreement where the requirements of the Act have not been met. The court must, before confirmation, have regard to the personal circumstances and family situations of all the parties concerned and above all the interests of the child.[81] This requirement is a confirmation of the duties of the court as upper guardian of all minor children, as well as its constitutional duties in terms of s 28(2) of the Constitution.

2 6 Artificial Insemination

The artificial fertilisation of the surrogate mother may take place only after confirmation by the court of the agreement, but before the lapse of 18 months from the date of confirmation.[82] The artificial insemination itself must be done in terms of the relevant health law provisions.[83]

It is prohibited for a person to artificially fertilise a woman in the execution of a surrogate motherhood agreement or render assistance in such artificial fertilisation, unless that artificial fertilisation is authorised by a court.[84] To contravene this section is a criminal offence[85] and parties found guilty in terms of this section may be liable for payment of a fine or imprisonment not exceeding 20 years or both.[86]

2 7 Effect of the agreement

The effect of a valid surrogate motherhood agreement is that any child born of a surrogate mother in accordance with the agreement is, for all intents and purposes, the child of the commissioning parent(s) from the moment of the birth.[87] The surrogate mother is obliged to hand the child over to the commissioning parent(s) as soon as is reasonably possible after the birth.[88] The surrogate mother, her husband/partner/relatives have no right of parenthood or care of the child[89] and no right of contact with the child unless provided for in the agreement

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79 1993 SALRC Report para 2.7.2 and 1999 Ad Hoc Committee Report 15.
80 Section 292(1)(e).
81 Section 296(e).
82 Section 296(1).
83 Section 296(2).
84 Section 303(1).
85 Section 305(1)(b).
86 Section 305(7).
87 Section 297(1)(a).
88 Section 297(1)(b).
89 Section 297(1)(c).

between the parties.[90] The child will have no claim for maintenance or of succession against the surrogate mother or her husband/partner or any of their relatives.[91] These consequences follow regardless of who provided the genetic material for the child.

Where the agreement does not comply with the Act it is invalid and any child born in execution of such an (invalid) arrangement would be deemed to be the child of the woman who gave birth to it, namely the surrogate mother.[92]

2 8 Termination of the agreement

2 8 1 No termination after artificial fertilisation

The agreement may not be terminated after the artificial fertilisation of the surrogate mother.[93] The Act however, makes provision for the termination of the agreement.

2 8 2 Termination by the surrogate (genetic) mother after birth

The surrogate mother, who is also a genetic parent of the child, may terminate the surrogate motherhood agreement by filing written notice with the court within sixty days after the birth of the child.[94] This risk of termination is only possible where the surrogate provided the genetic material for the child. It is recommended that commissioning couples use a donor egg from a person that is not the surrogate mother to avoid the consequences of ss 298–299 of the Children's Act.

Where the surrogate (genetic) mother chooses to terminate the agreement, the court must terminate the confirmation of the agreement. However, this termination may be effected only after notice has been given to the parties that the surrogate mother has voluntarily terminated the agreement and that she understands the effects of the termination and after a hearing has taken place.[95] The court may issue any other appropriate order in the best interests of the child.[96] Such an order could theoretically include an order affording rights to the commissioning parents where the child is genetically related to one of them, presumably the commissioning father. The surrogate mother incurs no liability to the commissioning parents for exercising her rights of termination, except to reimburse them for any payments made in terms of s 301.[97]

In terms of s 298, the effect of the termination of the agreement before or after the child is born is that parental rights vest in the surrogate mother and her husband/partner. If she is single, the parental rights vest in the surrogate mother and the commissioning father.[98] The surrogate mother and her husband/partner (if any) or if none the commissioning father, are obliged to accept the obligation

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90 Section 297(1)(d).
91 Section 297(1)(e).
92 Section 297(2).
93 Section 297(1)(e). This is subject to ss 292 and 293.
94 Section 298(1).
95 Section 298(2).
96 Section 298(2).
97 Section 298(3).
98 Section 299(a)–(b).

of parenthood.[99] In this scenario the commissioning parents have no rights of parenthood and the child has no claim for maintenance or of succession against the commissioning parents or any of their relatives,[100] unless the parental rights vest in the commissioning father as set out above, or unless the child is adopted.[101] The implication hereof is that the commissioning father (where the surrogate mother has no husband/partner), would be liable for maintenance of a child by a woman that is not his wife/partner.

2 8 3 Abortion

A surrogate motherhood agreement can also be terminated by a termination of the pregnancy carried out in terms of the Choice on Termination of Pregnancy Act 92 of 1996.[102] The decision to terminate the pregnancy lies with the surrogate mother, but she must inform the commissioning parents of her decision and consult with them before the termination is carried out.[103] It should be noted that they do not have to consent to the termination of the pregnancy. They merely have to be consulted.

The surrogate mother incurs no liability to the commissioning parents for the exercising of her right to terminate a pregnancy except to reimburse them for any payments made in terms of s 301 where the decision to terminate was taken for any reason other than on medical grounds.[104] If the termination was made on medical grounds there is no obligation on her to reimburse the commissioning parents for any payments made.

2 9 Other alternatives to obtain parenthood

As mentioned, in terms of the Children's Act, the surrogacy would be unlawful if it were not performed in terms of the legislation and the surrogate mother would be regarded as the legal parent of the child with her husband/partner, unless she is single. In this instance the commissioning father would legally be regarded as the father of the child. This might not be the outcome desired by the parties. The question is whether there are other alternatives available to the commissioning parents to legally obtain the parental results they desire.

2 9 1 Adoption

Where the surrogate motherhood agreement fails, the commissioning parents may still apply for an adoption order to secure the parental rights over the child. This might be problematic where money was paid to the surrogate mother in terms of s 301(2) of the Children's Act. The Child Care Act[105] prohibits any person from giving, undertaking to give, receive or contract to receive any consideration, in cash or kind, in respect of the adoption of a child.[106] Any person who contravenes this provision is guilty of an offence and on conviction,

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99 Section 299(c).
100 Section 299(d)–(e).
101 Section 299(d).
102 Section 300(1).
103 Section 300(2).
104 Section 300(3).
105 Act 74 of 1983.
106 Section 24(1).

may be liable to a fine not exceeding R8 000 or to imprisonment for a period not exceeding two years or to both.[107] There is a similar provision in the new Children's Act[108] that will replace the Child Care Act upon promulgation at a later stage.

2 9 2 Children's Act

Although s 22 and s 24 of the Children's Act have not yet been promulgated, once applicable, these sections might be useful to commissioning parents to obtain parental rights over the child where the surrogacy motherhood agreement is invalid.

Section 22 makes provision for the mother of the child (or other person who has parental responsibilities and rights in respect of the child) to enter into an agreement for the acquisition of such parental responsibilities and rights in respect of the child, with the biological father of the child who does not have parental responsibilities or any other person having an interest in the care, well-being and development of the child.[109] Such an agreement must be in the prescribed format and contain the prescribed particulars[110] and will only take effect if it is either registered with the family advocate; or made an order of the High Court[111] subject to the best interests of the child.[112] Only the High Court may confirm, amend or terminate a parental responsibilities and rights agreement that relates to the guardianship of a child.[113]

In terms of s 24[114] any person having an interest in the care, well-being and development of the child may apply to the High Court for an order granting guardianship of the child to the applicant.[115]

2 9 3 No legal steps

Should the parties agree informally and take no legal steps, the commissioning parents would, without a court order, be bringing the child up without formal legal authority. Legally, the surrogate birth mother would be regarded as the legal mother and the genetic father as the legal father. If the child's status were ever the subject of a court hearing, the outcome would presumably be determined by the Act as set out above. One exception might be where the best interests of the child demand a different conclusion.

2 10 Access to Information

The Children's Act provides that the identity of the parties to court proceedings relating to surrogate motherhood agreements may not be published without the written consent of the parties concerned.[116] Moreover, no person may publish

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107 Section 24(2).
108 Section 249(1).
109 Section 22(1).
110 Section 22(2)–(3).
111 Section 22(4).
112 Section 22(5).
113 Section 22(6) as read with s 24.
114 Not yet promulgated.
115 Section 24(1).
116 Section 302(1).

any facts that may reveal the identity of a child born as a result of such an agreement.[117] A contravention of s 302 constitutes a criminal offence and, if found guilty, the contravener could be liable to payment of a fine or imprisonment not exceeding 20 years or both.[118]

Although there is no obligation in the legislation that a register of information regarding surrogacy procedures should be kept, a child born as a result of artificial fertilisation or surrogacy or the guardian of such child is entitled to have access to any medical information concerning that child's genetic parents and any other information concerning that child's genetic parents (but not before the child reaches the age of 18 years).[119] This information may however not reveal the identity of the person whose genetic material was used for such artificial fertilisation or the identity of the surrogate mother.[120]

This access to information is commendable, although not quite in line with the current European trends that tend to favour not only revealing a child's genetic background, but also disclosing the identity of the persons involved.[121]

2 11 Conclusion

The proposed South African legislation is a leap towards legal certainty for parties involved in issues around surrogacy. If one compares the Act with the four approaches to surrogacy that was discussed *supra*, it is noteworthy that the "intent-based theory" will be applied in cases where there is a valid Surrogacy Motherhood Agreement; and the "gestational birth mother preference guideline" and the "genetic contribution theory" in instances where the birth mother is also genetically related to the child because she can choose to terminate any surrogacy agreement within the specified time. Legal motherhood would then vest in her. In all instances, however, the court will have to make its determination in the "best interests" of the child – not only because it is a requirement in terms of s 296 of the Children's Act, but also because of the constitutional obligation.

3 UNITED KINGDOM

3 1 The legal position

Surrogacy is not illegal in the UK but regulated by the Surrogacy Arrangements Act, 1985 and the Human Fertilisation and Embryology Act, 1990. The 1985 Act prohibits and criminalises commercial surrogacy under penalty of a fine and a maximum of three months imprisonment, or both; and makes any other surrogacy agreement unenforceable in the courts.[122]

The basic rule of the Human Fertilisation and Embryology Act is that the gestating woman, who carries and gives birth to the child, is the legal mother of the child whether or not she is genetically related to the child.[123] With artificial

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117 Section 302(2).
118 Section 305(7).
119 Section 41(1).
120 Section 41(2).
121 Baines "Gamete donors and mistaken identities: the importance of genetic awareness and proposals favouring donor identity disclosure for children born from gamete donations in the United States" 2007 *Family Court Review* 116.
122 Section 1A.
123 Section 27(1).

insemination, the father of the child is the husband/partner of the birth mother unless he did not consent to the procedure or was an anonymous donor.[124] An exception to this general rule is created in s 30 especially to deal with surrogacy.

Section 30 of the Human Fertilisation and Embryology Act provides for the possibility of parental orders in favour of gamete donors. The court may make an order providing for a child to be treated in law as the child of the parties to a marriage if the child has been carried by a woman other than the wife as a result of placing in her an embryo or sperm and eggs through artificial insemination. The gametes used must however be those of the husband and/or wife or both and certain other conditions must be met.[125] These conditions include that the spouses must apply for a parental order within six months of the birth of the child;[126] and at the time of the application and order, the home of the child must be with them and either or both of them must be domiciled within the broader UK.[127] Both spouses must be older than 18.[128] The court must further be satisfied that both the father of the child, where he is not the husband and the surrogate have freely and with full understanding agreed unconditionally to the order.[129] The court must be further satisfied that no money or other benefit, except for reasonable expenses incurred, has been given or received by the husband and wife for, or in consideration of the making of the order or in view of the order, unless authorised by the court.[130] The order must be registered in the Parental Order Register.[131]

The case of *P (A child)*[132] is noteworthy as it confirms the principles as set out in s 30 of the Act. The court granted the commissioning parents a parenting order in an instance where the biological surrogate mother fraudulently used the surrogacy agreement with the single purpose of acquiring another child for herself.[133] Although the child had already been in the care of the surrogate mother for 18 months, the court accepted expert evidence that it would be in the long-term interests of the child to grant the order in favour of the commissioning parents (the husband who was the biological father), notwithstanding the short-term adverse effect that it might have on the child to sever its relationship with its mother.[134]

Herring notes that, if all goes according to plan, there are various legal options available to the commissioning parents.[135] First, they could apply for a parental order; secondly, they could apply for a residence order. Generally, this would

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124 Section 28(2)–(3).
125 Section 30(1).
126 Section 30(2).
127 Section 30(3).
128 Section 30(4).
129 Section 30(5).
130 Section 30(7).
131 Section 30(9). For a discussion of this Act, see Herring 295 and 341; Wallbank 2002 *Medical Law Review* 272ff; Garrity 2000 *Louisiana Law Review* 820; Douglas "The Human Fertilisation and Embryology Act 1990" March 1991 *Family Law* 110; and Hogg "Surrogacy – Nobody's Child" 1991 *Family Law* 276.
132 [2007] EWCA Civ 1053.
133 *P (A Child)* para 1–5.
134 *P (A Child)* para 12.
135 Herring 342.

happen only when the commissioning husband is the genetic parent of the child. The primary concern before the court would however always be the best interests of the child and the court would not feel a sense of being bound by the surrogacy agreement. If the gestational mother does not oppose the application, a residence order would generally be granted.[136] Thirdly, they could apply for an adoption order. Although the Adoption and Children Act, 2002[137] forbids payment or reward in private adoption placements, the courts have been willing to overlook any payments made under a surrogacy agreement and have authorised the adoption.[138] Fourthly, they could take no legal steps and as such, the commissioning parents would, without a court order, be bringing the child up without formal legal authority as the gestational mother would be regarded as the legal mother and the genetic father, the father. If the child's status was ever the subject of a court hearing, the judge would probably confirm the status quo as the child would have already bonded with the commissioning parents. This is illustrated by *Re H (A Minor)(S 37 Direction)*[139] where the court, in an application by a lesbian couple who had been caring for the child for nine months after the gestational mother parted with the child willingly, found that notwithstanding the one partner's criminal conviction and the other's history of mental illness, confirmed the status quo. The court accepted that unless there was a danger of significant harm to the child, it would have to affirm the present arrangement. A fifth option was used by the court in *Re G (Surrogacy: Foreign Domicile).*[140] In this instance the commissioning parents were not domiciled in the UK at the time of the surrogacy and the court could thus not grant either a parenting order or an adoption order as in both instances UK domicile was required.[141] This left the couple and the surrogate mother in a tenuous position because, in terms of the Human Fertilisation and Embryology Act, the surrogate mother and her husband would legally be regarded as the parents of the child.[142] The surrogate mother and her husband were estranged and he refused to participate in the proceedings. The court granted an order in terms of s 84(2) of the Adoption and Children Act, granting the commissioning parents parental authority over the child as they intended to adopt the child in their home country, Turkey.[143]

However, where there is a dispute between the commissioning parents and the gestational mother who refuses to hand over the child, the commissioning parents can apply for a residence order. This is despite the fact that by the time the matter is heard, the gestational mother and the child would have bonded and this, together with the 'natural parent' presumption, would probably mean that the court would confirm that the child would stay with the gestational mother unless she is clearly unsuitable.[144]

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136 *Re C* (*A Minor*) (*Wardship: Custody*) [1985] FLR 846.

137 Section 95.

138 *Re Adoption Application AA 212/86 (Adoption: Payment)* 1987 2 FLR 291; *Re MW (Adoption: Surrogacy)* [1995] 2 FLR 759.

139 [1993] 2 FLR 541, [1993] 2 FCR 277.

140 [2007] EWHC 2814 (Fam).

141 *Re G (Surrogacy: Foreign Domicile)* para 15.

142 Section 27(1). (*Re G (Surrogacy: Foreign Domicile)* para 37).

143 *Re G (Surrogacy: Foreign Domicile*) para 50.

144 Herring 343.

It is an offence in the UK for a person, on a commercial basis, to initiate, negotiate and compile information aimed at the making of a surrogacy agreement.[145] It is not an offence to be a party to such an agreement, only to make the arrangements. It is also an offence to pay money as a reward or profit to the gestational mother, although payments may be made to cover expenses.[146] Payments can be authorised under s 30(7) of the 1990 Act.[147]

The legislation creates a duty on the Human Fertility and Embryonic Authority to keep a register of information relating to the provision of services for identifiable individuals. There is a legal duty to disclose to a child over 16 whether he/she was born as a result of donated gametes.[148] The duty is regarded to be for the welfare of the child.[149]

4 COMPARATIVE ANALYSIS

Compared to the SA legislation the following observations can be made: First, both countries prohibit commercial surrogacy but regulate surrogacy on a private, non-profit basis. This eliminates the argument that one party (the commissioning parent) may take advantage of the surrogate because an informed decision is made for altruistic purposes.[150] In South Africa, with the requirement that the surrogate should have one living child, the chances are better that the surrogate would be able to give informed consent, or should be able to.

Fundamental to both systems is the necessity of a court order. This ensures that the interests of the child is considered in light of all the circumstances – be it at different stages of the process. As far as the argument that a woman can only give real informed consent after the birth of the child is concerned, the UK system is better as the consent is given post-birth. In SA the surrogate mother must make the decision prior to the artificial insemination, although she can change her mind if she is also genetically related to the child. The necessity for a court order also ensures, in both systems, that the process is free and undertaken with full understanding of the consequences of the agreement.

The importance of surrogate legislation, as seen in both countries and from the viewpoint of the commissioning parent is that the outcome of the process is more certain. This is especially so in South Africa in instances where the surrogate is not genetically related to the child and the surrogate does not have the option of changing her mind about the child.

The alternatives to obtaining parenthood where the agreement becomes problematic are also similar. Adoption is a possibility, although the issue of money changing hands has yet to be pronounced upon in South Africa. Similarly, there is no judicial precedent in SA where the various parents have an informal arrangement outside the legislation.

Lastly, both systems make provision for medical information of the gamete donors to be given to the child, although the manner in which this is done differs.

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145 Surrogacy Arrangements Act 1985 (s 2(1)).
146 *Re C (Application by Mr and Mrs X)* [2002] FL 351.
147 *Re Q (Parental Order*) [1996] 1 FLR 369, [1996] 2 FCR 345; Herring 341.
148 Section 31(1)–(2).
149 Wallbank 2002 *Medical Law Review* 291.
150 Garrity 2000 *Louisiana Law Review* 820.

5 CONCLUSION

Notwithstanding Lupton's argument that the existing legislation in South Africa could deal adequately with surrogacy,[151] the new regime makes the applicable rules much clearer and ensures that the court is given the opportunity to evaluate what would be in the best interests of the child – as required by the Constitution. Furthermore, it ensures that any surrogacy arrangement is free and the consequences considered fully by all the parties. The one flaw in the Act is that it requires that at least one of the commissioning parents (or the single parent) must be genetically related to the child. It does not provide for the possibility of both the commissioning parents, for whatever reason, being unable to procreate naturally. It is suggested that the legislature rectifies this omission.

151 Lupton 1991 *TSAR* 232.

Green Public Procurement – An Option for South Africa?

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1 INTRODUCTION

The importance of public procurement, which, according to the World Trade Organisation (WTO), comprises between 10% and 15% of the gross domestic product (GDP) of most countries, cannot be denied.[1] In developing countries it is even more important as it comprises up to 20% of the GDP and is widely used to implement governments' socio-economic policies.[2]

Although the primary function of public procurement is to obtain value for money in the procurement of goods and services, it is accepted that public procurement may be used by government as a means to further its socio-economic policies.[3]

Public procurement is dealt with in s 217 of the Constitution of the Republic of South Africa 1996,[4] which provides for a public procurement system which is fair, equitable, transparent, competitive and cost effective. Section 217(2) allows organs of state to develop procurement policies that provides for categories of preference in the allocation of contracts, and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.[5]

Because of the growing realisation worldwide of the importance of the environment and of the use of public procurement as an instrument for government to realise its socio-economic policies, green public procurement has become a familiar phenomenon in the developed world.[6] With some exceptions,[7]

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1 Bolton *The Law of Government Procurement in South Africa* (2007) 3 states that public procurement is estimated to amount to 14% of the GDP of South Africa.

2 See WTO statistics on their website http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm. (accessed 24-04-2008). See also Bolton *The Law of Government Procurement* 3.

3 Arrowsmith "National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?" in Arrowsmith and Davies (eds) *Public Procurement: Global Revolution* (1998) 3; Arrowsmith *The Law of Public and Utilities Procurement*, 2ed (2005) 6–7; Bolton *The Law of Government Procurement* 4.

4 Hereinafter referred to as the Constitution.

5 In terms of s 217(3), national legislation must prescribe a framework in terms of which this must be implemented.

6 See for instance the work done by the Non-Governmental Organisations (NGO's), the Organisation for Economic Cooperation and Development (OECD) and the Asian-Pacific Economic Cooperation (APEC) with regard to green procurement. See in particular the documents of the OECD available at http://www.oecd.org/ech/docs/envi.htm (accessed 24-04-2008) in particular OECD document COM/TD/ENV(97)111/FINAL *Trade Issues In The Greening Of Public Purchasing*. See also the publications by APEC on public

continued on next page

green public procurement has not received much attention in South Africa. In this article, I will discuss the possibility of using green public procurement in the present public procurement regime in South Africa.

I will start with a description of green public procurement. The need and the underlying reasons for government to further green public procurement will cursorily be discussed. Thereafter I will deal with the South African public procurement regime and how green public procurement can be addressed within the present system. Some remarks will be made in conclusion.

2 GREEN PUBLIC PROCUREMENT

The term Public Procurement refers to governments' activities of purchasing goods and services necessary to carry out their functions.[8] The goods and services procured can be extremely diverse, from a pen to spaceships, and from cleaning services to the development of highly sophisticated information technology programmes. It will include the procurement of construction, for instance, of the Gautrain project in Gauteng.

The term green procurement generally refers to environmentally friendly procurement. In green procurement all the different aspects that might have an environmental impact are relevant. This entails that not only the outcome of the goods and services have environmental implications but also the manufacturing process and the way in which the service provider itself operates.

Attempts have been made to define green public procurement. I refer to two such definitions:

> "Green Public Procurement is the approach by which Public Authorities integrate environmental criteria into all stages of their procurement process, thus encouraging the spread of environmental technologies and the development of environmentally sound products, by seeking and choosing outcomes and solutions that have the least possible impact on the environment throughout their whole life-cycle."[9]

and

> "Green procurement can shortly be defined as public authorities' procurement of products; services and construction which have the lowest and safest impact on the

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procurement at http://www.apec.org/apec/apec_groups/committee_on_trade/government_procurement.html (accessed 24-04-2008).

7 Some state entities in South Africa, notably municipalities like Cape Town, Capricorn, Durban, Ekurhuleni, Johannesburg, Mangaung, Nelson Mandela Bay, Potchefstroom, Pretoria (Tshwane), Richards Bay (uMhlathuze) and Sol Plaatje, have committed themselves to some form of green procurement. They are all members of the ICLE (Local Governments for Sustainability). See http://www.iclei.org/index.php?id=global-about-iclei (accessed 25-04-2008). However, no concerted effort has been made by the state to ensure and promote green public procurement. The Department of Mineral and Energy is busy with a programme: "Green Buildings for Africa" http://www.engineeringnews.co.za/article.php?a_id=111643, accessed 25-04-2008) and the Gauteng Department of Environmental Affairs is also embarking on a green public procurement programme. See http://www.ces.fgvsp.br/arquivos/Sustainable%20Public.pdf (accessed 25-04-2008).

8 For a definition of public procurement, see Arrowsmith *Public Procurement: Global Revolution* 3 and Bolton *The Law of Government Procurement* 1.

9 Bouwer, Jonk, Berman, Bersani, Lusser, Nappa, Nissinen, Parikka, Szuppinger and Viganò *Green Public Procurement in Europe 2006 – Conclusions and recommendations* (2006) http://europa.eu.int/comm/environment/gpp (accessed 23-04-2008).

> environment and humans in terms of natural resources – materials; consumables; performance; operation and waste."[10]

The above definitions only refer to environmental factors in the production and process method and the performance of the products and services themselves. The use of procurement as an instrument to further environmental goals is not addressed and for purposes of this article such use is included in the phrase "green procurement". A distinction can be made between three possible ways to promote green public procurement.[11]

The first is environmental criteria relating to the product or service itself. This relates to the environmental requirements of the post-procurement performance of the product or service. These requirements can be specified in the invitation to tender and can be referred to as performance criteria or can be specified by prescribing specific technical specifications. An example would be to procure low energy consuming light bulbs by either describing the performance required or by giving appropriate technical specifications.

The second possibility relates to the process and production method (PPM). In this instance certain environmental requirements must be met by tenderers in the process and production methods used by them (and their subcontractors or suppliers) in producing the goods and services to be procured. An example would be to specify that only manufacturers complying with certain environmental criteria such as emissions, energy consumption and prescribed methods of transport in the production process will qualify to tender.

The third possibility is that broad environmental goals are pursued which are not directly connected to the subject matter of the procurement. This can be done by giving some form of preference to tenderers who comply with certain criteria which further environmental goals. An example would be to give preference, based on a percentage of the price, to tenderers that apply green procurement themselves, or use green energy or similar criteria which is not necessarily directly linked to the production or manufacturing process of the product to be procured. It can also be used to boost a particular green industry, for instance, alternative energy industries like solar or wind power. The purpose thereof is to further environmental goals in general and not only those directly related to the particular procurement.

When evaluating a product for purposes of green procurement, its whole life cycle, namely the production, use/consumption and disposal stages, needs to be taken into account.[12] This brings the question of sustainability into play. The question of sustainability can however include other socio-economic factors and costs which might be broader than environmental issues only. It could however be that the term 'sustainable procurement' might be more acceptable to some politicians, economists and people who have negative connotations of environmental issues.

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10 Raun and Weiglin "Introduction to environmental requirements for public procurement: Fact sheet on 'green' procurement" http://www.bedriftieu.no/system/Fact%20Sheet%20on%20Green%20Procurement.pdf (accessed 15-04-2009).

11 Kunzlik "Environmental Issues in International Procurement" in Arrowsmith and Davies (eds) *Public Procurement: Global Revolution* (1998) 199–217.

12 Westphal "Greening Procurement: An attempt to reduce uncertainty" 1999 *Public Procurement Law Review* 3.

For present purposes I will concentrate on green public procurement, which might incorporate aspects of sustainability and not the broader scope of sustainable procurement. In green public procurement it is necessary to take into account the whole life cycle of the goods or services, the process and production methods used for the goods and services to be procured, as well as the use of public procurement to realise secondary environmental goals.

3 THE NEED FOR GREEN PUBLIC PROCUREMENT

For many people it would be axiomatic that green public procurement needs to be implemented by all governments.[13] However, the reality is that many doubt the necessity thereof. Amongst many other objections, the perceived costs seem to be in direct contrast with the primary objective of public procurement, namely, to obtain value for money. Developing countries may argue that green public procurement is propagated by developed countries that achieved their developed status by exploiting the environment. Now, developing countries are not allowed the same leeway regarding the environment that developed countries enjoyed previously, which in turn poses an obstacle to much needed development.[14]

From a South African perspective, the importance of the environment cannot be doubted in the light of the inclusion of environmental rights in the 1996 Constitution[15] and environmental legislation in South Africa. This must be balanced with the constitutional requirement of a public procurement system which is fair, equitable, transparent, competitive and cost effective. It must be balanced, of course, with the other rights contained in the Bill of Rights.[16]

In the international context green public procurement is specifically mentioned in the "Plan of Implementation"[17] of the World Summit on Sustainable Development,[18] held in Johannesburg in December 2002. This plan encourages "relevant authorities at all levels to take sustainable development considerations into account in decision-making" and to "promote public procurement policies that encourage development and diffusion of environmentally sound goods and services".

I cursorily address only three aspects: the impact of green public procurement on the environment, the costs of green procurement as opposed to the lowest price and finally, the possible effect thereof on the economic growth of a country.

With regard to the beneficial impact of green public procurement on the environment, little needs to be said. Although I do not think the results of studies in the European Union (EU) are necessarily applicable to South Africa, it is

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13 See in this regard the Fourth Global Environment Outlook Report, also referred to as the GEO 4 report by the UNEP issued on 25 October 2007.

14 See in general Broad and Cavanagh "The Hijacking of the Development Debate: How Friedman and Sachs Got It Wrong" 2006 *World Policy Journal* 21–30. Khor "Development Issues Crucial For Post-2012 Climate Regime" 2007 Third World Network Information Service on Intellectual Property Issues http://www.twnside.org.sg/title2/intellectual_property/info.service/twn.ipr.info.120701.htm (accessed 15-04-2009).

15 Section 24 of the Constitution.

16 Chapter 2 of the Constitution.

17 This is a document to which the state parties to the summit agreed upon.

18 This was the tenth session of the United Nations Commission on Sustainable Development.

interesting to take cognisance of some of the results of the research project called "Relief", co-funded by the European Commission.[19] The purpose of the research was to scientifically assess the potential environmental benefits if green public procurement were to be adopted across the EU. Some of the findings were as follows:

> "• If all public authorities across the EU demanded green electricity, this would save the equivalent of 60 million tonnes of CO2 per year, which is equivalent to 18% of the EU's greenhouse gas reduction commitment under the Kyoto Protocol. Nearly the same saving could be achieved if public authorities opted for buildings of high environmental quality.
> • If all public authorities across the EU were to require more energy-efficient computers, and this led the whole market to move in that direction, this would result in a saving of 830 000 tonnes of CO2 per year.
> • if all European public authorities opted for efficient toilets and taps in their buildings, this would reduce water consumption by 200 000 million litres per year."

Research was also done for the Commission for Environmental Co-operation of North America into the benefits of green procurement.[20] Some of the findings of the positive outcomes of green procurement, which related to both public and private procurement, were the following:

> "• Cost avoidance—lower waste management fees, lower hazardous material management fees, less time and costs for reporting;
> • Savings from conserving energy, water, fuel and other resources;
> • Easier compliance with environmental regulations;
> • Demonstration of due diligence;
> • Reduced risk of accidents, reduced liability and lower health and safety costs;
> • Support of environmental/sustainability strategy and vision;
> • Improved image, brand and goodwill;
> • Improved employee and community health through cleaner air and water, less demand for landfill and less demand for resources; and
> • Increased shareholder values."[21]

In respect of the perceived higher costs of green public procurement (as opposed to non-green public procurement), research done for the European Commission by the Öko–Insitut e.V[22] and ECLEI[23] in Germany, showed *inter alia* the following:

> • "Taking into account the life cycle costs of products it cannot be said that green products are more expensive than non–green products.
> • Environmental qualities of a product are only one aspect determining the price of products. Other, partly more important aspects are the brand (or

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19 This project was financed by the Key Action "City of tomorrow and cultural heritage" under the 5th framework programme for Research, Technological Development and Demonstration activities. It published a guidebook for helping local authorities to green their purchasing decisions. For further information on the Relief project, see http://www.iclei.org/europe/ecoprocura/info/politics.htm (accessed 15-04-2008).

20 Nielsen, Brady and Hall *Green Procurement: Good Environmental Stories for North Americans* (2003).

21 *Ibid*.

22 Institute for Applied Ecology.

23 Also known as "Local Governments for Sustainability". ECLEI is an international association of local governments and national and regional local government organisations that have made a commitment to sustainable development.

make), quality, technical merit, aesthetic or functional characteristics as well as the price deduction schemes related to different purchase volumes.

- Higher initial purchasing prices are in many cases compensated for by lower operating costs."[24]

With regard to the possible effect of green procurement on economic development, one can argue that the principle of sustainable development is accepted by most countries as it is in their best interest or at least that there is not necessarily a conflict between environmental and economic objectives.[25] Economists have realised the importance of the environment as a scare resource for production and it has been incorporated into economic theory.[26] Also, on the political front, the importance of the environment is reflected in the explosion of environmental legislation and international conventions regarding the environment.[27] Both industry and the general public accept the importance of the environment. The demand for green products like organic food, green electricity and other green products are increasing. Industry is quickly responding thereto and new economic opportunities are being created.[28]

Green public procurement will clearly have a positive influence on sustainable development.[29] If green procurement does not necessarily increase the life cycle costs of goods and services procured, it should not be a significant barrier for development. However, in some instances, the initial higher costs of green procurement might have a negative effect on the ability of developing states to absorb the burden of such higher initial costs. Green public procurement can, on the other hand, create new opportunities in certain instances.[30]

It will be an oversimplification to state that green public procurement will not have a negative impact on economic development in developing countries. However, whether one agrees or not, the need for green public procurement is internationally recognised. Although it certainly is a generalisation, and although it can be expected that the costs of green public procurement will differ from country to country, product to product and service to service, it appears that when the whole life cycle costs are taken into account, green procurement is not necessarily more expensive than non-green procurement. The necessary deference needs to be given to specific circumstances in different states but green public procurement cannot be ignored, also not by developing states.

4 THE SOUTH AFRICAN PUBLIC PROCUREMENT REGIME

In order to determine to what extent it is possible to make use of green public procurement in South Africa, it is necessary to analyse its public procurement regime.

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24 Rüdenauer, Quack, Dross, Seebach, Eberle, Zimmer, Gensch, Graulich, Hünecke, Hidson, Koch, Defranceschi, Möller and Tepper *Costs and Benefits of Green Public Procurement in Europe* (2007) http://ec.europa.eu/environment/gpp/pdf/eu_recommendations_1.pdf (accessed 14-04-09).

25 Westphal 1–2.

26 *Ibid*.

27 *Ibid*.

28 *Ibid*. See also the Fourth Global Environmental Outlook Report by United Nations Environmental Programme published in October 2007.

29 Plan of Implementation, World Summit on Sustainable Development Johannesburg (2002).

30 An example would be where a certain sector like the solar power industry is furthered by such green public procurement.

4 1 The 1996 Constitution

4 1 1 Section 24

The rights entrenched in the Bill of Rights,[31] including the environmental rights provided for in s 24,[32] must be respected, protected, promoted and fulfilled by the state.[33] One of the measures available to the state to achieve this is public procurement. Section 24(b) refers to the protection of the environment through reasonable measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. In the public procurement process this can be done either directly, for instance by procuring land for a nature reserve, or indirectly by prescribing environmental criteria in the procurement process or thirdly, by promoting environmental objectives through public procurement.

4 1 2 Section 217

Public procurement is specifically provided for in the 1996 Constitution.[34] Section 217 provides for a public procurement regime which is fair, equitable, transparent, competitive and cost effective.[35] It further allows organs of state to develop procurement policies that provides for categories of preference in the allocation of contracts, and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.[36] National legislation must prescribe a framework within which the latter policies must be implemented.[37]

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31 Chapter 2 of the Constitution.

32 Section 24 reads as follows: 'Everyone has the right–
(*a*) to an environment that is not harmful to their health or well-being; and
(*b*) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that–
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

33 Section 7(2) of the Constitution.

34 For a detailed and well researched discussion on s 217, see Bolton *The Legal Regulation of Government Procurement in South Africa* (LLD-thesis, UWC, 2005) as well as her subsequent book: *The Law of Government Procurement in South Africa* (2007) chapter 3.

35 Section 217 reads as follows:
(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
(*a*) categories of preference in the allocation of contracts; and
(*b*) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

36 Section 217(2).

37 The Preferential Procurement Policy Framework Act 5 of 2000 (hereinafter the "PPPFA") was enacted to give effect to the provisions of s 217 of the Constitution.

The different provisions referred to above will be discussed hereunder. It must be kept in mind that they are interrelated, interdependent and in certain instances overlap. They should therefore not be interpreted in isolation and seen as separate stand-alone requirements.

4 1 2 1 *Fairness*

The dictionary meaning of fair and fairness varies. In general, the word means free from discrimination, to treat every one equally, impartial, just and appropriate.[38]

The Supreme Court of Appeal has held that fairness must be decided on the circumstances of each case.[39] Whatever is done may not cause the process to lose the attribute of fairness.[40] Fairness implies procedural fairness, a public duty to act fairly. It has also been described as the ever-flexible duty to act fairly.[41] It can also imply substantive fairness namely, that it must be in conformity with the notion of basic fairness and justice.[42]

Public procurement is administrative in nature and s 217(1) will often refer to procedural fairness. Administrative fairness does not mean that a person is entitled to a perfect process, free of innocent errors. One also cannot expect to be immunised from all prejudicial consequences flowing from such errors.[43] A measure of judicial deference is appropriate to the complexity of the task of the tender committees.[44] The equal evaluation of tenders has been held to be an essential element of fairness.[45]

Procedural fairness has been interpreted by the courts to include fairness in the relationship between an organ of state and private parties, as well as fairness in the relationship between an organ of state and between the private parties

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38 Concise Oxford Dictionary 10ed.

39 *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 1 SA 16 (SCA) para 13. Conradie AJA held that in given circumstances, it may be fair to ask a tenderer to explain an ambiguity in his tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particular in a complex tender, be fair to ask for clarification or details required for its proper evaluation.

40 *Logbro Properties CC v Bederson NO and Others* 2003 2 SA 460 (SCA) para 9.

41 *Logbro Properties CC* paras 8–9.

42 In *S v Ntuli* 1996 1 SA 1207 (CC) the Constitutional Court held that the meaning of "fair trial" in s 25(3) of the interim Constitution embraced a concept of substantive fairness. This meant that the trial must be in compliance with procedural fairness and with the notions of basic fairness and justice. See also S *v Zuma and Others* 1995 2 SA 642 (CC). See also the decision by the Constitutional Court in *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 9 BCLR 891 (CC). Bolton *The Law of Government Procurement* 45–49 comes to the conclusion that it refers to procedural fairness only.

43 *Logbro Properties CC* paras 15–20 where the court stated that when considering a tender, the tender board undertakes a typically complex task of balancing all the public interests its mandate requires it to fulfil. This includes fair reconsideration of the appellant's tender – but not to the exclusion of considerations involving its broader responsibilities. These include the public benefit to be derived from obtaining a higher price by re-advertising the property.

44 *Logbro Properties CC* para 21 quoting Hoexter "The Future of Judicial Review in South African Administrative Law" [2000] *SALJ* 484 501–502, which in turn cites Cockrell "Can You Paradigm?" 1993 *Acta Juridica* 227.

45 *Metro Projects CC* para 14. The court also stated in para 5 that there are degrees of compliance with any standard and it is notoriously difficult to assess whether the less than perfect compliance falls on one side or the other of the validity divide.

themselves.[46] The former means that organs of state should treat individual private parties fairly in the procurement process, for instance by being transparent and affording them access to the procurement process. The latter means that the parties in relation to each other should be treated fairly, for instance, that all parties are treated equally and given equal opportunities to participate in the process.[47]

The notion of equality, which is included in s 217, has both a formal and substantive element. This means *inter alia,* that because of the discriminatory practices of the past and the subsequent inequality in society which is still prevalent, parties to the public procurement process may be treated differently to ensure substantive equality and substantive fairness.[48]

Fairness can also be equated to equitableness or reasonableness.[49] It connotes fairness to all involved including the state, the general public and possible tenderers. In the context of green procurement, fairness will entail that the necessary measures must be taken to ensure the realisation of the environmental rights entrenched in s 24 of the 1996 Constitution. This must be done in a procedurally fair way, *inter alia* by providing objective environmental criteria with which the goods or service must comply and by clearly setting out the basis on which tenders will be evaluated. Substantial fairness will entail that the effect of the green procurement must not be to unreasonably favour a potential provider or group of providers. In particular, the effect of green requirements on previously disadvantaged potential providers needs to be taken into account and the inequalities of the past should not be entrenched by green public procurement.

4 1 2 2 *Equitability*

The dictionary meaning of equity is: "fairness; recourse to principles of justice to correct or supplement the law."[50] Equitable means "fair and impartial".[51]

What is equitable is also dependant on all the relevant circumstances.[52] Due weight must be given to each relevant circumstance.[53] No test or formula exists

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46 See *Du Preez and Another v Truth and Reconciliation Commission* 1997 3 SA 204 (SCA) 234H–I; *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) para 41; and *President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others* 2000 1 SA 1 (CC) para 214.

47 In practise no party should be given preference, all parties shall be given the same information and awarded the same time to partake in the procurement opportunities.

48 See *Harksen v Lane NO and Others* 1997 11 BCLR 1489 (CC); *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC).

49 See Concise Oxford Dictionary 10ed which refers to: "treating people equally – just or appropriate in the circumstances."

50 Concise Oxford Dictionary 10ed.

51 *Ibid.*

52 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 30. For instance, parastatals are often perceived to have an unfair advantage in competing for contracts with the private sector. They can base their price on operating costs alone, might have tax concessions, are not always obliged to earn a return on their investment and they might even undercut the prices of competitors despite making losses. Where parastatals are permitted to compete with the private sector, it is necessary to develop criteria that allow the private sector to compete with parastatals in an equitable manner.

53 In *Port Elizabeth Municipality* para 33, the court had to decide what is equitable in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of

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to determine what is equitable. The circumstances to be taken into account include, but are not limited to, the nature of the parties' rights and interests as well as those of the state and the public in general. The general tone and purpose of s 217 and the 1996 Constitution as a whole will be relevant. In this regard, the utilisation of public procurement to address the legacies of apartheid by means of preferential treatment of previously disadvantaged South Africans can be equitable.

The question of equality can, as with fairness, also be relevant to equitability. The Constitutional Court has held that the right to equality provided for in s 9 of the 1996 Constitution reflects a substantive rather than a formal conception of equality.[54] The implication in this context is that, in certain circumstances, private parties may be treated differently by the state.[55] Equity does not necessarily mean that all people or all groups should be treated equally and can include, in public procurement, measures to address the inequalities of the past.

In view of the importance of the environment as a scarce resource and the consequences of not taking proper cognisance of the environmental implications of a particular procurement, it will be equitable in many instances to require environmental-friendly goods and services as opposed to the non-green counterpart. On the other hand, it may have costs implications or entrench the historical imbalances in South Africa. Therefore, the circumstances of each case will have to determine what is just.

4 1 2 3 *Transparency*

The preamble to the 1996 Constitution states that the 1996 Constitution is adopted, *inter alia*, to lay the foundations for a democratic and open society. The 1996 Constitution pertinently refers to the values of accountability, responsiveness and openness.[56] The value of openness is given effect to in the Bill of Rights. In s 33, which provides for the right of access to information, the principle of transparency is entrenched.

Our courts have held on various occasions that the values of openness, transparency and accountability are foundational to the 1996 Constitution.[57] It has been held that a democratic state should function with transparency so that any member of the public can see that justice is being done.[58] Transparency, accountability and the prevention of corrupt practices are clearly in the public interest.[59]

1998. In this regard the court held that in that instance the court had to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and circumstances which would necessitate bringing out an equitably principled judgment.

54 See *Harksen* and *Bato Star*.

55 See Du Plessis "Just Legal Institutions in an Optimally Just South Africa under the Constitution" 1998 *Stellenbosch Law Review* 239.

56 Section 1(d) of the Constitution.

57 *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland*) 2005 2 SA 110 (SCA).

58 *Prinsloo v RCP Media Ltd t/a Rapport* 2003 4 SA 456 (T).

59 *Choice Decisions v MEC, Department of Development, Planning and Local Government, Gauteng and Another (no 2)* 2003 6 SA 308 (W) para 12 , 312F, G–H.

However, transparency is relative and determined by the circumstances. It does not necessarily mean that everything in minute detail needs to be furnished to possible tenderers.[60]

As in the case of an advertisement of a sale by auction of estate assets in terms of the provisions of s 82(1) of the Insolvency Act,[61] advertisements of tenders which are informative goes to the heart of fairness and is crucial to openness, transparency and fairness.[62] Information, in order to be used effectively, must be provided at the time and under the circumstances when it is useful to those who require it.[63]

A public authority is entitled to apply policies, standards and precedents when it does not preclude the exercise of a discretion. Such policies, standards or precedents however must be compatible with the enabling legislation. The policies, standards and precedents must also be disclosed to the affected persons before the decision is reached.[64]

With regard to public procurement, transparency must be ensured through all the stages of the process namely: identification of the need; compilation of tender requirements; invitation to tender; processing and evaluation of the tender; award of the tender; review procedures; and supervision of execution of the tender. To achieve this, procurement information needs to be correct, generally and timeously available, and accessible. This includes information on: the applicable rules, practices and policies; the available procurement opportunities; the criteria applicable to select the successful tenderer; the awards made; the decisions made; review and the reasons therefore; and the conclusion of the work.[65]

Because green procurement has not been widely applied in public procurement to date, it will be essential to ensure transparency at all stages of the procurement process. This entails in particular that the following information be accessible and timeously available:

- Proper, detailed and correct criteria with regard to the goods or services to be procured. Although technical specifications can be used, performance-based definitions are preferable.[66]
- Clear evaluation criteria applicable to the selection of the successful tenderer. It should focus on the ability to perform the contract and can relate to technical capacity.[67]

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60 *South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board and Others* 2001 2 SA 675 (C) where it was also held that the tenderers were treated equally where, prior to tendering, all tenderers were informed of criteria to be applied, that weightings would be allocated to criteria, and that such weightings would not be disclosed to them. No tenderer received such information as to enable it to obtain any advantage over other tenderers. The tender process was held to be fair, accessible, visible, subject to examination and enquiry, open, and transparent.

61 Insolvency Act 24 of 1936.

62 *Muller v de Wet NO and Others* 2001 2 SA 489 (W) 499G/H–500D.

63 *Muller v de Wet* 511. Compare Klaaren "Access to Information" in Chaskalson *et al Constitutional Law of South Africa* (2008) 24–4.

64 *Muller v de Wet* 676.

65 See Evenett and Hoekman 'Transparency in Government procurement: What can we Expect from International Trade Agreements?" in Arrowsmith and Trybus (eds) *Public Procurement: The Continuing Revolution* (2003) 272.

66 European Commission *Buying Green. A Handbook on environmental public procurement* 14.

67 European Commission *Buying Green* 14.

- Clear award criteria. This must be specific and objectively quantifiable and have a link with the subject matter of the procurement.[68]

4 1 2 4 *Competitiveness*

The Concise Oxford Dictionary[69] defines competitive as: "relating to or characterised by competition – as good as or better than others of a comparable nature." Watermeyer defines a competitive procurement system as one that provides for appropriate levels of competition to ensure cost-effective and best value outcomes.[70] It implies that the most meritorious should succeed above the less meritorious. The requirement of merit means that price should not be the only factor. For instance, one needs to look at the life cycle of the product or service. To put it simply, a more expensive product might last longer than the less expensive one. Although the initial outlay may be more expensive, it may be more cost effective and therefore cheaper in the long run to procure the more expensive product because of its longer lifespan.[71]

A competitive tender presupposes a procedure which ensures that the body judging tenders is presented with comparable offers in order for its members to compare them. This implies that an invitation to tender has to be clear and unambiguous. The criteria and other requirements set out in the tender must be easily understandable, be precise, not be open to contradictory interpretations, scientifically correct, and in sufficient detail to ensure that what is required by the procuring entity is what is tendered for by the tenderers. In short, the invitation to tender has to speak for itself. Its real import must not be disguised so that all potential tenderers know exactly what they need to tender for.

Competitors have to be treated equally, in the sense that they must all be entitled to tender for the same thing.[72] It is essential that the goods or services be defined in such a manner and detail, for instance with regard to specifications and performance criteria, that the tender prices can be directly compared.[73] Tenders must also be invited timeously and effectively so as to enable the widest possible participation.

Through competition the best value for money can be obtained in that efficiency and economy are assured. A problem that can arise in green procurement is that competition can be limited if potential tenderers are subjected to stringent environmental criteria to enable them to qualify, or if there

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68 European *Commission Buying Green* 17.

69 Concise Oxford Dictionary 10ed.

70 Watermeyer *Executive Summary on the Synthesis Report* www.cuts-international.org/pdf/Executive%20Summary.pdf (accessed 21-02-2007).

71 This reflects the principle of value for money.

72 *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA). In this case the tender board entered into a tender contract providing for an ancillary contract to regulate matters not determined under the tender contract. The ancillary contract, when concluded, contradicted the tender contract, by awarding greater rights than had been put out to tender. The ancillary contract was thus subversive of an open tender procedure and of the Act. The ancillary contract was therefore unlawful. The court also held that to allow a tender board to withhold from the body of tenderers its intention to conclude a secret agreement with one of them, an agreement which the others have never seen and never had a chance to match, would be entirely subversive of a credible tender procedure.

73 *WED (Pty) Ltd v Pretoria City Council and Others* 1988 1 SA 746 (A).

are limited suppliers who can provide the green products or goods to be procured.

Price cannot be the only criteria to determine competitiveness. In particular, other beneficial attributes of the goods and services, like the environmental impact, need to be taken into account when deciding which product or service is the most competitive. However, these criteria must be set out clearly from the start of the procurement process.

4 1 2 5 *Cost effectiveness*

Cost effectiveness can be defined as "effective or productive in relation to its costs".[74] Although the system in terms of which procurement is done should be cost effective,[75] the outcome of the system utilised should also be cost effective.[76] This means that not only should the system utilised be cost effective in the sense that the best procedures at the lowest cost be used during the stages of procurement, but also that the product, eventually procured, is cost effective as well. All aspects of cost effectiveness should be kept in mind through all the stages of procurement.[77]

The above entails that cost effectiveness should be considered before deciding on the need for procurement and what will fulfil the need the most effectively.[78]

Value for money does not necessarily entail that the lowest priced tender should be accepted.[79] A product with a longer lifespan or cheaper maintenance costs might be more cost effective than its cheaper counterpart. The lowest tender in price could even be the most expensive tender. It entails accepting the most meritorious tender, taking all circumstances into account.[80] Value for money or cost effectiveness need not be a measure of monetary cost alone and

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74 Concise Oxford Dictionary 10ed.

75 In the sense of "working productively with minimum wasted effort and expense". Concise Oxford English Dictionary 10ed.

76 This relates to obtaining value for money.

77 The stages are: identification of the need; compilation of tender requirements; invitation to tender; processing and evaluation of the tender; award of the tender; review procedures; and supervision of execution of the tender.

78 The Municipal Finance Management Act 56 of 2003 ("MFMA") provides in ss 11 and 112(1) that each municipality and each municipal system must have and implement a Supply Chain Management Policy which is cost-effective. In respect of contracts exceeding R10 million, the MFMA reg 21(d) provides that the financial and economic standing; experience and track record; and the nature quality and reliability of products or services to be rendered must be taken into account. Specific provision is made in regs 35 and 38 for the furnishing of information and the rejection of bids under prescribed circumstances in the procurement of consultancy services.

79 Turpin *Government Procurement and Contracts* (1989) 66 states that "[v]alue for money is not necessarily the same as the lowest price though it might be. Factors such as promptness of delivery, reliability in service, level of future operating costs, or compatibility with existing equipment may indicate acceptance of some other than the lowest tender. Current guidance emphasises the need to take into account whole life costs and not simply the initial procurement cost".

80 Best value for money in the context of a technical component in procurement is the optimum combination of whole life cost and quality to meet a user department's requirements and not the lowest short term cost. Whole life cost takes into account all aspects of cost over the lifetime of the asset, including capital, maintenance, management operating costs and closure or disposal costs.

collateral objectives should also be taken into account.[81] It must also be kept in mind that all the principles mentioned in s 217 of the 1996 Constitution are interrelated and interconnected. Cost effectiveness cannot be evaluated in isolation and all the circumstances and other prescripts of s 217 and other constitutional demands need to be taken into account.

It can be concluded that the procurement system through all the stages of the procurement process, as well as the outcome of the procurement process, must be cost effective. Cost effectiveness needs to be taken into account when deciding what is needed and how the needs will best be satisfied. Achieving collateral objectives is relevant in achieving cost effectiveness. Reaching a state's socio-economic objectives may entail that an initially more expensive tender be accepted in that it may achieve socio-economic benefits like the transfer of skills. It has to be determined how such secondary objectives can be achieved in the most cost effective manner. Cost effectiveness cannot be seen in isolation. It will depend on all the circumstances and other primary and secondary objectives of public procurement must be taken into account when evaluating whether this objective has been achieved in a particular instance. After taking all relevant aspects into account, this means that the most meritorious tender, offering the best value for money, should be the successful tender.

The beneficial outcomes of green procurement are therefore relevant to cost effectiveness. These outcomes should be quantified where possible, and need to be taken into account when the best value for money is sought.

4 1 2 6 *Preferential Procurement*

Section 217(2) of the Constitution allows for categories of preference in the allocation of contracts, and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. Green public procurement may fall under a category for which preference may be allowed. Section 217(3) provides that national legislation must be enacted to provide a framework for the preferential procurement envisaged in s 217(2) of the Constitution. The Preferential Procurement Policy Framework Act[82] (PPPFA) was enacted for this purpose.

The framework in the PPPFA provides for a preference point system to be developed.[83] For contracts with a value above a prescribed amount, a maximum of 10 points may be allocated for specific goals.[84] For contracts with a value equal to or below a prescribed amount, a maximum of 20 points may be allocated for specific goals.[85] The specific goals may include[86] contracting with

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81 An example would be where a more labour intensive procedure is used or the provision of training to unskilled labourers is part of the tender.

82 Act 5 of 2000.

83 Section 2(1)(a).

84 Section 2(1)(b)(i). The amount is at present equal to or above R500 000.

85 Section 2(1)(b)(ii). The amount is at present below R500 000 and equal to or above R30 000. See *Barry Kotze Inspections CC t/a Bis Joint Venture with Pugubye Invstments (Pty) Ltd v City Council of Johannesburg and Others* 2004 3 BCLR 274 (T) where the court said the values should be based on estimates.

86 Section 2(1)(d).

persons, or categories of persons, historically disadvantaged by unfair discrimination based on race, gender or disability;[87] or implementing the programmes of the Reconstruction and Development Programme.[88] The goals relating to the Reconstruction and Development Programme are provided for in the regulations issued in terms of the PPPFA[89] and do not include any environmental goals. The remainder of the points, namely eighty and ninety respectively, must be awarded for price. Any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender.[90] These goals must be measurable, quantifiable and monitored for compliance.[91] The contract must be awarded to the tenderer with the highest points unless objective criteria in addition to the goals set out justify the award of the contract to another tenderer.[92] The act is not clear on what such objective criteria could be.[93]

Regulation 9, issued in terms of the PPPFA,[94] further provides that a contract may be awarded, on reasonable and justifiable grounds, to a tenderer that did not

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87 A historically disadvantaged individual is defined in reg 1(h) as a South African citizen:
(1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 or the Constitution of the Republic of South Africa, 1993 (the Interim Constitution); and/or
(2) who is a female; and/or
(3) who has a disability: Provided that a person who obtained South African citizenship on or after the coming to effect of the Interim Constitution, is deemed not to be an HDI.
One of the problems with this definition is that it can be interpreted to mean that black men who, because of their age, were not allowed to vote prior to the interim Constitution, are not historically disadvantaged individuals.

88 Published in *Government Gazette* 16085, 23 November 1994.

89 GN R725 published in *GG* 22549, 10 August 2001. They are set out in reg 16(3):
(a) The promotion of South African owned enterprises;
(b The promotion of export orientated production to create jobs;
(c) The promotion of SMMEs;
(d) The creation of new jobs or the intensification of labour absorption;
(e) The promotion of enterprises located in a specific province for work to be done or services to be rendered in that province;
(f) The promotion of enterprises located in a specific region for work to be done or services to be rendered in that region;
(g) The promotion of enterprises located in a specific municipal area for work to be done or services to be rendered in that municipal area;
(h) The promotion of enterprises located in rural areas;
(i) The empowerment of the work force by standardising the level of skill and knowledge of workers;
(j) The development of human resources, including by assisting in tertiary and other advanced training programmes, in line with key indicators such as percentage of wage bill spent on education and training and improvement of management skills; and
(k) The upliftment of communities through, but not limited to, housing, transport, schools, infrastructure donations, and charity organisations.

90 Section 2(1)(e).

91 Section 2(2).

92 Section 2(1)(f).

93 See *Grinaker LTA Ltd and Another v Tender Board (Mpumalanga) and Others* [2002] 3 All SA 336 (T); *RHI Joint Venture v Minister of Roads and Public Works and Others* 2003 5 BCLR 544 (Ck); and *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council and Another* [2003] 2 All SA 340 (T).

94 GN R725, 10 August 2001.

score the highest points. However, this is not provided for in the act itself. It must be read with s 2(1)(f) of the act which states that the contract must be awarded to the tenderer with the highest points unless objective criteria in addition to the goals set out justify the award of the contract to another tenderer. Once again, such reasonable and justifiable grounds are not set out in the regulations. It is uncertain how, in practice, effect should be given thereto.

The PPPFA was not designed to further green procurement but rather to remedy the unequal position of historically disadvantaged people who wish to participate in public procurement. It would be artificial to try and accommodate preferential treatment for green procurement under the provisions of this act.

The meaning of "categories of preference", as provided for in s 217(2) of the Constitution is not altogether clear but it could accommodate green public procurement. However, this will have to be specifically dealt with in national legislation before it can be utilised to further green procurement[95].

4 2 The Green Paper on Public Sector Procurement Reform

The Green Paper on Public Sector Procurement Reform published in 1997 and the forerunner to our present public procurement regime, states with regard to green public procurement, that organs of state should implement policy which will influence vendors to comply with all environmental legislation; offer less environmentally damaging products and services; and develop products from recycled materials. It further states that procurement policy may require vendors to provide proof of their commitment to environmental protection. This may take the form of statements on the steps companies are taking to reduce their impact on their environment, or alternatively, to demonstrate that they are not in breach of any statutory requirements relating to the environment.[96]

It is further proposed in the green paper that organs of state should:

- "buy only from vendors who are in compliance with all environmentally-related legislation;
- promote environmental awareness amongst suppliers, service providers and contractors;
- favour procurement of less environmentally damaging products;
- discriminate in favour of products made from recycled materials;
- require that suppliers limit packaging to the minimum necessary to protect the items supplied;
- favour products which provide information about their effect on the environment;
- develop the environmental awareness of government officials;
- develop and maintain a database of vendors in which information relating to their environmental conduct is retained;
- develop and promote a code of conduct for vendors;
- develop a policy with respect to the use of products containing asbestos."[97]

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95 Section 217(3) of the Constitution.
96 Green Paper on Public Sector Procurement (1997) para 4.27.
97 *Ibid*.

With regard to suppliers, service providers and contractors, it is proposed that they should:

- "comply with the requirements of all environmental legislation;
- require that their suppliers and sub-contractors in turn comply with all environmental legislation;
- consider the environmental impact of their products over their full life cycle from 'cradle to grave';
- minimise the use of energy, non-renewable resources, hazardous chemicals and toxic substances;
- maximise the use of recycled materials;
- minimise the production of waste;
- dispose of all wastes in an environmentally responsible manner;
- not offer products or packaging containing CFCs, HCFCs, halons, carbon tetrachloride and other ozone depleting substances."[98]

These proposals are not reflected in the applicable legislation or regulations.

4 3 Public Finance Management Act

The purpose of the Public Finance Management Act[99] (PFMA), is to regulate the financial management in national and provincial governments. It endeavours to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the act applies.[100] The act applies to departments, public entities listed in Schedules 2 and 3, constitutional institutions, Parliament and the provincial legislatures.[101]

The national treasury has to promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions.[102]

The act also establishes a provincial treasury for each province.[103] The provincial treasuries have to promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities.[104]

Every department, trading entity[105] and constitutional institution must have an accounting officer.[106] The accounting officer has to ensure that his or her department, trading entity or constitutional institution has and maintains an

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98 *Ibid.*
99 Act 1 of 1999.
100 Preamble and s 2.
101 Section 4.
102 Section 5.
103 Section 17.
104 Section 18.
105 "trading entity" is defined in s 1 of the Act to mean . . . an entity operating within the administration of a department for the provision or sale of goods or services, and established–
(a) in the case of a national department, with the approval of the National Treasury; or
(b) in the case of a provincial department, with the approval of the relevant provincial treasury acting within a prescribed framework.
106 Section 36.

appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective[107] as well as a system for properly evaluating all major capital projects prior to a final decision on the project.[108]

Every public entity must be beholden to an authority accountable for the purposes of the act.[109] An accounting authority for a public entity must ensure that that public entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.[110]

National treasury may make regulations or issue instructions applicable to all institutions to which this act applies with regard to the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.[111]

The PFMA once again only sets out a framework within which the relevant accounting officer,[112] or accounting authority,[113] must have and maintain a procurement system. This framework echoes the constitutional requirements of fairness, equitableness, transparency, competitiveness and cost-effectiveness. This entails that every such department, trading entity, constitutional institution and public entity can have its own procurement system as long as it falls within the prescribed framework.

The regulations issued in terms of the PFMA provides that the accounting officer or accounting authority must develop and implement an effective and efficient supply chain management system in his or her institution for the acquisition of goods and services and the disposal and letting of state assets; including the disposal of goods no longer required.[114] Provision is made for procurement through either a tender process[115] or by way of quotations, depending on the value of the goods or services.[116] In the case of procurement through a tender process, provision must be made for tender specification, evaluation and adjudication committees.[117] In terms of the regulations the accounting officer or accounting authority must ensure the following:

1. The tender documentation and the general conditions of the contract must be in accordance with the instructions of the National Treasury, or the prescripts of the Construction Industry Development Board.[118]
2. Evaluation and adjudication criteria, including the criteria prescribed in terms of the PPPFA and the BBBEEA must be included in the tender documentation.[119]

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107 Section 38(1) (a) (iii).
108 Section 38(1) (a) (iv).
109 Section 49.
110 Section 51(1) (a) (iii).
111 Section 76(4)(c). Such regulations and instructions have already been issued and are often referred to as national treasury regulations and practice notes.
112 In the case of a department trading entity or constitutional institution.
113 In the case of a public entity.
114 Reg 16A3.1.
115 The regulations refer to a bidding process. For the sake of consistency the terms tender and tenderer will be used in stead of bid and bidder.
116 Reg 16A6.1. The thresholds are determined by national treasury.
117 Reg 16A6.2.
118 Reg 16A6.3(a).
119 Reg 16A6.3(b).

3. Tenders must be advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure.[120]
4. The awards of tenders must be published in the Government Tender Bulletin and the other media by means of which the tenders were advertised.[121]
5. In the case of information technology, the contract must be prepared in accordance with the State Information Technology Act.[122]
6. When goods or services are procured through, or as part of a public private partnership, regulation 16 must be complied with.[123]
7 In the case of the appointment of consultants, the applicable instructions issued by national treasury must be complied with.[124]

National treasury have issued instructions in terms of the PFMA as well as the the above-mentioned regulations which are referred to as practice notes. None however deal with green procurement.

On national and provincial government level it falls within the prerogative and duty of the departments, public entities listed in Schedules 2 and 3, constitutional institutions, Parliament and the provincial legislatures to identify and fulfil their need for procurement. It is therefore possible for these institutions to decide to procure green goods or services and to decide that green process and production methods be used by the suppliers. These will of course have to be specifically specified in the invitation to tender. Therefore, it will be possible when such an entity needs, for instance, to procure electric bulbs for its buildings to specify that they should be low-energy consuming bulbs. It will also be possible to specify that certain environmentally-friendly production methods be used by the successful tenderer. It must be kept in mind however that the constitutional prescripts of fairness, equitability, transparency, competitiveness and cost-effectiveness which are repeated in the PFMA, need to be complied with. If the environmental requirement(s) have the effect of compromising the above-mentioned constitutional principles, it will not be allowed. Each procurement will therefore have to be dealt with on its own merit.

It will not be possible to give preference to green procurement as envisaged in s 217(2) of the Constitution as the PPPFA does not provide therefore. If the relevant entity wishes to promote green procurement as a secondary goal, it cannot do so by means of a preferential procurement system.

4 4 Local Government: Municipal Finance Management Act

The purpose of the Local Government: Municipal Finance Management Act[125] (MFMA) is to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government. The act establishes norms and standards and other requirements in order to attempt to *inter alia* ensure transparency, accountability and appropriate lines of

120 Reg 16A6.3(c). In urgent cases shorter periods may be used.
121 Reg 16A6.3(d).
122 Act 88 of 1998.
123 Reg 16A6.3(e).
124 Reg 16A6.3(f).
125 Act 56 of 2003.

responsibility in the fiscal and financial affairs of municipalities and municipal entities. It also attempts to ensure the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings through a supply chain management system.[126]

The act applies to all municipalities and municipal entities.[127] The municipal manager of a municipality is the accounting officer of the municipality for the purposes of the MFMA.[128] The accounting officer is *inter alia* responsible for the management of the expenditure of the municipality. He or she must take reasonable steps to ensure that the municipality's supply chain management policy is implemented in a way that is fair, equitable, transparent, competitive and cost effective.[129]

Each municipality and each municipal entity must have and implement a supply chain management policy which must be fair, equitable, transparent, competitive and cost effective and comply with a prescribed regulatory framework for municipal supply chain management.[130] This regulatory

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126 Preamble and s 2.
127 Section 3.
128 Section 60.
129 Section 65. In terms of s 99 the same holds true for municipal entities.
130 Section 111. In terms of s 112 the supply chain system must cover at least the following:
- (a) The range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;
- (b) when a municipality or municipal entity may or must use a particular type of process;
- (c) procedures and mechanisms for each type of process;
- (d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;
- (e) open and transparent pre-qualification processes for tenders or other bids;
- (f) competitive bidding processes in which only pre-qualified persons may participate;
- (g) bid documentation, advertising of and invitations for contracts;
- (h) procedures and mechanisms for—
  - (i) the opening, registering and recording of bids in the presence of interested persons;
  - (ii) the evaluation of bids to ensure best value for money;
  - (iii) negotiating the final terms of contracts; and
  - (iv) the approval of bids;
- (i) other bids above a prescribed value;
- (j) compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids;
- (k) participation in the supply chain management system of persons who are not officials of the municipality or municipal entity, subject to section 117;
- (l) the barring of persons from participating in tendering or other bidding processes, including persons—
  - (i) who were convicted for fraud or corruption during the past five years;
  - (ii) who willfully neglected, reneged on or failed to comply with a government contract during the past five years; or
  - (iii) whose tax matters are not cleared by South African Revenue Service;
- (m) measures for–
  - (i) combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management; and

continued on next page

framework deals with the important stages of procurement. These stages include the methods of procurement; invitations to tender; pre-qualifications of tenderers; tender documentation; tender criteria; the opening of tenders; evaluation of tenders; negotiation of agreements; approval of tender awards; disclosure of conflict of interests; the barring of parties to participate in the tender process; measures for the combating of fraud, corruption, favouritism and unfair and irregular practices; the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced; and contract management and dispute settling procedures.[131]

Once again green procurement is not specifically dealt with in the act or regulations. It is however possible for these institutions, as in the case of state organs on national and provincial level, to decide to procure green goods or services and to decide that green process and production methods be used by the suppliers. These will have to be specified in the invitation to tender. It must once again be kept in mind that the constitutional prescripts of fairness, equitability, transparency, competitiveness and cost effectiveness which are repeated in the MFMA need to be complied with. If the environmental requirement(s) have the effect of compromising the above-mentioned constitutional principles it will not be allowed. Each procurement will therefore have to be dealt with on own merit.

It will also not be possible to give preference to green procurement as envisaged in s 217(2) of the Constitution as the PPPFA does not provide therefore. If the relevant entity wishes to promote green procurement as a secondary goal it cannot do so by means of a preferential procurement system.

5 CONCLUSION

The importance of the environment cannot be ignored in this day and age, irrespective of how sceptical one might be of research results on the deterioration of the environment and its consequences on the future of mankind. In South Africa the importance of the environment can be gleaned from the inclusion of environmental rights in the Bill of Rights and the plethora of legislation relating to the environment.

Green public procurement was mentioned in the Green Paper on Public Sector Procurement. However, it has not been specifically dealt with in the applicable legislation or supporting regulations. In particular, no provision was made in the

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(ii) promoting ethics of officials and other role players involved in municipal supply chain management;

(n) the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by—

(i) councilors in contravention of item 5 or 6 of the Code of Conduct for Councilors set out in Schedule 1 to the Municipal Systems Act; or

(ii) municipal officials in contravention of item 4 or 5 of the Code of Conduct for Municipal Staff Members set out in Schedule 2 to that Act;

(o) the procurement of goods and services by municipalities or municipal entities through contracts procured by other organs of state;

(p) contract management and dispute settling procedures; and

(q) The delegation of municipal supply chain management powers and duties, including to officials.

131 Section 112.

PPPFA to allow any preference in public procurement based on environmental criteria. However, under the public procurement regime it is for the individual organs of state to decide what their needs are. This can include the need for environmentally-friendly goods and services. It is therefore possible for individual state entities to prescribe criteria based on both the performance or specifications of the goods and services to be procured, and the method of production and processing of such goods and services. Of course, this must be done within the constitutional prescripts of fairness, equitability, transparency, competitiveness and cost effectiveness. No preference may however be given outside the provisions of the PPPFA. To enable preference to be given for environmental factors, as a category for which preference may be allowed as provided for in s 217(2) of the Constitution, national legislation providing for a framework for such preferential treatment needs to be promulgated.

As suggested in the Fourth Global Environmental Outlook Report of United Nations Environmental Programme,[132] states will have to develop an integrated policy to address environmental issues to ensure the sustainable use of the environment in the best interest of the planet and its inhabitants. Public procurement needs to be integrated into such policy. Green public procurement will be an inducement for contractors to apply good environmental practices. However, it is necessary that a concerted effort be made by government to promote green public procurement and put a proper policy in place. The necessary legislation providing for preferential green public procurement will also send a signal as to the importance of, and the government's commitment to, environmental issues.

Because of the importance of public procurement as an economic activity in South Africa and the need for green procurement, green public procurement cannot be ignored. Government has the duty to fulfil its environmental obligations under s 24 of the Constitution and public procurement is one of the measures that can be used to do so. As stated by McCrudden,[133] public contracts are awarded on behalf of the communities served by the procuring entities. In principle, it is reasonable that such contracts be awarded to contractors that do not violate the norms of such society. Such contractors should not infringe on society's rights including its environmental rights. Furthermore, government ought to set an example with regard to the environment.

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132 http://www.unep.org/geo (accessed 08-03-2009).

133 McCrudden "International Economic Law and the Pursuit of Human Rights. A Framework for the Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement" 1999 *Journal of International Economic Law* 3 7.

Constitutional Implications of the Restrictions Imposed by the South African Golf Association on Non-Amateur Golfers

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1 INTRODUCTION

This article concerns the relatively new South African golf initiative known as the "Players' Tour", and the constitutional implications of certain restrictions imposed by the South African Golf Association (the Association) on so-called "non-amateur" golfers. In particular, this article considers the extent to which the rights of voluntary associations to freedom of association or non-association may be limited based upon a person's rights to equality and just administrative action.

The article argues that two possible avenues of relief are available to non-amateur golfers. First, in terms of their rights to equality, the horizontal application of the Promotion of Equality and Prevention of Unfair Discrimination Act[1] (the Equality Act) might offer some relief. Secondly, in terms of their rights to just administrative action in terms of the Promotion of Administrative Justice Act[2] (the PAJA) and s 33 of the Constitution of the Republic of South Africa, 1996 (the Constitution) might be an appropriate remedy. As a voluntary association's conduct and policies are not automatically reviewable by the courts, it is argued that although the voluntary association in question (the South African Golf Association) is a private entity, it does perform a public function. Accordingly, this contribution considers the circumstances in which a private body may be held to perform a public function and addresses the balance which must be attained between the right to freedom of association and the right to equality in such instances.

In order to do so, it is necessary to consider each of these constitutional rights individually before applying them to the set of facts in issue. However, before that, it is necessary to sketch some background information regarding amateurism in golf and the governance of golf in South Africa as pertinent to the Players' Tour issue.

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1 Act 4 of 2000.

2 Act 3 of 2000.

2 AMATEURISM IN GOLF

Unlike sports such as cricket and soccer,[3] there is no single international governing body that constitutes the top structure of governance in golf. A further distinction between golf and other internationally-played sports such as soccer,[4] is that the national governing body in golf only governs the game of golf with respect to amateurs. The professional division of the game of golf is governed by the Professional Golf Association. The game of golf is thus split into an amateur and professional section and each section is administered separately.

The game of golf is unique in the way that it codifies, maintains and enforces the concept of amateurism. The Rules of Amateur Status,[5] which are administered by the Royal and Ancient Rules Limited (R & A) and the United States Golf Association, contain provisions that regulate the eligibility of players to participate in the different forms of competitive golf. These rules primarily focus on regulating the receipt of financial incentives for playing golf. The rules of amateur status, important for the argument developed below, have been explained by the national governing body for golf in Australia as follows:

> "Amateur status is a universal condition of eligibility for playing in golf competitions as an Amateur golfer. A person who acts contrary to the Rules may forfeit their status as an Amateur golfer and as a result will be ineligible to play in Amateur competitions. Amateur golf is almost unique in all of sport in that it is totally reliant on a handicapping system which allows any golfer to compete on equal terms with another golfer. Additionally, in virtually any Amateur golf event, competition is reliant upon self-regulation as regards to the Rules of play."[6]

The same Australian body has also explained the rationale for the Rules of amateurism:

> "It is the R & A's position that uncontrolled sponsorship and financial incentive in the amateur game would provide significant temptation to players to manipulate scores and handicaps and to consequently diminish the competitive experience that is enjoyed by so many millions of players. As a result, the R & A, in conjunction with the United States Golf Association, has set standards that limit the degree to which sponsorship and financial incentive may be involved with amateur golfers and amateur golf events …"

3 GOVERNANCE OF GOLF IN SOUTH AFRICA

The R & A and the United States Golf Association are responsible for the administration of the rules of golf. They do not, however, form part of the direct structure of golf governance within South Africa. This task of governance is the responsibility of the Association. The Association is the national governing body for the game of golf in South Africa. However, it governs the game with respect to males only. Female golf is regulated by Women's Golf South Africa. The Association consists of 14 provincial and regional golf unions.[7] It operates in

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3 The International Cricket Council (ICC) and Federation of International Football Associations (FIFA) respectively.

4 In the case of soccer, FIFA is at the top of the pyramid and governs amateur club level soccer and the professional division of the game.

5 *Rules of Golf, the Rules of Amateur Status* (2004) 154.

6 Extract from information sheet issued by Golf Australia, 12 May 2006 as quoted by Louw in Louw "An 'anomaly tolerated by the law': examining the nature and legal significance of the International Sports Governing Body" 2007 *SA Public Law* 211.

7 http://www.saga.co.za/unions_new.html (accessed on 27-05-2007).

terms of a mandate given to it by these unions and the golf clubs which are affiliated to the Association. The Association is recognised by the international rule-making body, the R & A, and its status and objectives are described in its constitution as the following:

> "The Association is the controlling body of amateur male golf in its area of jurisdiction and its purpose is to co-ordinate the activities of its members and to ensure the maintenance of the tradition of amateur golf in the area of jurisdiction."[8]

One of the powers and functions of the Association listed in its constitution (arguably its most significant function in relation to the average golfer) relates to the administering of an official handicapping system for amateur golfers and those professional golfers who are allowed handicaps. The Association has a monopoly in the regulation and administration of golf handicaps and consequently controls the way in which the average golfer can participate in the game of golf; be it at an amateur competitive level or merely on a social level. The handicap system distinguishes golf from any other sport in that any non-professional who wishes to participate in the sport must have an official handicap. In order to obtain a handicap, one is generally required to obtain a membership at a golf club which is affiliated to the Association. A significant advantage of being a member of an affiliated golf club is that the playing fees are drastically reduced when playing at one's own club or at other affiliated clubs. This financial incentive is initially the primary reason why most golfers become members of a golf club. The Association is also responsible for a course rating system which enables the calculation of handicaps on golf courses of varying difficulty.

The issue of the Players' Tour requires consideration against this backdrop.

4 THE PLAYERS' TOUR

The issue under discussion involves a dispute within the sport of golf in South Africa. At the centre of this dispute is a new golfing initiative, the Players Tour, which came into operation in June 2006. The Players' Tour is a golf organisation which may be joined by any person who is at least eighteen years old and who has an official golf handicap.[9] By joining the Players' Tour a golfer may compete in regional and national tournaments where substantial amounts of prize money may be won. It is this prize money which has caused controversy because, as indicated above, amateur golfers are not permitted to accept any cash prizes in terms of international golfing rules to which the Association subscribes. By accepting such prizes, the golfer contravenes the rules of golf relating to amateur status and, as a consequence, he has to forfeit his amateur status. For this reason, the Players Tour is primarily a "non-amateur" golf tour. A non-amateur golfer is accordingly a golfer who is neither an amateur nor a professional.[10] He is simply a regular golfer who has forfeited his amateur status and who accepts prize

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8 Clause 4, The South African Golf Association Constitution.

9 A handicap is defined in the handicap manual found on the national golf handicap website: www.handicaps.co.za/2007handicapmanual.pdf (accessed on 27-05-2007) as "the number of strokes a player receives to adjust their inherent scoring ability to the common level of scratch or zero-handicap golf".

10 Professional status is attained by meeting certain other requirements and is irrelevant for present purposes.

money contrary to the rules of golf which prohibit an amateur golfer receiving prize money.[11]

In normal circumstances such forfeiture merely has an effect on the golfer's eligibility to participate in certain forms of golf. However, the Association and its affiliated golf clubs have decided to impose even more restrictions upon non-amateur members of the Players Tour than what would normally be imposed upon golfers who do not have amateur status.

One of the Association's primary objectives is the preservation of the amateur code in golf. Therefore, it appears to consider the concept of non-amateurism negatively. This is evinced by the influence exerted by the Association on its affiliated unions and clubs by way of recommendations which demonstrate hostility to golfers associated with the Players' Tour. As a consequence of these recommendations, golf clubs in South Africa, with few exceptions, are refusing the use of their facilities to host Players' Tour tournaments and are penalising individuals who have joined the Players' Tour as non-amateurs by imposing severe sanctions against them. These sanctions include the refusal of membership of prospective golf club members and termination of membership of existing members of golf clubs; termination of affiliation to the Association; and, perhaps most significantly, loss of official handicap.[12] As a result, the restrictions are severe and appear to be aimed at impeding non-amateur golfers in the Players' Tour from participating in the game of golf at any level.

In balancing the interests of the Association on one hand and that of non-amateur golfers on the other, it must be accepted that the application of the concept of amateurism is unique in golf. This is as a result of the honour system upon which the game of golf operates. It must also be understood that the prohibition of financial incentives in amateur golf is based solely on the fear of handicap manipulation and cheating by players in order to win prizes. Proponents of the rights of non-amateur golfers, by contrast, challenge the extent of control enjoyed by the Association via their administration of golf handicaps, as described above. In short, their argument is that if the average golfer is stripped of a handicap, he or she will be hard pressed to be able to afford to play golf. Membership at a nationally affiliated golf club, together with an official handicap card, provides significant financial benefit in the form of reduced green fees at all other affiliated golf clubs in the country.[13] This enables golfers to play golf at other nationally affiliated golf clubs at a fraction of the usual cost. The Association thus has the power to exclude other forms of participation in the game of golf such as non-amateur golf, as it sees fit, by simply penalising "offenders" who wish to participate in such initiatives by taking away their handicaps and affiliation. The manner and form of this exclusive control deserves scrutiny under South Africa's constitutional framework.

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11 This statement is something of an over-simplification of the actual position: according to the Rules of Golf, amateurs may accept non-monetary prizes. However, the monetary value of the prize may not exceed a certain value specified by the R & A and the United States Golf Association from time to time.

12 Affiliation refers to the financial benefit (a reduction in playing fees when playing other courses) of being a member of a golf club which is affiliated to the Association. Reciprocity refers to the same type of financial benefit as affiliation. However, its basis is a partnership that one golf club has with certain specific other golf clubs rather than all other golf clubs which are affiliated with the Association.

13 A green fee is the fee payable to a golf club in order to play its course.

As mentioned in the introduction above, it may be argued that non-amateur golfers essentially have two possible avenues which may provide them with appropriate relief in response to the Association's actions. First, the direct horizontal application of the Equality Act (specifically enacted to provide remedies in the private sphere) may provide relief to non-amateur golfers on the basis that the Association's actions discriminate against them. Secondly, the refusal of membership, expulsion from membership and the infringement of other membership rights of non-amateur golfers by the Association may constitute an infringement of non-amateur golfers' right to just administrative action. On the latter basis, judicial review may provide relief in terms of the Promotion of Administrative Justice Act and s 33 of the Constitution. Whether or not the Association and its affiliates can be held to perform administrative actions within the means of the PAJA is a question which must be determined with reference to the nature of the functions and powers of the Association. In order to argue and establish that the Association *does* perform such an administrative function, it is necessary to show that it fulfils functions of a public nature.

5 THE APPLICABLE LEGAL FRAMEWORK

5 1 Application of the right to equality

The right of non-amateur golfers which is most severely affected by the policies of the Association and its affiliated golf clubs is the right to equality, which includes the right not to be unfairly discriminated against. In this instance, the discrimination is manifested in various ways. For example, the refusal of membership, handicaps and affiliated playing rates described above. The discrimination is not directed at the individual members only, but also against the Players' Tour itself by golf clubs which follow the Association's recommendation that golf clubs refuse the Players' Tour access to their facilities to host competitions.

The Equality Act appears to create the most appropriate legal framework for consideration of the germane issues. In particular, the Equality Act provides more detailed definitions and a wider range of remedies than the Constitution. For example, s 29 of the Equality Act provides for an illustrative list of unfair practices in certain sectors by means of a schedule to the Act. The schedule does not, however, detract from the general provisions of the Equality Act. Its purpose is to illustrate and emphasise certain practices that are widespread and that need to be addressed because they may be unfair. The schedule specifically lists unfair practices with regards to sport clubs and sports associations in s 10 thereof. One of the listed unfair practices regarding sport clubs and associations is the unfair refusal to consider a person's application for membership and the unfair denial of membership benefits or the unfair limitation of such benefits to a member of the club or association. These practices are thus specifically prohibited. The application of the Equality Act is accordingly more suited to such instances of discrimination in the private sphere than the direct use of the Constitution. In addition, the Equality Act was created in terms of s 9 of the Constitution to serve precisely this purpose. Therefore an analysis in terms of the Equality Act, which places the emphasis on an equitable balancing of the interests of both parties, is more appropriate to the current situation than the *Harksen* analysis, as formulated by the Constitutional Court.[14]

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14 *Harksen v Lane NO* 1997 11 BCLR 1489 (CC).

5 1 1 Establishing the existence of discrimination

In an endeavour to establish a case based upon unfair discrimination, one must start by establishing that the conduct in question (in this case, the policies and conduct of the Association and its affiliates) does indeed constitute discrimination. The Equality Act defines discrimination as:[15]

> ". . . any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—
>
> (*a*) imposes burdens, obligations or disadvantage on; or
>
> (*b*) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds; . . ."

In the scenario under discussion it is the second category of prohibited grounds, *viz.* the analogous grounds referred to in the Equality Act under its definition in s 1(b), which is relevant in establishing discrimination. These additional grounds are:

> "any other ground where discrimination based on that other ground—
>
> (i) causes or perpetuates systematic disadvantage;
>
> (ii) undermines human dignity; or
>
> (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)".

It is submitted that the conduct and policies of the Association and its affiliates do constitute discrimination in terms of the definitions of "discrimination" and "prohibited grounds" in terms of the Equality Act. The conduct and policies in question appear to withhold benefits, opportunities or advantages from non-amateur golfers on one or more of the prohibited grounds. Furthermore, it appears that the reported conduct and policies cause or perpetuate systematic disadvantage in that non-amateur golfers' access to the game of golf is limited. It is also arguable that their human dignity is undermined by the creation of a stigma which suggests that all non-amateur golfers are dishonest persons. These matters are dealt with in greater detail below.

5 1 2 The presumption of unfairness

In terms of the approach developed by the Constitutional Court in *Harksen v Lane NO*,[16] an applicant who relies on an analogous ground has to establish that discrimination exists before proving that it is unfair. The applicant in *Harksen* did not benefit from the presumption of unfairness which applied to discrimination based upon a listed prohibited ground. However, s 13 of the Equality Act does afford this benefit to the applicant. In terms of s 13(2)(b), if the applicant establishes one or more of the conditions set out in s 1(b), the discrimination will be deemed to be unfair unless the respondent proves that it is fair. It is submitted that the presumption of unfairness therefore applies to the situation under discussion because one or more of the conditions set out in s 1(b), has been established.

5 1 3 Determining unfairness and the question of justifiability

The final stage in establishing a case of unfair discrimination is the determination of unfairness with regards to the conduct and policies of the

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15 Section 1.

16 *Harksen v Lane NO* para 38.

Association and its affiliates. Because of the presumption of unfairness being applicable in the present situation, the *onus* will be placed upon the Association and its affiliates, when faced with a court challenge, to prove that the discrimination is not unfair. This shift in *onus* is appropriate because the party who causes the discrimination is in a much better position to explain and justify its discriminatory conduct. In this case, the Association and its affiliates know the reasons for the institution of the policies in question and may possess the necessary information to justify their conduct.

Section 14 of the Equality Act deals with the criteria that must be considered in order to determine whether the discrimination in question is unfair and s 14(2) provides the factors one must consider in determining fairness or unfairness. Section 14(2)(a) refers to the context in which the discrimination takes place. The context in which a voluntary sports association operates is that of an entity which provides a service to its members and the public in general and which enriches and fulfils the lives of those who participate in the activities of the sports association. The rights of the association to protect its own existence and the positive function that it serves in society should therefore be accommodated – but not at the expense of other people's rights, such as a non-amateur golfer's right to equality.

Section 14(2)(b) refers to the factors listed in s 14(3).[17] Section 14(3) contains two general enquiries.[18] The first part of the enquiry concerns the impact of the discrimination on the complainant, and the second part provides for an assessment of the justification for the discrimination. The impact that the discrimination has on non-amateur golfers is twofold.[19] First, there is the impact of losing the financial benefits of membership and, consequently, the practical impact that non-amateur golfers are limited in accessing the game of golf.

Secondly, the dignity of non-amateur golfers may be impaired as a result of being ostracised by the golfing community and being surrounded by the suspicion of dishonesty. Such a stigmatisation is unfair towards golfers who abide by the rules. It is irrational to assume that all or at least some players will always cheat in such events. Such an assumption is based upon a generalisation that all golfers when playing for financial incentives will act dishonestly. This same generalisation is not directed against amateur golfers who play in amateur events where substantial non-monetary prizes are involved, such as expensive golf equipment and vacation packages. Such an assumption leads to the stigmatisation that players who compete as non-amateurs are dishonest. A consequence of this may be the impairment of the dignity of golfers who compete as non-amateurs.

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17 The factors which are listed in s 14(3)(a)–(i) are the following: whether the discrimination impairs or is likely to impair human dignity; the impact or likely impact of the discrimination on the complainant; the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage; the nature and extent of the discrimination; whether the discrimination has a legitimate purpose; whether and to what extent the discrimination achieves its purpose; whether there are less restrictive and less disadvantageous means to achieve the purpose; whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to address the disadvantage which arises from or is related to one or more of the prohibited grounds or accommodate diversity.

18 Albertyn, Goldblatt and Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 42.

19 Section 14(3)(a)–(c).

The impact of the discriminatory measures on non-amateur golfers is made worse by the fact that the benefits which they have been deprived of cannot be obtained elsewhere. This is due to the Association's monopoly and control over the game of golf. The impact arguably would have been far less severe had another association existed through which meaningful entry to the sport of golf could be obtained.

In assessing the justification for the discrimination, the purpose of the discrimination, and the link between the Association's and its affiliates' purpose and the interests should be examined.[20] The purpose of the discriminatory policies and conduct in the situation under discussion is to protect the amateur code in the game of golf. It is one of the primary goals of the Association to maintain the amateur code in golf. Therefore a link between the purpose of the discrimination and the interests of the associations' involved does exist. The weight of this purpose, as balanced against the right to equality, must be determined in order to establish whether such purpose may constitute a valid justification for the discriminatory measures which protects it. In this regard, one may consider the approach followed in *Pillay v Kwazulu-Natal MEC of Education and Others*.[21] The court in this case examined the purpose of the discriminatory measure in question with reference to the activity concerned, and found that the purpose of the discrimination did not warrant the limitation of the constitutionally protected religious and cultural rights of the complainant. On appeal, in *MEC for Education: KwaZulu-Natal and Others v Pillay and Others,*[22] the Constitutional Court confirmed that the school's discriminatory conduct against Ms Pillay was unfair and that there was no evidence to show that the purpose of the discriminatory measure was a valid and justifiable purpose in the circumstances. The court emphasised that the Constitution required public educational institutions to facilitate environments in which all learners' religious and cultural backgrounds are equally protected.

Section 14(2)(c), read together with s 14(3)(f), places a significant amount of weight on the purpose of a discriminatory policy or action and, more specifically, its purpose in relation to the person or body which imposes it. The section does so in order to assess the validity of the policy or conduct. It is questionable whether and how the amateur code will be affected by some golfers competing in non-amateur events which are unrelated to the Association and completely independent from it. It is accordingly submitted that the Association's fear of a negative impact on the amateur code in golf will have to be rationalised and well established before it may justify the limitation of the right to equality of non-amateur golfers.

Part of the justification assessment involves an enquiry into the possibility of less restrictive and disadvantageous means to achieve the purpose in question.[23] In the case at hand, such less restrictive or disadvantageous means may be to penalise non-amateur golfers by restricting their eligibility to compete in official amateur events only. Ultimately, this is the reason for the existence of the

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20 Section 14(3)(f).

21 2006 10 BCLR 1237 (N) paras 57–65.

22 2008 2 BCLR 99 (CC) paras 167–171.

23 Section 14(3)(h).

concept of amateurism. By contrast, it is submitted that sanctions imposed against non-amateurs which affect them financially or socially are unnecessary to achieve the purpose of protecting the amateur code. Instead, the purpose in question may be achieved by simply restricting the eligibility of golfers who choose to become non-amateurs to compete in official amateur events. The issue of eligibility, which is the only privilege which need be affected in order to preserve the amateur code, is wholly unconnected to the financial benefits of membership and to the dignity of non-amateur golfers. The means adopted by the Association and its affiliates to achieve its desired purpose would therefore appear to limit the rights of non-amateur golfers more than is necessary.

Due to the serious and widespread nature of discrimination with regards to members or prospective members of sports associations, and the result of the Equality Act analysis conducted above; it is submitted that the discriminatory policies and conduct of the Association and its affiliates directed at non-amateur golfers is indeed unfair.

5 2 Application of the right to freedom of association

The argument that the Association and its affiliated golf clubs have a constitutional right not to associate with the Players' Tour and its non-amateur members must be countenanced. This negative element of the right to freedom of association is not absolute and does not bestow upon a person or entity a licence to unfairly discriminate. In terms of Canadian law, it has been held that this right of non-association does not enable one to simply avoid any association which one desires not to belong to, or refuse to have dealings with.[24] The same has been held in South African law in *Law Society of the Transvaal v Tloubatla*.[25] In this case the court held that lawyers and other professionals may be compelled to belong to the professional body which regulates their respective profession in South Africa. Therefore, even though a professional may not feel inclined to join such a professional body, and may want to rely upon a right of non-association to escape having to join it, the right of non-association may be limited and the person may be compelled to join the body. In other words, the public's interest in having a certain profession regulated properly outweighs the professional's right of non-association in this case.

The same argument may be made on behalf of the Association and its affiliates even though, in this situation, it is an association which is refusing to associate with individuals. It is true that the Association and its affiliated golf clubs may, in terms of their right to non-association, exclude non-conformists and require members to conform to its principles and rules.[26] However, such rights should not be interpreted as being absolute and should be exercised in accordance with the constitutional values. For example, a balance must be found between the Association and its affiliates' rights to freedom of non-association, and the right to equality of non-amateur golfers in the situation under discussion. In such a balancing process, one of the rights must inevitably be limited by the other. Section 36 of the Constitution contains the criteria for the justification of limiting rights in the Bill of Rights. In terms of this section, the nature of the right that is limited, the importance of the purpose of the limitation in our

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24 See generally *Lavigne v Ontario Public Service Employees Union* 1991 4 CRR.

25 1999 11 BCLR 1275 (T).

26 See *Wittman v Deutscher Schulvere in Pretoria* 1998 4 SA 423 (T).

society, the extent of the limitation, its efficiency, and whether the same result could be achieved through other means which are less damaging to the right in question, must be considered.

It may be argued that the infringement of the right to equality of non-amateur golfers serves to achieve a purpose of the Association which is of comparatively less importance than the right which is limited. The purpose of the limitation is to protect the amateur code in golf, a concept which is both archaic and comparatively insignificant in comparison to the right to equality. In addition, it is submitted that the right of non-amateur golfers to participate in the game of golf, free from prejudice, should outweigh the Association's right of non-association in this instance. Excluding non-conforming members based on irrational or unfairly discriminatory grounds should not be permitted.

5 3 The application of the right to just administrative action

Members of sports associations are required to perform in terms of their membership agreement. Certain non-financial duties are owed to the golf club by its members. Arguably the most important of these is the duty of loyalty. In terms of this duty, members are obliged to refrain from doing anything that could be detrimental to the goal for which the club was created. A golf club or the Association, when faced with a court challenge instituted by the Players' Tour or by one of its members, may argue that a member who registers as a non-amateur and who accepts financial incentives for playing golf acts contrary to the goal for which the golf club was created – namely the enjoyment of the game of golf by its members while upholding the amateur code. They may also argue that the protection and regulation of amateurism is one of the foundational goals of the R & A and the United States Golf Association. In line with the European model of sports, the Association and its affiliates also adhere to the goals of the R & A. The protection of amateurism is thus one of the goals of any golfing body or golf club in South Africa.

In order to determine whether one is in breach of this duty of loyalty by simply becoming a non-amateur golfer, certain questions need to be answered. Does non-amateur golf threaten the existence of amateurism? Is the protection of amateurism more important than the fundamental right of non-amateur golfers to equality? And, practically, to what extent is the Association and its affiliated golf clubs immune to intervention by the courts with regards to their disciplinary conduct towards their members? This last question is dependent on whether or not the Association performs a public function because only the decisions of bodies which perform public (and not private) functions are subject to judicial review and just administrative action in terms of s 33 of the Constitution.

5 3 1 Private sport entities that perform public functions

Both s 33 of the Constitution and PAJA are applicable only to the conduct of bodies which perform public rather than private functions. PAJA applies to administrative conduct which it defines as conduct performed by bodies which perform public functions or exercise public powers in terms of an empowering provision, which in turn includes a contract such as a membership agreement or a constitution. The constitution in terms of which the Association operates therefore constitutes an empowering provision. This definition in PAJA may thus include certain actions of the Association.

The determining factor in deciding whether a particular association performs a public function is not the private or public nature of the association itself, but rather the public or private nature of the power exercised or the function being performed by the association.[27] The substance of the nature of the association's powers and functions must therefore be taken into account, not merely the form which the association takes.

In terms of the definition of administrative action, as per s 1 of PAJA, private bodies are clearly included as being susceptible to judicial review. However, the inclusion of private bodies are limited to those bodies which exercise public powers. Those private bodies which perform private functions and exercise *private* powers in terms of a contract with their members (such as churches and clubs), are not included in the scope of the definition contained in the PAJA.

Traditionally our courts have been of the opinion that voluntary associations should be free to refuse membership applications for any reason the association deems fit. This position was expressed in *Carr v Jockey Club of South Africa*[28] where the court held that, in the case of an application by a non-member for membership or for permission to use the facilities of the association, the latter may decide for whatever reason not to receive or consider the application. In *Carr,* the court compared this freedom of the voluntary association to the freedom that any person has to decline to consider an offer to enter into a contract. The court held further that such a decision by a voluntary association is in effect not reviewable, regardless of whether membership may be of considerable economic benefit to the applicant. This view was shared in *Johnson v Jockey Club of South Africa*[29] where the court held that the Jockey Club was a private association and that no member of the public had a claim against the Jockey Club for damages in circumstances where the Club refused to admit him to any of the Club's privileges or where the Club simply refused to have anything to do with him.

With regards to the exercise of discretionary authority towards existing members of a voluntary association, the court held in *Carr v Jockey Club of South Africa*[30] that judicial intervention is only warranted if it is shown that such an exercise of discretion was not in accordance with the rules of the association. The court held that such rules constitute the terms of the contract between the parties and unless there has been a breach thereof, no grounds for review or intervention arise.

In *Cronje v United Cricket Board of South Africa*[31] the court was not willing to accept that the United Cricket Board performed a public function. The court held that the United Cricket Board's powers were based in contract and that the Board was under no statutory duty to act in the public interest.[32] However, Driver and Plasket argue that this viewpoint ignores the reality of the monopoly of power that such a body has at its disposal, and that the functions it performs may be equated with governmental functions in its particular sphere.[33]

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27 Hoexter *Administrative Law* (2007) 119.

28 1976 2 SA 717 (W) 721.

29 1910 WLD 136 140.

30 *Carr* 722.

31 2001 4 SA 1361 (T).

32 *Cronje* 1375F–1376C. See discussion under 4 4 above.

33 Driver and Plasket "Administrative Law" 2001 *Annual Survey* 81 116.

By contrast, it has been held in the decisions of both *President of the Republic of South Africa v The South African Rugby Football Union*[34] and *Tirfu Raiders Rugby Club v SA Rugby Union*[35] that the South African Rugby Union performed a public function.[36] In addition, the court in *Coetzee v Comitis*[37] accepted that the National Soccer League performed a public function and that its activities were of public interest. The court also emphasised the fact that any person who wishes to play professional soccer in South Africa is subject to the rules of the National Soccer League.[38]

Finally in this regard, it is noteworthy that the Constitutional Court in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council*[39] held that the Micro Finance Regulatory Council's composition and mandate indicate that even though the Council's legal form is that of a private company, its functions are essentially to regulate an industry – a function it carries out in the public interest and in the performance of a public duty. The court held that the Council did indeed perform a public function.[40]

This recent judgment confirms the courts' gradual shift in their understanding of the nature of public powers and functions, and the courts' willingness to recognise the public powers and functions of certain private associations. In determining whether the Association performs a public function, one may consider the following: the Association is responsible for the governing of golf in South Africa and constitutes the formal structures through which the game is administered. It has sole control and powers of administration over the golf handicapping system which enables all golfers to participate in the game, whether it be in organised competitions or socially. It also regulates all official tournaments in South Africa[41] including the SAA South African Open,[42] and is responsible for golf development at school level. Further, the Association regulates entry into the game of golf by any member of the public in a monopolistic manner. If the Association did not perform this function, an organ of state may have to perform this regulatory function.

One may argue therefore that some private regulatory bodies, such as the Association, do perform public functions. Hoexter submits that this argument would be difficult to sustain with regards to private sports clubs, but that the argument could be successful in relation to an association such as the Jockey Club. The Jockey Club is a regulatory body. It regulates the entry into the profession of horse racing. If the Jockey Club did not exist, this regulatory function might have to be exercised by an organ of state. If this argument were to be successful, at least some of the actions of the Jockey Club would be regulated

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34 2000 1 SA 1 (CC) 181.

35 [2006] 2 All SA 549 (C) paras 23–24.

36 See discussion under 4 4.

37 2001 1 SA 1254 (C) 17.

38 2001 1 SA 1254 (C) 38.

39 2006 11 BCLR 1255 (CC) 45.

40 *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2006 11 BCLR 1255 (CC) 40.

41 Except for Sunshine Tour events which is the official professional tour in South Africa.

42 This tour is co-sanctioned by the European Tour which is the main professional tour in Europe.

by PAJA.[43] Taking this position further, Louw argues that just administrative action is especially relevant in the context of professional sport because here the potential participants' rights of access relate not only to the benefits usually associated with club membership, but also to constitutional guarantees regarding the freedom to pursue an occupation or engage in economic activity.[44]

Similar to the Jockey Club, the Association regulates the entry of persons into a sport - although the Association does not regulate the entry into a profession (as the Jockey Club does) but to the entry into the game of golf at an amateur level. It is significant, however, that the amateur game of golf is unique in comparison to all other sports in the manner in which it is regulated. In no other sport is the entry into, and participation in the sport so strictly regulated, even at a mere social level. A golfer is not permitted to compete – even in social club competitions – if he is not affiliated to the Association. A golfer's access to the game of golf is thus reliant on affiliation to the Association. It is possible to play golf without being associated with the Association. However, one cannot participate in the game at an organised or socially competitive level without the Association because of the unique handicap system which applies. The point is that without a handicap competing is not possible, even on a social level.

This strict national regulatory function and the monopolistic nature thereof are analogous to that of the functions of the Jockey Club and other sports bodies, such as the South African Rugby Union and the Professional Soccer League (in particular when regard is had to the regulatory function these bodies perform). This analogy exists despite the Association regulating the amateur game of golf only. The public has a great interest in how the game of golf is governed because it affects the public's actual active participation in the game in addition to their access to attend and watch tournaments. It is submitted that the Association does indeed perform a public function. In line with the developments in Europe and elsewhere, and the approach followed in the *Tirfu* case,[45] *President of the Republic of South Africa v The South African Rugby Football Union*[46] and *Coetzee v Comitis*,[47] the conduct of private sports governing bodies such as the Association and its affiliated golf clubs may be subject to intervention or review by our courts. This is particularly the case with respect to their freedom of contract when denying membership applications, the ability to vary the contractual rights and benefits of existing members, and powers to take disciplinary action against their members (such as expulsion) which must comply with the rules of natural justice.

5 3 2 Other issues

Certain problems may arise when a private and monopolistic entity is conducting a regulatory task, performing a public function or exercising a public power, such as the Association. One such problem is that the golfer does not have a

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43 Hoexter *Administrative Law* (2007) 193.

44 Louw "Employment Based on a Fiction: Evaluating the Legitimacy of Traditional Notions of Contract in their Application to an Atypical Employment Relationship" 2007 *Obiter* 187 228.

45 See 4 4 *infra*.

46 *The South African Football Union* 181.

47 2001 1 SA 1254 (C) 17.

choice in the matter of who provides the service and he may have no effective private law remedy against the Association as a "private provider" of an essential service (the service being the entry to the game of golf). The golfer's private law remedies may be limited to those which are found in contract but the Association may then merely rely on the terms of the contract between it and the golfer to escape any responsibility. By entering into an agreement with a golf club and with the Association, the golfer submits himself to the standards set by the Association in terms of its constitution, with regards to amateur status and the protection of the amateur code. However, whether a golfer agrees with these terms or not, he is obliged to enter into the agreement if he wants to participate in the game of golf. One must also bear in mind that without an express provision contained in the voluntary association's constitution to this effect, it is not empowered to expel members.[48] Upon a reading of the Association's constitution, it is apparent that there is no such express provision in its constitution. Neither is it included by necessary implication. It is therefore submitted that the expulsion of membership and the termination of members' handicaps by the Association may result in a violation of such members' administrative rights in terms of s 33 of the Constitution and in terms of PAJA.

Further support for this view may be found in Louw's submissions that the traditional view of absolute freedom of voluntary associations to refuse membership may need to be reviewed, given the nature of organisation of the governance of modern sport.[49] Louw argues that where such governance is based on a monopoly of control, for example one supreme national governing body for the sport exercising control over provincial or regional unions and clubs, the freedom of that body to limit access to membership should be limited and should be based on reviewable and just administrative action in terms of s 33 of the Constitution.[50] The right to just administrative action becomes of particular importance in respect of disciplinary action by such associations and the imposition of sanctions on members. If an association has a monopoly of control in a given field and is also free from any judicial review, the possibility arises that the rights of existing and prospective members may be abused by such an association.

6 CONCLUSION

The constitutional values of our country have a bearing on every aspect of our society, be it law, politics or even sport. Two possible remedies which non-amateur golfers may have against the actions which have been taken against them by the Association and its affiliates have been discussed. First, the direct horizontal application of the Equality Act in terms of a non-amateur golfer's right to equality and the right not to be unfairly discriminated against. Secondly, the remedy of judicial review, with regards to a non-amateur golfer's right to fair administrative action in terms of PAJA and s 33 of the Constitution. The Association's right to freedom of association was also briefly countenanced.

The Association's monopoly of control has enabled it to dictate the form in which people may participate in the game of golf, to the exclusion of all non-conformers. The penalties imposed against non-conforming golfers are extreme.

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48 See discussion under 4 3 1; *Conrad v Farrel* 1974 2 SA 200 (C) 202.

49 Louw 2007 *Obiter* 187.

50 *Ibid*.

These penalties include the refusal of membership, termination of existing membership and the loss of the financial and other benefits of membership to a golf club. Such conduct is specifically prohibited by the Equality Act in s 10 of its schedule. The grounds upon which the conduct of the Association is based are the preservation of the amateur code in golf and the unfounded assumption that financial incentive for participation in the game will corrupt all golfers. Neither of these two grounds justifies the violation of non-amateur golfers' rights to equality. It has been submitted that the policies and conduct of the Association and its affiliates in fact constitutes unfair discrimination. In any event, the purpose sought to be achieved could have been realised by making use of far less restrictive means. It has been submitted that these policies therefore limit the rights of non-amateurs more than is necessary to achieve their purpose.

In order to justify their exclusionary policies, private bodies such as the Association may assert their right to freedom of non-association and may, when faced with a court challenge, argue that as private bodies they should be entitled to refuse to associate with whomever they choose. However, the purpose for which these private bodies seek to enforce their right to non-association may not in each instance justify the limitation of the right to equality in a constitutional democracy that values human dignity, freedom and equality above all other considerations. This balancing process does not suggest that the association rights of the Association are inferior to the right of equality in general. In essence, the argument is simply that the underlying reason for the assertion of the right to non-association and the consequent limitation of the right to equality in this particular case simply does not justify such a limitation.

Traditionally, our courts have held that voluntary associations should be free to refuse membership applications for any reason the association deems fit. However, recent judgments such as that of *President of the Republic of South Africa v The South African Rugby Football Union* and *Tirfu Raiders Rugby Club v SA Rugby Union,* suggest a growing trend in our jurisprudence towards recognising the fact that certain private bodies do perform public functions, and that in terms of our constitutional values, unjustifiable exclusionary policies of these bodies should be carefully scrutinised by our courts. It has also been argued in line with such reasoning that the Association does perform a public function. The conduct of the Association and its affiliated golf clubs is thus open to review and intervention by our courts. The autonomy of these voluntary associations is thus subject to their members' and other affected parties' rights to just administrative action.

In order to determine whether the exclusionary or discriminatory policy in question is valid and justifiable, the court may embark upon balancing the interests of the private body in question against the interests of those who are adversely affected by its policies. The reason or justification for such policies will have to be constitutionally sound in order for it to be valid and enforceable in our democracy which has the constitutional values as its cornerstone. The exclusionary policies of the Association have had a severely prejudicial effect on non-amateur golfers and it has been suggested that the implementation of this approach will not withstand constitutional scrutiny given the rights of non-amateur golfers and the recent trends in our case law.

Defining the minimum essential levels of socio-economic rights: The role of comparative analysis in delimiting the minimum core of socio-economic rights

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1 INTRODUCTION

This article seeks to conduct a functional comparison of the different approaches towards the protection and realisation of socio-economic rights under the South African, Indian and German constitutions. The purpose of the functional comparison is to develop a novel approach to the interpretation of socio-economic rights. Since the Constitution of the Republic of South Africa, 1996 (hereinafter "the South African Constitution") is the only one of the constitutions under examination which contains express socio-economic rights codifications, the novel approach will be developed in the context of the South African Constitution. The main focus is based on the jurisprudence of the highest national constitutional courts in the respective jurisdictions; namely, the Indian Supreme Court, the South African Constitutional Court and the German Federal Constitutional Court (*Bundesverfassungsgericht*). Besides the jurisprudence of these superior courts, reference may be made, in appropriate situations, to the jurisprudence of relevant inferior courts.

This article employs the finalist functional method of comparative law.[1] The theoretical starting point is that the world's legal systems should fulfil certain purposes. Those purposes are the same everywhere. However, the fulfilment of the purposes is attained in different jurisdictions by utilising different rules of positive law. The purposes of positive law are universally commanded by natural law. The *tertium comparationis* which is employed in this article is the *causa finalis* of socio-economic rights. The principal purpose, ie the *causa finalis,* of any socio-economic right codification is to protect the socio-economic wellbeing of the respective country's citizens and/or residents in order to ensure that they have the material means available to enjoy a dignified life.

While only a few of the world's national constitutions guarantee enforceable socio-economic rights as a part of their Bills of Rights, courts in various jurisdictions have taken it upon themselves to fill in this void. They achieve the realisation of certain minimum essential levels of socio-economic rights by interpreting other fundamental rights to protect the *causa finalis* of socio-economic rights. Of the three jurisdictions under scrutiny only South Africa has a

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* This article forms part of the author's doctoral research at the University of Venda under the supervision of Professor Obeng Mireku.

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1 See Michaels "The Functional Method of Comparative Law" in Reimann, Mathias and Zimmermann, Reinhard (eds) *The Oxford Handbook of Comparative Law* (2006) 339–382.

constitution which contains justiciable socio-economic rights. The German Basic Law of 1949[2] does not explicitly entrench socio-economic rights. On the other hand, the Constitution of India[3] provides for socio-economic rights, but only through "Directive Principles of State Policy"[4] which are not judicially enforceable.[5]

2 PART 1: A FUNCTIONAL COMPARISON OF THE CONSTITUTIONAL PROTECTION OF SOCIO-ECONOMIC RIGHTS UNDER THE SOUTH AFRICAN, INDIAN AND GERMAN CONSTITUTIONS

2 1 South Africa

While express justiciable socio-economic right stipulations are absent in the German and Indian[6] constitutions, the socio-economic rights contained in the South African Constitution have been praised around the world as exemplary. Ironically, it is highest courts in India and Germany, rather than the South African Constitutional Court, which has offered, at times, socially disadvantaged litigants effective relief. For example in *Soobramoney v Minister of Health (KwaZulu–Natal)*[7] and *Government of the Republic of South Africa and Others v Grootboom and Others*,[8] the South African Constitutional Court failed to assist the litigants seeking protection of their socio-economic rights. In *Soobramoney*, the South African Constitutional Court refused to provide relief to a patient who had been denied medical treatment for his chronic ailment. The patient died shortly before the judgment. In *Grootboom* the court also refused, despite finding that the housing programme of the government fell short of the constitutionally required minimum standards to provide meaningful relief to the litigants who sought emergency housing. Ms Irene Grootboom, the chief litigant in that landmark case died in 2008 without ever realising her dream for the right to decent housing.[9]

The South African Constitutional Court has followed the so-called reasonableness approach in the interpretation of socio-economic rights entrenched in the South African Constitution. In *Grootboom,* the unanimous court per Yacoob J observed "the real question is whether the measures taken by the State are reasonable".[10] However, the standard of reasonableness has not been defined in clear terms. In the *Grootboom* decision as well as in the later

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2 *Grundgesetz*, 23 May 1949.

3 It was passed by the Indian Constituent Assembly on 26 November 1949 and entered into force on 26 January 1950.

4 Contained in Part IV of the Constitution of India.

5 Art 37 of the Indian Constitution, which refers to part IV of the Indian Constitution, stipulates: "The provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

6 The Directive Principles of State Policy, which *inter alia* contain programmatic socio-economic rights stipulations, do not qualify as enforceable subjective rights.

7 1998 1 SA 765 (CC).

8 2001 1 SA 46 (CC).

9 Joubert "Grootboom dies homeless and penniless" *Mail and Guardian online*, 8 August 2008 http://www.mg.co.za/article/2008-08-08-rip (accessed 29-08-2008).

10 *Grootboom* 66C.

Treatment Action Campaign decision,[11] the South African Constitutional Court defined the reasonableness standard in the light of the facts of the specific cases. It is clear that reasonableness is an objective standard against which State policies can be measured.

The South African Constitutional Court, however, did refuse to grant the individual litigant a remedy in circumstances where the standard was not met by the relevant state policy. Instead the South African Constitutional Court only made orders addressed to the State declaring the relevant policy to be falling short of the constitutionally required minimum standard. In the *Treatment Action Campaign* case, the South African Constitutional Court went further than the declaratory order in *Grootboom* and compelled the State to take certain concrete steps to change its policy.

The South African Constitutional Court had an opportunity to further develop its socio-economic rights jurisprudence in the *Olivia Road* case[12] decided 19 February 2008. In the context of an appeal against an order for the eviction of certain occupiers from allegedly unsafe buildings granted by the City of Johannesburg under s 12(4)(b) of the National Building Regulations and Building Standards Act[13] ("NBRA"), the court issued an interim order[14] compelling the City of Johannesburg and the occupiers to meaningfully engage with each other in an effort to resolve the issues raised in the application and to alleviate the plight of the applicants. They had to file affidavits reporting on the results of the engagement.

The court reasoned that in the light of the constitutional right to human dignity and of the right to life a municipality that ejects people from their homes without prior meaningful engagement would be at odds with the spirit and purpose of its constitutional obligations.[15] Furthermore, s 26(2) of the South African Constitution required that the municipality's response to people threatened by homelessness with whom it engages must be reasonable.[16] The City of Johannesburg and the occupiers subsequently entered into a settlement agreement. This agreement was endorsed by the South African Constitutional Court in an order dated 5 November 2007. The court deemed it necessary to endorse the agreement because it had ordered the engagement and the parties had been asked to report back. The court however made it clear that it is not always necessary for a court to approve agreements entered into consequent to engagement.[17] The South African Constitutional Court also held that the criminal sanction contained in s 12(6) of the NBRA was inconsistent with the Constitution insofar as it concerned criminal sanctions for a failure to comply with an order to vacate a building before an eviction order had been issued[18].

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11 *Minister of Health v Treatment Action Campaign (no. 2)* 2002 10 BCLR 1033 (CC).

12 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 3 SA 208 (CC).

13 Act 103 of 1977.

14 The order was given on 30 August 2007, the reasons were provided in the judgment which was handed down on 19 February 2008.

15 *Olivia Road* para 16.

16 *Olivia Road* para 17–18.

17 *Olivia Road* para 28–30.

18 *Olivia Road* para 54.

Furthermore, the court held that it is necessary to consider the issue of alternative accommodation for occupiers before a notice which results in the eviction of occupiers can be made in terms of s 12(4)(b) of the NBRA.[19] Unfortunately, the South African Constitutional Court did not consider it to be in the interest of justice to pronounce on the issue of the relationship between the standards set for evictions by the Prevention of Illegal Occupation of Land Act[20] ("PIE") and the NBRA. PIE, a South African statute, requires that a court may only grant an order for evictions from unlawfully occupied land if it is just and equitable to do so. Furthermore it prescribes a procedure for eviction matters which takes the interests of the evictees into account. The applicants in the *Olivia Road* case had argued that the PIE Act would be applicable *in casu* because the occupants would fall within the ambit of the definition of an "illegal occupant".[21]

This recent decision has been applauded by some commentators as reaffirming the South African Constitution's transformative role.[22] It is submitted that this assessment may have been premature since the judgment left many of the central issues undecided. The requirement of "effective engagement" is merely procedural and does not put any substantive burden on an entity wishing to evict occupants. The essence of the matter is that the occupiers were invoking socio-economic rights in the *status negativus*, ie they invoked them seeking protection from threatening state action. This must be distinguished from situations where individuals seek positive delivery of essentials necessary for their survival by the state, ie where they are invoking their socio-economic rights in the *status positivus*. The fact remains that in terms of the present jurisprudence in South Africa dealing with constitutionally entrenched socio-economic rights, the best an individual litigant can hope for when approaching a South African court is a court order requiring the state to change its policies. To date, the South African Constitutional Court has been reluctant to enforce any positive obligation on the state to provide essential services to persons in dire need of essentials necessary for survival pursuant to the infringement of their socio-economic rights.[23]

The South African Constitutional Court may have a renewed opportunity to revisit its position to the issue of the minimum core approach to the enforcement of individual socio-economic rights in the near future. On 30 April 2008, the Witwatersrand Local Division of the High Court of South Africa ("WLD") handed down its judgment in *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae)*.[24] This case concerned the introduction of prepaid water meters in a poor neighbourhood, Phiri, in the vicinity of Johannesburg. The introduction of such prepaid meters resulted in severe water cuts for the concerned residents. The WLD held that the

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19 *Olivia Road* para 46.

20 Act 19 of 1998.

21 *Olivia Road,* Applicants' heads of argument para 216.

22 Chenwi and Liebenberg "The Constitutional Protection of those facing eviction from 'bad buildings" 2008 *ESR* Review 12.

23 In *Khosa v The Minister of Social Development* 2006 6 SA 505 (CC), the South African Constitutional Court granted relief to a permanent resident seeking social assistance which at the time was only available to South African citizens, was decided on the basis of the right to equality (s 9 of the Constitution) and consequently can not be said to be an instance where the court provided individual relief as contemplated above.

24 [2008] 4 All SA 471 (W).

introduction of the prepaid water meters was illegal and ordered the City of Johannesburg to make 50 litres of waters available per person per day.

This judgment is groundbreaking in various respects. First, the decision endorses the minimum core approach in the interpretation of socio-economic rights and held that it could be applied with regard to the right to access to water.[25] The *Grootboom* and *Treatment Action Campaign* matters were revisited and the court observed that the Constitutional Court of South Africa had not rejected the minimum core principle as part of South African law in either of the two judgments.[26] Secondly, the court held that it flows from the principle of progressive realisation espoused in s 27(2) of the South African Constitution that the applicants were entitled to so much water as they required, provided that resources are available.[27]

At present the South African Constitutional Court is again called upon to decide on two cases concerning the subject matter of evictions. In *Various Occupants v Thubelisha Homes and Others*[28] the plight of shack dwellers from an informal settlement in Cape Town is at stake, whereas the *Mamba and Others v Minister of Social Development and Others*[29] case involves the closure of the camps which were opened by the South African government to shelter those displaced by the recent spate of xenophobic violence. It will be interesting to see whether the court will use this opportunity to give more content to the concept of "meaningful engagement" which it augmented in the *Olivia Road* case. The interim order in *Mamba*[30] indicates that this may well happen since the court ordered the parties to "engage meaningfully"[31] and to do so *inter alia* with a view of "reintegrating as soon as possible those victims of xenophobic violence who are entitled to be in the Republic of South Africa into communities".[32]

2 2 India

The Constitution of India protects socio-economic entitlements through Directive Principles of State Policy which are entrenched in Part IV of the Constitution of India. These directive principles include *inter alia* the right to livelihood,[33] the right to education[34] and the right to public assistance.[35] While they are not judicially enforceable, they are fundamental to the governance of the state.[36]

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25 *Mazibuko* para 134.
26 *Mazibuko* para 129–133.
27 *Mazibuko* para 135–181.
28 *Various Occupants v Thubelisha Homes and others,* Constitutional Court of South Africa, case CCT 22/08. The case is currently awaiting judgment.
29 *Mamba and others v Minister of Social Development and others,* Constitutional Court of South Africa, case CCT 65/08 The case is currently awaiting judgment.
30 *Mamba*, Interim order, 21 August 2008.
31 *Mamba,* Interim order, para 1.
32 *Mamba,* Interim order, para 5.
33 Art 39(a) of the Constitution of India.
34 Art 41 of the Constitution of India.
35 Art 41 of the Constitution of India.
36 Art 37 of the Constitution of India provides: "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

The Supreme Court of India has adopted a broad interpretation of the constitutionally entrenched right to life to include certain socio-economic entitlements. For example, the court has read the right to livelihood into the interpretation of the right to life[37] in the case of *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*[38] where it held:

> "The right to life includes the right to live [*sic*] with human dignity and all that goes with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings. The magnitude and components of this *[sic*] rights would depend upon the extent of economic development of the county, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self."[39]

The Indian Supreme Court again had an opportunity to consider a matter concerning the realisation of the *causa finalis* of socio-economic rights in *Olga Tellis v Bombay Municipal Corporation*.[40] This case concerned the plight of pavement and slum dwellers who were facing forced eviction from their makeshift homes. The court analysed the interrelationship between the Directive Principles of State Policy and the right to life. The court pronounced:

> "The principles contained in Arts. *[sic*] 39(a) and 41 must be regarded as equally fundamental in the understanding and operation of the meaning and content of fundamental rights. If there is an obligation upon the state to secure the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. . . . But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Art. 21."[41]

It has also observed in this judgment that abrogating the means to livelihood "would not only denude the life of its effective content and meaningfulness but would make it impossible to live".[42] It is interesting to note that the court made reference to what is protected essentially by the right to human dignity in other constitutions albeit that an express right to human dignity is not entrenched in the Constitution of India.[43] The court held *inter alia* that in certain instances the state is compelled to provide alternative accommodation to the evictees.

In *Unni Krishan, J.P. v State of Andhra Pradesh*[44] the Supreme Court of India revisited the principles underlying the interrelationship between the right to life espoused in s 21 of the Constitution of India and the Directive Principles of State

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37 Art 21 of the Constitution of India.

38 (1981) 2 SCC 310, quoted from Muralidhar "Justiciability of Economic and Social Rights – The Indian Experience", *Circle of Rights* (2000) http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm (accessed on 04-05-2007).

39 *Francis Coralie Mullin* 529B–F.

40 (1986) SCC 195; 1987 LRC 351.

41 *Olga Tellis* para 33.

42 *Olga Tellis* para 32.

43 The Constitution of India only refers to human dignity in its preamble, with regard to children in the Directive Principles of State Policy [art 39(f)] and with regard to the duty to respect the dignity of women (art 51A). It does not contain a general right to human dignity.

44 (1993) 1 SCC 645; AIR 1993 SC 2178.

Policy. The court held that the right to education constitutes a fundamental right flowing from art 21 of the Constitution of India. It construed this fundamental right in the light of the directive principles in Part IV of the Constitution of India. It held:

> "Right to education, understood in the context of Arts. 45 and 41, means: (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the state and its development."[45]

Essentially, the Supreme Court of India distinguished in this decision, without using the relevant terminology, between an inalienable minimum core of the right to education which constitutes an absolute entitlement, and other aspects of the education right which are subject to the economic capacity and the development of the State. The court determined the minimum core content of the right by having recourse to the principles laid down in Part IV of the Constitution of India.

Subsequently, the Supreme Court of India has granted relief to individuals in many socio-economic rights cases. For example, in *Paschim Banga Khet Samity v State of West Bengal,*[46] the Indian Supreme Court held that the right to life encompasses the right to emergency health care. In this case the state government of West Bengal was compelled to compensate a labourer who suffered losses pursuant to the failure of various government hospitals in Calcutta to admit him.

Further groundbreaking cases in which the Supreme Court of India developed its socio-economic rights jurisprudence were *Consumer Education and Research Centre v Union of Indi*[47] in which it considered the right to health and medical care to be a fundamental right, and the court's decision in *People's Union for Civil Liberties v Union of India.*[48] In the latter case, the Supreme Court of India enforced the right to food of underprivileged persons. Unfortunately, the dynamic socio-economic rights jurisprudence of the Supreme Court of India which afforded relief to individual litigants has not been sustained at all times. It has been claimed that the "golden period [*sic*] of the Supreme Court" is over and that now Indian courts are taking a more hostile approach to socio-economic rights.[49]

2 3 Germany

The German Federal Constitutional Court[50] has interpreted the right to human dignity[51] and the "social state" principle (*Sozialstaatsprinzip*)[52] to protect the

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45 *Unni Krishan, J.P.* para 80.

46 (1996) 4 SCC 37.

47 (1995) 3 SCC 42.

48 *People's Union for Civil Liberties v Union of India* 2000 (5) SCALE 30.

49 Suresh "Socio- Economic Rights and the Supreme Court" http://www.ambedkar.net/ACJP%20Activities/News%20-%20Socio-Economic%20Rights%20And%20The%20Supreme%20Court.html (accessed on 04-05-2008). Copy on file with author.

50 *Bundesverfassungsgericht.*

51 Art 1(1) of the German Constitution.

52 The Social State Principle is codified in arts 20I and 28(1) of the German Basic Law (*Grundgesetz*).

margin of minimum subsistence (*Existenzminimum*) of citizens.[53] As early as 1954, the German Federal Administrative Court,[54] the highest German court in administrative matters, recognised that individuals were in certain instances entitled to welfare not as a privilege but as of right.[55] In 1974 the Federal Constitutional Court followed this progressive judicial development when it stipulated in the context of age restrictions concerning pensions for mentally handicapped orphans that "the State must at least secure them the minimum prerequisites for a dignified existence".[56] This jurisprudence was followed in the *Kindergeldbeschluss*[57] case where the court unequivocally ruled that it was mandatory for the state to provide the minimum requirements for the existence of its citizens in accordance with the principles of human dignity.[58] In the same case, as well as in the *Einkommenssteuerbeschluss*[59] case, the court decided that the state has to spare the income required for a person's minimum subsistence from taxation.[60]

However, it is important to note that to date, the court has never defined a precise amount sounding in money as the minimum subsistence. Instead, the court has referred to the principles of welfare law as enacted by the legislature for the determination of the relevant amounts. It has been observed that the right to protection of the margin of minimum subsistence cannot be quantified because it is not absolute; its content changes from time to time.[61] Consequently, the said jurisprudence cannot be characterised as having failed to define the minimum margin of subsistence in specific figures; rather, the German Federal Constitutional Court has consciously restrained itself from making any absolute quantification. Nevertheless, the German Federal Constitutional Court has not been shy to pronounce on instances where taxation left individual litigants with an income insufficient to provide for their minimum subsistence.

On 23 November 2007,[62] the German Federal Social Court[63] confirmed the jurisprudential principles dealing with the right to a minimum subsistence in a decision concerning the so–called "Hartz IV" legislation. This legislation entered into force on 24 December 2003[64] and brought about what can be said to be the first serious cuts to the welfare system of the Federal Republic of Germany.[65]

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53 See for example Neumann "Menschenwürde und Existenzminimum" NVwZ 1995 426.

54 *Bundesverwaltungsgericht.*

55 *BVerwGE* 1 94.

56 *BVerfGE* 40 121 and 133: "Die Staatliche Gemeinschaft muß ihnen jedenfalls die Mindestvoraussetzungen für ein menschenwürdiges Dasein sichern."

57 *BVerfGE* 82 60, 80.

58 *BVerfGE* 82 60, 80: "Zwingend ist (lediglich), daß der Staat die Mindestvoraussetzungen für ein menschenwürdiges Dasein seiner Bürger schafft."

59 *BVerfGE* 82, 198. See also *BVerfGE* 87, 153.

60 *BVerfGE* 82, 207: "Ausgangspunkt der verfassungsrechtlichen Beurteilung ist der Grundsatz, daß der Staat dem Steuerpflichtigen sein Einkommen insoweit steuerfrei belassen muß, als es zur Schaffung der Mindestvoraussetzungen für ein menschenwürdiges Dasein, daß heißt zur Sicherung seines Existenzminimums, benötigt wird."

61 Wallerath "Zur Dogmantik eines Rechts auf Sicherung des Existensminimums" *Juristenzeitung* 2008 157, 162.

62 BSG *Urteil vom 23. November 2006*, BS 11b AS 1/06 R.

63 *Bundessozialgericht.*

64 *Bundesgesetzblatt* I, 2954.

65 For an introduction to the Hartz IV legislation, see Eichenhorst; Grienberger-Zingerle,Konle-Seidl, *Activation Policies in Germany: From Status Protection to Basic Income Support* (2006) http://ftp.iza.org/dp2514.pdf (accessed on 04-05-2008) 8.

The court held the right to minimum subsistence also protects the subsistence minimum in accordance with the jurisprudence of the German Federal Administrative Court. However, the court found *in casu* that it had not been infringed by the legislation.

The Federal Constitutional Court refused to consider an application for the review of this decision on its merits.[66] In the reasons for the decision it stated that a constitutional complaint which challenges a lower deviation (*Unterschreitung*)[67] of the margin of minimum subsistence must aver that the provisions by the State do not suffice to guarantee the minimum subsistence.[68] The court held that the plaintiff failed to make the necessary averment. While it is to be regretted that the Federal Constitutional Court did not consider the matter on its merits, the decision confirms that the court recognises that a lower deviation (*Unterschreitung)* of the margin of minimum subsistence constitutes a violation of the right to human dignity read in conjunction with the social state principle. In summary it can be said that the jurisprudence of the German courts at present effectively protects the rights of individual litigants to certain minimum socio-economic entitlements.

2 4 Evaluation of the jurisprudence of the highest courts in constitutional matters in the three jurisdictions.

The comparison of the jurisprudence of the three courts reveals that the inclusion of justiciable socio-economic rights in a constitution is not necessarily the best approach to the effective protection of individual entitlements to a minimum core of socio-economic rights. To illustrate this point, this article will now attempt to undertake a direct comparison between the *Olga Tellis* decision of the Supreme Court of India and the *Olivia Road* decision of the South African Constitutional Court. Both cases concerned the eviction of desperate people who had found ramshackle accommodation in places unsuitable for human habitation. In *Olga Tellis,* the destitute persons lived in shacks on pavements whereas in *Olivia Road* they occupied abandoned buildings. In both matters the respective courts refrained from permanently restraining the authorities from evicting the occupiers.

However, a crucial difference between the judicial approaches lies in the order made. In both cases the respective authorities were compelled to follow a due process in preparing the evictions. Whereas the South African Constitutional Court only imposed a general requirement to "meaningfully engage" with evictees[69] the Supreme Court of India did not only enforce due process rights, it

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66 *BVerfG*, *1 BvR* 1840/07 *vom* 7.11.2007. German constitutional procedure requires that the Federal Constitutional Court accepts a case before it is considered on its merits.

67 This term is the technical term used by the *Bundesverfassungsgericht*. Various dictionaries suggest that "lower deviation" is a proper translation of the word. For example,. the online dictionary of the Technische Universität Dresden available at http://dict.tuchemnitz.de/dings.cgi?lang=en&service=deen&opterrors=0&optpro=0&query=Unterschreitung&iservice=&comment= (accessed on 20-04-2008).

68 *BVerfG, 1 BvR* 1840/07 para 14: "Angesichts der Schwierigkeiten bei der Bestimmung der von Verfassungs wegen unerlässlichen Mindestvoraussetzungen eines Menschenwürdigen Daseins muss eine Verfassungsbeschwerde, die eine Unterschreitung des Existenzminimums rügt, substantiiert darlegen, dass die staatlicherseits zur Verfügung gestellten Leistungen nicht ausreichen, um das Existenzminimum zu gewährleisten."

69 *Olivia Road* para 16.

went further and imposed a duty upon the evicting authority to provide alternative land to the evictees within a specified distance from the previous location.[70]

This example serves to illustrate that the Supreme Court of India succeeded in securing certain substantive entitlements of the evictees. The court requested the state to allocate to the evictees accommodation which provided the material prerequisites with respect to housing necessary to lead a dignified life. On the other hand, the South African Constitutional Court restricted itself essentially to safeguarding the due process rights of the evictees.

It is difficult to directly compare the consequences of cases concerning the *causa finalis* of socio-economic rights heard by the German Federal Constitutional Court to the effects of the jurisprudence of the highest courts of India and South Africa. While the fundamentally different circumstances in this affluent country prevent at present situations akin to those which the courts had to consider in *Olivia Road* and *Olga Tellis*, it is nevertheless beneficial to compare the dogmatic base of the German Federal Constitutional Court's socio-economic rights jurisprudence to those of the Supreme Court of India's and South African Constitutional Court's jurisprudence. It is apparent from the cases discussed above that the said court is actively protecting positive socio-economic rights entitlements in its area of jurisdiction.

Dogmatically, the German Federal Constitutional Court takes recourse to the right to human dignity flowing from art 1 of the German Basic Law read together with the Social State Principle to protect basic socio-economic entitlements within its area of jurisdiction. The Supreme Court of India has interpreted the right to life to encompass "the right to livelihood"[71] and has taken recourse to the Directive Principles of State Policy to determine its content. The South African Constitutional Court has based its socio-economic rights jurisprudence mainly on the express socio-economic rights stipulations in the South African Constitution but has also recognised the overlap with the right to dignity. For example, in *Grootboom,* the court stipulated at para 83 that the value of human dignity must be taken into account when determining the content of the right to reasonable action.[72] On the other hand, the court has been reluctant to consider the right to life when interpreting socio-ecomic rights. In *Soobramoney*, the court stated:

> "Unlike the Indian Constitution ours [the South African] deals specifically in the bill of rights with certain positive obligations imposed on the State, and where it does so, it is our duty to apply the obligations as formulated in the Constitution and not to draw inferences that would be inconsistent therewith."[73]

The highest courts in constitutional matters in the three jurisdictions under scrutiny have all found a way to utilise the fundamentally different basic rights stipulations in the respective constitutions to attain, at least to a certain extent, the *causa finalis* of socio-economic rights. However, in South Africa (the only jurisdiction under scrutiny which has constitutionally entrenched judicially enforceable socio-economic rights) the Constitutional Court failed to provide

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70 *Olga Tellis* para 57.

71 *Olga Terris* para 32.

72 *Grootboom* para 83.

73 *Soobramoney* para 15.

effective relief to individual litigants seeking protection of their socio-economic rights directly under the constitution. In contrast, the relevant courts in India and Germany have succeeded in this task, at least in certain instances. In fact, the Indian Supreme Court has accomplished this in an environment in which resources may be even more limited than in South Africa. This paradox evokes the burning question why the Constitutional Court in South Africa, with its daunting socio-economic challenges, fails to come to the assistance of those who are denied the material circumstances which are necessary to lead a dignified life. Contrast this with cases where those in want of such essential needs have been assisted by the judiciary in jurisdictions which do not even have such sophisticated enforceable rights entrenched in their constitutions.

3 PART 2: PROPOSITION OF A NOVEL APPROACH FOR THE INTERPRETATION OF SOCIO-ECONOMIC RIGHTS

In this part of the article, an attempt is made to use the insights gained from the comparative analysis in formulating a new approach to the interpretation of socio-economic rights. The right to life and the right to human dignity are essentially the two organising concepts employed to determine the minimum core of socio-economic rights. The discussion takes place in the context of the South African jurisdiction. At the outset it needs to be emphasised that South African courts are permitted to consider foreign law when interpreting the South African Constitution's Bill of Rights.[74] In instances where a court, in its discretion, deems this desirable, it is at liberty to apply the jurisprudential principles developed *inter alia* by the Indian and German courts to a South African matter.

Recently, South African scholarly debate has concentrated on the so-called minimum core approach.[75] This approach, which unfortunately was not applied by the South African Constitutional Court in the *Grootboom*[76] and subsequent decisions, regards a minimum threshold of socio-eoconomic entitlements as inalienable and obliges any state to guarantee it irrespective of resource constraints. It was originally developed by United Nations Human Rights Committee in its General Comment No 3[77] in which it considered the nature of state parties obligations flowing from the International Covenant on Economic, Social and Cultural Rights ("CESCR").[78] The Committee appropriately stipulated that it holds "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

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74 Section 39(1)(b) of the South African Constitution.

75 See for example Young "Conceptualising Minimalism in Socio-Economic Rights" 2008 *ESR Review* 6; Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007); Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundation for Future Human Rights Jurisprudence" 2003 *SAJHR* 1.

76 In *Grootboom,* the South African Constitutional Court rejected the *amicus curiae's* submission that the court should apply the minimum core approach. Some commentators have perceived this as a rejection of the minimum core approach by the South African Constitutional Court.

77 CESCR General Comment 3 (General Comments): The Nature of States Parties Obligations (art 2 para 1) 14-12-1990.

78 South Africa has signed but not ratified this human rights treaty.

incumbent upon every state party".[79] However, the CESCR has not formulated a concise test as to what those minimum core obligations would encompass.

Although there have been various attempts to define the minimum core of certain socio-economic rights[80] there is still no test formulated as to how one can generally determine what the minimum core obligations in socio-economic rights entail. Young's recent attempt[81] to conceptualise the minimum core approach has served to illustrate that the problem of searching for the content of the minimum core remains unresolved.[82] She categorises the justifications for the minimum core concept into the essence approach, the consensus approach and the obligations approach.

In short, the obligations approach "investigates whether a minimum obligation can correlate to the minimum core"[83] whereas the consensus approach "situates the minimum core in the minimum consensus surrounding socio-economic rights."[84] Finally, the essence approach "prescribes a moral foundation or justification to the minimum core, such as how the liberal values of human dignity, equality and freedom . . . is minimally sustained within core formulations of the right".[85] Unfortunately, Young only illustrates the limitations of the present arguments and fails to provide direction with regard to the determination of the scope of the minimum core. Ultimately, it is submitted that it is not so much the theoretical justification of the minimum core concept but rather the question of whether it is viable for the practical task of giving effect to the values underlying an open and democratic society which will determine whether the minimum core approach will prevail in a country's jurisprudence.

The reluctance of South African courts to follow the minimum core approach has been caused to a large extent by problems encountered in determining the minimum core of socio-economic rights. In *Grootboom,* Yacoob J refused to follow the minimum core approach because there was "not sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution".[86] However, the decision left the door open to revisit the minimum core approach at a later stage. This is precisely what happened recently in *Mazibuko*.[87] However, the court again failed to provide direction as to how the minimum core could be defined. As shown above, the German and Indian courts have not used minimum core obligations to date as a justification for their respective socio-economic rights jurisprudence.

As stated above, the *causa finalis* of any socio-economic right codification is to protect the socio-economic wellbeing of the respective country's citizens and/or residents in order to ensure that they have the material means available to

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79 CESCR General Comment 3 3.

80 For example, Brand and Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002) contains a collection of essays in which attempts are made to define minimum core obligations with reference to specific rights.

81 Young 2008 *ESR Review* 6.

82 *Ibid.*

83 Young 2008 *ESR Review* 9.

84 Young 2008 *ESR Review* 8.

85 Young 2008 *ESR Review* 7.

86 *Grootboom* para 33.

87 Young 2008 *ESR Review* 6.

lead a dignified life. The comparative analysis has shown that the right to life (if it is interpreted to include the right to livelihood, as has been done by the Supreme Court of India,) and the right to human dignity can be utilised to protect this *causa finalis*. Those rights, which are closely related, are also protected under the South African Constitution. There is an overlap between the scope of the right to life and the right to human dignity on the one hand, and the scope of specific constitutional socio-economic right stipulations on the other hand. As will be shown below, the South African socio-economic rights stipulations fail at present to give effect to the intertwined right to human dignity and right to life but rather serve as a limitation thereof.

In terms of the rule *lex specialis derogat lex generali*, the specific socio-economic rights stipulations of the South African Constitution could be understood to constitute a limitation to the right to life and the right to human dignity. All socio-economic rights contained in the South African Constitution are subject to the qualification that they are subject to progressive realisation within available resources.[88] If one scrutinises South African decisions such as the *Olivia Road* case and compares them directly with the Indian case such as the *Olga Tellis* case, it appears that the South African decisions limit the right to human dignity and the right to life (which is not construed to encompass the right to livelihood) whereas certain Indian and German decisions give effect to those rights. The refusal of the South African Constitutional Court to consider the right to life in the *Soobramooney* judgment[89] confirms that the court applies the *lex specialis* rule. In applying the rule, the court made the qualification that the rights are subject to progressive realisation within available resources applicable to factual situations which are covered by both the right to life and the right to dignity by express socio-economic rights. In short, the recourse to the specific socio-economic rights stipulations of the South African Constitution has resulted in the South African Constitutional Court giving the protection of the *causa finalis* of socio-economic rights a narrower scope than the Indian Supreme Court or the German Federal Constitutional Court.[90]

It is submitted that it would be more appropriate to interpret the express socio-economic rights in the South African Constitution in a way that gives effect to the right to life and the right to human dignity. This could be attained by regarding the scope of application of the right to life and the right to human dignity as the inalienable minimum core of socio-economic rights. All cases which fall within the sphere of application of both specific socio-economic rights on the one hand, and the right to life and the right to human dignity on the other hand, should be regarded as not being subject to the qualification of "immediate realisation within available resources". The limitation of those aspects of socio-economic rights which also fall within the ambit of the right to life and the right to human dignity could then only be justified in accordance with the stricter requirements of the South African Constitution's general limitation clause.[91]

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88 Such limitations are for example entrenched in the South African Constitution in s 26(2) with respect to the right to housing, s 27(2) with respect to the rights to health care, water and social security and in s 29(1)(b) with respect to the right to further education.

89 *Soobramoney* para 32. See also the discussion in para 2 4 above.

90 The Supreme Court of India took recourse to the Directive Principles of State Policy whereas the Federal Constitutional Court took recourse to the German Basic Law's *'Sozialstaatsprinzip'* (Social State Principle), see above.

91 Section 36 of the South African Constitution.

When interpreting the South African Bill of Rights[92] "a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".[93] The South African Constitution itself refers to the fundamental values underlying it. The preamble of the South African Constitution states *inter alia*:

> "We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to – Heal the divisions of the past and establish a society based on democratic values, *social justice* and fundamental human rights."[94]

Section 1 of the South African Constitution states *inter alia*:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

Of course, there can be no doubt that human dignity is one of the fundamental values which must be considered when interpreting the Bill of Rights. Social justice is not mentioned as a value in s 1 of the South African Constitution but is only referred to in the preamble. However, this does not mean that it is excluded from the values which must be considered when interpreting the Constitution. It is submitted that only an interpretation of socio-economic rights which promotes the values of social justice and human dignity is constitutional. In order to promote those values, it is necessary to follow an interpretative approach which gives effect to the right to life and the right to human dignity rather than restrict them. It is submitted that this can be achieved by defining the minimum core of socio-economic rights as the area of overlap between socio-economic rights on the one hand and the right to life and the right to human dignity on the other hand.

4 CONCLUSION

The constitutional comparison above has revealed that, despite the differences in the constitutional approaches, it is the courts in all three jurisdictions which provide relief to persons whose socio-economic rights and interests are infringed. In other words, individuals in all three jurisdictions have, more than anything else, benefited from the jurisprudence of the highest courts in constitutional matters in seeking the protection of socio-economic entitlements. The analysis has further revealed that, at least in the South African context, specific socio-economic rights stipulations in constitutions do not necessarily result in the better protection of the *causa finalis* of socio-economic rights. This, however, can be overcome by adopting an interpretation of socio-economic rights which takes account of the minimum core approach to give effect to the values of social justice and human dignity. It is, as explained above, possible to give content to the minimum core by defining it as that part of express socio-economic right codifications which overlap with the right to life and the right to human dignity. It is submitted that it is this area of overlap which defines the inalienable minimum core of socio-economic rights.

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92 Chapter 2 of the South African Constitution. All socio-economic rights are entrenched in this chapter of the South African Constitution. It also contains the right to life (s 10) and the right to dignity (s 11).

93 Section 39(1) of the South African Constitution.

94 Author's emphasis.

The Customary Law Rule of Primogeniture and its Discriminatory Effects on Women's Inheritance Rights in Nigeria: A Call for Reform

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1 INTRODUCTION

Since the adoption of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) by the United Nations General Assembly in December 1979, there has been a global emphasis on gender equality and freedom from discrimination.[1] The CEDAW establishes the universality of the principle of equality of rights between men and women and provides for measures to ensure equality of rights for women throughout the world. Apart from the CEDAW, the right to equality or freedom from discrimination is widely recognised in a number of important international and regional instruments.[2] For instance, the Universal Declaration of Human Rights (UDHR) asserts the equality of all persons and guarantees freedom of everyone from any forms of discrimination.[3] Also, the International Covenant on Civil and Political Rights (ICCPR) reiterates the equality of all person and freedom from discrimination.[4] In the same vein, the African Charter on Human and Peoples'

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1 The CEDAW opened for signature on 1 March 1980 and was entered into force on 3 September 1981 after 20 states consented to be bound by its provisions in line with art 27 thereof.

2 See art 3 of the African Charter on Human and Peoples' Rights (1981) which provides that every individual shall be equal before the law and shall be entitled to equal protection of the law; art 18(3) thereof also obliges the State to eliminate every form of discrimination against women. Art 7 of the Universal Declaration of Human Rights 1948 (UDHR) also guarantees the equality of all persons and freedom from any form of discrimination. Art 26 of the International Covenant on Civil and Political Rights 1966 (ICCPR) prohibits discrimination and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See also para 24 of the Beijing Declaration: Fourth World Conference on Women (September 1995) where the participating governments declared: "We are determined to: take all necessary measures to eliminate all forms of discrimination against women and the girl child and remove all obstacles to gender equality and the advancement and empowerment of women".

3 Art 7 UDHR.

4 Art 26 ICCPR provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Rights (ACHPR) obliges state parties to eliminate every form of discrimination against women.[5] At the national level, the constitutions of most African countries prohibit discrimination on the ground of sex or gender differences.[6]

Despite these various instruments put in place to guarantee freedom from discrimination, discrimination against women remains widespread across African societies. Many African customary law systems differentiate between sexes over distribution of rights, powers, duties, functions and wealth.[7] It is not unusual to encounter discriminatory attitudes, both on the part of individuals and communities which relegate women to a second position.[8] While causes and consequences of these attitudes vary from country to country, discrimination against women is widespread and it takes similar forms. In many African countries, the way women are treated in terms of property rights, inheritance right, marital relationships, the right to acquire nationality, the right to manage property or seek employment, reflect the age-long inequality between men and women.[9]

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5 See art 18(3) ACHPR 1981 which provides: "The State shall ensure the elimination of every discrimination against women and shall also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions".

6 For example, s 42(1) and (2) of the Constitution of the Federal Republic of Nigeria 1999 (CFRN) prohibits discrimination on the ground of sex among other grounds which include community, ethnic group/race, place of origin, religion or political opinion and circumstances of birth. See also, ss 15(2) and 17(3)(a) and (e) of the 1999 Nigerian Constitution. The South African Constitution is more elaborate on the grounds for discrimination; apart from gender/sex, other grounds listed include, race, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Discrimination on any one or more of those grounds is considered as unfair discrimination. See s 9(3) and (5) of the 1996 South African Constitution. See also the following Constitutions which prohibits discrimination on the ground of sex, among others: s 82(1), (2) and (3) of the Constitution of the Republic of Kenya (as revised in 2001); s 17 (1) and (2) of the Constitution of Republic of Ghana 1992; art 10 (1) and (2) of the Republic of Namibia 1998; s 23 of the Constitution of Zimbabwe (as amended in 2005); s 21 (1) and (2) of the Constitution of the Republic of Uganda 1995.

7 Fredman argues that while there is global recognition of equality of all human beings, the reality, however, is that women still remain substantially disadvantaged in all facets of life. See Fredman *Women and the Law* (1997) 1.

8 Many people argue that the rightful place of the female is in the home bringing up children, and for that purpose, a lesser degree of education is required than will be necessary for her brothers. Neither will she require independent earning power because her father and, later on, her husband will provide for her in economic terms.

9 See *Women Rights: The Responsibility of All* (United Nations Basic Information Kit No. 2, 10 November 1997) 7; In this regard, Mqeke expressed concern regarding the plight of customary law widow in the light of the South African Supreme Court of Appeal (SCA) in *Wormald NO v Kambule* 2006 3 SA 562 (SCA). In this case, the court declared the deceased's second widow (who was with him when he took ill and before his death) as an unlawful occupier of her late husband's property. See Mqeke "The Plight of a Widow of an Unregistered Customary Marriage entered into in terms of the Transkei Marriage Act 21 of 1978: *Wormald NO v Kambule* 2006 3 SA 562 (SCA)" 2006 *Speculum Juris* 266; see also Mqeke "The Rights of Widows in Unregistered Customary Marriages in The Transkei – A Disappointing Decision: *Kwitshane v Magalele* 1999 4 SA 616 (TK)" 2000 *Obiter* 231; Koyana "Legal Pluralism in South Africa: The Resilience of Transkei's Private Law" 2005 *Speculum Juris* 131 141. However, the history of relegation of women in society is not peculiar to African societies alone. In the past hardly any country treated women equally

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In this article, an attempt shall be made to examine gender discrimination in Nigeria in the light of its constitutional provisions and other regional and international human rights instruments which Nigeria has adopted. While the focus is on Nigerian customary law, the article will draw however on the experiences of other African countries on the subject.[10] Aspects of gender discrimination in Nigeria are multi-faceted, cutting across economic, political, social, cultural and religious sectors. However, it will not be possible to deal in details with all these aspects as that would make the topic unwieldy for effective treatment in a piece like this. While some of these issues will be referred to in passing, the focus will be on the discrimination which women suffer on account of cultures, customs and traditions, especially as it bears on aspects of succession and inheritance rights.

This article is divided into five parts. Following this introduction, part two discusses the meaning of discrimination and part three examines the customary rule of inheritance and primogeniture rule. Part four examines aspects of discrimination in primogeniture rule before concluding in the fifth part.

2 WHAT IS DISCRIMINATION?

The word "discrimination" has not been defined in any Nigerian statute book and, as such, guidance is taken from the CEDAW as well as from foreign statutes and judicial decisions where the term has been defined. Article 1 of the CEDAW provides:

> "For the purpose of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

On a plain reading of the definition, to discriminate is to distinguish or differentiate between things and to prefer one thing to another. It entails treating people differently or unfairly because of their race, sex, or religion.[11] A person is discriminated against if, on the ground of sex, he or she is treated less favourably than a person of the other sex.[12] Discrimination may be either direct or indirect

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with men. Historical records are replete with cases of gender discrimination and inequality across the globe. It was well into the 20th century before the major impediments to the rights of women were removed in most advanced countries of the world. See for example, the ancient common law doctrine of "covertures". This doctrine incorporated the very being or legal existence of a wife during a marriage into that of her husband, under whose wing, protection and cover she performed everything. Covertures gave the husband near-absolute control over the wife's property as well as her person. Married women were perpetual legal minors, divested of the possibility of economic independence. Any property which a married woman owned as a single person became her husband's property on marriage. The married woman's personal property vested absolutely in the husband and real property vested in the husband during her lifetime. See Blackstone *Commentaries on the Law of England* (1809) Book I Ch XV 430; Fredman *Women and the Law* 40.

10 Most supporting examples are taken from South Africa being a country that has articulated so well on constitutional jurisprudence and on the impact of the Bill of Rights on customary law.

11 See *Oxford Mini School Dictionary* (2002) 186.

12 See s 1(1)(a) of the Sex Discrimination Act 1975 (Britain). In *James v Eastleigh BC* [1990] 2 AC 751 (HL), the House of Lords held that the test for establishing direct discrimination

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discrimination. Apart from the general discrimination of treating women as weaker vessels, discrimination against women may also take the form of an indirect social discrimination which appears on first sight to be neutral, but which nevertheless has a discriminatory effect.[13] Thus in this context any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on, or which withholds benefit, opportunity or an advantage from any person on the ground of sex constitutes discrimination.[14]

With these brief definitions, I will now examine the customary law rule of succession and primogeniture rule of inheritance.

3 CUSTOMARY LAW RULE OF INHERITANCE AND PRIMOGENITURE RULE

Customary law has been defined as the "custom and usages traditionally observed among the indigenous African peoples and which form part of the culture of those peoples".[15] It is reputed as being the law that was handed down from time immemorial from ancestors and, as such, represents a collection of precedents and decisions by the by-gone chiefs.[16] It entails the customs and usages traditionally observed among the indigenous people that formed part of their cultures and religions.[17] Customary law has also been described as "a

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consisted of applying what was termed the "but for" test. According to this test, if it is established that a person would not have been denied a benefit "but for" his or her sex, then direct discrimination has been established.

13 For example, dismissal on the ground of pregnancy is recognised as one instance of such indirect discrimination. In *Danmark v Dansk Arbejdsgiverforening* [1991] IRLR 31 ECJ, it was held that the dismissal of a female worker because of her pregnancy constitutes direct discrimination on the grounds of sex in the same way as refusing to recruit a pregnant woman constitutes direct discrimination. Therefore, a woman is protected from dismissal because of absence during the maternity leave. Similarly, in *Webb v Emo Air Cargo (UK) Ltd* [1994] IRLR 482 ECJ, it was also held that dismissal of a woman on a ground of pregnancy constitutes direct discrimination on the grounds of sex. The court held further that it is contrary to the Equal Treatment Directive to dismiss a woman who shortly after her recruitment is found to be pregnant, even though she was recruited initially to replace another employee during the latter's maternity leave. See also Rubenstein *Discrimination* 10ed (1997) 4 and 7.

14 See s 1(viii) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 otherwise known as the Equality Act 2000 (South Africa). The prohibited grounds of discrimination include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. See s 9(3) of the 1996 South African Constitution. See also De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) 211.

15 See Mqeke *Customary Law and the New Millennium* (2003) 3.

16 *Ibid.*

17 Although African customary law is often perceived to be synonymous with culture and custom, Juma argues that lawyers must endeavour to distinguish "law" from "custom" to facilitate a more reasoned appreciation of the place African law ought to occupy in the legal system. He asserts that "[c]ustom refers to practice; what people do. Law is the norm; what people ought to do". See Juma "From 'Repugnancy' to 'Bill of Rights': African Customary Law and Human Rights in Lesotho and South Africa" 2007 *Speculum Juris* 88 94; See also *Hlope v Mahlalela* 1998 1 SA 449 (T) 457 where Van der Heever, AJ observed that not "all cultural practices are indigenous law and vice versa".

mirror of accepted usage"[18] and common law of the people.[19] According to Bronstein, "culture is a critical part of the lived reality of people's lives. It gives meaning to all our lives and is fundamental to our identities".[20] Thus, culture and customs are valuable and important parts of people's lives.[21] On his part, Allot posits that custom is the "raw material out of which customary norm is manufactured".[22]

In this article, "customary law" is used advisedly as a blanket term. However, such use should not be taken to indicate that there is a single uniform set of customs prevalent throughout Africa. Custom varies from country to country and even within a country, there are variants of customary laws. For instance, Nigeria as a country is a heterogeneous society with diverse customs and cultures.[23] The term is therefore used as a blanket term covering diverse customs and cultures.[24] Even within a tribal group, there are some local variations and differences. In the Nigerian context, therefore, the term "customary law" embraces both the ethnic law and the Muslim law.[25] The former is known as the native law and custom, while the latter is referred to as *Shari'ah* or Islamic law. However, for our purpose, Islamic law and the various tribal laws are treated as customary law.[26]

According to Kerr, the two basic principles of succession in customary law are the primogeniture of males through males and universal succession.[27] The rule of

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18 *Owonyin v Omotosho* (1961) All NLR 304 309; This definition was also adopted by the Nigerian Supreme Court of Nigeria in *Kimdey v Military Governor of Gongola State* [1988] 2 NWLR (pt 77) 445; see also *Zaidan v Mohssen* (1973) 11 SC 1 at 21.

19 See *Ex Parte Ekepenga* FSC 204/1961 of 30/4/1962 (unreported).

20 See Bronstein "Reconceptualising the Customary Law Debate in South Africa" 1998 *SAJHR* 388 393.

21 See Robinson "The Minority and Subordinate Status of African Women under Customary Law" 1995 *SAJHR* 457 469.

22 See Allott "The People as Lawmakers: Custom, Practice and Public Opinion as Source of Law in Africa and England" 1977 *Journal of African Law* 1 5.

23 Indigenous law of succession in Nigeria varies from one ethnic group to another. For a detailed account, see Elias *Nigerian Land Law and Culture* (1951) 216–235.

24 This author had earlier alluded to the facts that the term "Customary Law" in the Nigerian context embraces both Native Law in Southern Nigeria and Shari'ah Law operating in Northern Nigeria. See Taiwo "Justifications, Challenges and Constitutionality of the Penal Aspects of Shari'ah Law in Nigeria" 2008 *Griffith Law Review* 183 187–188.

25 Obilade notes: "In Nigeria, customary law may be divided in terms of nature into two classes, namely, ethic or non-Muslim customary law and Muslim law". See Obilade *The Nigerian Legal System* (1990) 83; Park equally alluded to this categorisation when he notes: "But tribal laws are not the only systems covered by the term 'Customary Law', for throughout the federation it includes Islamic Law also". See Park *The Sources of Nigerian Law* (1963) 130; Anderson *Islamic Law in Africa* (1970) 172. However, the scholar / jurist Hon Justice Tobi holds a contrary view to categorising Islamic Law as customary law. He argues: "Islamic law has a separate and distinct identity from customary law. To equate the two or give the impression that Islamic law is either an off-shoot of or appendage to customary law is to say the least, an ignorant assumption or conclusion". See Tobi *Sources of Nigerian Law* (1996) 151. See also *Alh. Ila Alkamawa v Alh. Hassan Bello* (1998) 6 SCNJ 127 136.

26 See Park *The Sources of Nigerian Law* 1963 65.

27 See Kerr "Customary Law, Fundamental Rights, and the Constitution" 1994 *SALJ* 720 725; Kerr "The Bill of Rights in the New Constitution and Customary Law" 1997 *SALJ* 346 350; Kerr *The Customary Law of Immovable Property and of Succession* (3ed) (1990) 99–100.

primogeniture permits only male issue to inherit the property of a person who dies intestate.[28] Under this rule, on the death of an indigenous person, his estate devolves on his eldest son, or his eldest son's eldest male descendant.[29] If the eldest son has died leaving no male issue, the next son or his eldest male descendant inherits and so on through the sons respectively.[30] No female child is permitted to inherit under this customary law rule.[31] A widow is equally excluded from inheriting.[32] If a man dies without a son, his property is inherited by his nearest male relative in the collateral line, usually his brother or his brother's male descendant.[33] This rule has been in existence in Africa since the early times as part of the African culture.[34] The concept of universal succession entails that under the customary law, when a man dies his heir[35] takes his (deceased) position as the head of the family and stands *in loco parentis* to the other members of the family.[36]

In 1994, Kaganas and Murray adequately expressed the position of African women under the customary law in the following words:

> "Under customary law, women are always subjected to the authority of a patriarch, moving from the control of their guardians to that of their husbands. The male head of the household represents the family and a woman cannot generally contract or litigate without assistance. Husbands control virtually all the family's property while wives' rights are confined to things such as items of a personal nature. Women cannot initiate the divorce process but must enlist the help of the bride-wealth holder, who may have a vested interest in the continued existence of the marriage. Husbands, on the other hand, may simply unilaterally repudiate their wives or, if they wish to retain the bride-wealth, can rely on specified grounds. Finally, on divorce, the children 'belong' to the husband's family."[37]

Delivering the judgment of the Supreme Court of Appeal in *Mthembu v Letsela,*[38] Mpati AJA said of the South African customary law of succession thus:

> "The customary law of succession in South Africa is based on the principle of male primogeniture. In monogamous families the eldest son of the family is heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased

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28 Kerr *The Customary Law of Immovable Property* 99–100.

29 Mbatha equally states that the devolution of estates under customary law follows the male lineage by entrusting the control and administration of the family property to the heir. See Mbatha "Reforming the Customary Law of Succession" 2002 *SAJHR* 259 260.

30 See *Sonti v Sonti* 1929 NAC (C&O) 23 24.

31 See *Madolo v Nomawu* (1896) 1 NAC 12; *Mahashe v Hahashe* 1955 NAC 149 (S) 153; See Mbatha 2002 *SAJHR* 260–261.

32 The daughter, however, has the right to be maintained while the widow has servitude over her late husband's land and a personal right against the heir to be maintained.

33 Kerr *The Customary Law of Immovable Property* 99.

34 Omotola "Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture" 2003 *Speculum Juris* 181 182.

35 The heir is the person who steps into the shoes of the deceased head of the family as the administrator of the family property. See Mbatha 2002 *SAJHR* 260–261; see also Robinson 1995 *SAJHR* 460.

36 Kerr *The Customary Law of Immovable Property* 100.

37 Kaganas and Murray "Law and Women's Rights in South Africa: An Overview" in Murray (ed) *Gender and the New South African Legal Order* (1994) 17; See also Bennett *Human Rights and African Customary Law* (1999) 80–81.

38 2000 3 SA 867 at 876 (SCA).

> the family head without leaving male issue, the second son became heir; if he is dead leaving no male issue, the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue his father succeeds. . . . Women generally do not inherit in customary law."[39]

The Nigerian case of *Ogunbowale v Layiwola*[40] states the position under the Yoruba customary law.[41] In this case, the deceased was survived by three wives and three children, one from each wife. The deceased also had two houses. The second defendant (the mother of one of the children) sold and conveyed in fee simple one of the two houses left by the deceased. She did so claiming that she sold the property under the authority of a paper signed by the two daughters and another relation of the deceased. The question that arose for determination in the case was: "what is the position in law of the wife or children of a Yoruba man in relation to his real property after his death intestate?"

The court, setting aside the sale of the property, held that nothing by way of property devolves on the wife/wives of a Yoruba man under customary law. It held further that under the customary law, a wife who had children for the deceased could continue to live in the home of the deceased with her children. If a wife without any issue of the deceased desired to stay on with the deceased's family, it would appear that she only has a right of occupation. The court concluded that the second defendant had sold the said property as her own property and conveyed same to the first defendant in fee simple. Since she inherited no estate in the real property of her husband, except the right to live there as a widow, she had no interest in the property that she could convey.

Similarly, in *Oloko v Giwa*[42] it was held that on the death of the husband, the room allotted to a wife becomes part of the deceased's real estate and does not vest in the wife. The wife is privileged to use the property not as a member of the family, but with the acknowledgement of her husband's membership of the family if and only if she does not remarry outside her deceased husband's family after the death of her husband. Also, in *Bolaji v Akapo,*[43] Sowemimo J (as he then was) held as follows:

> "The only person entitled to a grant of a letter of administration under Yoruba native law and custom which would be applicable by virtue of s 27 of High Court of Lagos Act, were the plaintiffs, four of the Children of the deceased, but not the wives who are regarded as part of his estate".

A similar position was taken in *Davies v Davies*[44] where Beckley J held that a wife was deprived of inheritance rights in her deceased husband's estate because, in intestacy under native law and custom, the devolution of property follows blood. Therefore a wife or widow not being of the same blood as her husband, had no claim to any cause. In *Suberu v Sunmonu*[45] Jibowu FJ reiterated that it is a well-settled rule of native law and custom of the Yoruba people that a wife

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39 *Mthembu v Letsela* para 8.

40 (1975) 3 CCHCJ/HC 323 of 19 March 1975.

41 Yoruba is one of the major tribes in Nigeria. The Yoruba tribe occupies the western part of the country.

42 (1939) 15 NLR 31.

43 (1968) NMLR (pt 2) 203 206; See also *Akinubi v Akinubi* [1997] 2 NWLR (pt 486) 144; (1997) 1 SCNJ 202.

44 (1929) 2 NLR 79 80.

45 (1957) 2 FSC 31.

could not inherit her husband's property since she herself is like a chattel to be inherited by a relative of her husband. Thus in *Osilaja v Osilaja*[46] the Nigerian Supreme Court held that the rule that a widow cannot inherit her deceased husband's property has become so notorious by frequent proof in courts that it has become judicially noticed.

However a foremost Nigerian scholar, Omotola, has likened the primogeniture rule under African customary law to the common law rule under which all the realty (immovable properties) which vested in the intestate estate is passed to his heir, the eldest male child, subject to the rights of the surviving spouse.[47] Some chattels (movable properties) known as "heirloom" also descended to the heir. He argues that at common law the heir takes beneficially, but in customary law he takes on behalf of the family.[48] In the same vein, Van Niekerk asserts that primogeniture rule plays an important role in ancient African customary societies.[49] He explains the evolution of male primogeniture in these words:

> "The reason for the emergence of the rule was to ensure the continued existence of the family or the group. It is obvious that the primary goal of the rule of male primogeniture could not have been to prejudice certain members of the community. After all, in line with *ubuntu* which is the foundation of the basic principles underlying indigenous law, the individual and the community are two sides of the same coin. The essence of *ubuntu* is encapsulated in the belief that the welfare of the individual is inextricably linked to the welfare of the group or family; that, in turn, is linked to a harmonious relationship with the ancestors and with nature. The welfare of *all* members of the community guarantees the equilibrium and welfare of society. The group, family or collectivity cannot be seen as an entity separate from its component members."[50]

However, one of the consequences of the basic principles of succession under the customary law is that the heir becomes the owner of all the deceased's property, movable and immovable at the time of death.[51] As there is hardly a right without a corresponding duty, as the heir becomes owner of the deceased's property, he equally becomes liable for the deceased's debt. He is liable for the deceased's debts even though they exceed the value of the assets in the estate, and even though there are no assets in the estate enough to offset them.[52] Thus, in *Maguga v Scotch*[53] the court held:

> "It is most characteristic of the Native law of inheritance that the view was adopted that the heir must be made answerable for the debts of the deceased, if necessary, with his own property. The heir was made answerable in the same manner as though he had contracted the debt himself or, to put it more plainly, he was made answerable in the same way as though he was the deceased himself."[54]

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46 (1972) 10 SC 126.

47 Omotola 2003 *Speculum Juris* 184.

48 However, this position has changed in England since 1925. See Megarry and Wade *The Law of Real Property* (5ed) (1984) 539–548; Omotola 2003 *Speculum Juris* 184.

49 Van Niekerk "Succession, Living Indigenous Law and *Ubuntu* in Constitutional Court" 2005 *Obiter* 474–487.

50 Van Niekerk 2005 *Obiter* 479.

51 This does not include for examples, the property owned by the deceased's wife or property which he gave away during his lifetime to a junior son, family members or even strangers. See Kerr *The Customary Law of Immovable Property* 100–101.

52 Kerr *The Customary Law of Immovable Property* 104.

53 (1931) NAC (T&N) 54; See also *Dlumti v Sikuade* 1947 NAC (C & O) 47.

54 Similarly, in *Umvovo v Umvovo* 1952 NAC 151 at 153 (S), it was stated that: "when the action is based on contract and one party has fulfilled his part of the contract and the other

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Another important consequence of an heir succeeding to the deceased's position is that he becomes guardian of the women and minor sons in the family and he is bound to maintain and support them.[55] The earlier Nigerian case of *Ogamien v Ogamien*[56] followed this reasoning in its decision. In that case, the court refused to declare the custom of primogeniture as contrary to natural justice, equity and good conscience. The court upheld the customary law rule of primogeniture in the Benin kingdom which allows the eldest son to take the whole of the father's estate to the exclusion of other children of a father who dies intestate. The court was satisfied that the custom imposed a responsibility on the eldest son to look after the young members of the family out of the estate as a kind of *paterfamilias* which existed under the Roman law.[57]

4 ASPECTS OF DISCRIMINATION IN THE PRIMOGENITURE RULE

The primogeniture rule has been severally criticised on the ground that it prohibits female children from inheriting.[58] Kaganas and Murray assert that customary law openly discriminates against African women.[59] Equally, in *Bhe v The Magistrate, Khayelisha, and others*[60] Ngwenya J opines:

> "We should make it clear in this judgment that a situation whereby a male person will be preferred to a female person for the purposes of inheritance can no longer

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party has died before fulfilling his part, then his heir is obliged under Native law to honour the agreement. If it is not possible for the heir to do so or if he repudiates the contract he is bound to make restitution, if not of the original things given them in kind". Kerr maintains that notwithstanding the general rule of the customary law as discussed above, certain highly personal debts of the deceased die with him; they cannot be enforced against the heir of the wrong-doer. Kerr *The Customary Law of Immovable Property* 105. The debt arising from adultery and seduction falls into this category. In these cases, the liability is entirely extinguished by the death of either party before the judgment is satisfied. See *Ngesi v Mcuta and Another* (1948) 1 NAC 12 (S).

55 Kerr *The Customary Law of Immovable Property* 108; Reiterating this, Mpati, AJA equally states: "When the head of the family dies his heir takes his position as head of the family and becomes owner of all the deceased's property, movable and immovable; he becomes liable for the debts of the deceased and assumes the deceased's position as guardian of the women and minor sons in the family. He is obliged to support and maintain them, if necessary from his own resources, and not expel them from his house". See *Mthembu v Letsela* 2000 3 SA 867 (SCA) 876.

56 (1967) NMLR 245 247.

57 See *Ogamien v Ogamien* 247; See also Ademola "Customary Law and the Doctrine of Repugnance: Marriage and Succession" *Judicial Lectures, Continuing Education for the Judiciary* (1991) 162.

58 See Bennett *Human Rights and African Customary Law* 80–95; Robinson 1995 *SAJHR* 457–476; Van der Meide "Gender Equality v Right to Culture: Debunking the Perceived Conflicts Preventing the Reform of the Marital Property Regime of the 'Official Version' of Customary law" 1999 *SALJ* 100; See also Liebenberg and O'Sullivan "South Africa's New Equality Legislation A Tool for Advancing Women's Socio-economic Equality?" in Jagwanth and Kalula (eds) *Equality Law: Reflections From South Africa and Elsewhere* (2001) 70 72–73.

59 Kaganas and Murray "Law and Women's Rights in South Africa: An Overview" in Murray (ed) *Gender and the New South African Legal Order* (1994) 16. Conversely, it can be argued that whereas patriarchy has often been a feature of customary law rule of inheritance, it was often fortified with checks and balances that ensured the welfare of women and other dependants.

60 2004 2 SA 544 (C). Judgment was delivered on 25 September 2003 and was subsequently confirmed by the Constitutional Court. The later decision is discussed in detail *infra*.

> withstand constitutional scrutiny. That constitutes discrimination before the law. To put it plainly, African females, irrespective of age or social status, are entitled to inherit from their parents' intestate like any male person."[61]

Unlike a woman who marries under the Marriage Act, a woman who marries under customary or Islamic Law in Nigeria does not enjoy adequate legal protection in the distribution of assets.[62] Under customary arrangements, however, the husband is generally regarded as having dominant/legal power to dispose of family property. In some cases, the husband often exercises this power without taking cogniscance of the wife's contributions to the assets as they are usually acquired in the husband's name.[63] Under the Yoruba customary law, the deceased's wife is regarded as part of the chattel or property to be inherited[64] and, as such, she has no inheritance rights in her husband's property.[65] Exclusion of the wife from inheriting from her husband's estate is based on the customary law notion that succession/devolution of his property follows blood. Not being a blood relation of the husband, a wife or widow has no claim to any share.[66]

Nigerian customary law follows a patriarchal system which does not allow women to inherit real property. The fact that a wife is not a blood descendant of

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61 *Bhe* 2004 554I–555B. Also, in *Brink v Kitshoff NO* 1996 6 BCLR 752 (CC) para 44 where O'Regan J said: "Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution."

62 The Married Women's Property Act 1883 accords some recognition and gives a surviving wife inheritance rights on certain portion of the legacy. Married Women's Property Act (England) is a Statute of General Application in Nigeria. Where marriage is dissolved, the Nigerian Matrimonial Causes Act 1970 provides that a judicial order shall divide the family assets between the parties.

63 See *Nwanva v Nwanva* [1987] 3 NWLR 697; In South Africa, by virtue of s 11(3)(b) of the Black Administration Act 38 of 1927, African women married under customary law were regarded as minors under the guardianship of their husbands. Mbatha argues that this minority legal status disqualified them from inheriting family property as wives or daughters. However, this position has changed with s 6 of the Recognition of Customary Marriage Act 120 of 1998 which came into operation on 15 November 2000. The effect of this Act is that women who are married under customary law will no longer be minors subject to their husband's guardianship. They now have equal capacity and full status to acquire assets and dispose of them, to enter into contracts and litigate. See Liebenberg and O'Sullivan 73. See also Mbatha 2002 *SAJHR* 264.

64 This is made possible through *levirate* arrangement. Under this system, if a person dies leaving a young widow capable of bearing children, she would be expected to enter into a *levirate* union with one of the deceased's male relatives. This institution ensures that death does not disturb the relationship between the spouses' families and the widow will continue to produce children for her husband's patriline. In some cultures, a similar arrangement is made if a wife died while still of child-bearing age. In these circumstances, her family would be expected to provide a substitute spouse with whom the surviving husband could consummate a *sororal* union. However, while *levirate* union is practiced widely, the *sororal* union has no root under the Nigerian customary law system and little is known about it.

65 Following customary law, the Nigerian Court of Appeal, Lagos Division held that wives are regarded as chattels which are capable of being inherited by other members of the family of the deceased. See *Ogunkoya v Ogunkoya* Suit No. CA/L/46/88, 56 (unreported).

66 See *Davies v Sogunro* 8 NLR 79.

her husband's family deprives her of succession rights in that family. As regards her father's place, a woman by culture is never allowed to come from her husband's house to inherit her father's property. In both cases the female loses as she can not inherit on either side. Duncan captures this when he states:

> "Traditionally the position of women, throughout their lives, is that of minor children. Before they are married, they are the children of their father; after their marriage, they are the children of their husbands; and during widowhood, they are the children of their heirs".[67]

However, it is argued that in today's circumstances, enforcing a law that gives family property to one person (the heir) enriches him unfairly and encourages him to use the inherited property to serve his personal interest.[68] It is submitted that the heir, like a trustee, should be disqualified if he acts contrary to the trust placed on him.[69] The position needs to change in view of the constitutional and human rights instruments which emphasise equality of all persons. For example, s 42(1) of the Constitution of the Federal Republic of Nigeria 1999 prohibits discrimination on account of sex. It states:

> "A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person—
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> (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
>
> (b) be accorded either expressly by, or in practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions."

Nigeria is also a signatory to the CEDAW which emphasises the universality of the principle of equality of rights between men and women and makes provisions for measures to ensure equality of rights for women throughout the world.[70] The 30-article Convention provides a framework for development and application of equality norms to address specific conditions in every country and every legal system. It sets out in legally binding form internationally accepted principles and measures to achieve equal rights for women everywhere. In terms of art 2 of the Convention, state parties condemn discrimination against women in all its forms, and agree to pursue by all appropriate means. This includes pursuing a policy of eliminating discrimination against women without delay. State parties further undertake to take, *inter alia,* all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.[71] In terms of art 5 of the CEDAW, state parties are obliged to take appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination

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67 See Duncan *Sotho Laws and Custom* (1960) 4.

68 See Mbatha 2002 *SAJHR* 267.

69 *Ibid.*

70 Nigeria is bound by the provisions of the CEDAW; although the bill domesticating it has never been passed by the Nigerian National Assembly on the ground that certain provisions of the convention violate certain religious tenets and principles.

71 See art 2(f) of the CEDAW.

of prejudices and customary practices and all other practices which are based on idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[72]

Similarly, a basic goal in the preamble to the United Nations Charter is the "reaffirmation of faith in fundamental human rights in the dignity and worth of the human person, in the equal rights of men and women." Article 1 of the Charter proclaims that one of its purposes is to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all people "without distinction as to race, sex, language or religion." Under the Charter, all member states of the United Nations (of which Nigeria is one), have the legal obligation to strive towards the full realisation of human rights for all persons.

Article 3 of the African Charter on Human and Peoples' Rights provides that every individual shall be equal before the law and shall be entitled to equal protection of the law. Article 18(3) in the Charter further provides that "[t]he state shall ensure the elimination of every discrimination against women and shall also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions."[73] Article 26 of the International Covenant on Civil and Political Rights also provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The achievement of equality between women and men has been considered an important goal in strengthening democratic societies. It is asserted that the general welfare of everyone "can be increased by a decrease in oppression of women."[74] Several human rights issues affecting the rights of women have received a renewed boost in recent times, and have attracted long-deserved attention at the top of international human rights agenda. The Second World Conference on Human Rights in Vienna in 1993[75] contains a number of very extensive paragraphs on women's rights.[76] Also, in the Beijing Declaration,[77] the participating governments declared their determination to take all necessary measures to eliminate all forms of discrimination against women and the girl child and to remove all obstacles to gender equality and the advancement and

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72 See art 5(a) of the CEDAW.

73 See also art 7 of the UDHR which guarantees the equality of all persons and freedom from any forms of discrimination.

74 See Olsen "Feminism Across Frontiers" Paper Presented at the 8th World Conference of the International Society of Family Law, Cardiff (1994) 4.

75 This was the Second World Conference on Human Rights held in Vienna, 14–25 June 1993, adopted by 180 Governments by consensus. The 1st International Conference on Human Rights was held in Teheran in 1968.

76 For example, part 1, s 18 provides: "The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on ground of sex are priority objectives of the international community."

77 Otherwise known as the Fourth World Conference on Women (September 1995).

empowerment of women.[78] The Beijing Declaration also emphasised the connection between the advancement of women and the progress of society as a whole.[79]

The Nigerian case of *Augustine N Mojekwu v Caroline MO Mojekwu*[80] supports this changing attitude towards securing equality of men and women in society. In this case, the appellant claimed that the deceased, the owner of the property, was his father's only brother and he had predeceased his father. The deceased had two wives, Caroline (the respondent) and another wife, Janet. Caroline had a son who died in 1970 and had no issue. Janet had two daughters. The deceased bought the property in dispute from the Mgbelekeke family of Onitsha under kola tenancy. The appellant claimed that he was the rightful heir to the property under Native Law and custom of Nnewi, their home town. He paid the necessary kola (being the consideration to the Mgbelekeke family) who recognised him as a kola tenant, that is, the eldest surviving son of his father and the eldest male in the Mojekwu family. The respondent denied the appellant's claim. However, under the Mgbelekeke family customary law of Onitsha, both male and female children can inherit the property of an intestate heir. The customary law of Nnewi is known as *Oli-ekpe* and under it, only a male can inherit. The trial judge decided that the applicable law is the *lex situs* (that is, the law where the land is situated). In this case then, the trial judge found that the customary law of the Mgbelekeke family of Onitsha and not *Oli-ekpe* applied.

On appeal, the Nigerian Court of Appeal agreed with the trial court. It found that the applicable law is the *lex situs*, that is, the customary law of Mgbelekeke family of Onitsha. Delivering the judgment of the court, Niki Tobi JCA (as he then was) expressed the following view on the *Oli-ekpe* custom:

> "The appellant claims to be that '*Oli-ekpe*'. Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilised sociology does not discriminate against women? Day after day, month after month and year after year, we hear of and read of about customs, which discriminate against the womenfolk in this country. They are regarded as inferior to menfolk. Why should it be so? All human beings, male and female are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy, which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi *Oli-ekpe* custom relied upon by the appellant are not consistent with our civilised world in which we all live today, including the appellant. . . . Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the *Oli-ekpe* custom of Nnewi is repugnant to natural justice, equity and good conscience."[81]

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78 See Beijing Declaration and Platform for Action, UN Doc. A/50/744, 10 November 1995, para 24.

79 See Eriksson *Reproductive Freedom in the context of International Human Rights and Humanitarian Law* (2000) 5.

80 [1997] 7 NWLR (pt 512) 283.

81 *Mojekwu v Mojekwu* 304–305; See also *Mojekwu v Ejikemi* [2000] 5 NWLR (pt 657) 403 429, where it was held that the *Nrachi Nwanyi* customary practice of Nnewi (eastern Nigeria) encouraged promiscuity and prostitution and therefore constituted discrimination. In terms of this practice, a man may keep one of his daughters unmarried perpetually under

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> Omotola vehemently disagrees with the above view of the Court of Appeal on two grounds. First, he argues that the *Oli-ekpe* custom should not have been declared as contrary to natural justice, equity and good conscience because female children are not prevented from benefiting.[82] He submits that the family property inherited by the heir is to be used for the benefit of all family members who will fall under his care. The property does not belong to heir in his personal capacity.[83] He therefore posits:
>
> "What is inequitable in asking property to be held for others or in saying males should hold for females so long as no one that is entitled is thereby deprived? This is principle upon which the English Trust was founded in order to keep the property safe and ensure evenhanded in its administration."[84]

Secondly, he argues that the learned Justice referred to the custom (*Oli-ekpe*) as unconstitutional and antithesis to a society based on the tenets of democracy but did not refer to any specific constitution. Omotola comments:

> "Although fundamental rights relating to discrimination, contained in s 39, Chapter IV of the [1979] Constitution were preserved, it is doubtful whether this provision would justify the dismissal of the primogeniture rule, as was done by the learned Justice, especially taking into account the provisions of s 20 of the same Constitution which provides for the protection of Nigerian culture."[85]

In the considered view of this present writer, the above arguments cannot be supported in constitutional jurisprudence. First, the global reasoning is that any customary rule of inheritance which has the slightest effect of discrimination on the ground of sex (and in this case the *Oli-ekpe* customary rule of inheritance) is the antithesis of modernisation and therefore repugnant to natural justice, equity and good conscience.[86] In this regard, a foremost scholar, Kerr, while commenting on the customary rule of primogeniture and the Bill of Rights under the South African Constitution, submits as follow:

> "Succession of males through males is inconsistent with the provision on unfair discrimination on the ground of gender. Primogeniture does not discriminate unfairly if the succession is to a position that can only be held by one person, such as the headship of a tribe, which position does not involve legal guardianship of

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his roof to raise male issue in order to succeed him; Also in *Meriba v Egwu* [1976] 1 All NLR 266, the traditional practice in the Igbo land of Nigeria was found to be inconsistent with natural justice, equity and good conscience. This practice allowed marriage between two women to cater for well-to-do female members of society who were unable to conceive. As a result, the practice was declared a nullity by the Supreme Court.

82 Omotola 2003 *Speculum Juris* 187.

83 *Ibid.*

84 *Ibid.*

85 *Ibid.*

86 See art 3 of the ACHPR 1981 provides that every individual shall be equal before the law and shall be entitled to equal protection of the law. Art 18(3) of the ACHPR also obliges the State to eliminate every form of discrimination against women; art 7 of the UDHR guarantees the equality of all persons and freedom from any forms of discrimination. Art 26 of the ICCPR prohibits any discrimination and guarantees to all persons, equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; See also para 24 of the Beijing Declaration: Fourth World Conference on Women (September 1995) where the participating governments declares: "We are determined to: take all necessary measures to eliminate all forms of discrimination against women and the girl child and remove all obstacles to gender equality and the advancement and empowerment of women".

> others and does not deprive others of equality of treatment in the distribution of assets. If the Bill of Rights applies to all branches of customary law, one has to eliminate the phrase 'of males through males' as 'inconsistent' with the Constitution and therefore 'invalid', and the position of primogeniture is continued, is that the eldest *child*, not eldest *son*, succeeds to the position."[87]

The second aspect of Omotola's argument also cannot be supported considering the provisions of s 20 of the 1979 Constitution relied upon by the learned scholar. The section (which is now s 21 of the 1999 Constitution) is a mere State Directive on Nigerian culture as opposed to s 39 of the 1979 Constitution (now s 42 of the 1999 Constitution) which is a fundamental right prohibiting discrimination. The said s 20 of the 1979 Constitution provides: "[t]he State shall— (a) protect, preserve and promote the Nigerian cultures which enhances human dignity and are consistent with the fundamental objectives as provided in this chapter." It is the view of this writer that s 20 of the 1979 Constitution is of a lesser category compared to s 39 of the same Constitution because s 6(6)(c) of the same Constitution makes s 20 non-justiciable[88] whereas s 39 is justiciable as a fundamental right.

In a constitutional arrangement (such as South Africa) where the right to culture is recognised as a justiciable right,[89] it is accepted that the right to cultural practices cannot be exercised in a manner inconsistent with any provision of the Bill of Rights. In this case, s 9 of the South African Constitution which guarantees the right to equality and freedom from discrimination is relevant.[90] In this regard, Mbatha argues that enforcing the rule of primogeniture by invoking constitutional provisions that protect culture when there are other constitutional provisions encouraging equal access to property by family members reinforces gender discrimination.[91] He posits that the rule that allows an heir to be the sole successor to family property does not deserve protection as a cultural right in any democratic country.[92] Similarly, Bronstein submits that the right to equality has great prominence in the South African Constitution and therefore, on a formal level, it seems that competing rights like equality or dignity will prevail over cultural rights.[93]

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87 Kerr 1997 *SALJ* 350–351; Kerr 1994 *SALJ* 725–726. Original emphasis.

88 Section 6(6)(c) provides: "The judicial powers vested in accordance with the foregoing provisions of this section – (c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution".

89 See ss 30 and 31 of the 1996 South African Constitution.

90 See ss 30, 31(2) and 36 of the 1996 South African Constitution. Kerr described this as "[s]ome provisions of the Constitution versus other provisions of the same Constitution". He comments: "The main difficulty is that each of the provisions of the Constitution has a contradiction within itself. It is not a question of customary law versus the Constitution but of some provisions of the Constitution versus other provisions of the same Constitution". See Kerr "Inheritance in Customary Law under the Interim Constitution and under the present Constitution" 1998 *SALJ* 262 267.

91 See Mbatha 2002 *SAJHR* 266.

92 Mbatha 2002 *SAJHR* 267.

93 See Bronstein 1998 *SAJHR* 388–389; see also Robinson 1995 *SAJHR* 465–466. Equality as a value and as a right is central to the task of transformation in South Africa. As a value, equality gives substance to the vision of the Constitution. As a right, it provides the

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The contention of this article is that women are still disadvantaged and discriminated against largely on cultural and customary grounds. As shown above, many customary law practices and decided cases have shown that women are denied the right of inheritance and succession. It is submitted that these practices and the rules of customary law are, no doubt, inconsistent with the 1999 Nigerian Constitution and therefore, cannot stand.[94] It is therefore my view that the customary rules of inheritance which deny a surviving spouse the right of inheritance or benefit over the property of her deceased partner is repugnant to natural justice, equity, fair play and good conscience.[95]

In modern times, it is an established fact that both men and women contribute to the families' economic wealth irrespective of the fact that they consummate their marriages in terms of the Native Law and custom. It is therefore submitted that to allow the rule of primogeniture to govern intestate succession would not only be unfair, but outrageous. In this regard, Van der Meide argues:

> "Generally speaking, African women contribute to their families' economic wealth in the same manner as do their husbands and non-African counterparts. Yet during a customary union they are legally prevented from maintaining a separate estate, and should the union be dissolved, the law is such that they leave it virtually empty-handed".[96]

Van der Meide maintains that in effect, the customary law rules deny both formal and substantive equality to a wife in a customary union simply by virtue of her sex. This results in her subordination and disadvantage in and through the law.[97] I submit therefore that such customary law practices are repugnant to natural justice, equity and good conscience and above all, are inconsistent with the Constitution and therefore need reform if they are to stand.[98]

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mechanism for achieving substantive equality, legally entitling groups and persons to claim the promise of the fundamental value and providing the means to achieve this. Equality is a foundational value and organising principle of the South African democracy. See Albertyn and Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 *SAJHR* 248 249.

94 Conversely, it has been argued that customary law is not inconsistent with modern constitutions. In this regard, see Omotola 2003 *Speculum Juris* 181 and 187; Mqeke is equally of the view that customary law is not incompatible with the doctrine of human rights. He posits that the philosophical framework for the customary law conception of human rights is located within the African variant of humanism particularly known as *ubuntu*; Mqeke "The Customary Law of Delict and a Bill of Rights" 1992 *De Jure* 462–467; Mqeke "Patriarchy and the Bill of Rights" 2004 *Obiter* 109 113. He however mentioned that there were isolated instances where the community tolerated the violation of human rights as was the position in the case of people accused of witchcraft who were stoned to death. See Mqeke "Customary Law and Human Rights" 1996 *SALJ* 364 369.

95 See the Supreme Court Ordinance No. 4 of 1876 which formally introduced the doctrine of equity as part of English Law to be applied in the Nigerian Courts and which laid the foundation of the modern legal systems in Nigeria. It provides: "Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance or shall deprive any person of the benefit of any Native Law and customs, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force". See also, s 14 of the Evidence Act, Cap 112 Laws of the Federation of Nigeria (LFN) 1990.

96 Van der Meide "Gender Equality v Right to Culture" 1999 *SALJ* 100.

97 Van der Meide 1999 *SALJ* 109.

98 Kerr argues for reform in this way: "Enough has been said to show that if the Bill of Rights applies to all branches of customary law, the whole of the present customary law

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The constitutionality of the customary rule of primogeniture was considered recently by the South African Constitutional Court in *Bhe v Magistrate Khayelitsha; Shibi v Sithole*; *SA Human Rights Commission v President of the Republic of South Africa*.[99] In this case, it was contented that the rule of primogeniture which precludes: (a) widows from inheriting as the intestate heirs of their late husband; (b) daughters from inheriting from their parents; (c) younger sons from inheriting from their parents, and (d) extra-marital children from inheriting from their fathers constitutes unfair discrimination on the basis of gender and birth and forms part of a scheme underpinned by male domination.[100]

The South African Counstitutional Court agreed with these submissions and found primogeniture rule discriminatory and inconsistent with the Constitution. The court held *inter alia*:

> "The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order. . . . The primogeniture also violates the right of women to dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property.[101]

While this judgment has been hailed as a fundamental achievement for the liberation of woman and the equality principle, it has been criticised for abolishing the core of the indigenous law. Van Niekerk expresses his criticism of the judgment thus:

> "Yet, in spite of these sentiments, [on the relegation of indigenous law rules merely because they differ from the general law of the land] the Constitutional Court, in a disappointedly contrived manner, abolished an indigenous law rule which goes to the heart of indigenous law, instead of adapting it to conform with the constitutional principles of equality and dignity".[102]

Notwithstanding the criticisms, *Bhe*'s case and *Mojekwu*'s case constitute fundamental achievements in constitutional jurisprudence on the equality right and freedom from discrimination in Africa. Specifically, the Court of Appeal pronouncement in *Mojekwu*'s *case* represents a turning point in Nigerian jurisprudence, as the court scrutinised the customary law rule of inheritance through a human rights lens. As a result, the case has been cited by several human rights activists and proponents.

However, the Court of Appeal pronouncement in *Mojekwu*'s case has been criticised by the Supreme Court when the case came before it on appeal in *Mojekwu v Iwuchukwu*.[103] The names of the parties changed because, when the

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of intestate succession is in important respects inconsistent with the Constitution and therefore invalid, and so is much of the law of marriage and parts of the law of property. Hence a court or legislature considering reform needs to consider and to reform these branches of the law together". See Kerr 1997 *SALJ* 352.

99 2005 1 BCLR 1 (CC). Langa, DCJ (as he then was) delivered the majority judgment with Chaskalson, CJ, Madala, Mokgoro, Moseneke, O'Regan, Sachs, Skweyiya, Yacoob and Van der Westhuizen JJ concurring. Ngcobo J dissented.

100 *Bhe* 2005 para 88.

101 *Bhe* 2005 paras 91–92.

102 See Van Niekerk 2005 *Obiter* 486.

103 [2004] 1 NWLR (pt 883) 196 216–217, Uwaifo, JSC.

matter was pending before the Supreme Court, Caroline Mojekwu (the original party to the suit) died and was substituted by her daughter, Mrs Iwuchukwu. The legal issue before the Supreme Court was whether the Court of Appeal erred in holding the *Oli-ekpe* custom to be repugnant and contrary to the gender equality provisions under the Nigerian Constitution and pertinent international human rights instruments.

The Supreme Court held that the rules of procedure precluded the Court of Appeal from determining whether *Oli-ekpe* custom was repugnant since neither of the parties to the case brought the validity of the custom as a legal issue before the court. The court, per Uwaifo JSC criticised the Court of Appeal's pronouncement as follows:

> "I cannot see any justification for the court below to pronounce that the Nnewi native custom of *'[o]li-ekpe'* was repugnant to natural justice equity and good conscience. . . . The learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi *'oli-ekpe'* custom and that is quite understandable. But the language used made the pronouncement so general and far-reaching that it seems to cavil at, and is capable of causing strong feelings against all customs which fail to recognise a role for women. For instance the custom and traditions of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities."

The Supreme Court upheld the Court of Appeal's judgment in the case because, in its view, it did not result in miscarriage of justice. It found that the *kola tenancy* was indeed the applicable law, and thus, the respondent and her family were rightfully held to be the owners of the property in issue. However, it held that Court of Appeal erred in holding that the *Oli-ekpe* custom is repugnant to natural justice.

This decision, however, raises considerable doubt as to whether Nigerian apex court would fufil the rights guaranteed to women by international, regional and national laws by its present approach on discriminatory inheritance customs. The view of the court is that similar customs, such as those that exclude women from being family heads would not be discountenanced without hearing from the communities in question. While this sounds logical, however, the pronouncement reveals that the court is not eager to deem such customs discriminatory since they represent the ways of life of the people in question. It is submitted that this decision could have a chilling effect of dissuading lower courts from using human rights to challenge customary law rules that exclude women from property inheritance. This approach is in contrast with the South African position where the customary law rule must be enforced subject to the Bill of Rights and constitutional provisions.[104] It is hoped that in the not too distant future, the Supreme Court will review this decision and makes its position clear on the issue.[105]

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104 See s 31(2) of the 1996 South African Constitution which provides that the rights in subsec (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights. See also, s 211(3) of the Constitution which also provides that: "[t]he courts must apply customary law, when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

105 The position taken by the Nigerian Supreme Court is strange in the sense that the decision of the Court of Appeal in *Mojekwu*'s case has greatly influenced other jurisdictions in

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5 CONCLUSION

This article has argued that the customary rule of primogeniture denies dependants of the deceased person access to and enjoyment of inheritable property. It has also contended that the rule discriminates unfairly on the grounds of gender and sex by preferring a male heir to female members of the family. No doubt, in today circumstances, interactions with other cultures have brought about changes in Africa's perceptions of things. Social values and a sense of justice, inconceivable some centuries ago when our customary rules evolved, have become a part of the African way of life. Therefore, there is the need to bring African customary law rules in tune with modernisation. This is not as strange as it seems: modern statutes are often subjected to constant amendments to reflect social changes and values. For that reason, it is recommended that discriminatory customary law rules be reformed. After all, flexibility and adaptability has been recognised as valuable characteristics of customary law. The customary law rule of primogeniture should therefore be reformed to be in tune with modern constitutions and international Bills of Rights. This reform is necessary to accommodate the changing needs of the societies' demands and developments. The rule of primogeniture needs to be modified to allow women to inherit by deleting the notion of inheritance of "males through males."[106]

The reality of the modern individualistic and capitalist societies is that a person's material security is more effectively guaranteed by real rights, namely, rights that the holder can assert against the world. There is the likelihood that the customary law right to maintenance which the primogeniture rule guarantees may no longer work for the benefit of women. In effect, the customary law rule of primogeniture may no longer be achieving its social purpose, that is, to provide a material basis of support for the deceased's surviving spouse and dependants. It is therefore reasoned that individuals (male and female) should be given real rights to inherit directly from deceased estates.[107] In view of the changing social structures in customary societies across Africa, it is recommended that every customary law rule that discriminates on the grounds of sex or gender be reformed to reflect modern realities. Perhaps the much-advocated codification of Nigerian customary law may help in this regard, taking into account the new faces of Nigerian societies.

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coming to a decision on declaring a custom discriminatory and a violation of human rights principles. For example, the South African Constitutional Court cited and relied on this decision in *Bhe*'s case.

106 See Kerr 1997 *SALJ* 350–351; See also the dissenting judgment of Ngcobo J in *Bhe* 2005 paras 183, 216 and 218.

107 See South African Law Commission Report on Customary Law: Succession (Project 90) Discussion Paper 93 (August 2000) 33–34.

"How to Fix a Life": Lessons on *Ubuntu* and Restorative Justice from Alexander McCall Smith's The No. 1 Ladies' Detective Agency

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1 INTRODUCTION

Alexander McCall Smith probably never imagined in the course of writing *The No. 1 Ladies' Detective Agency* that his work had any great jurisprudential merit. Yet, beneath the deceptively simple plot of his novel lies a rough road-map for infusing African justice into Western and orthodox legal systems which dominate our legal system. The means of dispute resolution adopted by his detective-protagonist Mma Ramotswe (who famously reasons that "in the final analysis" eating pumpkin "solve[s the] big problems in life"![1]) exhibit a measure of *ubuntu* gravely lacking in contemporary South Africa. South Africa's legal system has instead edged too closely to the metaphorical greyness and fogginess of legal orthodoxy portrayed in Charles Dickens's famous legal dystopia, *Bleak House*. This article will advocate a wider embrace of Mma Ramotswe's jurisprudential philosophy through the medium of restorative justice. In the result, the question of "how best to fix a life", so often overlooked by a legal system favouring form and procedure above substance, can be given the credence it deserves.

2 LAW AND LITERATURE

> "*Books are the carriers of civilisation. Without books, history is silent, literature dumb, science crippled, thought and speculation at a standstill. They are engines of change, windows on the world, lighthouses erected in the sea of time.*"[2]

The seasoned formal legal academic might well ask, with puzzlement stretched across his or her face, "in what conceivable way can literature offer 'practical solutions' for legal reform?" The simple answer to this is that literature cannot and should not pretend to do so. What it *can* do though is to open the windows of the imagination, that part of the intellect so often neglected by legal scholars, and sketch roughly but colourfully new ways of being. Such literary vision then depends upon the smaller and practical steps of legislators, lawyers, judges and the like to be translated into reality. The law and literature scholar occupies that marginal space between vision and reality, attempting to place the authoritative interpretative stamp on literary meaning and to link that meaning to the law.

What facilitates this cross-border law and literature realm? Many scholars have commented on the unity of law and literature as word-based spheres, with

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1 McCall Smith *The No. 1 Ladies' Detective Agency* 12th Impression (2007) 81.

2 Tuchman 1979 *Author's League Bulletin* 1.

Minda describing how "law is in fact a special form of literary activity which connects law to literature in a more fundamental and basic way".[3] While this identity certainly allows for ease of comparison, it is the ability of literature to critique the law and to illustrate "how actual practices of law run counter to the principles and values natural law thinking upholds"[4] that is intrinsically valuable.

Nussbaum, in her pioneering work *Poetic Justice: The Literary Imagination and Public Life*, asserts: "the contribution of the novel to moral and political life, both represent[s] and enact[s] the novel's triumph over other ways of imagining the world".[5] The accessibility and recreational character of literature has certain benefits, enabling the author to pierce the reader's insecurities and "giv[e] [us] pleasure in the very act of confrontation".[6] Not only is the reader drawn into a liberated realm of personal sentiment, but he or she is invited to indulge these very sentiments. In the case of literature dealing with legal subjects, Nussbaum contends that the reader is re-constituted in the process of reading as a "judge".[7] She adds that the ordinary "judge" pursues a "view of moral education that makes sense of our own personal experience [and] one that we can defend to others and support with others whom we wish to live in community".[8] The result of this view would be that every text is morally assessed; the reader's goal being a synthesis or antithesis with the ideas expressed therein. This article seeks synthesis with the content of *The No. 1 Ladies' Detective Agency* by acting as its own "judge", and extracting from the text the defensible and communally applicable moral education described above. A successful outcome will be "selling" this moral education to a more academic audience. In contrast, antithesis with the orthodox form of *Bleak House*'s Chancery is an inevitable outcome, causing any moral education stemming from Dickens's novel to be solely satirical.

The title of Nussbaum's work – *Poetic Justice: The Literary Imagination and Public Life* is of particular relevance. Without poetic justice and imagination, a novel would be no different from a dissertation; it could not conceive of "other ways of imagining the world".[9] Yet these two fundamental qualities detract from the essential quality of the average dissertation: accuracy. Thus, as the reader indulges the imaginative inaccuracies and generalisations of the novel's author, so he or she must extend this indulgence to the law and literature scholar. This indulgence is emphasised when the question is raised as to whether there are similarities between the fictional world of *Bleak House* and contemporary South Africa. A number of generalisations become unavoidable in allowing for this comparison. Above all, the classification of the society in *Bleak House* as stereotypically Western and orthodox is obvious. Having reached consensus on this point, identification of South Africa as the same should be accepted.

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3 Minda "Law and Literature at Century's End" 1997 *Cardozo Studies in Law and Literature* 245 246.

4 Witteveen "Law and Literature: Expanding, Contracting, Emerging" 1998 *Cardozo Studies in Law and Literature* 155 159–160.

5 Nussbaum *Poetic Justice: The Literary Imagination and Public Life* (1995) 3.

6 Nussbaum *Poetic Justice* 6.

7 Nussbaum *Poetic Justice* 83–84.

8 Nussbaum *Poetic Justice* 84.

9 Nussbaum *Poetic Justice* 3.

Inherent in this conceptualisation are the qualities of an adversarial approach to dispute resolution and a prioritisation of form and procedure above substance. This article recognises the limitation of this generalisation (whether literary or real) but simultaneously submits that the broad message underlying what may be in part exaggerated claims, is a fair representation of the truth. This message does not aspire to total factual accuracy but rather to an artist's representation of the whole. Generalisation must then be a running strand throughout the article. Just as Dickens stereotypes the Victorian Western legal system as excessively "bleak", so McCall Smith posits Mma Ramotswe's African means of problem-solving as a happy alternative to what Western justice in Africa can offer.

3 THE UNDOING OF LIVES

While a figurative literary expanse apart in terms of location, style, time frame and plot, Dickens's epic novel *Bleak House* and McCall Smith's *The No. 1 Ladies' Detective Agency* share significant value for the legal scholar. It seems that in spite of the temporal difference of over a century, representations of the orthodox legal system remain unchanged. Kelley cites the English Court of Chancery in Victorian times as one of Dickens's "bleak houses,"[10] with the plot's third person narrator violently expressing the wish that "all the injustice it has committed, and all the misery it has caused, could only be locked up with it, and the whole burnt away in a great funeral pyre".[11] The dominant symbol of a fog-ridden atmosphere in *Bleak House* embodies the pervasive lack of clarity, not only in social morality and the personal identity of its characters, but also in what the legal institution of Chancery can achieve, or even hopes to achieve, for its parties. "Not much", Dickens implies, with the Chancery suit of *Jarndyce v Jarndyce* continuing fruitlessly until the proceeds of the estate are exhausted by the legal costs. Miller astutely observes:

> "Yet though we see nothing but the effects of *Jarndyce and Jarndyce*, everywhere present, affecting everyone, everything, we never come close to seeing what the suit is all about, as though this were merely the pretext that allowed for the disposition and deployment of the elaborate channels, targets, and techniques of a state bureaucracy."[12]

Much of the inefficacy of the system can textually, and (one would expect in Dickens's lifetime) literally, be attributed to the greed of the lawyers and presiding officers who sense the relationship between the extension of a case and increased legal fees. Blame can also be laid on the resistance of the entrenched hierarchy to modernisation, exemplified figuratively by the representation of Chesney Wold as foggy, damp and stagnant – a place set against procreation, with the Dedlocks' childless union reinforcing the atmosphere of sterility and even doom. The parallel between the archaism of Chesney Wold and that of the Chancery is linearly identified by their proximity "as the crow flies".[13] Dickens's implicit warning is that both institutions will suffer the self-implosive fate of Krook if modernisation does not occur.

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10 Kelley "The Bleak Houses of Bleak House" 1970 *Nineteenth-Century Fiction* 253 254.

11 Dickens *Bleak House* (Reissue 1998) 17.

12 Miller "Discipline in Different Voices: Bureaucracy, Police, Family, and Bleak House" (1983) *Representations* 59 61.

13 Dickens *Bleak House* 17.

A telling indicator of the need for legal reform is the tragedy caused to numerous characters by the empty promise of the Chancery. The image of Tom-all-Alone's, a neighbourhood which is in Chancery, is the high-point of this tragedy. Not only is Tom-All-Alone's destitute but its name signifies the social alienation resulting from such destitution.

Above and beyond this, as if to drive his message home, Dickens provides his reader with vivid representations of the legal profession. The offices of Vholes, the vampire-like lawyer, reflect the mode of his practice: the narrowness of his compassion, the failure to bestow light on clients' lives and the smell of the flesh of those whose energy and hope he consumes.[14] Tulkinghorn is arguably an even more sinister figure with his ominous power derived from the secret knowledge he obtains as a practitioner, and which he thereafter employs as a torturer. Kelley best captures the subtle distinction between the two characters: "Mr Vholes strips layer after layer from his victims in the most respectable fashion until he has laid their hearts bare. Mr Tulkinghorn conceals his knives, then strikes to the core almost without warning".[15] As this characterisation shows, *Bleak House* embodies the worst of orthodox, Western legal systems: an obedience to set procedure so extreme that the needs of the parties involved are jeopardised, legal careerism driven by power and greed, and moral conviction clouded by the omnipresent "fog".

A current literary representation of this orthodoxy strikes a similar, if more muted, tone in a vastly altered context. Mma Ramotswe, the heroine of *The No. 1 Ladies' Detective Agency*, is introduced by McCall Smith as a "good detective, and a good woman".[16] Her professional classification as a detective and not as a lawyer is significant in a novel where the latter are consistently abused. The incontestable voice of moral authority, Mma Ramotswe asks in critical exasperation: "What did they [lawyers] know of life? All they knew was to parrot the stock phrases of their profession and to be obstinate until somebody, somewhere paid up".[17] The same prioritisation of money is made apparent by the attitude of the fraudster Solomon Moretsi's lawyer who internally reasons that "[I] could do with the fees, even if taking the matter to court would delay [my] client's damages".[18] With literature sceptical of the ability of Western-modelled lawyers and orthodox legal institutions to help those they portend to serve, the question is begged – who will?

The role of detection as an alternative form of problem-solving is prominent in both the texts. Police investigator Bucket in *Bleak House* assumes an omniscient and omnipresent form, appearing to the simple boy Jo to "be everywhere, and cognisant of everything".[19] McCall Smith, in a comparative fashion, places strong emphasis on optic images in the novel: the frequent reference to "eyes" re-enacts how, subjectively speaking, Mma Ramotswe's "vision" allows her to pierce the heart of things. Indeed, a contrast can be drawn between this signified

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14 Dickens *Bleak House* 573.

15 Kelley 1970 *Nineteenth-Century Fiction* 262.

16 McCall Smith *The No. 1 Ladies' Detective Agency* 2.

17 McCall Smith *The No. 1 Ladies' Detective Agency* 152.

18 McCall Smith *The No. 1 Ladies' Detective Agency* 164.

19 Dickens *Bleak House* 742.

omniscience and the "fog" that enshrouds the orthodoxy. Bucket does much to alleviate this fog of social and legal confusion through unravelling the mysteries of Lady Dedlock's disappearance and Tulkinghorn's death. Admittedly these are not happy solutions, but they are solutions of a definitive kind (in this regard, Mma Ramotswe's *modus operandi* will be discussed at greater length below). On a character level, the distinct face given to detection in the two novels is significant. Dickens describes Bucket as "on the whole a benignant philosopher not disposed to be severe upon the follies of mankind . . . but through the placid stream of his life, there glides an under-current of forefinger". [20] Miller reiterates this generous opinion of Bucket in academic format:

> "Whereas the law is impersonal and anonymous, the law enforcement is capable of showing a human face – if that is the word for the mechanically recurring tics and character-traits that caused Inspector Bucket to be received at the time of the novel's publication as one of Dickens's most 'delightful' creations."[21]

A contrary and convincing opinion is that Bucket's fascination with other human lives is a mere guise for what is really detective blood-lust, the desire to find the ultimate "Holy Grail" of the corpse. Has he been awarded a kinder interpretation than justly called for? Thoms contends as much, noting how "Bucket is invigorated by the blood of Tulkinghorn; and later as his investigation nears completion he pronounces satisfaction: 'It is a beautiful case',[22] a statement suggesting forgetfulness of individual suffering and enthusiasm for the story he has constructed".[23] Miller takes this line further by forging a link between the Chancery and the police, suggesting that "the police derive their ideological efficacy from providing, within a total system of power, *a representation of the containment of power*".[24] In clearer terms, Bucket's very name acts as the signifier of his function: to contain the fragile *status quo,* a containment necessary in the light of the courts' failure to deliver, and enabled by his capacity to provide an ending of sorts. Miller claims that Bucket's purported perpetuation of the orthodox power structure is underpinned by his black clothing, harking back to images of Tulkinghorn and Vholes.[25] If the representation of Bucket as an ambiguous pawn of the legal institution is accepted, and if we accept that his character uses the detective's human proximity for his own ends, then *Bleak House* fails to offer any human face to any officialdom. Nor can we accept detection as a meaningful resource for the resolution of personal problems. Bucket's state-sanctioned detection is tainted with the brush of orthodoxy. One can certainly conclude from *Bleak House* that any authority stemming from orthodox Western institutions is corrupted by self-interest and an endemic lack of human emotion.

Even this brief literary assessment of Western legal and legally-related institutions will show the reader that, for an individual seeking redress for problems beyond his or her own problem-solving capacity, the position is indeed "bleak". Can a parallel be traced between the criticisms of the orthodox and

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20 *Ibid.*

21 Miller 1983 *Representations* 70.

22 Dickens *Bleak House* 749.

23 Thoms "The Narrow Track of Blood: Detection and Storytelling in Bleak House" 1995 *Nineteenth-Century Literature* 147 149.

24 Miller 1983 *Representations* 68. My emphasis.

25 Miller 1983 *Representations* 79.

Western legal system in Dickens's nineteenth century work and the South African legal system today? Many angles for comparison *do* exist. Common complaints which are given literary life in *Bleak House* are also touched upon in *The No.1 Ladies' Detective Agency*. These complaints include the obsession with due process, often at great expense to the parties in costs and long delays in litigation which can defeat the purpose of one's claim; the self-serving traits of lawyers; a problem of lack of access to justice for the disadvantaged; self-interested and expedient investigations; and most saliently, a lack of compassion for the parties involved. The tragedy that befalls characters such as Nemo, Jo, Richard Carstone and Miss Flite is replicated continuously in the South African context, with the promise of legal resolution ever evasive. In the context of criminal law, different problems arise. The victim and his or her interests are notoriously excluded from the criminal justice process with the state assuming the role of *dominus litis*. Kgosimore aptly describes the state as "a cold, unsympathetic and isolated bureaucracy that ignores [victims of crime] and [which] cares very little for their plight".[26] As a result, both literature and reality depict a culture of isolated individualism characterised by a lack of faith in the official means of solving problems. The question is raised: can this be changed?

4 "A FIXER OF LIVES"

> "*Mma Ramotswe did not want Africa to change. She did not want her people to become like everybody else, soulless, selfish, forgetful of what it means to be an African, or, worse still, ashamed of Africa*."[27]

The reader's first indication of the distinction between Western and African problem-solving methods is observed early on in both novels respectively from the descriptions of the Chancery and of Mma Ramotswe's "No. 1 Ladies' Detective Agency". Dickens evokes a place where "[n]ever can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds, this day, in the sight of heaven and earth".[28] Mma Ramotswe's meagre agency equipment stands in sharp contrast to these images of pollution. Her agency equipment has the simplicity (and hence clarity) of the stereotypically African view:

> "To the front, an acacia tree, the thorn tree which dots the wide edges of the Kalahari; the great white thorns, a warning; the olive-grey leaves, by contrast, so delicate . . . a Go-Away Bird . . . over the dusty road, the roofs of the town under a cover of trees . . .; on the horizon, in a blue shimmer of heat, the hills, like improbable, overgrown termite-mounds."[29]

The reader who has suffered the sensation of claustrophobia from reading Dickens's first page is invited to take a deep breath from the open and generous landscape of Gaborone, Botswana. At the same time, McCall Smith uses the image of "great white thorns, a warning"[30] to remind his reader of the purpose of the agency, which is to solve inevitable social breaches.

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26 Kgosimore "Restorative Justice as an Alternative Way of Dealing with Crime" 2002 *Acta Criminologica* 69 70.

27 McCall Smith *The No. 1 Ladies' Detective Agency* 207.

28 Dickens *Bleak House* 12.

29 McCall Smith *The No. 1 Ladies' Detective Agency* 1.

30 *Ibid.*

McCall Smith's evocation of a generous, earthy environment is enhanced by the introduction of Mma Ramotswe as a "good detective, and a good woman . . . A good woman in a good country, one might say".[31] Indeed, what is envisioned by McCall Smith in the novel is "the return to an almost pristine, essentially righteous, African environment with a strong, though, empathetic sense of human 'good' and 'evil' "[32] through the actions of his protagonist. The various adventures, moral dilemmas and ingenious solutions of his lady-detective are designed to inculcate an "African" form of justice in the novel in contradistinction to the more adversarial justice of the West which South Africa utilises. As Dickens implies, even the profession of the Western detective (Bucket) is tainted in a self-serving system by implication. What this article professes to reveal is how the entirely alternative African and non-legal methods practised by Mma Ramotswe can be infused into South Africa's Western legal system to enable the better "fix[ing] of lives". Before embarking on this practical analysis, an examination of the essential values underpinning Mma Ramotswe's "fix[ing]" is needed.

5 AN AFRICAN VALUE SYSTEM

According to Mma Ramotswe, "[i]f you believed in the old Setswana morality, you couldn't turn a relative away, and there was a lot to be said for that".[33] How indeed, one may ask, would such an assertion have any bearing on law and justice? Jurisprudentially, at the root of this comment lies the African philosophy of *ubuntu-botho*, a human-centred approach to justice and social relations. In the course of discussing *ubuntu* and its reflection by Mma Ramotswe's problem-solving methods in *The No. 1 Ladies' Detective Agency*, complementary elements from two different theories will be touched upon, *inter alia,* the ethic of care and the jurisprudence of generosity.

The term *ubuntu* originates from the Zulu saying "*umuntu ngumuntu ngabantu*", translated as "persons depend on persons to be persons".[34] Langa J in *S v Makwanyane*[35] describes *ubuntu* as:

> "a culture which places some emphasis on communality and the interdependence of the members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be a part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."

Keep and Midgley[36] in their article "The emerging role of *ubuntu-botho* in developing a consensual South African legal culture", praise the development of

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31 McCall Smith *The No. 1 Ladies' Detective Agency* 2.

32 Matzke "A good woman in a good country" 2006 *Wasafiri* 64 66.

33 McCall Smith *The No. 1 Ladies' Detective Agency* 9.

34 Mokgoro J in *S v Makwayane* 1995 6 BCLR 665 (CC) para 308.

35 *S v Makwayane* para 224.

36 Keep and Midgley "The Emerging Role of *ubuntu-botho* in Developing a Consensual South African Legal Culture" (2007) *Explorations in Legal Cultures* 29 30.

a distinctly African legal culture permeated by the value of *ubuntu*. More specifically, the authors, with reference to formal authority, track the "way in which one of these values, namely *ubuntu-botho*, has been used by courts in a transformative sense to express African values and to incorporate them into the legal system so as to form a cohesive, plural, South African legal culture".[37] The link between *ubuntu* and an African legal culture, which this article argues for in the light of the values expressed by Mma Ramotswe, is further propounded by Nolte-Schamm. Nolte-Shamm advises South Africa to "strive to transcend both individualism [the Western norm] and (rigidly Marxist) collectivism in order to model 'a new vision of humanity,' namely 'a communal vision'. It is this idea of a communal vision for humanity in South Africa that corresponds with the notion of *ubuntu*."[38] Another authority who connects African-ism with *ubuntu* is Ovens, drawing the comparison that "Western theories serve to analyse, predict and control human behaviour, while the African approach strives towards intuition and integration".[39] Indeed, the need to infuse *ubuntu* into present African legal systems is so compelling on a legal, sociological and political basis that Mokgoro J has remarked that without such infusion a "legitimate system of law for all South Africans" will not arise.[40]

While it has been shown how McCall Smith enjoys a wide scope of authority from which to justify his collation of an African setting and the exercise of *ubuntu*, more explanation is required regarding the effect of *ubuntu* in an African legal context. One of the key analyses of the normative approach that South Africa should take towards punishment is found in *S v Makwanyane*. The Constitutional Court's decision to abolish the death penalty in this case is a reflection of the principles adopted during the judgment, namely, those of "reconciliation and restorative notions, like rehabilitation, that are inherent in *ubuntu*, and not revenge, retaliation and victimisation".[41] Underlying the connection between reconciliation, restoration and *ubuntu* is the anthropological African "communality" to which Nolte-Schamm refers. This "communality" has been variously described in the context of a criminal process as "the ability of restoring humanity and dignity to both perpetrators and victims of violence, and of creating a sense of mutuality among humans alienated from one another"[42] and the "conciliatory character of the adjudication process which aims to restore peace and harmony among members rather than the adversarial approach which emphasises retribution and seems repressive . . . [T]he importance of group solidarity requires restoration of peace between them".[43] In other words, *ubuntu* theory conceives of a type of adjudicatory proceedings specifically tailored to

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37 Keep and Midgley 2007 *Explorations* 30.

38 Nolte-Schamm "African Anthropology as a Resource for Reconciliation: *Ubuntu/Botho* as a Reconciliatory Paradigm in South Africa" 2006 *Scriptura* 370 376.

39 Ovens "A Criminological Approach to Crime in South Africa" 2003 *Acta Criminologica* 67 68.

40 Mokgoro "*Ubuntu* and the Law in South Africa" 1998 *Potchefstroom Electronic Law Journal* 1 4.

41 Keep and Midgley 2007 *Explorations* 41.

42 Nolte-Schamm 2006 Scriptura 377; Battle *Reconciliation: The Ubuntu Theology of Desmond Tutu* (1997) 5.

43 Mokgoro 1998 *Potchefstroom Electronic Law Journal* 8–9.

restore broken social relations. It is interlinked with the notion of restorative justice which is "based on the redefinition of crime as injury to the victim and community, rather than as an infringement on the power of the state".[44] The root of the problem at hand is rightfully located with the parties involved, usurping the overriding and alienating influence of the state. The remedies which flow from restorative justice will be assessed in a later section, but in short, their collective emphasis is upon returning the *status quo ante* in the community.

Aspects of the ethic of care and the jurisprudence of generosity can inform our understanding of *ubuntu*. These jurisprudential theories share Western roots, reminding the reader that Western legal systems can also provide alternatives to orthodoxy. It appears that, globally and theoretically, such alternatives occupy common ground. Much of this common ground is based on the perception that orthodox legal systems are indifferent to, and unequipped for, human needs. While substantial differences in the form of these alternatives are apparent, this article only focuses on tracing the broad overlaps between the overriding value of *ubuntu* in *The No. 1 Ladies' Detective Agency* and the two complementary Western alternatives mentioned.

The ethic of care was pioneered by Carol Gilligan in her book *In a Different Voice: Women's Conceptions of Self and Morality* in which she describes:

> "a moral universe in which men, more often than women, conceive of morality as substantively constituted by obligations and rights and as procedurally constituted by the demands of fairness and impartiality, while women, more often than men, see moral requirements as emerging from the particular needs of others in the context of particular relationships".[45]

In simpler terms, Gilligan argues that men are prone to view issues of right or wrong through a lens of abstract rights and obligations, while women conceive of their ethical obligations as deriving from and dependent on their relationships. She calls this female, relational conception of morality as the "ethic of care". It would be tempting, but artificial, to employ McCall Smith's gendered characterisation of his protagonist and his deliberate play on a "ladies'" detective agency to support Gilligan's gendered model. This support fails to give credit to McCall Smith's wide-reaching holism and, in particular, his "caring" male characters, Obed Ramotswe and Mr JLB Matekoni. Tronto prefers a class-based understanding of how the notion of care is instilled, highlighting the existence of white women and minority men and women in the caretaking roles in society.[46] Her belief that "in order for an ethic of care to develop, individuals need to experience caring for others and being cared for by others"[47] strikes a note of hope in terms of the human, and not exclusively female, potential for learnt compassion.

A closer look at Mma Ramotswe's dispute resolution shows that her solutions are, in fact, a form of caring. Instead of alienating wrongdoers, she takes steps to restore them to the community and (one hopes) to a better life. Mirroring the rationale of *ubuntu*, Mma Ramotswe's focus in awarding punishment is the

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44 Ovens 2003 *Acta Criminologica* 76.

45 Flannagan and Jackson "Justice, Care and Gender" 1987 *Ethics* 622 623.

46 Tronto "Beyond Gender Difference to a Theory of Care" 1987 *Signs* 644 652.

47 Tronto 1987 *Signs* 652.

preservation of relationships. This is indisputably "caring" in its most untainted form, free of retributive tendencies. It is also future-orientated in the sense that mercy reminds the wrongdoer of his debt to a caring society. According to Tronto, in doing so, the ethic of care is thereby perpetuated.

The second theory complementing the reader's perception of *ubuntu* is the jurisprudence of generosity which has been the subject of recent and local interest. Van Marle adopts the expression from Williams book *The Alchemy of Race and Rights* to describe this theory. In adopting Williams expression, Van Marle describes it as "the idea of unexpectedness that breaks with the formality and predictability of law" and "a response to the gap between theoretical legal understanding and social transformation".[48] Van Marle, as with Gilligan, locates her theory in an exclusively gendered spectrum, announcing that she "want[s] to put forward laughter and detachment as ways of resisting and refusing patriarchy".[49] Again, in the name of McCall Smith's holistic outlook, this article excludes van Marle's gender specificity. What remains still holds critical if not actual value: does *ubuntu* propose another way of "being" in respect of the law and justice? Does *ubuntu* not only evoke a relational manner of caring for others, but also a *manner* of caring, *inter alia,* with generosity, laughter and friendship?

Van Marle herself refers to literary situations in which passive and light-hearted resistance to entrenched legal norms succeeds. One well-known example is that of Penelope, the wife of Greek hero Odysseus, weaving the garment that will herald her re-marriage on completion by day, and unweaving it at night.[50] An African parallel can be drawn with our Mma Ramotswe. Against all odds, and despite the dying will of her father, she establishes a ladies' detective agency. What is more, she conducts her work with perennial optimism, a cup of bush tea always by her side. Mma Ramotswe's break from traditional norms is not only a subtle resistance against Setswanan patriarchal norms, but also a refusal to submit to Western, adversarial justice as a whole. On a broader application to the literature, the inappositeness of the term "generosity" to the lawyer characters (Vholes, Tulkinghorn and Solomon Moretsi's lawyer to name a few) is self-evident, as are the alienating and destructive results of their attitudes. In sharp contrast, Mma Ramotswe's very compassion and ability to experience the spirit of *ubuntu* render her a "fixer of lives" in the best sense. What McCall Smith, van Marle and Dickens together imply is that justice is best identified, understood and achieved by full-bodied and feeling individuals, of which Mma Ramotswe is arguably the African literary leader.

The impression has been given so far of a perfect literary society. However, there would be no "No. 1 Ladies' Detective Agency", no Mma Ramotswe and no mysteries enticing the reading-public if life in McCall Smith's plot was a perfect expression of *ubuntu*. It is the emergence of human fallibility in the novel that spurs Mma Ramotswe into action, initiating by her will the "return to an almost pristine, essentially righteous, African environment".[51] In both the dimensions of

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48 Van Marle "Laughter, Refusal, Friendship: Thoughts of a 'Jurisprudence of Generosity' " 2007 *Stell LR* 194 195.

49 Van Marle 2007 *Stell LR* 198.

50 Van Marle 2007 *Stell LR* 199.

51 Matzke 2006 *Wasafiri* 66.

reality and McCall Smith's world, there exists the actual and the ideal. The "actual" in *The No. 1 Ladies' Detective Agency* occurs when people fail to discharge their communal obligations and Mma Ramotswe must step in to restore what she can through the exercise of *ubuntu*. On the other end of the spectrum, the "ideal" is a place in which a detective agency would be a redundant institution and *ubuntu* uniformly prevailed. What is "actual" and "ideal" in South Africa runs along the same lines. The South African "ideal" has been the subject of much discussion in the post-Constitutional era and it is interesting to note its frequent association with *ubuntu*. The South African Interim Constitution stated that:

> "[the] divisions and strife of the past [which created] a legacy of hatred, fear, guilt and revenge . . . can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation".[52]

The same philosophy of *ubuntu* was memorably echoed by Thabo Mbeki in his "I am an African" speech (semantically if not explicitly) and *ubuntu* has since then informed many precedent-setting judgments.[53]

However, while Mma Ramotswe brings the community closer to its ideal state in *The No. 1 Ladies' Detective Agency*, the comparable jurisprudential vehicle for doing so in South Africa has not been found. The parallels between South Africa's legal system and that evident in *Bleak House* are a reminder that reform is necessary. It is here that the value of law and literature steps in: Mma Ramotswe's methods have been identified as infinitely suitable in an African context. Surely an infusion of the values she embodies could carry South Africa much further towards its own ideals? Closely linked to *ubuntu* in jurisprudence, and increasingly popular as a form of punishment, restorative justice will be looked to as an example of how such infusion can be undertaken incrementally.

6 RESTORATIVE JUSTICE

> "*I do not think that what you did was bad . . . I'm sure that God will not be angry. It was not your fault*."[54]
>
> "*I want you to find out who owns that car . . . Then I want you to steal it from my husband and give it back to its rightful owner. That's all I want you to do*."[55]

While South Africa and many other democratic states strongly enforce the separation and independence of the police, prosecution and judiciary, McCall Smith's employment of a detective agency as the keystone of "African" forms of justice implies that Mma Ramotswe can play the role of quasi-police investigator, quasi-prosecutor and quasi-judicial officer simultaneously. Ultimately this allows her to mete out punishment instead of any Botswanan court. The principles guiding her decisions in issues which are not strictly legal, such as the cases of adultery or the monitoring of Mr Patel's daughter, echo those where the punishment is in fact a replacement of the courts' own punishment. At the heart of these principles is the core value of *ubuntu* and its counterpart, restorative justice.

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52 Last unnumbered section of the Constitution of the Republic of South Africa Act 200 of 1993: "National Unity and Reconciliation".

53 Some of which will be discussed further on in para 6 *infra.*

54 McCall Smith *The No. 1 Ladies' Detective Agency* 64 (from the Mapeli incident).

55 McCall Smith *The No. 1 Ladies' Detective Agency* 123 (from the Pekwane incident).

Retributive justice remains the favoured jurisprudential theory for punishment in South Africa. Burchell explains retributive justice as follows: Persons who have caused harm should themselves suffer harm, yet the harm so imposed must be proportional to the harm of the deed committed (thus differentiating retributive justice from revenge).[56] Other influential theories are utilitarian or reformative in nature. However, these theories tend to be subservient to the need for retribution. Is retributive justice always appropriate in the context of legal disputes? Undoubtedly, there will always be crimes in which the advantages of formal, proportional punishment prevail. Mma Ramotswe herself acknowledges the distinction between crimes demanding "traditional" justice and those where restorative justice is more effective and ethical, saying she "would never dream of helping anyone conceal a murderer".[57] A further example of her appropriate use of discretion is the Komoti matter. Having discovered that twin brothers, one qualified in medicine and one not, were interchanging jobs in order to increase practice fees, Mma Ramotswe and her client recognise that prosecution is necessary to "protect the public from people like this".[58] The idea of conciliating the issue with such unscrupulous characters is not even canvassed. Yet the fact remains that orthodox, retributive justice dominates South Africa's legal system to the exclusion of any, perhaps kinder, alternatives.

In what ways then can restorative justice be an alternative to orthodoxy, and how can it lead to a greater cultivation of the value of *ubuntu*? Kgosimore, quoting Price, observes that "rather than define crime as a violation of the rules or laws established by the state, restorative justice takes the view that crime is an offence against human relationships".[59] "Fixing" a crime in terms of restorative thinking does not entail punishment which isolates the wrongdoer from the victim and society (such as imprisonment). Instead, penance is rendered in an inter-personal and inclusive setting. Such a relational definition conforms to our understanding of *ubuntu* as emphasising the restoration of relationships within the context of the community. In order to mend these human relationships, "each party is given an opportunity to tell the other the story of the crime from their own perspective and talk about their fears, concerns and feelings".[60] The patent similarity of restorative justice to methods of alternative dispute resolution, in which parties are also fully participatory, is no coincidence. The twin aim of both forms of problem-solving is the re-integration of the divergent parties. It is submitted that the increased employment of mediation, arbitration and negotiation mirrors the contemporary interest in restorative justice, and serves as further proof of disillusionment with orthodox justice. As if in deliberate opposition to any stereotyped orthodoxy, restorative justice propounds a flexible approach to problem-solving. Llewellyn and Howse describe how, as a theory, "it is open and flexible enough to apply at various levels and contextual imperatives,"[61] thereby avoiding the stagnation of "official channels" in *Bleak House's* Chancery.

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56 Burchell *Principles of Criminal Law* 3ed (2005) 69.

57 McCall Smith *The No. 1 Ladies' Detective Agency* 122.

58 McCall Smith *The No. 1 Ladies' Detective Agency* 211.

59 Kgosimore 2002 *Acta Criminologica* 72.

60 *Ibid.*

61 Llewellyn and Howse "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission" 1999 *The University of Toronto Law Journal* 355 374.

The best means of conveying a sense of restorative justice is through a practical example which, fortunately, local jurisprudence is well-equipped to provide. The Truth and Reconciliation Commission, established in the aftermath of the apartheid era of human rights' abuses,[62] laid emphasis on "reintegrative measures that build or rebuild social bonds, as opposed to measures such as imprisonment and the death penalty that isolate and alienate the perpetrator from society".[63] The TRC operated in terms of three committees:[64] the Human Rights Violation Committee which conferred victim status on persons coming forward with their stories; the Amnesty Committee which dealt with individual applications for amnesty; and the Reparation and Rehabilitation Committee which looked both at the reparation and rehabilitation of individual victims and how to rehabilitate South African society on a wider scale. Given the political history within which the TRC had to operate, the aim of restorative justice to mend societal breaches and promote "practices that do not isolate or remove the perpetrator from society, but rather, *reintegrate* him as a citizen in a relation of social equality with all citizens in the society, including the victim"[65] was not only apt but necessary. The perpetuation of the apartheid psychology of victimisation and exclusion would have been intolerable. Thus, victims and perpetrators were encouraged to come forth with their stories, not only to bear light on the true atrocities of apartheid, but also to enable acceptance of responsibility and forgiveness. Certain academics have attached importance to the process of story-telling in the restoration of relationships, claiming that the TRC provided a platform for its healing and reconciliatory functions.[66] The story of Neville Clarence and Aboobaker Ismail[67] is an example of how these aims were achieved. Ismail planned a bomb attack which resulted in Clarence's blindness. At his amnesty hearing Ismail stated that:[68]

> "Despite the fact that he (Neville) is totally blind, he says he has accepted that he was a casualty of war, he understood he stood on the other side. Since then I believe we are coming closer to each other, he has been to my home, had a meal together and not so long ago, we were looking at the possibility . . . of actually planting a tree of reconciliation."

In this bare statement is the hope of reconciliation enabled by restorative justice, the hope of coming to terms with a reconstructed self and the dream of a society of brotherhood and *ubuntu*. The TRC offered the promise of a new South Africa to many through its focus on restoration and not vengeance. In the light of current dissatisfaction with the South African legal system, it seems anomalous to exclude the lessons learnt from the TRC completely.

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62 The Commission (hereinafter the "TRC"), was tasked with establishing "as complete a picture as possible of the causes, nature and extent of gross violations of human rights which occurred between 1 March 1960 and 10 May 1994". See Llewellyn and Howse 1999 *The University of Toronto Law Journal* 366.

63 Llewellyn and Howse 1999 *The University of Toronto Law Journal* 357.

64 Llewellyn and Howse 1999 *The University of Toronto Law Journal* 368.

65 Llewellyn and Howse 1999 *The University of Toronto Law Journal* 378. My emphasis.

66 Bohler-Muller "Beyond Legal Metanarratives: The Interrelationships between Storytelling, *Ubuntu* and Care" 2007 *Stell LR* 133 140.

67 Stanley "Evaluating the Truth and Reconciliation Commission" 2001 *The Journal of Modern African Studies* 525 542.

68 Stanley 2001 *The Journal of Modern African Studies* 542.

How can the above analysis be linked to literature? In *Bleak House*, the concerns of the parties are utterly irrelevant to the course, and indeed the outcome, of the proceedings. The need to abide by the set procedure is overwhelming. Dickens describes the solicitors distanced from the registrar's table by "bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports [and] mountains of costly nonsense".[69] The physical weight of the court papers stands in stark contrast to the weightless absence of the parties involved. Where are these parties? In a tragic condition somewhere, isolated and condemned by the court's indifference, Dickens will tell us. Kgosimore's criticism of the South African criminal justice system as "a cold, unsympathetic and isolated bureaucracy that ignores [victims of crime] and cares very little for their plight"[70] is entirely reminiscent of the *Bleak House* literary situation and entirely non-reminiscent of TRC-like restorative justice.

Again in stark contrast, we have stories from *The No. 1 Ladies' Detective Agency* enunciating the value of *ubuntu* through Mma Ramotswe's use of restorative methods. The opening quote of this section stems from an incident wherein Reverend Mapeli admits to concealing information regarding the disappearance of one of the members of his following. The wife of this member, Mma Malatsi, approaches Mma Ramotswe to locate her missing husband. Mma Ramotswe's trail eventually leads to Reverend Mapeli who, after confessing that Mr Malatsi had vanished into a river, looks down to the ground and says:

> "I know I should have told them. God will punish me for it. But I was worried that I would be blamed for poor Peter's accident and I thought they might take me to court. They might make me pay damages for it, and that would drive the Church into bankruptcy and put a stop to God's work".[71]

Mma Ramotswe's reply to the Reverend excuses him from blame. She, the omniscient one, sees that his act was not motivated by any malice and that, in the eyes of God, no sin has been committed. Ostensibly, the Reverend's omission constitutes an offence in terms of the Inquests Act,[72] yet it never crosses Mma Ramotswe's mind to pursue this route. Instead she bravely tracks down the crocodile which consumed Mr Malatsi. Why does Mma Ramotswe overlook the Reverend's culpability? The answer lies readily in the thinking of restorative justice. Reverend Mapeli's reasoning clearly conveys the distinction between the aloofness and impersonality of the orthodox courts and the security found in the interpersonal resolution Mma Ramotswe offers. What will orthodox courts do to a man like Reverend Mapeli? Probably nothing at all, but the possibility the courts present of social alienation and condemnation is too overwhelming a risk for a simple man like the Reverend to face. He is acutely aware of the ramifications of even the most harmless "guilt" in a retributive, rule- and procedure-based system. What makes his admission to Mma Ramotswe a safer bet for resolving the Malatsi issue? Inherent in the Reverend's reference to Mma Ramotswe as his "sister"[73] rests the acknowledgement that they are members of

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69 Dickens *Bleak House* 12.

70 Kgosimore 2002 *Acta Criminologica* 70.

71 McCall Smith *The No. 1 Ladies' Detective Agency* 64.

72 Inquests Act 18 of 2006 (Botswana).

73 McCall Smith *The No. 1 Ladies' Detective Agency* 64.

one community. Furthermore, it is a community in which the African spirit of *ubuntu* is enveloping, a "theology [with the] ability of restoring humanity and dignity to both perpetrators and victims of violence, and of creating a sense of mutuality among humans alienated from one another".[74] Instead of instantly criminalising Reverend Mapeli's act, Mma Ramotswe finds a solution which allows the former to retain his public image as a godly man (which we believe he is in private as well) and, in the same way, brings closure for Mma Malatsi. Thus the aim of restoring peace and order to the community without alienating or damaging any human relationships is accomplished.

A similar, if not more controversial, instance of Mma Ramotswe's restorative justice at work is the Pekwane case. Mma Pekwane, on suspecting that her husband is the driver of a stolen car, approaches Mma Ramotswe on the following terms: steal the car back from Mr Pekwane and thus absolve him without legal punishment, but at the same time teach him the age-old lesson that "crime doesn't pay".[75] The reader's initial response to Mma Ramotswe's complicity might be one of shock and indignation. What gives Mma Ramotswe the right to allow one man to go free, whilst others must pay? Then again, the imposition of "justice-lite" on Mr Pekwane might not serve as an adequate deterrent, prejudicing society's interests. Here is a matter where the reader is asked to free him- or herself of any traditional biases towards the necessity of formal punishment for a serious crime such as theft. The question is: how best can the humanity and dignity of the parties involved and the interests of society be maintained? In the matter at hand, where Mma Ramotswe is confronted by a concerned wife, she faces two choices. She can report Mr Pekwane to the police and leave his fate up to the institutions, or she can, in spite of some reservation on her part, do as her client wishes: steal the car back and give it to its rightful owner. In terms of the former route, the owner will retrieve his car, Mr Pekwane will be deterred by retributive punishment from stealing again and he and his wife will be alienated from respectable society forever. By taking the latter route, the owner will retrieve his car, Mr Pekwane will be deterred in karmic fright from stealing again and peace and order will be restored to society.

Clearly Mma Ramotswe is invested with the discretion to determine when restoration outweighs adversarial justice. In Mr Pekwane's case restoration is considered in the best interests of all because of his evident folly and lack of malicious or persistent criminal behaviour. Another case demanding the exercise of judicious discretion on Mma Ramotswe's part is that of Solomon Moretsi. Solomon Moretsi has made some good money out of faking injuries in the workplace. In particular, the loss of his fingers to industrial machinery. A fraudster, no doubt, but does he deserve swift prosecution? In any other situation Mma Ramotswe would surely have turned this persistent wrongdoer over to the police. However, a stern talking to and the extraction of a promise from Solomon never to commit fraud again constitute the sum of his punishment.[76] Mma Ramotswe, in consultation with Moretsi, discovers that he has committed fraud for noble reasons. His sister is infected with HIV/AIDS and Solomon must

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74 Nolte-Schamm 2006 *Scriptura* 377, Battle *Reconciliation* 5.

75 McCall Smith *The No. 1 Ladies' Detective Agency* 123.

76 McCall Smith *The No. 1 Ladies' Detective Agency* 167–168.

somehow support her and her children.[77] On these grounds she can conclude that "[t]here was no point in sending this man to jail. What would it achieve? It would merely add to the suffering of others".[78]

Is Solomon restored to the community? Not only is McCall Smith's reader encouraged to believe that he has truly repented, there is the additional threat of Mma Ramotswe's words hanging over him: "If you try any more of this nonsense with insurance people, then you will find that I will become very unpleasant".[79] How has the community benefited? If Solomon's assurances are taken in good faith, an infringer of the community is "healed" (deterred) and, more specifically, three members of society (the sister and her children) are saved from destitution.

McCall Smith's lady detective is a "fixer of lives"; she is no Tulkinghorn or Vholes sucking her clients' life-blood, nor is she a detective like Bucket, committed to resolution, but resolution that entails blood and misery. She is the "ideal", yet obviously a fictional ideal. How then can the message of Mma Ramotswe be used practically to transform the South African legal system from what it is (primarily orthodox and Western) to a system underpinned by *ubuntu*?

Tshela advises that in incorporating restorative practices into the formal legal system, it would "make sense to tap into the knowledge of those in South African villages and townships who are already practicing restorative justice".[80] To go further back in time, Braithwaite has noted that the indigenous origins of restorative justice in ancient Arab, Greek, Roman, Indian Hindu, Buddhist, Taoist and Confucian traditions provides fuel for his theory that "restorative justice has been the dominant model of criminal justice throughout most of human history for all the world's peoples".[81] In 1999, the South African Law Commission (as it then was) issued a discussion paper[82] which recognised the existence of local anthropological knowledge on restorative methods in debating whether to include community dispute resolution structures in the formal justice system. Such structures are the closest recognised South African entities come to organised restorative justice with their focus on mediation, reconciliation and arbitration. The findings of the Commission were as follows: that structures should retain their traditional form, rather than being heavily regulated by the state,[83] that participation should be voluntary[84] only and that the structures should retain their character as an alternative to the courts. Why did the Commission steer away from greater regulation of community practices? The answer to this, in essence, is that state bureaucratisation would destroy the

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77 *Ibid*.

78 *Ibid*.

79 *Ibid.*

80 Tshela "The Restorative Justice Bug Bites the South African Criminal Justice System" 2004 17 *SACJ* 1 13.

81 Braithwaite *Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory* www.aic.gov.au in Llewellyn and Howse 1999 *The University of Toronto Law Journal* 372.

82 South African Law Commission *Community Dispute Resolution Structures* Paper 87, Project 94 (1999).

83 South African Law Commission *Community Dispute Resolution Structures* para 4.3.

84 South African Law Commission *Community Dispute Resolution Structures* para 4.3.2.

responsiveness, flexibility and individualism of these structures.[85] The implication was that restorative justice is better-suited and preserved by maintenance in alternative forums. However, are state regulation and restorative practices necessarily inimical? This article submits that formal courts are not averse to improved responsiveness, flexibility and individualism. The reach of community dispute resolution structures is of course restricted, but there *is* scope for infusion of a "Mma Ramotswe" attitude into the Western, adversarial legal system at all levels. Restorative justice *can* permeate these institutions through a change in mind-set.

There is evidence that this change in mind-set is forthcoming. Recent cases from South African courts show a decisive shift towards restorative justice. The judiciary, inspired by South Africa's new liberal and constitutional era, can be said to be distancing themselves from their former, orthodox image and moving closer to the values of the TRC. The idea is that, contrary to Reverend Mapeli's view of the courts as the antitheses of restoration, they can in fact become defenders of humanity. The facts from a 2004 judgment, *Du Plooy v Minister of Correctional Services*,[86] are illustrative. The applicant who was suffering from leukaemia, was denied medical parole. Patel J noted an "obvious tension between the necessity that the prisoner continues to serve his or her term of imprisonment and the compassion for his or her suffering from a terminal illness".[87] In the final analysis, Patel J held that the denial of parole constituted an infringement of the applicant's s 10 constitutional right to human dignity.[88] What stands out most in the judgment is the learned judge's expression of values. In awarding the applicant medical parole, Patel J remarked that:

> "The applicant is critically ill. He is dying. Imprisonment is too onerous for him by reason of his rapidly deteriorating state of health to continue remaining in jail and to be treated at a prison hospital. What he is in need of is humanness, empathy and compassion. These are values inherently embodied in *Ubuntu*. When these values are weighed against the applicant's continued imprisonment, then, in my view, his continued incarceration violates his human dignity and security, and the very punishment itself becomes cruel, inhuman and degrading."[89]

Two 2008 judgments deal more particularly with the requirements of restorative justice. The first of these, *S v Maluleke*,[90] concerns the murder of a young person who broke into the accused's house and who was subject to a sustained attack by the latter. Bertelsmann J was tasked with balancing the seriousness of the offence and the defencelessness of the deceased against the personal circumstances of the accused (a repentant unemployed widow with four dependants and a first offender with minimal likelihood of offending again).[91] Recognising that the severe crime of murder cannot go wholly unpunished, Bertelsmann J examined alternatives to incarceration, notably the traditional custom in the accused's community of the perpetrator's family sending a senior representative to the

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85 South African Law Commission *Community Dispute Resolution Structures* para 2.30.

86 [2004] 3 All SA 613 (T).

87 *Du Plooy v Minister of Correctional Services* 615.

88 Constitution of the Republic of South Africa, 1996.

89 *Du Plooy v Minister of Correctional Services* 621.

90 2008 (1) SACR 49 (T).

91 *S v Maluleke* 51.

deceased's family to apologise and mend the relationship between the two.[92] As the accused and deceased's mother began talking before the court *a quo* had formally adjourned, "the particular circumstances of the case created the opportunity to introduce the principles of restorative justice into the sentencing process".[93] Bertelsmann J accordingly embarked upon an in-depth analysis of restorative justice in the South African context. As a new approach to criminal justice and social science, he placed emphasis on its features of "reparation, healing and rehabilitation"[94] and its "development of the offender into a responsible member of society, through the process of acknowledging the hurt suffered by the victim and society, and taking steps [to remedy] the effects of the crime upon these individuals and the community at large".[95]

Bertelsmann J accepted that restorative justice may "combat recidivism" by fostering individual responsibility and may reduce overcrowding in prisons by providing sentencing alternatives Notwithstanding he admitted (like Mma Ramotswe) that traditional methods cannot be side-stepped in certain instances: "Restorative justice cannot ensure that society is protected against offenders who have no wish to reform, and who continue to endanger our communities".[96]

Bertelsmann J's research revealed that Canada, New Zealand and Australia have tapped into their own indigenous legal systems to locate alternatives to imprisonment,[97] thereby supporting Tshela's earlier recommendation. (Llewellyn and Howse also note how much of the inspiration for contemporary restorative justice programmes has come from aboriginal communities).[98] In the South African context, Bertelsmann suggested that the custom applied by community dispute resolution structures, if not formally regulated, should at minimum be given serious cognisance in cases warranting a restorative approach.[99] Although the learned judge foresaw the possibility of ultimate legislative intervention, this eventuality was advised not to "deter courts from investigating the possibility of introducing exciting and vibrant alternative sentences into our criminal justice system".[100]

The second relevant 2008 case is *S v Shilubane*.[101] The accused, a remorseful first offender, had been convicted of the theft of seven fowls and sentenced to nine months' imprisonment. (Law and literature analogies immediately come to mind; for example, the similar facts in *Les Miserables*). On review, Bosielo J criticised the sentence as "disturbingly inappropriate" and explicitly took into account the principles of restorative justice. More pertinently, the court ascertained that the complainant was far more concerned with compensation for his loss than retribution.[102] In addition to commenting on the weaknesses of

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92 *S v Maluleke* 51.
93 *S v Maluleke* 52.
94 *S v Maluleke* 52.
95 *S v Maluleke* 53.
96 *S v Maluleke* 54.
97 *S v Maluleke* 55.
98 Llewellyn and Howse 1999 *The University of Toronto Law Journal* 372.
99 In line with Tshela 2004 *SACJ* 13.
100 *S v Maluleke* 55.
101 2008 1 SACR 295 (T).
102 *S v Shilubane* 296.

retribution, Bosielo J raised a new angle to restorative justice, that is, "the price civil society stands to pay . . . by having [an offender] emerge out of prison a hardened criminal".[103] Community service was suggested as a viable alternative to imprisonment where the accused does not pose a serious threat to society.

The ruling of Sachs J in the fairly recent Constitutional Court judgment of *Dikoko v Mothlala*[104] is eminent evidence of the move towards a wider acceptance of restorative justice and *ubuntu* by the legal system. In the context of a defamation claim, the learned judge referred generally to the role restorative justice could play in any evolving legal system, noting its primary elements of encounter, reparation, re-integration and participation; and how such elements harmonised well with already-existent traditional forms of dispute resolution.[105] A broader engagement between the legal system and the constitutional value of *ubuntu* was recommended, and one which would not amount to "a gracious and affirmative gloss to a legal finding already arrived at".[106] The permeation of *ubuntu* considerations into judgments contemplating capital punishment, evictions and murder was noted, with Sachs J commenting further that "there is no reason why it should be restricted to those areas".[107] What endows Sachs J's judgment with such significance for the purposes of this article, is his comparable association of restorative justice and *ubuntu* and his assertion of apology as a species of restorative justice.[108] Further, his judgment removes (and then advocates the further removal of) the concept of *ubuntu* from mere abstraction, not only through the highly symbolic sanction of the Constitutional Court,[109] but also in addressing the way *ubuntu* can lead to practical reform, that is, by the cultivation of restorative solutions.

7 IN DEFENCE OF RESTORATIVE JUSTICE

This article recognises the two major objections which could be made to the infusion of restorative justice in formal legal processes: (1) That restorative justice is a subjective concept which, if more widely sanctioned, will lead to arbitrary decision-making; and (2) that restorative justice, as a theory of punishment, is no punishment at all.

In defence of the first objection, the argument that follows relies heavily on the perception of representatives of the legal system as rational, judicious and discretionary enforcers of justice. Simon, in his famous work "Ethical Discretion in Lawyering",[110] defends the notion that lawyers can exercise an ethical discretion in choosing whether to accept clients' claims. Simon rejects the contention that it is only judges who have such discretionary powers, asking whether "[o]nce it is conceded that judges have capacity for meaningful

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103 *S v Shilubane* 297.

104 2006 6 SA 235 (CC).

105 *Dikoko v Mothlala* para 114.

106 *Dikoko v Mothlala* para 113.

107 *Dikoko v Mothlala* para 114.

108 Apology as a restorative solution will be dealt with in greater depth *infra*.

109 Cognisance of *ubuntu* has been given in numerous Constitutional Court judgments, although restorative justice has not been so directly addressed.

110 Simon "Ethical Discretion in Lawyering" 1988 *Harvard Law Review* 1083 1126.

discretionary judgment, is it plausible to deny that lawyers have it?" He then answers his own question in the negative, observing that "nearly all discussions of the type of thinking required of practitioners speak in terms of complex, informal judgment, not of mechanical rule-following".[111] Simon's thesis can be extended to all officials active within the legal system: if the normative mode of law demands ethical decisions to be made daily, then normatively all legal officials should to be equipped to make ethical decisions. In doing so, a culture of restoration may be allowed to develop without the need for official legislative or policy changes. Furthermore, this culture will exist at the beginning and end stages of the legal process, affecting the decisions of police to report to the prosecution, the prosecution to lay charges, legal counsel to litigate, settle or withdraw, and judges in deciding upon appropriate sentences. Even though we may rightly expect rational and judicious decision-making from our officials, inculcation of the leading Mma Ramotswe-value of *ubuntu* will provide an extra safeguard. This in turn requires moral education, of which one of the better teachers (as espoused by Nussbaum) is the novel. Why not use Mma Ramotswe as an official example of such values?

Comforted then in the knowledge of a legal system trained to exercise discretion judiciously, and with the hope that such discretion will concur with the abstract values of Mma Ramotswe, we can defend against arbitrariness. Is there any instance in *The No. 1 Ladies' Detective Agency* when restorative justice is applied, or withheld, arbitrarily? There is none, only because Mma Ramotswe's discretion is tailor-made for individual problems in the communal context. This brings us to the important distinction between arbitrariness and individualism. Arbitrariness takes no account of circumstance, whereas circumstance is important, if not everything, in individualism. Restorative justice thus occupies the binary position of simultaneously looking at the individuals concerned in a problem, as well as the wider interests of society. While the uniform fog in *Bleak House* threatens to cloud over all the characters and destroy their individuality in the face of orthodoxy, individual characters and their problems are treated uniquely by Mma Ramotswe. The result is more effective restoration of society, never discrimination.

The position in *The No. 1 Ladies' Detective Agency* can be vividly distinguished from that in another Western classic, Tom Wolfe's *Bonfire of the Vanities*. The misdemeanours of Sherman McCoy, the "Great White Defendant",[112] are hungrily welcomed by the Bronx District Attorney's Office at a time when racial tensions are soaring, and a show of non-elitism and non-"white-ism" is needed by various characters for political reasons. The inconsistencies and sheer untruths concerning McCoy and his alleged reckless endangerment of the life of a "black honour student"[113] are overlooked in favour of the symbolism of "a high publicised arrest of this Wall Street investment banker in his apartment".[114] McCoy's lawyer strikes at the reality of the prosecutorial strategy when he describes a "circus arrest, and then . . . a circus

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111 Simon 1988 *Harvard Law Review* 1122.

112 Wolfe *Bonfire of the Vanities* 2ed (1987) 546.

113 Wolfe Bonfire of the Vanities 272.

114 Wolfe Bonfire of the Vanities 461.

arraignment, and then . . . the District Attorney's office prostituting itself . . . for [the] cameras and for the approval of a partisan mob".[115] This is Western individualism at its most perverted. It transforms the individual into the symbol of a greater cause, a perversion repeated on a frequent basis in moralistic court sentencing. Not only is the alleged wrongdoer alienated from his or her society, he or she is ironically reconstituted as victim. The cycle of social breach is merely perpetuated by a legal system orbiting in arbitrary circles.

In concluding the argument against the first objection to restorative justice: discretion in the light of individual circumstances is a prerequisite for successful restoration. If exercised by authorised legal officials in accordance with a restorative value system, arbitrariness can be averted.

The second objection – that restorative justice is no punishment at all – is entirely legitimate when considering the wrongs committed by restored offenders. Is restorative justice no more than the exemption of offenders by a mere slap on the wrist? Too much restorative justice theory conceptualises restoration as solely the re-integration of the offender into society. No wonder then that, at first glance, this approach appears to lean heavily on re-integration. A strong indicator of this apparent bias is the terminology of restorative justice as a form of "justice" and not as a form of "punishment". If anything, Mma Ramotswe demonstrates that the offender must experience hardship of some sort before *deserving* to be re-integrated. In terms of this understanding, restorative justice merely redefines the nature of such hardship. It must be viewed as a more innovative, rather than more lenient, approach.

In her article, "Reparation and Retribution: Are they Reconcilable?", Zedner identifies reparation with restorative justice. The author comments that the former "relieves the offender's feelings of guilt and alienation which may precipitate further crimes . . . The effect is said to be *restorative* not only to the victim but also to the offender, increasing their sense of self-esteem and aiding re-integration".[116] (Zedner uses crimes as the focal point of her discussion but her findings have general value for the theoretical basis of punishment). In answering the question posed in her article title, Zedner discusses whether reparation and retribution can be reconciled. Her contention is that reparation, like retribution, "involves more than 'making good' the damage done to property, body or psyche. It must also entail recognition of the harm done to the social relationship between offender and victim, and the damage done to the victim's social rights in his or her property or person".[117] The need to recognise harm mirrors Burchell's[118] conceptualisation of retributive theory as harm-based. Without penance for harm done, it is inconceivable that the restoration of a wrongdoer is possible in a community. What restorative justice achieves though, again borrowing retributive theory's benchmark of proportionality, is a variety of forms of penance. Penance must be geared towards restoration, not towards alienation as with retributive modes.

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115 Wolfe Bonfire of the Vanities 534.

116 Zedner "Reparation and Retribution: Are they Reconcilable?" 1994 *The Modern Law Review* 228 233. My emphasis.

117 Zedner 1994 The Modern Law Review 234.

118 Burchell *Criminal Law* 69.

How, it may be asked, can penalties for wrongdoing both punish and restore? Zedner cites the criteria for punishment as punitive quality, recognition of social wrong, and response to culpability.[119] This article will focus on one form of restorative remedy, that is, the recognition of wrong and apology, and then test it against Zedner's criteria in order to ascertain whether the legal and moral requirements of punishment are thereby attained (it is noted that one must assume the capacity of a genuine apology to restore social relations for the purposes of this argument).

Recognition of one's guilt (whether directly or indirectly) appears to be a common mode of penance in *The No. 1 Ladies' Detective Agency*,[120] echoing the TRC's confession- and amnesty-based approach to punishment. A comparative legal remedy stemming from the recognition of guilt which has been partially acknowledged in delictual claims, is that of retraction and apology. Sachs J, in the Constitutional Court judgment in *Dikoko v Mothlala*, recognised apology as a species of restorative justice which could foster the constitutional value of *ubuntu*.[121] In addition, the upgrading of the position of apology was recommended as a remedy in the context of defamation claims by means of reconciling *ubuntu* and the Roman-Dutch *amende honorable*.[122] However Sachs J, in his usual generous style, proposed a much wider incorporation of restorative justice[123] which, given the running association between restorative justice and apology, could easily be interpreted as a vote for apology-remediation throughout the legal system. Apology-remediation in this sense would amount to the totality of the court's order handed down, in lieu of any criminal punishment or damages award.

As with the present civil law, an apology in criminal law is restricted to mitigation and never to complete exculpation. Is there a possibility of rendering it as full punishment in certain instances? Should the recommendation of the Constitutional Court in *Dikoko v Mothlala* be taken to heart outside the field of delict? If Zedner's classical requirements for punishment are satisfied, there remains very limited scope for objection to such extension. With regard to the punitive quality of apology, we may be obliged to set aside our traditional prejudices as to what form punishment should objectively take, and instead adopt the subjective approach of Zedner:

> "It is possible to argue that the public drama of trial, the naming of the defendant and, in particular, the formal attribution of guilt goes a long way toward fulfilling the requirements of censure. Once the demands of reproof have thus been met, is it not excessive to demand that penal sanctions also be endowed with censuring qualities?"[124]

Zedner's second criterion, that is, recognition of social wrong, is already a prerequisite for an apology in mitigation. Courts will not admit an apology as

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119 Zedner 1994 The Modern Law Review 239.

120 Solomon Moretsi, Reverend Mapeli, Mr Pekwane and even Mr Patel at some point admit, or at least internally recognise, moral or legal culpability.

121 *Dikoko v Mothlala* paras 112–115.

122 *Dikoko v Mothlala* para 121.

123 *Dikoko v Mothlala* para 115.

124 Zedner 1994 The Modern Law Review 240.

mitigating unless expressed sincerely, thus the recognition aspect is implicit therein. Griseri describes the psychological process of apology as follows:

> "When someone repents, apologises or in some way makes atonement for their offence, that action makes it clear that he, the offender, is sorry for what he has done. In other words, he sees what he did *as* an offence, not justifiable within the shared values of the community".[125]

One could find no better example than the TRC's engagement with political criminals to illustrate this process of atonement.

Zedner notes that reparation has been criticised for shifting the focus in criminal matters from the offender's *mens rea* to the issue of harm done.[126] Following from this, it is contended that the offender's culpability is not adequately taken into account. Zedner attacks these criticisms by asserting that harm and intent are far from mutually exclusive in the criminal enquiry, rather, they are often highly relevant to one another.[127] Indeed the need for proportionality between the harm caused and the punishment imposed is intrinsic to retributive theory.[128] From a more practical viewpoint, it is unlikely that any legal official, when testing the cogency of an apology, will have sole regard for the harm caused by the wrong. The intention of the wrongdoer will weigh in significantly since the more pointed the intent, the less likely mere apology will suffice. This will be the case especially in respect of serious crimes.

Apology thus appears to "pass the test" as a symbolic form of punishment. However, any legal official wishing to use it in remediation must carefully consider the circumstances of his or her case. It is suggested that where an apology is acceptable to the victim and his or her direct community (again re-asserting restorative justice's active involvement of all parties), the legal official should be permitted to release the wrongdoer from any other liability in law. A precondition for such acceptability will often be a sense of communal kinship, as per the Setswanan society in *The No. 1 Ladies' Detective Agency*.[129] Mma Ramotswe shows lenience to some of the wrongdoers in the novel simply because she relates to them, their circumstances in the same society, and the repercussions of her actions on them. She can also safely anticipate that they will be pardoned by society. It will be on rare occasions only that apology will suffice for even a trivial wrong where there are no compelling social ties between the parties. For example, in *S v Maluleke*,[130] Bertelsmann J took judicial cognisance of the traditional custom in the accused's community of the perpetrator's family sending a senior representative to the deceased's family to apologise and mend the relationship between the two.[131] As the parties in that case had already commenced speaking, the need for formal punishment and its attendant alienation from the community was thrown into major doubt. Indeed, criminal cases present an easier course for the application of apology in full absolution given the absence of any complicated, patrimonial claims.

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125 Griseri "Punishment and Reparation" 1985 *The Philosophical Quarterly* 394 408–409.

126 Zedner 1994 The Modern Law Review 242.

127 Zedner 1994 *The Modern Law Review* 243–244.

128 Burchell *Criminal Law* 69.

129 And not, perhaps, the city of atomised individuals, Johannesburg.

130 2008 (1) SACR 49 (T).

131 *S v Maluleke* 51.

Given that apology is far more controversial as a "punishment" than other restorative forms such as community service and material reparation, it can safely be submitted that *where appropriate in the circumstances, and as judged by the discretion of the legal official*, restorative justice conforms to our legal and psychological notions of what punishment ought to be. Beyond this, compliance is inevitably the social benefit of restoration. The ramifications of apology for society are well conveyed by the literature. In *Bleak House*, Lady Dedlock never succeeds in atoning for her "original sin" (her illegitimate child Esther) and ultimately dies a lonely and tormented death as a result of it. Clearly forgiveness is not a value esteemed by the Victorian officialdom. In the setting of *The No. 1 Ladies' Detective Agency,* the *failure* to forgive wrongdoers requires justification. Such is the strength of Mma Ramotswe's *ubuntu*.[132] What we have in the result is a stable peace-loving community, tolerant towards human fallibility and closer to an African ideal than most literary representations.

8 CONCLUSION

> "*Dear reader! It rests with you and me, whether, in our two fields of action, similar things shall be or not. Let them be! We shall sit with lighter bosoms on the hearth, to see the ashes of our fires turn gray and cold*."[133]

Dickens, ever the prodding and poking advocate of social change, lays at our feet the choice to transform society "in our field of action". Is South African society satisfied with a legal system under-nourished by the humanism of *ubuntu*, willing to tear parties apart where reconciliation is a real alternative? Are we willing to risk the immortalisation of our present legal system in Dickensian *Bleak House* style? It seems not. The recent philosophy propagated by the TRC and certain court judgments indicates an incremental desire to embrace indigenous African values of brotherhood, care and generosity. This philosophy is not only more fitting to the aspirations of the South African Constitution, but arguably, in appropriate circumstances, it is the only way to "fix" social relations and lives. The ideal sought after is a perfect, Taoist balance between retribution and reconciliation, an ideal that has so far been elusive in reality but reachable through the writings of McCall Smith. The conclusive response of this article to the restorative methods of Mma Ramotswe can only ever be: "Let them be!" "Let them be!"

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132 McCall Smith gives his reader explicit reasons as to why prosecution of the Komoti twins *is* appropriate, *inter alia*, the need for the public to be protected from such reckless fraudsters.

133 Dickens *Hard Times* (1907 edition) 256.