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COMMENT

Revolutionary Changes to the Parent-Child Relationship in South Africa: End of the Revolution for the "Unmarried" Father?

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1 INTRODUCTION

Revolutionary changes to the parent-child relationship have recently taken place in South Africa. These changes can be found in the Children's Act.[1] These changes are evident in the change of terminology that has occurred. In South African law the term "access" has been used for many years. The Children's Act replaced this term with the term "contact";[2] the reason being that this term emphasises the responsibilities of parents and is also used internationally.[3] In the past the term "parental power" was used whereas now the term "parental responsibility" is found,[4] which emphasises the duties and responsibilities of parents. The focus is no longer on the rights of parents but rather on the best interests of the child.[5]

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1 Act 38 of 2005. These changes, particularly in relation to guardianship, care and contact are examined in Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa with specific reference to Guardianship, Care and Contact* (LLD-thesis, UP, 2007), on which this article is partly based.

2 Due to the nature of this article, these terms are used interchangeably.

3 Davel & Jordaan *Law of Persons* (2005) 55–56 submit that the most important reason for the change in emphasis from parental rights to children's rights is South Africa's ratification of the Convention on the Rights of the Child and the inception of the South African Constitution. Robinson "The Child's Right to Parental and Family Care" 1998 *Obiter* 329 333 emphasises that the use of the word "care" (s 28(1)(b) of the Constitution) denotes a radical deviation from the parental authority notion of the common law.

4 There has been a paradigm shift from parental rights to parental responsibilities. See further Boniface (LLD thesis, UP, 2007) 133 and authority cited there. Pieterse ("Reconstructing the Private-Public Dichotomy? The enforcement of Children's Constitutional Social Rights and Care Entitlements" 2003 *THRHR* 1) cautions that difficulties have arisen in regard to balancing the constitutional rights of children with the common law powers of their parents and warns that children's rights must not be used to accommodate parental interests by "reconceptuali[sing] entitlements formerly associated with parental power as children's rights". See further *B v P* 1991 4 SA 113 (T); *B v S* 1995 3 SA 571 (A); *T v M* 1997 1 SA 54 (SCA). Human "Kinderregte en ouerlike gesag: 'n teoretiese persektief" 2000 *Stell LR* 71 76-81 states that the change in terminology from "parental rights" to "parental responsibilities" is not merely coincidental but is an attempt by the law to emphasise parental responsibility.

5 Contemporary international law distinguishes the rights of the child from the rights of the parent. Van Bueren *The International Law on the Rights of the Child* (1995) 95.

This article examines the development in South African law of the concept "contact", particularly with regard to the legal position of the unmarried father.[6] After a brief overview of the history of the concept, relevant South African case law and the provisions of the Children's Act are examined. The changes in South African law are compared with the provisions of the recent Namibian Children's Status Act,[7] the Kenyan Children's Act,[8] the African Charter on the Rights and Welfare of the Child, and the Convention on the Rights of the Child.

2 HISTORICAL BACKGROUND

In Roman law the head of the family was the *paterfamilias* and all the members of the family fell under his power, including all legitimised and adopted children.[9] A mother could never acquire the *patria potestas* over the child, even if the marriage was dissolved. Children born from a legitimate marriage fell under the power of the *paterfamilias*. If born outside of marriage the children fell outside the power of the father but the blood relationship with their mother was recognised.[10] In Roman law illegitimate[11] children were regarded as having no father at all and rights of contact for their father were probably never considered.[12] However, there are traces in the legal sources of fathers being involved in the welfare of their children where it is clear that they were aware of their children's existence and were taking some steps to provide for them.

In Roman-Dutch law a mother had certain parental powers over her children. A child born out of wedlock was in the mother's power.[13] Fathers of children born out of wedlock had to maintain them.[14]

In South African law the term "access" entails that the non-custodian parent and the children have contact with each other.[15] Reasonable access is aimed at

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6 The term "unmarried father" is used in the Children's Act. The term refers to a man that was not married to the child's mother at the time of their child's conception, birth or any time in between. Such a person can, of course, be married to someone other than the said child's mother.

7 Act 6 of 2006.

8 Act 8 of 2001.

9 For detail regarding the content of *patria potestas* and the power of the *paterfamilias*, see Thomas *Textbook of Roman Law* (1976) 414 and Van Zyl *History and Principles of Roman Private Law* (1983) 88–89.

10 Van Zyl *History and Principles* 90.

11 The term "illegitimate" will be used in this article when it is the term that was used during that stage of the development of our law. In *Bhe v Magistrate*, *Khayelitsha* 2005 1 SA 580 (CC) the Constitutional Court endorsed the view that the word "illegitimate" is discriminatory.

12 See the explanation given by Van Zyl J in *Van Erk v Holmer* 1992 2 SA 636 (W) 637T. However, there are traces in the legal sources that some fathers who were aware of their children's existence, were involved in the welfare of their children, and took some steps to provide for them: Gardner *Family and Familia in Roman Law and Life* (1998) 259.

13 "*Eene moeder maakt geen bastaard* ". See further Hahlo & Kahn *The South African legal system and its background* (1985) 446.

14 Schäfer *The Law of Access to Children*: *A Comparative Analysis of the South African and English Laws* (1993) 67.

15 Cronjé & Heaton *South African Family Law* 2 ed (2004) 280 define access as "the right and privilege to see, visit and spend time with, have contact with and enjoy the company of one's child".

maintaining some form of relationship between the children and the non-custodian parent.[16] The parents have to act in accordance with the court's order. In practice, "reasonable access" is often defined as meaning visits by the child to the non-custodian parent on alternate weekends and during alternate school holidays.[17] In the case of children born from a marriage the basic view is that it is in the interests of children that they should not be estranged from either of their parents[18] and the court will only deny the non-custodian parent access in exceptional circumstances.[19]

The South African Constitution states that each child has the right to parental care.[20] The courts take the best interests of the children into account and courts have refused access where the non-custodian parent was reluctant to exercise contact, neglected or abused the child, or where access prejudiced the child's well-being.[21] In terms of South African common law, the mother of a child born out of wedlock is the sole guardian and has sole custody of such child.[22]

In 1984 the South African Law Reform Commission[23] investigated the legal position of illegitimate children and recommended that "the father of an illegitimate child should not acquire parental power *ex lege*".[24] Regarding access

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16 Schäfer *The Law of Access to Children* 67 sets out the two kinds of access, that is, undefined and defined or structured access. Undefined access is subject to such reasonable terms and conditions as may be imposed by the custodian parent. Defined or structured access is where the courts prescribe the parameters within which access must be exercised. The court can also order that visits must occur in the presence of a third party. A type of defined access is divided access, where custody is awarded to a third party and access is divided between the child's parents. Visiting access is also possible: this is where the access "takes place 'on a particular day or days and the duration and frequency of the access may be defined and the place where it is to take place'". Staying access "involves staying over night, for example, over a weekend or during a holiday period". (Schäfer *The Law of Access to Children* 71–73). Non-physical access is "appropriate where physical access is deemed undesirable but some form of alternative access is considered necessary", for example by means of telephone calls or letters. Deferred access is "a temporary denial of access leaving the way open for an application for access to be made at a later stage". (Schäfer *The Law of Access to Children* 75).

17 In *Schwartz v Schwartz* 1984 4 SA 467 (A), the court would not define a right to access and said that the parties must use their good judgment to make arrangements as to how the father must exercise his right of access. Although this case dealt with access to a child born from a marriage, the basic principles regarding how to exercise access could be applied to instances where a parent desires access to a child born out of wedlock.

18 Singh "The Non-Custodian Parents 'Right of Access': A Note to the Complacent" 1996 *SALJ* 171, referring to *Kok v Clifton* 1955 2 SA 326 (W) 330.

19 Singh 1996 *SALJ* 172. Section 1 of the General Law Further Amendment Act 96 of 1963 provided that any parent who has the sole custody of a child and refuses or prevents the other parent from having access is guilty of an offence. This has been replaced by s 35 of the Children's Act.

20 Section 28(1)(b) of the Constitution of the Republic of South Africa, 1996.

21 Singh 1996 *SALJ* 172.

22 For detail regarding the South African legal position until 1999, see Van Heerden, Cockrell & Keightley (eds) *Boberg's Law of Persons and the Family* 2 ed (1999) 404–418.

23 Then known as the South African Law Commission (SALC). *Investigation into the Legal Position of Illegitimate Children* Project 38, October 1985.

24 SALC Working Paper 7 86.

of the father to his illegitimate child, the SALC said that, although it is denied that he has parental power over the child, some commentators were of the opinion that a father does have reasonable access.[25] The Commission was of the view that the direction in which the law was tending to go was to grant access to such a father, although this would only be allowed by an order of court, and thus it was doubtful that the legislature should interfere at that stage.[26]

A number of South African decisions clearly stated that the natural father of a child born out of wedlock had no inherent right of access to such child.[27] In *B v P*[28] the court stressed that "guardianship and custody of an illegitimate child are vested in the mother",[29] but that the father may approach the court for an order limiting the mother's right of custody by granting him access to his child and, in an appropriate case, may even deprive a mother of custody.[30] In determining the best interests of the child,[31] the court, as upper guardian of minors, would apply the same procedure and the same standards as applied when deciding what is in the best interests of legitimate children.[32] The court concluded that the approach to be followed should be similar to that in *Van Oudenhove v Grüber*,[33] namely that the applicant must prove on a preponderance of probability that access is in the best interests of the child. In *B v P* it was also said that regard must be had to the rights of the custodian parent.[34]

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25 SALC Working Paper 7 83–84.

26 *Ibid*.

27 *F v L* 1987 4 SA 525 (W); *Douglas v Mayers* 1987 1 SA 910 (Z) and *F v B* 1988 3 SA 948 (D).

28 1991 4 SA 113 (T) 114. For a summary of the legal position and arguments during this time period in our law, see Van Onselen "TUFF – the Unmarried Father's Fight" 1991 *De Rebus* 499; Ohanessian & Steyn "To see or not to see – that is the question (The right of access of a natural father to his minor illegitimate child)" 1991 *THRHR* 254 and Eckhard "Toegangsregte tot Buite-Egtelike Kinders – Behoort die Wetgewer in te Gryp?" 1992 *TSAR* 122.

29 The court referred to *F v L* (1987 4 SA 525 (W) 527H–J) and *F v B* (1988 3 SA 948 (D) 950E) in this regard. The court also stipulated that *Matthews v Haswari* (1937 WLD 110) is no authority for the proposition that the father of an illegitimate child has a right of access to such child.

30 *B v P* 115A.

31 *B v P* 115. The onus is on the applicant to satisfy the court on the matter and usually the court will not intervene unless there is some very strong compelling reason to do so. The onus of proof is discharged on a balance of probabilities.

32 *B v P* 117: "[T]he paramount consideration is what is in the best interests of the illegitimate child. The other consideration is the right of the custodian parent which, in the case of an illegitimate child, is not subject to the right of access by the non-custodian parent." The court also referred to *Dunscombe v Willies* 1982 3 SA 311 (D) 315H–316A, where it was said that the matter is a question of the rights of the children to have access to their non-custodian parent, and that it is in their interests that they should have a sound relationship with both parents. However, sometimes it is in the interests of the children to deprive them completely of access to the non-custodian parent.

33 1981 4 SA 857 (A) 867D–E.

34 Here the court looked at the *Van Oudenhove* decision at 867 where it was said that the court would consider whether the access is in the best interests of the child and will not unduly interfere with the mother's right of custody (*B v P* 117F). Van Zyl J says that it is not clear what will constitute "undue interference" with the mother's right of custody, but that this factor should not be elevated to more than a factor to which regard should be had when assessing what is in the best interests of the child (*B v P* 641).

A dramatic change of view occurred in *Van Erk v Holmer*.[35] It was held that the father of an illegitimate child has an inherent right of access which can only be taken away if it is in conflict with the best interests of the child.[36] The matter had been first referred for investigation to the Family Advocate who recommended that the applicant be granted defined rights of access. The parties then settled the matter on the basis that the applicant would be allowed reasonable access to the child and this agreement was made an order of court. However, due to the importance of this matter, the parties requested reasons for the court's decision to accept the Family Advocate's recommendation.[37] The court stipulated that in Roman and Roman-Dutch law the father of an illegitimate child had no rights to such child. The court said further that the paramount importance of the illegitimate child's best interests had been emphasised in a number of recent cases, but that simultaneously it had been stated that the father of such child had no inherent right of access. Van Zyl J held the view that there should be no distinction between legitimate and illegitimate children and that it is immoral to penalise the children born of cohabitation by placing curbs on the right of access by their fathers.

Van Zyl J disagreed with the decision in *F v B*,[38] that the father of an illegitimate child has no right of access to his child and that the rights of the custodian parent should not be interfered with unless this is in the interests of the child.[39] He emphasised that social *mores* and attitudes have changed, legally binding marriages are no longer the only lasting unions between a man and a woman, and that the emphasis is on children's rights and not parents' rights.[40] Van Zyl J concluded that if there is no legislation, precedent or case in point, then a judge must decide the case based on the *boni mores* or public policy[41] and accordingly there should be no distinction between a legitimate and illegitimate child.[42] The judge further said that it is in the child's interests to develop as

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35 1992 2 SA 636 (W). For a discussion of this case see Hutchings "Reg van Toegang vir die Vader van die Buite-Egtelike Kind – Outomatiese Toegangsregte – sal die beste belang van die kind altyd seëvier? *Van Erk v Holmer* 1992 2 SA 636 (W)" 1993 *THRHR* 310 and Clark "Should the Unmarried Father have an Inherent Right of Access to his Child? *Van Erk v Holmer* 1992 2 SA 636 (W)" 1992 *SAJHR* 565.

36 In this case the applicant (the father of an illegitimate child) brought an application that he be granted access to the child as the respondent (the child's mother) had refused access.

37 Particularly in view of the suggestion put forward that, despite the existence of precedents to the contrary; the time might have arrived for the recognition by our courts of an inherent right of access by a natural father to his illegitimate child (*Van Erk v Holmer* 636–638).

38 1988 3 SA 948 (D).

39 *F v B*. Van Zyl J states at 647 that, in the case of legitimate children, access to a child is regarded as an incident of parental authority but that this is not so where the court grants access to the father of an illegitimate child because it is in the child's best interests. In such circumstances the court is not conferring parental authority upon the father.

40 *Van Erk v Holmer* 648. Van Zyl J does not, however, support the restrictions on access suggested by Clark & Van Heerden.

41 *Van Erk v Holmer* 648. Van Zyl J refers here to two sources dealing with the importance of public policy for legal development, namely, Corbett "Aspects of the Role of Policy in the Evolution of our Common Law" 1987 *SALJ* 52–69 and Van Zyl "The Significance of the Concepts 'Justice' and 'Equity' in Law and Legal Thought" 1988 *SALJ* 272–290.

42 *Van Erk v Holmer* 649: "By this I do not propose that they should be equated with each other in one fell swoop. Certain parental rights have been legislatively enacted and require amendments to such legislation to provide for more extended rights. It is the least of these rights . . . the right of access, which public policy requires should be inherently available to all fathers."

normal a relationship as possible with both parents[43] and this right should not be denied unless it is clearly not in the best interests of the child.[44] Van Zyl J stressed that a natural father's inherent right of access to his illegitimate child should be recognised[45] and he accepted the Family Advocate's recommendation that access should be granted to the applicant.[46]

The decision in *Van Erk v Holmer* was criticised and not followed in a number of reported cases. In *S v S*,[47] the court followed the decision reached in *B v P*,[48] and emphasised that parental power vests in the mother of a child born out of wedlock and that the father has no parental authority.[49] Flemming DJP stated that, until Parliament changed the law, the following applied in the determination of the interests of the extra-marital child:[50] Firstly, the father of an extra-marital child has *locus standi*.[51] Secondly, the mother has sole parental authority and control over who has access to the child.[52] Thirdly, when the court

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43 *Van Erk v Holmer* 649.

44 *Van Erk v Holmer* 649.

45 *Van Erk v Holmer* 649–650: "That such right should be recognised is amply justified by the precepts of justice, equity and reasonableness, and by the demands of public policy. It should be removed if the access is shown to be contrary to the best interests of the child."

46 *Van Erk v Holmer* 650. For criticism of this decision see Hutchings 1993 *THRHR* 310 314–315. According to Hutchings, the case emphasised the access rights of the father rather than the best interests of the child. The best interests of the minor child should be the primary consideration. She was also of the opinion that an automatic recognition of access rights will not always be in the child's best interests. It was also suggested that it is time for the legislature to intervene. Church ("*Secundum ius et aequitatem naturalem*: a note on the recent decision in *Van Erk v Holmer*" 1992 *Codicillus* 32 36) welcomed the decision, but said that the mother now has to prove that it is in the best interests of the child that the father's right of access be taken away, and that this would be problematic, especially in black communities. Horak ("Om te trou of nie te trou nie – besluit in *Van Erk v Holmer* aangeval" 1992 *De Rebus* 515) said that this decision undermines the importance of a healthy family life as the core of a healthy society. Clark 1992 *SAJHR* 565–567 was of the opinion that "[t]o bestow an inherent right of access on a father who has maintained no relationship with the mother and child and who has made no effort either to voluntarily acknowledge paternity or discharge his obligations there is . . . to place the interests of an unmarried father above the welfare of a child" and later (569) "[o]nly where there is a father who is both willing and able to act as such and one who gives evidence thereof, should it be decided that the unmarried father should have a right of reasonable access".

47 1993 2 SA 200 (W). The father of an illegitimate child wanted access to his child and, relying on the *Van Erk v Holmer* decision, averred that he had such right. The court held that the mother has sole parental authority over the child, and that if it decides to interfere with that discretion then it must be remembered that the mother, not the court, has this discretion and the order must not constitute undue interference with the mother's rights. It must be established whether the best interests of the child require access to a specific person.

48 The court emphasised that the *stare decisis* principle was not followed in the *Van Erk* case.

49 *S v S* 204. The court stated that it could not find any legitimate reason for the principle applied in *Van Erk* (that a court can design law to suit justice when it is "bereft of binding legislation, precedent or modern custom") and found that there were many precedents in existence (205–206). It also stated at 206 that "[t]he law must be applied even when a Judge believes that the law requires revision or is in an undesirable state. It is alien to a Judge's functions or powers to act as an alternative to Parliament. That is salutary because the state of the law should not be determined by the preference of one single individual . . . a Judge is not equipped . . . to ascertain the true preferences and desirabilities which operate in society".

50 *S v S* 207.

51 *S v S* 207.

52 *S v S* 208.

must decide whether to interfere with the mother's discretion as custodian, it should give due weight to the fact that the mother and not the court is vested with the discretion. The court must be satisfied that an order will not constitute undue interference with the mother's right and that she has exercised her discretion in the child's best interests.[53] Lastly, the court can grant access to someone who is important to the child's emotional development.[54] Flemming DJP emphasised that it is neither possible nor advisable to attempt to define when and with what cogency existing bonds between a natural father and extra-marital child should be a factor, and dismissed the application for access.[55]

Another case in which the applicant relied on the case of *Van Erk*, is *B v S*.[56] In this decision the court agreed with the decision reached in *S v S*. The application for access was dismissed as the applicant could not show that a refusal of access would be harmful to the child or that the child would be better off if access were to be granted to the applicant.[57]

In *Chodree v Vally*[58] the court awarded access to the father of a child who was born from a Muslim marriage and held that it was to the advantage of the child to have communication with both its parents.[59] In *Krasin v Ogle*[60] it was held that the main factor in determining whether access should be granted to a non-custodian parent is the best interests of the child. The court referred to the matter of *B v S* in support of its view.[61] In *I v S* [62] the court held that the applicant had a right of access to the children if this was in their best interests and that due weight had to be given to their wishes.[63] The court found that the children were mature and old enough to give an opinion and that their refusal to have contact with their father had to be respected. Thus the application was dismissed.

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53 *S v S* 208: "The best interests of the child is the yardstick. But, unlike a custody dispute between spouses or ex-spouses, the issue is not which of two parents it is best to choose to benefit the child most. The issue is whether it is established that the interests of the child require that there must be access to a specific person (someone who has no parental authority)."

54 *S v S* 208.

55 *S v S* 208–210.

56 1993 2 SA 211 (W). For a summary of the South African law up until this decision see Goldberg "The Right of Access of a Father of an Illegitimate Child: Further Reflections" 1996 *THRHR* 282 and "The Right of Access of a Father of an Extra-marital Child: Visited Again" 1993 *SALJ* 261. For a summary and criticism of this case, see Heaton "Family Law and the Bill of Rights" in *Bill of Rights Compendium* (1998) 3C48 para 3C32.2.

57 *B v S* 215.

58 1996 2 SA 28 (W).

59 *Chodree v Vally* 32F. In *Bethell v Bland* 1996 2 SA 194 (W) custody was awarded to the natural father instead of the maternal grandparents, the reason for this being that it was the maternal grandparents and not the mother asking for custody. For a summary of South African law up until 1997, in this matter, see Wolhuter "Balancing the Scales – Access by a Natural Father to his Extra-Marital Child" 1997 *Stell LR* 65 65–71.

60 1997 1 All SA 557 (W).

61 *Krasin v Ogle* 566.

62 2000 2 SA 993 (C). The parties had been married in terms of Islamic law. When the marriage was dissolved they had concluded an agreement relating to access to the child. The applicant had irregular access and then such access terminated. He applied in terms of s 2 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 to have the agreement relating to access made an order of court.

63 As s 2(5)(d) of the act lists the attitude of the child in relation to the granting of the application as one of the factors the court must consider.

Fraser v Children's Court, Pretoria North,[64] although dealing with adoption,[65] opened the way for the rights of unmarried fathers to be recognised.[66]

Due to the case law as well as the coming into being of the South African Constitution, it became clear that changes needed to take place in the rights of the unmarried father to have contact with his child.

According to the Natural Fathers of Children Born out of Wedlock Act[67] a court could, on application by the natural father of a child born out of wedlock, make an order giving him guardianship or custody of, or access rights to, the child.[68] Such application would not be granted unless the court was satisfied that it is in the best interests of the child, the Family Advocate had instituted an enquiry, and the court had considered its report and recommendations. When considering such application, the court took certain circumstances into account.[69] An order made in regard to guardianship and custody of, or access rights to, a child born out of wedlock could on application be rescinded, varied or suspended.[70] In general, orders are only amended where the best interests of the child require it.[71] Although this Act provided some relief to unmarried fathers, it did not comply with the equality provision[72] of the South African Constitution, and it was questionable as to whether it fully accommodated the best interests of the child.[73]

3 THE CHILDREN'S ACT

The Children's Act,[74] partially in force as from 1 July 2007,[75] was introduced to clarify the South African law regarding certain aspects pertaining to children and

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64 1997 2 SA 261 (CC).

65 This case dealt with the question of whether the requirement of s 18(4)(d) of the Child Care Act 74 of 1983 (as it then was), that the consent of only the mother of the illegitimate child to adoption is necessary, is unconstitutional as it unfairly discriminated against unmarried fathers.

66 The section first remained in force and Parliament was given two years to correct it. These rights were recognised by the amendment of the Child Care Act to include the consent of the father of an illegitimate child (the relevant sections will not be discussed in detail here) and later, the introduction of the Natural Fathers of Children Born out of Wedlock Act.

67 Act 86 of 1997.

68 Sections 2(2)(a) and (b).

69 Sections 2(5)(a)and (g): The relationship between the natural mother and the applicant and whether any of them have a history of violence or abuse against the child or each other; the relationship of the child with the natural mother and the applicant; the effect that separating the child from its natural mother, or the applicant, will have on the child; the attitude of the child to the granting of the application; the degree of commitment shown to the child by the applicant; whether the child was born from a customary union or marriage concluded under religious law; any other fact the court deems should be taken into account.

70 Section 4(1): If an enquiry had been instituted by the Family Advocate, such order could not be varied or rescinded before its report and recommendations had been considered by the court and it believed that it was in the best interests of the child to change such order.

71 *Manning v Manning* 1975 4 SA 69 (A); *Baart v Malan* 1990 2 SA 862 (E); *Märtens v Märtens* 1991 4 SA 287 (A).

72 Section 9, particularly s 9(3) which relates to discrimination based on marital status.

73 Section 28(2).

74 Act 38 of 2005.

75 Sections 18–21 and 30 are in operation but s 33 is not. According to the Family Advocate's office the fact that s 33 is not yet in operation has made the unmarried father's position very difficult.

to provide for a comprehensive children's statute. Amongst others, the Act defines "parent"[76] and "parental responsibilities and rights".[77] A parent may have "either full or specific parental responsibilities and rights in respect of a child".[78] The biological father of a child has full parental responsibilities and rights in respect of the child if

> "he is married to the child's mother; or if he was married to her at – the time of the child's conception; the time of the child's birth; or any time between the child's conception and birth."[79]

This provision is the same as the South African common law prior to the advent of the Children's Act. According to the Act, the biological mother acquires full parental responsibilities and rights in respect of her child without qualification.[80]

Section 21 deals with the parental responsibilities and rights of unmarried fathers. Section 21(1) stipulates that the biological father of a child acquires full parental responsibilities and rights in respect of the child if at the time of the child's birth he is living in a permanent life partnership with the child's mother, or, regardless of whether he is living with the child's mother, consents to be or successfully applies to be, identified as the child's father, and contributes or has attempted to contribute to the child's upbringing for a reasonable period, and contributes or has attempted in good faith to contribute to expenses in connection with the maintenance of the child for a reasonable period. The Children's Act does not provide for equal status for unmarried mothers and fathers. However, there is a legitimate reason for this, namely, that South African women suffer many disadvantages.[81] Bonthuys[82] stresses that there is a problem of gender inequality between parents in South Africa. Women spend twelve times as much time caring for children as men do; the childcare burden results in women being less successful in the labour market and women-headed households are poorer than those headed by men.[83] Bonthuys therefore cautions that although the drafters of the Act aimed to increase parental equality, the social, cultural and economic context within which the Act will operate may result in the opposite effect. In other words, awarding full parental rights to most unmarried fathers will increase the burden born by mothers. Bonthuys also cautions that the

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76 Section 1: A "parent" includes the adoptive parent of a child but excludes "(a) the biological father of a child conceived through the rape or incest with the child's mother; (b) any person who is biologically related to a child by reason of being a gamete donor for purposes of artificial fertilization; and (c) a parent whose parental responsibilities and rights in respect of a child have been terminated."

77 Sections 1 and 18: "the responsibility and the right – to care for the child; to have and maintain contact with the child; and to act as the guardian of the child; and to contribute to the maintenance of the child." Contact is defined as "maintaining a personal relationship with the child; and if the child lives with someone else – communication on a regular basis with the child in person, including – visiting the child; or being visited by the child; or communication on a regular basis with the child in any other manner, including – through the post; or by telephone or any other form of electronic communication" (s 1). The term "contact" replaces the common law term "access".

78 Section 18(1).

79 Section 20.

80 Section 19. See the discussion below as to whether the rights of unmarried mothers and fathers, as provided for in the Children's Act, are equal.

81 *President of the RSA v Hugo* 1997 4 SA 1 (CC); *Bannatyne v Bannatyne* 2003 2 BCLR 111 (CC).

82 "Parental Rights and Responsibilities in the Children's Bill 70D of 2003" 2006 *Stell LR* 482 487–489.

83 Bonthuys 2006 *Stell LR* 487–488.

Children's Act "seems to contemplate default position of joint custody after divorce" which can place an additional burden on women and lead to disputes. She submits that a parent who wants the other parent's contact or care of a child to be terminated or suspended must apply for an order in terms of s 28.[84] Van der Linde[85] questions whether parents having common responsibilities have equal responsibilities.[86] He refers to art 16(1)(d) of the Convention on the Elimination of All Forms of Discrimination Against Women which states that States shall ensure, on the basis of equality of men and women, the same rights and responsibilities as parents.

If there is a dispute between the biological father and biological mother regarding the fulfilment of the conditions specified,[87] then the matter must be referred for mediation according to the Act.[88] The Act also makes provision for the biological father who does not have parental responsibilities and rights in terms of ss 20 or 21 to enter[89] into an agreement with the child's mother,[90] providing for him to acquire such parental responsibilities and rights as are set out in the agreement.[91] Such agreement must be in a format prescribed by regulation.[92]

Section 33 provides for co-holders of parental responsibilities and rights to enter into a parenting plan "determining the exercise of their respective responsibilities and rights in respect of the child".[93] If such co-holders are having difficulty exercising their parental responsibilities and rights, they must first agree on a parenting plan before seeking the intervention of the court.[94] When preparing a parenting plan,[95] parents must seek the assistance of the Family Advocate, a social worker or psychologist; or mediation through a social worker or other suitably qualified person.[96]

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84 Bonthuys 2006 *Stell LR* 490.

85 *Grondwetlike Erkenning van Regte te Aansien van die Gesin en Gesinslewe met Verwysing na Aspekte van Artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mens* (LLD-thesis, UP, 2001).

86 Van der Linde here speaks of the fact that "common responsibilities" often given to parents (eg referred to in legislation) but that in practice there is not equal responsibility in the sense that one parent usually has to take care of the day-to-day needs of the children, planning regarding the children etc.

87 In ss 21(1)(a) or (b).

88 To a family advocate, social worker, social service professional or other suitably qualified person (s 21(3)(a)). Any party to the mediation may have the mediation reviewed by a court (s 21(3)(b)).

89 The term "*may* enter into an agreement" is used (own emphasis).

90 Or other person who has parental responsibilities and rights in respect of the child.

91 The mother, or other person, may only confer upon the father those parental responsibilities and rights which she, or the other person, has in respect of the child at the time the agreement is concluded (s 22(2)). Only the High Court would be able to confirm such an agreement that relates to the guardianship of the child (s 22(3)).

92 Section 22(4).

93 Section 33(1). A parenting plan may determine any matter in connection with parental responsibilities and rights, including – where and with whom the child is to live; the maintenance of the child; contact between the child and – any of the parties; and any other person; and the schooling and religious upbringing of the child: s 33(2). A parenting plan must be in writing and signed by the parties (s 34(1)(a)) and must be registered with a Family Advocate or made an order of court.

94 Section 33(2).

95 As per s 33(2).

96 Section 33(5).

Application may be made to the court[97] for an order to terminate, restrict or suspend parental responsibilities and rights. When considering the application, the court takes certain factors[98] into account, and may order that a report and recommendations of the Family Advocate, social worker or other person be submitted, or that an investigation be done, or that a specific person must give evidence.[99]

Section 35(1) stipulates that a person who has care of a child and refuses to allow another person who has contact to exercise such contact, contrary to any order of court or a parental responsibilities and rights agreement, is guilty of an offence and liable on conviction to a fine or imprisonment for one year.[100] This section clearly would not enable the parents to reach an amicable solution and may well result in an escalation of conflict between the parties. It is also questionable whether this approach is in the best interests of the child.

Section 9 of the Children's Act stipulates that in all matters concerning the care, protection and well-being of a child, the standard that the child's best interests are of paramount importance must apply. This complies with international trends.[101] The fact that a conciliatory and problem solving approach should be followed, and a confrontational approach avoided, is stressed in the Children's Act.[102]

4 DOES THE CHILDREN'S ACT COMPLY WITH THE PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1989 INSOFAR AS UNMARRIED FATHERS ARE CONCERNED?

South Africa ratified the Convention on the Rights of the Child (CRC) in 1995.[103] Due to the provisions of ss 39(1)(b) and 233 of the Constitution, the

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97 High Court, Divorce Court, or Children's Court.

98 Section 28(4): the best interests of the child, the relationship between the child and the person whose parental responsibilities and rights are being challenged, the degree of commitment the person has shown towards the child, and any other fact which, in the opinion of the court, should be taken into consideration.

99 Section 29(1)(5). The court may also appoint a legal practitioner to represent the child (s 29(6)(a)).

100 Section 1 of the General Law Amendment Act 93 of 1963 was repealed by the Children's Act.

101 See discussion of the provisions of the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) below.

102 Therefore it is questionable why the legislature executed s 35(1) in its current form, without first providing for mediation.

103 UN Doc A/44/49 adopted by the General Assembly of the United Nations in 1989. Robinson "An Introduction to the International Law on the Rights of the Child Relating to the Parent-Child Relationship" 2002 *Stell LR* 309 stresses that the 1980s were important in the development of children's rights. He opines that one of the significant developments was the adoption of the Convention on the Rights of the Child. See also arts "The International Protection of Children's Rights in Africa: the 1990 OAU Charter on the Rights and Welfare of the Child" 1992 *AJCL* 139–141 for an overview of "Children's Rights at the International Political Agenda" and Woodrow *International Children's Rights: An Introduction to Theory and Practice* (LLM-thesis, Loyola University of Chicago, 2001) 3–8 for a brief history of the CRC. For information about the Committee

continued on next page

CRC "enjoys a heightened status in the South African Legal Framework".[104] The Convention is important in South African jurisprudence. The standards of the CRC have become domesticated in South African law.[105] When implementing the rights of children, as specified in s 28 of the Constitution, the courts often refer to the provisions of the Convention on the Rights of the Child.[106] The CRC states that the parent-child relationship is a significant one and that the family deserves protection and assistance.[107] The Children's Act does not explicitly provide for the protection of the family nor does it state that the child has the right to a family.

One of objects of the Children's Act[108] is to "promote the preservation and strengthening of families". It is clear from the objects of the Act that art 3 of the CRC has been complied with. The importance of parental responsibilities and rights is emphasised in the Children's Act. This is in accordance with arts 5, 7, 14(2) and 18 of the CRC. Article 5 of the Convention stipulates that State Parties must "respect the responsibilities, rights and duties of parents . . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction

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of the Rights of the Child, see arts 43 to 45 of the Convention and Robinson "Enkele Gedagtes oor die Komitee van die Regte van die Kind" 2002 *THRHR* 600. Viljoen ("Supra-National Human Rights Instruments for the Protection of Children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" 1998 *CILSA* 199 200) states that African involvement in the drafting of the Convention on the Rights of the Child was limited and that only 3 African states took part in the working group for at least 5 of the 9 years that it took to draft the final proposal. See Viljoen 1998 *CILSA* 200–204 for a discussion of the composition of the committee on the rights of the child; the ratification of and reservations to the Convention and the reporting obligations by states, including the areas that the CRC had identified where protection had fallen short. Viljoen (1998 *CILSA* 204) points out that there are limitations in the reporting procedure, namely, that a "treaty body is powerless to address more comprehensive considerations on the socio-political and economic terrain".

104 Davel "The child's right to legal representation in divorce proceedings" in Nagel (ed) *Gedenkbundel vir JMT Labuschagne* (2006) 17. See also Sloth-Nielsen "Children's Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child" 2002 *IJCR* 137 139.

105 Sloth-Nielsen and Mezmur "2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002–2006)" 2008 *IJCL* 1. The CRC does not form part of domestic law in South Africa unless incorporated by the national assembly into law. Although the CRC is not directly incorporated in domestic law, key rights and principles are contained in the South African Constitution: UNICEF Innocenti Research Centre *Law Reform and Implementation of the Convention on the Rights of the Child* (2007) 6.

106 *S v Williams* 1995 3 SA 632 (CC) (whipping of juveniles as sentencing option); *Howell v S* 1999 2 All SA 233 (C) (child's right to parental care taken into account when sentencing parent); *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) (right to care, right to shelter); *Jooste v Botha* 2000 2 BCLR 187 (SCA) (right to parental care); *Christian Education v Minister of Education* 2000 10 BCLR 105 (CC) (banning of corporal punishment in schools).

107 See the preamble to the CRC: "[T]he family . . . should be afforded the necessary protection and assistance so that it can fully assume its responsibility within the community . . . the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding."

108 Section 2(a).

and guidance in the exercise by the child of the rights recognised in the . . . Convention". The provisions of the Children's Act comply with this article of the Convention in that when determining what is in the best interests of the child, the nature of the personal relationship between the child and his or her parents, as well as the attitude of the parent or parents towards exercising parental rights and responsibilities,[109] are considered. Additionally, the Children's Act emphasises the need for the child to remain in the care of his or her parent or parents.[110]

Article 7 of the Convention provides that the child has the right to know and be cared for by, his or her parents. The Children's Act states that one of its objects is to give effect to the constitutional right of children to family or parental care.[111] Article 14(2) of the Convention provides that:

> "State Parties shall respect the rights and duties of parents . . . to provide direction to the child in the exercise of his or her rights in a manner consistent with the evolving capacities of the child."

The Children's Act complies with this provision of the Convention in that it defines part of the term "care", which is exercised by a person with parental responsibilities and rights,[112] as "guiding, directing and securing the child's education and upbringing . . . in a manner appropriate to the child's age, maturity and stage of development" and "guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development".[113]

In terms of the Children's Act a person may have "either full or specific parental responsibilities and rights in respect of a child".[114] The Act also provides that parental responsibilities and rights agreements can be entered into between the mother of the child, or other person having parental responsibilities and rights, and the biological father of the child[115] or any other person. The acquisition of parental rights and responsibilities by mothers and fathers is dealt with separately in the Children's Act. The mother of a child acquires full parental responsibility and rights in respect of the child, whether she is married or unmarried.[116] The rights and responsibilities of married and unmarried fathers are dealt with separately in the Act.[117] The acquisition of parental responsibility and rights by unmarried fathers is subject to a list of criteria.[118] It is submitted that these sections of the Children's Act do not comply with art 18(1) of the Convention, as the "common responsibilit[y] for the upbringing and development of the child" by both parents is not emphasised sufficiently in the Children's Act. There is still a distinction made between mothers and fathers,

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109 Section 7(1)(b)(ii).
110 Section 7(1)(f)(i).
111 Section 2(b)(i). See also s 7(1)(f)(i).
112 In accordance with s 18.
113 Section 1.
114 Section 18(1).
115 Who did not acquire parental responsibilities and rights in terms of ss 20 or 21.
116 Section 19(1).
117 In ss 20 and 21.
118 Section 21(1).

and married and unmarried fathers. There is also no provision made to force a parent to be accountable for the "common responsibility" for the upbringing and development of the child.[119] The "responsibility" required by the Convention obviously extends much further that simply the responsibility to provide maintenance for the child, for example it would include the need to care for the development of the child.[120]

5 DOES THE CHILDREN'S ACT COMPLY WITH THE PROVISIONS OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD?

South Africa ratified the African Charter on the Rights and Welfare of the Child (ACRWC) in 2000.[121] The preamble to the ACRWC stipulates that "for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding". The wording of the preamble to the Children's Act is nearly identical. The best interests of the child are stressed in the Children's Act.[122] Article 4(1) of the ACRWC stipulates that the best interests of the child shall be "the primary consideration" in matters concerning the child. The Children's Act states that the best interests of the child are of "paramount importance" in every matter concerning it.[123] It is submitted that the term "paramount importance" complies with or even exceeds the "primary consideration" that must be given to the best interests of the child according to art 4(1) of the ACRWC.

Articles 9(2) and (3) of the Charter provide for parents to direct and guide the exercise of the child's right to freedom of thought, religion and conscience. Provision is made for compliance with this article in the definition of "care" found in s 1 of the Children's Act, which stipulates that parents may guide and direct the child's religious upbringing. Article 10 of the ACRWC provides that parents have "the right to exercise reasonable supervision over the conduct of their children". This provision is accommodated in the Children's Act in the definition of "care" in s 1, which states that care means, amongst other things, "guiding the behaviour of the child in a humane manner". Article 18(1) of the Charter stipulates that the family is the natural basis of society and shall enjoy the protection and support of the state for its development and establishment. Section 2(a) of the Children's Act states that one of its objects is "to promote the preservation and strengthening of families" and to give effect to the right of children to parental care. However, the Children's Act does not expressly

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119 Section 30 of the Children's Act provides for the co-exercise of parental responsibilities and rights by co-holders of parental responsibilities and rights. It is submitted that this section is insufficient for the act to comply with art 18(1) of the Convention, as not all parents are co-holders of parental responsibilities and rights in terms of the Children's Act.

120 The provision of maintenance for the child is, for example, protected in s 21(2).

121 OAU Doc CAB/LEG/24.9/49 1990. The Charter entered into force in 1999. According to Davel *The child's right* 20, it is "perhaps a less well-known international treaty with mere regional application, but nevertheless a supra-national document aimed at reconciling Western juristic thought and African traditional values". For an in-depth discussion of all the aspects dealt with in this Charter, see Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 214–231.

122 Sections 2(a)(iv), 6, 7 and 9 of the Act.

123 Sections 2(a)(iv) and 9.

stipulate that the family will enjoy the protection and support of the state for its development and establishment, although this is implied.

Article 18(2) of the Charter stipulates that "the equality of right and responsibilities of spouses with regard to children during marriage and in the event of its dissolution" must be provided for. This article recognises "equal" and not merely "common" responsibilities.[124] Section 20 of the Children's Act provides for married fathers to acquire automatic parental rights and responsibilities in respect of their biological children. On the face of it this complies with art 18(2). However, a court may grant an order regulating guardianship and care of, or contact with the children,[125] for example on divorce, and there is no provision in the Children's Act that clearly stipulates that the rights and responsibilities of spouses with regard to their children should be equal during the marriage and at its dissolution, if applicable.[126]

Section 2(a)(i) provides that one of the objects of the Act is to give effect to the constitutional right of children to parental care. Section 7 of the Act provides that when applying the best interests of the child standard some of the factors taken into account are: the nature of the relationship between the child and the parents, the effect of separation from the parents on the child, and the need for the child to remain in the care of his or her parents. The responsibilities of parents are emphasised in the Act.[127] This is in compliance with art 20 of the Charter which states that parents have the primary responsibility for the upbringing and development of the child. Of particular importance to unmarried fathers is art 18(3), which stipulates that no person may be deprived of maintenance due to their parent's marital status, and art 19(1), which provides that a child has the right to parental care and to reside, where possible, with its parents. Article 19(2) states that if a child is separated from its parents, it has the right to maintain personal relations and have direct contact with both parents on a regular basis.

6 DOES THE CHILDREN'S ACT COMPLY WITH THE PROVISIONS OF THE SOUTH AFRICAN CONSTITUTION?

Sections 19, 20 and 21 of the Children's Act specify when parents obtain parental responsibilities and rights towards their children. Provision is also made in ss 23 and 24 for the assignment of contact, care or guardianship to an interested person by the court. Thus, provision is made for the child's right to parental and family care, despite the fact that these sections seem to focus more on the parents than on the children.[128] This is, at least, balanced by provision for the best interests of the child to be taken into account.[129]

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124 UNICEF Innocenti Research Centre *Law Reform* 53.

125 The court may assign contact and care to an interested person: s 23. Court may assign guardianship: s 24.

126 The Children's Act provides in s 31(2)(a) that in major decisions involving the child "due consideration must be given to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child".

127 Ch 3.

128 Sections 19–21 simply state when the biological parents have parental responsibilities and rights in respect of a child, thus focusing on the rights of the parents and not the right of the child to parental care.

129 For example, in s 23(2)(a) and s 24(2)(a) where it is specifically mentioned, and s 9 which covers all matters affecting the child.

A main reason for the coming into force of the section of the Children's Act on 1 July 2007 was to pre-empt a constitutional challenge, as prior to such section fathers of children born out of wedlock were denied automatic responsibilities and rights; and this arguably infringed the Constitution.[130] Heaton submits that, although s 21 of the Children's Act

> "does not confer full parental responsibilities and rights on all unmarried fathers, its provisions probably satisfy most advocates of automatic responsibilities and rights for unmarried fathers, while leaving those who argue that fathers and mothers should not have equal responsibilities and rights because mothers still bear a disproportionate child-care burden, dissatisfied."[131]

7 COMPARATIVE PERSPECTIVE

Recent changes have occurred in our neighbouring country, Namibia. Part 4 of the Namibian Children's Status Act[132] makes provision for children born outside of marriage and s 11 stipulates that "[b]oth parents of a child born outside of marriage have equal rights to become the custodian of the child". This provision is in clear contrast to the provisions of the South African Children's Act which treats mothers and fathers of children born out of wedlock unequally. The Namibian statute states further that one parent must be the primary custodian of the child where the child is born outside of marriage.[133] If there is no agreement as to who the custodian shall be, then either of the parents[134] may make an application to the Children's Court for the appointment of a primary custodian.[135]

The Kenyan Children's Act[136] provides that where the mother and father of a child were not married to each other at the time of the child's birth, and have not subsequently married each other, "the mother shall have parental responsibility at the first instance",[137] and that the father subsequently acquires parental responsibility.[138] Where a child's mother and father were not married at the time of the child's birth, s 25 states:

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130 Sections 9 (equality) and 28 (children's rights). See Heaton "Parental Responsibilities and Rights" in Davel & Skelton (eds) *Commentary on the Children's Act* (2007) 3–10.

131 Heaton in Davel & Skelton (eds) 3–10.

132 Act 6 of 2006.

133 Both parents may agree, verbally or in writing as to who the primary custodian will be (s 11(2)). It would appear that the Namibian Act therefore does not make provision for joint custody.

134 Or primary caretaker of the child, or someone authorised by the minister, to act on behalf of the child (s 12(1)).

135 Section 11(3). Section 11(4) provides that an *ex parte* application may be brought by a person who has physical custody of the child for an interim order of custody where the parties cannot agree and where the best interests of the child may be compromised.

136 2001.

137 Section 24(3)(a).

138 "[I]n accordance with the provisions of s 25" (s 24(3)(b)). Wabwile "Rights Brought Home? Human Rights in Kenya's Children Act 2001" 2005 *ISFL* 299 states that the Kenyan Children Act was "[a]n ineffectual attempt to stop discrimination against illegitimate children" and that a crucial question related to the "illegitimacy" of children is the legal status of the unmarried father. Wabwile (399–400) also observes that "[s]ection 24 of the Act makes it clear that the unmarried father does not have parental status or responsibility unless he takes positive steps to acquire it under s 25. Since duties owed to

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"(1)(a) the court may, on application of the father, order that he shall have parental responsibility for the child; or

(b) the father and mother may by agreement ("a parental responsibility and rights agreement") provide for the father to have parental responsibility for the child.

(2) Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child."[139]

Section 25 has been criticised as "discriminat[ing] against unmarried women and undermin[ing] the accepted principle that parents, irrespective of their marital

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the child depend on the existence of parental status/responsibility, the unmarried father who stays aloof enjoys the liberty to be free from parental obligations. Such a man has no duty to care for the child or even maintain the child. By pursuing a policy of shielding unmarried fathers from child support obligations the Act is self-contradictory, unduly indifferent to the financial support rights and needs of the child born outside of marriage and subjects the affected child to discriminatory treatment on the basis only of the marital status of his parents . . . s 24 is inconsistent with the anti-discriminatory principle in applying criteria for parental status that disentitles the child born outside of marriage from the right to care under the Bill of Children's Rights. On this issue, the Act offends the express provisions of both the Charter and the Convention that it promises to incorporate." It is submitted that Wabwile's opinion in this regard is correct. See also Koome "Spare a Thought for the Fatherless Child" *Daily Nation on the Web* 2002-08-20 *http://www.nationaudio.com/News/DailyNation/20082002/Comment/*Comment23.html (accessed 10-05-2006). Koome states that "[i]t is very disheartening to know that child maintenance issues may have been more advanced in 1959, when the Affiliation Ordinance [which allowed for a mother of a child born out of wedlock to seek a maintenance order against the father], than today, when we have the Convention on the Rights of the Child and The African Charter on the Rights and Welfare of the Child".

139 Section 25. This section of the Kenyan Children Act (or Bill, as it then was) was referred to by the South African Law Commission (*Report of the Law Commission on the Children's Bill* ch 8 "The Parent-Child Relationship" (2003) 247–248) in their comparative review of foreign legislation dealing with parental responsibility. The SALC recommended (273) that fathers of children born out of wedlock (the SALC uses the term "unmarried father" in the Report) should be able to "acquire parental responsibility by entering into an agreement with the mother, which agreement must be in the prescribed form and must be registered with the appropriate forum and in the prescribed manner". The SALC also recommended that, where there is no agreement between the parents, such a father may obtain parental responsibility by making an application to court. However, the SALC also suggested that certain categories of "unmarried fathers" should automatically have parental responsibility. These categories included (273–274): "(a) the father who has acknowledged paternity of the child and who has supported the child within his financial means; (b) the father who, subsequent to the child's birth, has cohabited with the child's mother for a period or periods which amount to no less than one year; (c) the father who, with the informed consent of the mother, has cared for the child on a regular basis for a period or periods which amount to not less than twelve months, whether or not he has cohabited with or is cohabiting with the mother of the child". Similar provisions are now included in the South African Children's Act, except that the time period of twelve months has been removed from the act. The Act (s 21) now refers to contributing (or attempting to contribute) to the upbringing or maintenance of the child "for a reasonable period".

status have a shared responsibility of caring for their children".[140] The provisions of the Act have also been criticised as providing inferior protection to children, compared to that provided by customary law.[141] The Act has also been criticised as "[a]n ineffectual attempt to stop discrimination against illegitimate children".[142]

The Kenyan Act makes provision for a parental responsibilities agreement,[143] as does the South African Children's Act.[144] However, while the South African Act places more emphasis on the parents' duties than on the responsibilities of the child, the Kenyan Act is more balanced.[145]

In contrast to the statutes mentioned, the Ghanaian Children's Act[146] does not distinguish between children born in or out of wedlock.[147] The Ugandan Children's

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140 Sloth-Nielsen, Chirwa, Mbazira, Mezmur & Kamidi *Report on Child Friendly Laws in African Context Good and Promising Practices* submitted to the African Child Policy Forum Addis Adaba Ethiopia (November 2007) 7.

141 In customary law, an unmarried biological father acquires full parental responsibility if he pays damages to the family of the mother of the child (see Sloth-Nielsen *et al Report on Child Friendly Laws* 11). Whether customary law actually provides better protection for the child in such an instance is debatable.

142 Wabwile 2005 *ISFL* 399. A crucial question related to the "illegitimacy" of children is the legal status of the unmarried father. Wabwile (399–400) observes that "[s]ection 24 of the Act makes it clear that the unmarried father does not have parental status or responsibility unless he takes positive steps to acquire it under s 25. Since duties owed to the child depend on the existence of parental status/responsibility, the unmarried father who stays aloof enjoys the liberty to be free from parental obligations. Such a man has no duty to care for the child or even maintain the child. By pursuing a policy of shielding unmarried fathers from child support obligations the Act is self-contradictory, unduly indifferent to the financial support rights and needs of the child born outside of marriage and subjects the affected child to discriminatory treatment on the basis only of the marital status of his parents . . . s 24 is inconsistent with the anti-discriminatory principle in applying criteria for parental status that disentitles the child born outside of marriage from the right to care under the Bill of Children's Rights. On this issue, the Act offends the express provisions of both the Charter and the Convention that it promises to incorporate." It is submitted that Wabwile's opinion in this regard is correct.

143 Section 26(1).

144 Section 22. Such agreement can be entered into by the mother of the child (or other person who has parental responsibilities and rights) with the biological father who does not have parental rights and responsibilities in terms of ss 20 or 21, or with any other person who has an interest "in the care, well-being and development" of the child.

145 Sloth-Nielsen *et al Report on Child Friendly Laws* 7. It is reported (at 12) that the proposed Child Care, Protection and Justice Bill of Malawi 2006, "do[es] not give too much room to fathers of children born outside of wedlock whether they should accept parentage or not" and provides that an application can be brought to determine the parentage of the child, s 96, and the rules of evidence of parentage are tilted against the father: Sloth-Nielsen *et al Report on Child Friendly Laws*.

146 1998.

147 Section 5: "No person shall deny a child the right to live with his parents and family and grow up in a caring and peaceful environment unless it is proved in a court that living with his parents would lead to significant harm to the child, or subject the child to serious abuse, or not be in the interest of the child." Section 6 "prohibits parents from depriving a child of his welfare whether 'the parents of the child are married or not at the time of the child's birth' or whether 'the parents of the child continue to live together or not'" (see Sloth-Nielsen *et al* "Report on Child Friendly Laws" 12). See also Gruber "*Erkenning van Kinderen in Ghana*" 2004 *FJR* 90. The report of the Law Commission on the Children's Bill ch 8 "the Parent-Child Relationship" (2003) 247 states that s 6 of the Ghanaian Children's Act "applies to all parents, regardless of whether or not they are living together".

Statute[148] also does not distinguish between children born in or out of wedlock and simply states that "[e]very parent shall have parental responsibility of his or her child".[149] It is submitted that the current trend in African law is not to discriminate between married and unmarried fathers, and South Africa diverged in this regard.[150]

8 CONCLUSION

From the above analysis it is clear that there have been recent revolutionary changes to the parent-child relationship in South Africa. First, whereas previously such fathers had no access to their children, they now have automatic contact in certain circumstances. Secondly, the best interests of the child are paramount in every decision affecting the child, and care has been taken to entrench this in the Children's Act. Thirdly, once fully in force, this legislation should contribute to clarifying the rights of children and the rights and responsibilities of parents. Fourthly, having the laws relating to children in one piece of legislation leads to easy accessibility of the law.[151] However, unmarried mothers and fathers do not have equal rights to contact with their children. This is in contrast with the provisions of the Convention on the Rights of the Child as well as the provisions of the Namibian Children's Status Act. A number of questions remain: Is this the end of the revolution for the unmarried father in South Africa? Should South Africa take a page out of her neighbour's book? Should the main criterion to determine who should have contact with a child be based solely on the best interests of the child and not on the marital status of the parents?[152]

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148 1996.

149 Section 7(1).

150 The African Child Policy Forum *In the Best Interests of the Child: Harmonising Laws in Eastern and Southern Africa* (2007). See further www.africanchildforum.org (accessed 01-02-2008).

151 However, we must be careful not to move towards a system of codification where the law is not flexible and adaptable to the facts at hand. The Children's Act does seem to have provided a safeguard against this by the inclusion of the best interests of the child standard. Already in 1992 Clark ("Custody: The Best Interests of the Child" 1992 *SALJ* 391) proposed that (at 394–395) "there is a need for careful re-examination of the 'best interests of the child' principle as a focal point in decision making. Child-custody disputes are 'person-oriented' as compared with ordinary litigation, which generally focuses on the Act or subject-matter of the litigation rather than the evaluation of the parties, except to determine which party's version of the Act is more credible. A second difference is that child-custody disputes require a prediction of the future – with whom will this child be better off in the years to come? A decision has to be reached based on the future best interests of the child, whereas adjudication normally requires a determination of past Acts and facts. Applying the test is thus a difficult process, very different from the test employed in ordinary litigation and one which raises enormous problems for the judiciary in the interpretation and evaluation of the personalities of the parties and the evidence produced to support their claims.". The application of the standard of the best interests of the child is not an easy one.

152 Ie married to each other.

In Defence of *Barkhuizen*: Preferring the Methodology of Direct Application

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1 INTRODUCTION

Since the advent of constitutional democracy, the role and influence of the Constitution[1] on private law relations has been discussed and debated by jurists and scholars. Conventionally, the vehicle for applying the Constitution and Bill of Rights to private law disputes has been through the indirect application contemplated by s 39(2). The Constitution's influence has thus been mediated through the "spirit, purport and objects of the Bill of Rights". For whatever reason, there is a general acceptance that indirect application, when it comes to private law relations at least, is preferable to direct application.[2]

The Constitutional Court's judgment in *Barkhuizen v Napier*[3] is an invitation to re-open this debate and question the "consensus" of indirect application. The decision itself has already been the subject of strident criticism,[4] but despite this, it is submitted that it will nonetheless have a number of adherents.[5] The present writer is one of these adherents. The majority decision in *Barkhuizen* is a poorly written, unclear, confusing and puzzling judgment. However, it is submitted that if one analyses the *ratio* of the case and locates it within the context of South Africa's law of contract, it ought to be welcomed.

To show this, this discussion is structured in four parts. In the first, the distinctions between direct and indirect application are analysed. Specifically, two are highlighted – the first relates to the methodology of direct and indirect application, whilst the latter relates to the remedy which either approach generates. In terms of the methodology of indirect application, it will be shown that indirect application, instead of looking at specific substantive provisions in the Bill of Rights, looks to the spirit, purport and values of s 39(2). The second is largely remedial in nature: direct application demands striking down, whilst indirect application demands development.

In the second section, the consensus that indirect methodology is preferable to direct methodology is questioned on two grounds. Given that the focus of this discussion is the Constitutional Court's decision in *Barkhuizen,* this is specifically located in the law of contract. Firstly, it is submitted that there has been a tendency to reduce and stereotype the content of these values without interrogating their actual content. Secondly, it is submitted, the use of values as

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1 Constitution of the Republic of South Africa, 1996.

2 See, for example the *dicta* of Langa CJ in *Barkhuizen v Napier* 2007 [ZACC] 5 para 186.

3 2007 [ZACC] 5.

4 See, for example Woolman "The Amazing, Vanishing Bill of Rights" 2007 *SALJ* 762.

5 See, for example Bhana "The Law of Contract and the Constitution: *Napier v Barkhuizen* (SCA)" 2007 *SALJ* 269.

opposed to constitutional provisions has lent itself to the inclusion of arbitrary values which are not necessarily consonant with the specific provision or the spirit and purport of the Constitution.

In the third section, the *Barkhuizen* judgment itself is analysed. It is submitted that although Ngcobo J cloaked his judgment in the garb of indirect application, he actually did something entirely different – he applied a specific constitutional provision – the right of access to court – to public policy. Although his application itself is problematic for a lack of robust and rigorous analysis in respect of the rights implicated, it is submitted that it ought to be welcomed insofar as it creates *scope* for robust and rigorous analysis. If one pins their constitutional challenge to the mast of a specific right, a specific body of case law is immediately implicated and judges have clear policy concerns and considerations to balance against one another. This allows, it is submitted for greater clarity in reasoning, critical rigor and greater certainty for litigants. It is therefore submitted that the methodology of direct application ought to be preferred over indirect application when dealing with contractual disputes.[6]

In the final section, the question of whether our law of contract is amenable to such an approach is discussed. This is discussed in two parts. The first looks at the two-stage approach of infringement and limitation contemplated by s 36 and deals with the specific question of whether a contractual term can be said to be a "law of general application" for the purposes of s 36. It is submitted that this is not an insurmountable hurdle. The second problem analysed is whether the common law of contract is amenable to the type of development and remedies contemplated when undertaking direct application. The answer, it is submitted, lies in the hybridisation of direct and indirect application. It is submitted that whilst our courts ought to adopt the methodology of direct application (as was done in *Barkhuizen*), they equally ought to use the developmental flexibility of indirect application in fashioning an appropriate remedy. Additionally, it is submitted that the utilisation of indirect application in cases like *Barkhuizen* will in all likelihood render an identical remedy to indirect application.

2 DIRECT AND INDIRECT APPLICATION

Despite the fact that, as Woolman and Brand correctly observe, there are no universally accepted definitions of direct and indirect application,[7] it is submitted that two basic distinctions can be drawn between them. It is instructive at this stage to consider the specific provisions dealing with direct and indirect application. Sections 8(2) and 8(3) of the Constitution provide that:

> "(2) A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
>
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of s (2), a court–
>
> (a) in order to give effect to a right in the Bill, must apply or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

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6 This is arguably the case for *all* private law disputes, but the present discussion confines itself to the law of contract.

7 Woolman & Brand "Is there a Constitution in this courtroom? Constitutional Jurisdiction after *Afrox* and *Walters*" 2003 *SAPR/PL* 37 42.

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with s 36(1)."

This section provides for the direct horizontal application of the Bill of Rights.[8] In contradistinction, s 39(2) provides for the indirect application of the Bill of Rights in the following terms: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

The first difference between direct and indirect application, therefore, is that in the former, a specific provision of the Bill of Rights is pinned down and interrogated. Section 8(3) specifically refers to a provision of the Bill of Rights. In the latter, one considers the underlying "spirit, purport and object" of the Bill of Rights: the application of the Bill of Rights to a dispute is mediated and applied through constitutional values. A consequence of this is that direct application demands "adherence to the logically more rigorous two-step approach to rights inquiries,"[9] whilst indirect application seems to be free floating and amorphous. Roderer, for example, describes indirect application as "business as usual, with a twist – in other words, the message is to keep doing what you are doing but have in view these fuzzy, amorphous constitutional values in the back of your mind".[10] Substantively, therefore, indirect application looks to values, whilst direct application looks to specific provisions. This is referred to in this paper as the "methodology" of either form of application.

The second difference between direct and indirect application is illustrated in Currie and De Waal's discussion of various strategies for indirect application. These authors distinguish three strategies open to a party wishing to apply the Bill of Rights indirectly to her dispute.[11] The first is to "argue for a change in the existing principles of the common law so that the law gives better effect to the Bill of Rights".[12] The second strategy is to "apply the common law with due regard to the Bill of Rights",[13] and the final strategy is to develop and elaborate on open-ended common law concept with constitutional content.[14] The concept of public policy in the legality enquiry in the law of contract is obviously one such open-ended concept. This illustrates what might be described as the "developmental flexibility" of indirect as opposed to direct application; a striking down or declaration of invalidity follows a finding of unconstitutionality when applying a right directly, whereas when dealing with indirect application, the law is *developed* appropriately.[15] Thus, the second distinction between direct and

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8 Currie & De Waal *The Bill of Rights Handbook* 5 ed (2005) 43.

9 Woolman & Brand 2003 *SAPR/PL* 42. Woolman and Brand consider two further analytical differences between direct and indirect application, neither of which are relevant for present purposes.

10 Roederer "Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law" 2003 *SAJHR* 57 75.

11 Currie & De Waal *Handbook* 68.

12 *Ibid*. Currie and De Waal use the example of the development in our law of defamation in the "line of defamation cases from *Holomisa v Argus Newspapers* 1996 2 SA 588 (W) to *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 6 SA 329 (SCA)".

13 Currie & De Waal *Handbook* 69.

14 *Ibid*.

15 Another consequence of this is that direct application, as a form of application, is better suited to assessing the constitutionality of specific and discrete provisions, as opposed to indirect application which, it is submitted, is better suited to assessing broader doctrinal features of the common law.

indirect application lies in the remedy generated. Currie and De Waal articulately crystallise the distinction as follows:

> "When it comes to the common law, the principle supports the courts' longstanding routine and practice of developing the common law in conformity with the Bill of Rights (indirect application) in preference to assessing whether the common law is in conflict with the Bill of Rights (direct application)."[16]

The developmental flexibility of indirect application has ensured that it has become the default approach for parties who wish to apply the Bill of Rights to their private law dispute.[17] Prior to the decision of the Constitutional Court in *Khumalo v Holomisa*,[18] ss 8(2) and (3) were virtually redundant.[19] In *Khumalo* however, O'Regan J, writing for the majority of the court, held that the Bill of Rights ought to be applied directly to the common law where this was appropriate.[20] In this regard, the court specifically held that:

> "Section 8(2) . . . provides that natural and juristic persons shall be bound by provisions of the Bill of Rights 'to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. Once it has been determined that a natural person is bound by a particular provision of the Bill of Rights, s 8(3) then provides that a court must apply and if necessary develop the common law to the extent that legislation does not give effect to the right."[21]

The *Khumalo* case concerned the development of the common law requirements for a successful defamation action with reference to the right of freedom of expression.[22] The specific question which arose for decision in this case, as framed by the Constitutional Court, was whether or not the common law of defamation insofar as it "does not require a plaintiff in a defamation action to plead that the defamatory statement is false *in any circumstances* . . . limits unjustifiably the right to freedom of expression".[23] O'Regan J's finding was that the common law relating to defamation was not in fact unconstitutional, and therefore dismissed the appeal.[24] As Currie and De Waal note, a decision to approach a matter in terms of either direct or indirect application will seldom be determinative of the outcome of a particular matter.[25]

3 THE PROBLEM WITH INDIRECT APPLICATION: WOOLMAN'S FLACCID CONSTITUTION

The law of contract has not been immune to this aversion to direct application. The prevailing approach to the application of the Constitution in our law of contract has been indirect application to the public policy enquiry (the final strategy outlined by Currie and De Waal). This approach – the conventional

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16 Currie & De Waal *Handbook* 64.

17 Currie & De Waal *Handbook* 50. In addition, consider the *dictum* in the concurring minority judgment of Langa CJ in *Barkhuizen* para 186 to the effect that indirect application will "ordinarily be the best manner to address the problem [of applying the Bill of Rights]".

18 2002 5 SA 401 (CC).

19 Currie & De Waal *Handbook* 51.

20 Paras 30 to 31.

21 Para 31.

22 Para 33.

23 Para 33.

24 Para 47.

25 Currie & De Waal *Handbook* 74, *Barkhuizen* para 186.

approach, if you will – is to be illustrated in the leading cases of *Brisley v Drotsky*,[26] *Afrox Healthcare Ltd v Strydom*,[27] and *Juglal v Shoprite Checkers (Pty) Ltd*.[28] In the Supreme Court of Appeal's judgment in *Napier v Barkhuizen*,[29] this approach was sketched as follows:

> "[C]ourts will invalidate agreements offensive to public policy, and will refuse to enforce agreements that seek to achieve objects offensive to public policy. Crucially, in this calculus, 'public policy' now derives from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism."[30]

This approach is crisply articulated by Harms JA in *Johannesburg Country Club v Stott*.[31] In this matter, the respondent's husband had been killed by a lightning strike whilst playing golf at the appellant's facilities.[32] The appellant sought to avoid her claim by invoking an exemption clause limiting its liability for harm or injury occasioned whilst using its facilities.[33] On a proper construction of the clause, the court held that the respondent's dependant's claim was not excluded by it.[34] Despite this however, the court nonetheless heard argument on whether, if indeed the clause did exclude the respondent's claim, it would be contrary to public policy.[35] Harms JA set out the approach which the court would have taken as follows:

> "[T]he question is whether a contractual regime that permits such exemption is compatible with constitutional values, and whether growth of the common law consistently with the spirit, purport and objects of the Bill of Rights requires its adaptation."[36]

This approach is unproblematic and indeed, seems to accord with the admonishment of Chaskalson P in *Pharmaceutical Manufacturers Association of South Africa: In re: Ex parte President of the Republic of South Africa*[37] that all law "derives its force from the Constitution and is subject to constitutional control".[38] It is submitted however, that on a closer look, a different picture emerges. Whilst *Afrox, Brisley* and *Napier* all locate constitutional values as central in the enquiry of whether or not a contractual clause is contrary to public policy, they nonetheless contemplate a closely circumscribed and cautious approach to declaring contracts contrary to public policy.[39] This approach is closely circumscribed insofar as the constitutional import to the public policy enquiry is limited to constitutional values, as contemplated in s 39(2). As long as

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26 2002 4 SA 1 (SCA) paras 88–95.
27 2002 6 SA 21 (SCA).
28 2004 5 SA 248 (SCA).
29 2006 4 SA 1 (SCA).
30 *Napier* para 7.
31 2004 5 SA 551 (SCA).
32 Para 1.
33 Para 4.
34 Para 11.
35 Para 12.
36 Para 12.
37 2000 2 SA 674 (CC).
38 Para 44.
39 *Brisley* para 31.

Lubbe's observation regarding how content is to be given to these values is heeded, this seems innocuous enough:

> "[C]loser analysis of what is comprised within the various constitutional values is essential in order to ensure that the potential of the Bill of Rights as a stimulus for the future development of the common law is preserved."[40]

It is submitted that a close analysis of these values and the way in which they ought to shape the common law has *not* been undertaken. Rather, the content of these values has been reduced to stereotyped content by our courts, particularly the Supreme Court of Appeal. In addition to this, the consideration of the import of constitutional values as opposed to specific constitutional provisions is problematic as it introduces an element of arbitrariness to the enquiry.

Obviously, whether or not an agreement is contrary to public policy is not the only issue a court will consider when asked to given effect to the provisions of a contract – the presence or absence of consensus, duress, possibility of performance and the other essential elements of a contract are all considerations which a court will also apply its mind to. To this point however, the Constitution has primarily been applied to the public policy and legality enquiry in our law of contract.[41]

4 *BRISLEY*, *NAPIER* AND *AFROX* REVISITED

Both of the problems highlighted (the stereotyping of the content of values and the inclusion of arbitrary values) are illustrated in the trilogy of cases mentioned above. In *Brisley*, a matter dealing with the enforceability of a no-variation-without-writing clause,[42] Cameron JA held that dignity underpins contractual autonomy and that this demands that courts approach the striking down of agreements on the basis of public policy with "perceptive restraint".[43] His finding in *Napier* was that "the Constitution prizes dignity and autonomy, and in appropriate circumstances these standards find expression in the liberty to regulate one's life by freely engaged contractual arrangements".[44]

The content of the value of dignity was therefore held to be the same in either case without any factual or contextual analysis. With respect to the learned judge, the content of the right, quite aside from the general value of dignity, is impossible to define down without reference to the factual circumstances of a particular case. Dignity not only informs the content of the provisions of the Bill of Rights, especially so in the context of socio-economic rights,[45] but can be said to be the very foundation of every other right.[46] As such, when one invokes the value of dignity, an entire spectrum of constitutional interests is germane and

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40 Lubbe "Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law" 2004 *SALJ* 395 423.

41 One example where the effect of the Constitution was considered not in relation to public policy but in relation to the reliance theory is in *Goldberg v Carstens* 1997 (2) SA 852 (C). In this judgment, decided under the Interim Constitution, Davis AJ held that the reliance theory was congruent with the "injunction to Courts" to consider the spirit, purport and objects of the Bill of Rights (860 D).

42 Para 1.

43 Para 94.

44 Para 12.

45 Chaskalson "Human Dignity as a Foundational Value of our Constitutional Order" 2000 *SAJHR* 193 196.

46 *S v Makwanyane* 1995 3 SA 391 (CC) para 144.

relevant. The significance of dignity in the context of the right of access to adequate housing was emphasised in *Government of the Republic of South Africa v Grootboom*.[47] Cameron JA's stereotyped equation of human dignity with the maxim *pacta sunt servanda* ignores this fact – that dignity, more so than any constitutional value, is a multi-faceted and nuanced concept. Whilst it would in all likelihood *not* have been decisive, the indignity and inconvenience endured by an evicted lessee was entirely overlooked in *Brisley*. The Court failed to interrogate and analyse what the purport and import of the value of dignity was *in the circumstances* of the particular case before it.

In *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn*,[48] a decision which was handed down subsequent to the Constitutional Court's decision in *Barkhuizen,* Davis J cautioned against such value stereotyping in the following terms:

> "The uncritical use of the concept 'contractual autonomy as part of freedom in forming the constitutional value of dignity' may be incongruent with the principles contained in the development clauses in the Constitution, the objective of which is to transform existing concepts of law where the content of such concepts is at war with the fundamental values of the Constitution. The use of the phrase 'contractual autonomy wrenched from any examination of the concept of existing power relationships' is, in my view, reflective of a libertarian view of the world . . . in conflict with the spirit of the Constitution read as a whole which promotes an entirely different vision of our society. A transformative constitution needs to engage with concepts of power and community."[49]

The second problem outlined above – that of the potential arbitrariness in relying solely on constitutional values – is illustrated in *Afrox*. In this matter, the respondent was admitted to a hospital administered by the appellant. Upon admission, he signed an agreement in terms of which the appellant was absolved of liability for the negligent conduct of its employees.[50] He suffered loss as a result of the negligence of one of the appellant's nurses.[51] The respondent argued that the exemption clause ought not be applied by virtue of the fact that it was inconsistent with the principle of good faith, public policy as well as the spirit and purport of the Bill of Rights.[52] It is only necessary to analyse the court's treatment of the argument based on public policy and the spirit and purport of the Bill of Rights here. The court's finding – that the clause was unobjectionable and enforceable[53] – is arguably correct. However, what is problematic is the manner in which it came to this conclusion. Brand JA begins with the uncontroversial statement that s 39(2) demands that the underlying values of the Constitution must form the starting point for an analysis of public policy.[54] This statement is not open to criticism. Thereafter however, it is submitted that the judgment becomes problematic. Brand JA proceeds to assess the first "constitutional value" which the respondent relied on – the right of access to healthcare

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47 2001 1 SA 46 (CC) para 23.
48 2008 2 SA 375 (C).
49 Para 30.
50 Para 2.
51 Para 2.
52 Para 7.
53 Para 37.
54 Para 17.

enshrined in s 27(1)(a) of the Constitution.[55] Brand JA held that whilst this "value" might be relevant, it did not in the present case assist the respondent.[56] In casting the right of access to healthcare as a fundamental constitutional value, Brand JA has elevated a constitutional right to the position of constitutional value. This, it is submitted, is plainly incorrect.

A more charitable approach to the interpretation of his judgment would be that his finding that s 27(1)(a) is a constitutional value is merely *obiter* and nothing more than a rhetorical device aiding his disposal of the respondent's contention that it was relevant.[57] However, the same cannot be said for the second "constitutional value" invoked by the learned judge. Brand JA, after disposing of s 27(1)(a), continues as follows:

> "Hierbenewens is artikel 27(1)(a) nie die enigste konstitusionele waarde wat in onderhawige verband ter sprake kom nie . . . *Die grondwetlike waarde van kontrakteersvryheid* omvat, op sy beurt weer die beginsel wat in die stelreël '*pacta sunt servanda*' uitdrukking vind."[58]

In this *dictum*, Brand JA effectively elevates contractual freedom and *pacta sunt servanda* from being common law maxims underpinned by dignity[59] to fully fledged "grondwetlike waarde". Unaccompanied by rigorous contextual analysis of the content of the constitutional values in each case, it is submitted that the recourse to values renders the enquiry, to an extent, arbitrary. The words of Lord Atkin in *Fender v St John-Mildmay*[60] as quoted in *Sasfin* are apposite in the present context: "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and *does not depend upon the idiosyncratic inferences of a few judicial minds*."[61]

It is submitted that the content and purport of the constitutional values used presently in the indirect application of the Constitution to the law of contract have indeed been rendered dependent on the "idiosyncratic inferences of a few judicial minds". Indeed, as Lubbe,[62] Bhana[63] and Pieterse[64] have recognised, this approach has only served to buttress traditional doctrines like *pacta sunt servanda* and "stultify a creative tension that might result in the wholesome development of the common law".[65] As Bhana and Pieterse demonstrate, apart from stunting the developmental potential of the Constitution in relation to the common law, this approach has in fact had the opposite effect of further

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55 Para 19.

56 Para 21.

57 This is illustrated by virtue of the fact that he clearly states that it was the *respondent's* contention that the value in question was relevant. Para 19 of the judgment begins as follows: "By die toepassing van hierdie beginsel [the principle that public policy derives from the Constitution] is die enigste grondwetlike waarde waarop die respondent hom beroep dié wat onderskryf word in artikel 27(1)(a)."

58 Paras 22–23 (emphasis added).

59 Consider para 95 of the judgment of Cameron JA in *Brisley*.

60 1938 AC 1 (HL).

61 9B–E (emphasis added).

62 Lubbe 2004 *SALJ* 421.

63 Bhana 2007 *SALJ* 274.

64 Bhana & Pieterse "Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* revisited" 2005 *SALJ* 865.

65 Lubbe 2004 *SALJ* 420.

entrenching our common law of contract in its liberal origins.[66] Whilst these authors take their critique further and question the substance of the approach of our courts, it suffices for present purposes to only observe (a) the reduction of constitutional values into stereotyped content and (b) the introduction of arbitrary "values".

Although he directs his criticism towards the Constitutional Court (as opposed to the Supreme Court of Appeal), this is the essence of what Woolman is referring to when he talks about the substitution of "rigorous interrogation of constitutional challenges" for "flaccid" values analysis.[67] By deferring to the use of values as opposed to pinning their constitutional analysis to a specific provision and rigorously interrogating the content of that provision, our courts have neglected their mandate to develop the Bill of Rights. The effect of failing to engage substantively with the content of the provisions of the Bill of Rights is that South African constitutional jurisprudence has been deprived of a large body of law dealing with the application of the Bill of Rights in private law disputes.

5 UNTANGLING *BARKHUIZEN V NAPIER*

In light of the above, it is submitted that the finding of the Constitutional Court in *Napier v Barkhuizen* ought to be welcomed. Before this submission can be shown however, it is necessary to analyse the *ratio* of the judgment. With respect to Ngcobo J, *Barkhuizen* may be the most unclear judgment to emerge from the Constitutional Court to date.

The applicant had entered into a short term insurance agreement with Lloyds of London, represented in South Africa by the respondent, in terms of which his motor vehicle was insured.[68] The vehicle was involved in an accident and was damaged beyond economic repair.[69] The respondent, however, repudiated liability on the basis that the vehicle had been used for purposes other than that for which it was insured.[70] Subsequent to this repudiation, the applicant waited almost two years before he decided to institute action against the respondent.[71] To his dismay, the insurance policy contained a time-bar clause in terms of which the respondent was released from liability if, subsequent to the repudiation of a claim, litigation was not instituted within 90 days of such repudiation.[72] The applicant, filled with righteous indignation, sought to have the clause declared contrary to public policy insofar as it limited his right to judicial redress.[73]

The applicant was rebuked by Ngcobo J for conflating two distinct claims: the first being that the time-bar clause was an unjustified violation of his s 34 right of access to courts (direct application) and the second being the claim that the time-bar clause was contrary to public policy, as given content by the values of the Bill of Rights (indirect application).[74] As such, it was argued that the time-bar clause ought not be enforced against the applicant. Given this rebuke, it is a

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66 Bhana & Pieterse 2005 *SALJ* 879.
67 Woolman 2008 *SALJ* 763.
68 *Barkhuizen v Napier* para 2.
69 Para 2.
70 Para 3.
71 *Ibid*.
72 *Ibid*.
73 Para 20.
74 *Ibid.*

shame that the learned Justice proceeds to make exactly the same mistake in his judgment.

Ngcobo J proceeded by analysing what the appropriate approach to constitutional challenges to contractual terms ought to be.[75] He considered direct application to be inappropriate for a number of reasons.[76] The first is that if one applies the Bill of Rights directly to a contractual provision and one finds that it limits or violates a right, it is impossible for one to proceed to consider whether this limitation is justified, as a contractual provision cannot be said to be a "law of general application" for the purposes of s 36.[77] He provides further analysis of the difficulties experienced by the High Court in its judgment *a quo* in applying the bill of rights directly,[78] and concluded the he had "grave doubt[s] on the appropriateness of testing the constitutionality of a contractual term directly against a provision in the Bill of Rights".[79] Despite this however, Ngcobo J seems to leave the question of direct application open in this section of the judgment.

This raises the obvious question of what approach a court ought to take when assessing a constitutional challenge to a contractual term. Ngcobo J considers the most appropriate approach to be that of public policy, as this is now rooted in the Constitution and the values embodied by it.[80] He elaborates on this in the next paragraph:

> "What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."[81]

At this stage, Ngcobo J clearly sets up and casts the enquiry which is to be made in terms similar (if not identical) to the conventional approach outlined above: the assessment which is to be made is whether the contract in question is "inimical to the values enshrined in our Constitution".[82] This seems identical to the enquiry formulated by Harms JA in *Stott*[83] and undoubtedly utilises the methodology of indirect application.

It is at this stage that Ngcobo J's stated and actual approach part ways. Instead of looking at what constitutional values demand of public policy in respect of time-bar clauses, Ngcobo J begins by analysing the effect of the time-bar clause on the right of access to court.[84] Ngcobo J states that the time-bar clause in question does not entirely exclude access to court, but rather qualifies the way in which one is to approach court for relief in respect of the insurance agreement.[85] The consequence of this, as Ngcobo J explicitly finds, is that the "clause limits

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75 Para 23.
76 *Ibid*.
77 *Ibid*.
78 *Barkhuizen v Napier* [2005] JOL 15466 (T) 13.
79 Para 26.
80 Para 28.
81 Para 29.
82 *Ibid.*
83 Para 12.
84 Para 45.
85 Para 45.

the right to seek judicial redress"[86] – that is, it limits the s 34 right of access to court. In the very next paragraph, he again considers the effect of time-bar clauses in general, whether they be statutory or contractual. He again affirms that "[t]hese clauses therefore limit the right to seek judicial redress."[87]

The essence of Ngcobo J's finding, therefore, is that a right – the right of access to court – has been infringed. Whilst he fails strictly to apply the two-stage approach of delineating the ambit of the right and assessing whether or not it has been infringed, it is nonetheless clear that his finding is that time-bar clauses, generally speaking, infringe the right of access to court. What this betrays is that the learned Justice has made exactly the same error he accused counsel for the applicant of making – conflating direct reliance on a constitutional right with a reliance on s 39(2).

This error becomes clearer when Ngcobo J considers whether public policy tolerates such a limitation, concluding that as long as the limitation in question is fair and reasonable, there ought to be no question of its repugnancy in respect of public policy.[88] The following paragraph from the judgment is telling:

> "I can conceive of no reason either in logic or in principle why public policy would not tolerate time limitation clauses in contracts subject to the considerations of reasonableness and fairness.What is also relevant in this regard is that the Constitution recognises that the right to seek judicial redress may be limited in certain circumstances where this is sanctioned by a law of general application in the first place, and where the limitation is reasonable and justifiable in the second. The Constitution thus recognises that there may be circumstances when it would be reasonable to limit the right to seek judicial redress. This too reflects public policy."[89]

With respect, this attempt by Ngcobo J to distinguish the methodology of direct application from his "public policy" analysis cannot avail him. In the penultimate sentence in this passage, Ngcobo J is referring to the fact that s 36 sanctions the reasonable and justifiable limitation of the right to seek judicial redress. Having already explicitly stated that time-bar clauses amount to a limitation of the right of access to courts, but that this limitation is acceptable if the time-bar clause is reasonable and fair, it is not open to the judge to distinguish these situations from one another. His statement that time-bar clauses are acceptable when reasonable and fair amounts to nothing more than the statement that the limitation of the right of access to court is justifiable when it is fair. Ngcobo J's indirect public policy analysis thus amounts to nothing more than the direct application of the right to access to court to the time-bar clause.

This is compounded by his reference to *Mohlomi v Minister of Defence*.[90] In this matter, the Constitutional Court was called upon to assess the constitutionality of s 113(1) of the Defence Act.[91] The section in question amounted to a statutory time-bar provision requiring prospective litigants to institute proceedings against the South African Defence Force within six months of their cause of action

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86 *Ibid.*
87 Para 46.
88 Para 48.
89 *Ibid.*
90 1997 1 SA 124 (CC).
91 Act 44 of 1957.

arising.[92] The court, per Didcott J, held that the time-bar provision in question had the effect of denying claimants

> "an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. They are left with too short a time within which to give the requisite notices in the first place and to sue in the second. Their rights in terms of s 22 are thus, I believe, infringed."[93]

Having found that the time-bar clause in question did indeed infringe the interim Constitution's s 34 equivalent, Didcott J proceeded to consider whether it could be saved by s 33 (s 36 under the Final Constitution).[94] The essence of this assessment, and it seems that Ngcobo J borrows this phrase directly in his judgment,[95] is that the clause in question must pass "the tests of reasonableness and justifiability which are set there [in s 33]".[96] In *Mohlomi* it was held that the time-bar clause in question was an unjustifiable limitation of the right of access to court.[97]

Without providing a direct reference,[98] Ngcobo J finds that "the test announced in *Mohlomi* is whether a provision affords a claimant an adequate and fair opportunity to seek judicial redress" and that this is the test which ought to be applied in *Barkhuizen*.[99] In providing this analysis, he makes a further attempt to cast his approach as an indirect application of the Bill of Rights. Having set out the 'broad test' of *Mohlomi*, he examines the dictates of public policy as follows:

> "Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of *ubuntu*. It would be contrary to public policy to enforce a time limitation that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress."[100]

If one were to read this statement in isolation, it might be argued that Ngcobo J does indeed engage in the methodology of indirect application – by looking at the dictates of public policy (and the effect of constitutional values like *ubuntu* on public policy) and assessing the time-bar clause in this setting, Ngcobo J does ostensibly seem to engage in conventional indirect application. Such an approach however, it is submitted, is untenable for two reasons. The first is that it would make his judgment, up until this point, surplusage. In the previous part of his judgment, Ngcobo J has engaged in what clearly amounts to direct application. To accept his purported return to indirect application would render all of this analysis irrelevant. The second is the reference to *Mohlomi*. *Mohlomi*, as noted above, dealt with the direct application of the Bill of Rights. Ngcobo J does

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92 Para 2.
93 Para 14.
94 Para 15.
95 Para 52.
96 Para 15.
97 Para 20.
98 Indeed, it is plainly clear that the judgment of Didcott J in *Mohlomi* is far more sophisticated than Ngcobo J's analysis would indicate. Ngcobo J's analysis amounts to nothing more than the extraordinarily trite statement that infringements of rights must be fair.
99 Para 51.
100 Para 53.

nothing more than place his template of what is purportedly "public policy" analysis on Didcott J's limitation test. Without a robust interrogation of what public policy demands, this paragraph cannot prevent one from concluding that Ngcobo J did exactly the opposite of what he said he was going to do – he applied a provision of the Bill of Rights directly to a contractual term, as opposed to applying it indirectly to public policy via the values of the Bill of Rights. He used the methodology of direct application, despite purporting to use that of indirect application.

This submission is borne out in the use of *Barkhuizen* in the two, to date, reported cases citing it. The first is the *Advtech Resourcing* decision of Davis J whilst the second, emanating from the Supreme Court of Appeal, is that of *Linvestment CC v Hammersley*.[101] In the former, the applicant (the respondent's former employer) applied for an interdict preventing the respondent from breaching an agreement in restraint of trade.[102] Whilst it is difficult to extract the exact *ratio* of the case, it seems that Davis J dismissed the application on the basis that the applicant had no protectable proprietary interest which was targeted by the restraint.[103] In coming to this decision however, he observed that burdening employees with the onus of showing unreasonableness in restraint of trade cases might be unconstitutional.[104] In making this observation, he highlighted the constitutional right to freedom of trade and profession[105] and the "dignity of work"[106] as considerations favouring the reversal of the onus. Relevant to this is obviously the question of whether or not constitutional rights are directly applicable to clauses in a contract, and in this regard, Davis J explicitly held as follows: "In summary, the position 'post-*Barkhuizen*' is that contractual terms are subject to constitutional rights."[107]

Whilst the endorsement of the direct application interpretation of *Barkhuizen* in *Linvestment* is not as clear or unequivocal as in *Advtech Resourcing*, it is nonetheless submitted that it is indeed endorsed. The issue facing the Supreme Court of Appeal in this case was "whether the owner of a servient tenement can, of his own volition, change the route of a defined right of way registered against the title deeds of his property".[108] Heher JA's reasoning on the merits is not of much interest to the present enquiry, aside from a comment he makes in passing at paragraph 17 of the judgment:

> "As the law stands, once the servitudal rights of the parties are unambiguously circumscribed by the terms of their agreement, a court will not order a departure from such terms in order to bring about a lessening of the burden on the servient property: *pacta sunt servanda – Van Rensburg en Andere v Taute en Andere*[109] – except in the case of constitutional violations: *Barkhuizen v Napier*."

His reference to *Barkhuizen* is to paragraph 15 of the judgment in which Ngcobo J states that the " . . . validity of all law depends on their [*sic*] consistency with

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101 2008 3 283 (SCA).
102 Para 8.
103 Para 61.
104 Para 32.
105 Section 22.
106 Para 27.
107 Para 26.
108 Para 1.
109 1975 1 SA 279 (A).

the provisions of the Constitution and the values that underlie the Constitution".[110] Heher JA's specific use of the word "violation" seems to indicate that he understands *Barkhuizen* as being an instance of the direct application of the Bill of Rights to contractual provisions.[111]

6 *QUO VADIS*?

Having untangled the mess in the *Barkhuizen* judgment, the most pressing question is how the thesis set out at the start of this discussion – that it is to be welcomed – is defensible. Woolman, in particular, is vociferously critical, and trenchantly writes off the judgment as follows:[112] "I see no reason to entertain the *Barkhuizen* court's assertion that its approach constitutes 'the proper approach'. The *Barkhuizen* court is incapable of telling us what that approach is."

From a purely structural perspective, *Barkhuizen* is an incredibly unclear judgment: there is no discernable internal structure and no continuous thread saving the reader when Ngcobo J's reasoning becomes cloudy. These structural errors, it is submitted, are indicative of the fact that the learned judge makes two conceptual errors that are inexcusable for any South African legal practitioner or academic, quite aside from a member of our apex court. The first is, as Woolman notes, the fact that the court has "flatly contradicted itself" in respect of the question of the direct horizontal application of the Bill of Rights.[113] Ngcobo J approached the matter of the basis of indirect horizontal application, as he asserted that the question of direct horizontal application was an open one.[114] This, as Woolman correctly observes, completely contradicts the court's decision in *Khumalo*.[115]

Of greater relevance to the present enquiry however, is the second significant mistake Ngcobo J makes: the conflation of the methodology of direct and indirect application. As is demonstrated above, Ngcobo J purportedly undertakes indirect application by giving constitutional content to the public policy requirement in the law of contract. In fact however, he pits the right of access to court directly against the time-bar clause. The judgment in *Barkhuizen* is thus poorly structured and conceptually problematic; one would expect far better of South Africa's apex court.

Criticism aside, what must be shown is that this decision ought to be welcomed. There are, it is submitted, three reasons for this. The first is that the use of the methodology of direct application of the Bill of Rights to contractual terms remedies the problems associated with the conventional approach outlined above. The conventional approach to invalidating contractual terms through the

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110 Para 15.

111 The reference to *Barkhuizen* in *Linvestment* is, as noted to Ngcobo J's *dictum* at para 15 of the judgment. In this paragraph, he distinguishes between two types of constitutional inconsistency – direct constitutional inconsistency (ie inconsistency with specific provisions of the Constitution) and indirect constitutional inconsistency (ie inconsistency with the values of the Constitution). Heher JA's use of the word "violation" characterises an endorsement of the above reading of *Barkhuizen*.

112 Woolman 2008 *SALJ* 777.

113 Woolman 2008 *SALJ* 774.

114 Para 23.

115 Woolman 2008 *SALJ* 774. *Khumalo* is dealt with in greater detail above.

Bill of Rights requires only that the open-ended norm of public policy be given constitutional content via the values of the Bill of Rights. As noted above, this has resulted in the reduction of these values to certain stereotyped content as well as the arbitrary inclusion of a number of values and concerns not directly implicated in the Constitution. By adjudicating contractual terms directly against the specific provisions in the Bill of Rights, it is submitted that this problem is avoided in its entirety. The pinning of a constitutional challenge against a term of a contract to a specific provision of the Bill of Rights ensures that the enquiry which is to be made is not only clear, but can also be crisply articulated.

However, this does not mean that the vast body of case law dealing with the expression of constitutional values through public policy is now redundant. Instead of being the primary focus of the enquiry however, such concerns become relevant at the limitation stage. Section 36 reads as follows:

> "The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

The first portion of s 36 clearly contemplates that in making an assessment regarding the justifiability of a limitation, a court must take into account what is acceptable in an "open and democratic society". The expression of *pacta sunt servanda* and the relationship between contractual autonomy and dignity can find expression here. In addition, s 36(2)(b) – the purpose of the limitation – allows courts to scrutinise the commercial expedience of a specific contractual provision in relation to the extent to which it limits a constitutional right. This means that the conventional approach to the invalidation of contracts on the basis of public policy is subsumed into a clearer and crisper enquiry. The key difference between this enquiry and the conventional approach is that instead of dealing with amorphous, vague and values with arguable content, litigants would be able to clearly identify specific and discrete constitutional provisions.

This identification of specific constitutional provisions in turn means that a specific body of case law is immediately identifiable as relevant to a dispute.[116] This is the second reason *Barkhuizen* is to be welcomed. With the exception of covenants in restraint of trade,[117] our case law dealing with the invalidation of agreements on the basis of public policy, despite being voluminous, is divergent. It spans a broad spectrum of issues and factual complexes. Christie, whilst conceding that his list by no means constitutes a *numerus clausus*, identifies no less than eight categories of agreements contrary to public policy and unenforceable,[118] each with their own policy considerations and intricacies. If

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116 This is an advantage inherent in the methodology of direct application.

117 See the long list of cases dealing with such agreements, including, for example, *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A), *Botha v Carapax Shadeports (Pty) Ltd* 1992 1 SA 202 (A) and *Fidelity Guards Holdings (Pty) Ltd v Pearmain* [1997] 4 All SA 650 (SE).

118 Christie *The Law of Contract in South Africa* 4 ed (2001) 398–442.

one isolates and implicates a specific provision of the Bill of Rights as being impaired by a term in a contract, the case law relevant to this provision, as well as the policy concerns and considerations which are most important to it are both easily identifiable. The invalidation of contractual terms on the basis of public policy is difficult enough without the light of authoritative precedent to guide litigants. In *Barkhuizen*, nothing more than a cursory glance at the Constitutional Court's jurisprudence on s 34 would have revealed a wealth of precedent.[119] This is to be welcomed by academics and practitioners alike – with a body of precedent clearly applicable to one's matter, the confidence and certainty of litigating parties can only be enhanced.

Christie's remark in the preface to the fourth edition of his work, *The Law of Contract in South Africa* is apposite in this regard:

> "The South African law of contract continues to advance, and it seems to me that the gap between law and justice is steadily closing as the judges become more confident in applying the concepts of good faith and public policy. *If these concepts can be further developed without undermining the predictability on which the law of contract must be founded*, I anticipate even greater pleasure in preparing the next edition than I have had in tracing recent developments for this edition."[120]

The final, and probably most powerful reason to welcome the use of the methodology of direct application of the Bill of Rights is that to prefer the methodology of indirect application over that of direct application renders ss 8(2) and (3) redundant, a claim forcefully made by Woolman.[121] Assume that indirect application methodology is preferred over that of direct application and a law (whether it be a statute or rule of common law) falls short of the "the spirit, purport and objects of the Bill of Rights".[122] The embodiment of the spirit, purport and object of the Bill of Rights, at a minimum, demands compliance with the substantive provisions of the Bill of Rights, and when applying the Constitution indirectly, s 39(2) is the vehicle for this. It is notionally impossible for a law to be consistent with the "spirit and purport" of an instrument whilst still offending its individual substantive provisions, and as such, in this scenario, there will be no causal efficacy to ss 8(2) and (3). All of the invalidating work is done by s 39(2) and ss 8(2) and (3) (and the concrete provisions of the Bill of Rights which 8(2) and (3) were to apply) are rendered epiphenomenal and thus redundant.

If we assume the converse, that direct application methodology is to be preferred over that of indirect application and consider the same scenario, a different situation emerges. It is at least notionally possible that a particular law will not fall foul of a specific provision in the Bill of Rights, but will fall short of

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119 Such cases include, for example *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) (referred to in the judgment), *Moise v Greater Germiston Transitional Local Council* 2001 4 SA 491 (CC), *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng* 2001 11 BCLR 1175 (CC), *Eke v Sugden* 2001 2 SA 216 (E), *Jooste v Score Supermarket (Pty) Ltd* 1998 9 BCLR 1106 (E) and *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 2 SA 1 (CC).

120 Christie *Contract* (2001) v (emphasis added).

121 Woolman 2008 *SALJ* 777.

122 Section 39(2).

the "spirit, purport and objects of the Bill of Rights". Woolman makes this claim as follows:

> "[I]ndirect application was not meant to 'avoid' actual constitutional analysis in terms of the specific substantive provisions of the Bill of Rights. It enables a court to go beyond the limited substantive provisions of the Bill of Rights."[123]

The effect of preferring indirect methodology over direct methodology is thus that ss 8(2) and (3) of the Constitution are rendered redundant. The drafters of our Constitution could plainly not have inserted ss 8(2) and (3) with the intention that they would be inefficacious – from a purely interpretive perspective, giving indirect application priority over direct application cannot be sustained. Indeed, such an approach belittles the supremacy of the Constitution in a very real sense. The radiating effect of the Constitution on private law through s 39(2) ought not be downplayed. However, relegating the Constitution to this role in each and every private law dispute without an assessment of whether a specific provision of the Bill of Rights is implicated pays but lip service to the doctrine of constitutional supremacy. In order to constitutionally infuse our law, courts ought to have to grapple with specific provisions in the Bill of Rights, pin them down and cast them against contractual terms. To do otherwise fails to fully express the centrality of the Constitution to our legal system.

It must be conceded that *Barkhuizen* by no means does all of this. Indeed, it is submitted that the extent and rigor of the infringement and justification enquiry leave much to be desired. Whilst superficially engaging with the question, the Constitutional Court failed to robustly interrogate the content of the right of access.[124] Additionally, the thoroughness of the justification enquiry is highly questionable. It is also worrying that the Constitutional Court conflates and confuses basic constitutional law concepts. At the same time however, for the three reasons outlined above, the essence of the reasoning in *Barkhuizen* – the prioritisation of the methodology of direct application over that of indirect application – must be welcomed.

7 IS OUR LAW OF CONTRACT AMENABLE TO SUCH AN APPROACH?

As noted at the outset, indirect application has been preferred over direct application. This preference, it is submitted, can be attributed to two features of direct application, the first pertaining to its methodology and the second pertaining to the remedy it generates. In terms of the former, direct application, as has been shown, demands that more analytically stringent approach be adopted. A s 36 analysis however, can only be applied to a "law of general application". This raises the obvious issue of whether or not a term in a contract can be considered a "law of general application" for the purposes of s 36. Indeed, it was this conceptual problem that lead Ngcobo J to purport to use indirect as opposed to direct application in dealing with the issue before him in *Barkhuizen.*[125] In the court *a quo*, De Villiers J conceded that it is clear that the

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123 Woolman 2008 *SALJ* 777.

124 Indeed, it might be argued that this is symptomatic of the fact that the Constitutional Court sought to engage in indirect, vague, values-based application of the Bill of Rights.

125 Paras 23–27.

specific time-bar clauses do not constitute a law of general application:[126] "Die bepalings van klousule 5.25 [the time-bar clause] is immers net op die partye tot die kontrak van toepassing. Dit sou dus op die oog af voorkom of dit nie ''n algemeen geldende regvoorskrif' is nie."

Immediately after finding this, the learned judge then proceeds to consider the legislature's intent in this regard: that the phrase "law of general application" be given a broad construction.[127] The court then sought to identify a law of general application susceptible to limitation analysis.[128] The law identified by the court was the common law principle of *pacta sunt servanda* – the principle agreements seriously and deliberately entered into are binding on those entering into such agreements:

> "*In casu* sou die 'algemeen geldende regsvoorskrif' wees dat 'n ooreenkoms bindend is . . . Die vraag is dan of een kontraksparty met 'n ander kan ooreenkom dat die ander kontraksparty se reg op toegang tot 'n hof beperk sal word."[129]

Ngcobo J rejects this approach, finding that the court *a quo* erred in that, despite the fact that it considered the common law of contract to be law applicable, it nonetheless looked at the specific time-bar clause.[130]

With respect to the learned Justice, the reasoning of the court *a quo* has much to commend itself for. If one assumes that the common law principle of *pacta sunt servanda* is an applicable law of general application and that the time-bar clause in question does indeed violate one's right of access to court, then the s 36 inquiry can be formulated as follows: is the common law rule of *pacta sunt servanda*, to the extent that it binds parties to a contract which violates their right of access to court[131] reasonable and justifiable in an open and democratic society? The fact that a court might, for the sake of convenience, refer directly to the clause in question does not undermine the fact that it is the common law principle of *pacta sunt servanda* referred to, nor does it mean that a court has conflated the two with one another.

As noted above, it is submitted that the second reason indirect application has been preferred lies in its "developmental flexibility" – that is, indirect application

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126 Para 13.

127 Para 13. De Villiers J held as follows: "Waarskynlik het die wetgewer egter bedoel om die aangehaalede frase 'n wyer betekenis te gee." Although he does so incredibly superficially and quickly, if one considers the *dictum* of Kriegler J in *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 136, it is submitted that his analysis in this regard is correct.

128 Para 13.

129 Para 25. Whilst the High Court also considered s 172(1)(a) of the Constitution as applicable to the dispute before it and considered the clause a "regsvoorskrif" for such purposes, this does not matter for the purposes of the present inquiry.

130 Para 24. Ngcobo J's finding in this regard is unclear, but it seems that he thinks that the court *a quo* conflated the time-bar clause with the common law of contract and, as the court had previously found that a contractual clause did not constitute a law of general application, this conflation was unacceptable. Para 24 of his judgment reads as follows: "Having found that the limitation is not reasonable and justifiable under s 36(1), the High Court found that clause 5.2.5, not the common law principle that agreements are binding, fell foul of s 34."

131 The extent of this violation will obviously depend on the scope and content of the contractual clause in question.

gives courts a wide berth in appropriately developing the common law. Direct application, on the other hand, generally results in the striking down of law or a declaration of invalidity. As such, this "developmental flexibility" has meant that parties prefer direct to indirect application.

This, it is submitted, cannot be used to perpetuate the preference of indirect application methodology over that of direct application. The fact that the methodologies of direct and indirect application can be distinguished from the remedies which they generate shows that the developmental flexibility of indirect application is not necessarily intrinsic to its methodological approach. The Constitution states that when dealing with constitutional matters, courts may make "any order that is just and equitable".[132] If, on utilising the methodology of direct application, a court finds that a specific contractual provision does not accord with a provision in the Bill of Rights, it can make any equitable order, whether this demands the development of the common law or an order declaring the provision invalid and unenforceable.

Additionally, it is not clear whether in cases like *Barkhuizen* the remedy generated by indirect application would differ from that of direct application. Given that the applicant in such cases seeks to avoid the operation of a specific clause of the contract, it is unclear how the remedy they seek would differ when the methodology of direct or indirect application is utilised: in either case, the clause would be unenforceable.[133]

8 CONCLUSION

As noted above, the *Barkhuizen* judgment seems superficially problematic. When one strips it down to its essential *ratio* however, a different picture emerges. What Ngcobo J did in *Barkhuizen*, despite his claims to the contrary, was apply the right of access to court directly to the time-bar clause. What this discussion has demonstrated is that in *Barkhuizen*, the Constitutional Court engaged in a conventional, two-stage analysis, assessing whether the right had been violated and whether this violation was justified. The conventional vehicle for the application of the Constitution to contracts – s 39(2) – is deficient insofar as it lends itself to the reduction and stereotyping of the content of the constitutional values of dignity and equality. Indeed, the value of dignity in South Africa contract law has come to represent nothing more than an affirmation of contractual autonomy. The value of *Barkhuizen* is that it reverses this trend. By adjudicating contractual terms directly against individual provisions in the Bill of Rights, the interpolation of the personal view of judicial officers and the consequential reductive stereotyping of constitutional values are both avoided. It is further submitted that this provides greater certainty to academics, practitioners and prospective litigants.

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132 Section 172(1)(b).

133 This is illustrated in the minority judgment of Sachs J in *Barkhuizen.* Although he seems to utilise indirect application (para 150), his finding para 185 (" . . . that the time-bar clause in question limiting access to court, should not be enforced . . .") seems quite similar to a remedy based on the methodology of direct application.

Ultimately, what *Barkhuizen* represents is the fact that ensuring that our law of contract passes constitutional muster need not be an uncertain and frightening experience. Through the use of the methodology of direct application, specific provisions in the Bill of Rights, each with their own body of case law, are implicated. This approach adequately balances the competing demands that the Constitution be ascendant against that of the orderly and judicious development of our law of contract. The position, post-*Barkhuizen* is that s 8(2) and (3) are no longer redundant. Despite being poorly written and, at times, thinly reasoned, *Barkhuizen* is undoubtedly a welcome development in our law of contract.

Succession in terms of Islamic law and its Application in South Africa

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1 INTRODUCTION

In order to understand Islamic law of succession, we need to understand the basic framework of Islamic law. The basic text which provides the guidelines for succession in terms of Islamic law is the *Qur'an*, the revealed word of God. However, the *Qur'an* does not address every possible situation that may face Muslims. For cases not explicitly expressed in the *Qur'an*, Muslims look to the examples of the Prophet Muhammad as a secondary source (*Sunnah*). Often, that too leaves open some questions of interpretation and application. In such cases Muslims rely on *ijtihad*, which is the ability to analyse the *Qur'anic* text or a problematic situation within the relevant cultural and historical context and then devise an appropriate interpretation or solution based on a thorough understanding of the *Qur'an* and *Sunnah*. This approach results in a highly flexible jurisprudence.[1]

There are two jurisprudential schools in Islam, called the *Sunni* and *Shi'ite* schools of law. The *Sunni* school of law is further subdivided into four schools, which are the *Hanafi, Shafi, Hanbali* and *Maliki* Schools. Besides the *Qur'an* and *Sunnah*, the discussion on Islamic law of succession in this article will be based on the rules and views of the above four *Sunni* schools. In the process of this discussion, mention will be made of the views of modern scholars whose views and opinions differ from the traditional views of the *Sunni* jurisprudential schools. Traditional scholars follow the rules and views of the judges of the four *Sunni* schools. Modern scholars believe that Islam is a dynamic religion for all times and places, and the law that provides structure and order for the faith's believers must grow and change to be relevant to the changing times. They believe that the classical jurists and scholars of the four *Sunni* schools were not "wrong" in their interpretations, considering the circumstances of their lives and societies, but it would be wrong if we today follow them blindly instead of doing what is best for our time and society.[2] They use the tool of *ijtihad* (interpretation as an Islamic jurisprudential tool) to re-interpret inheritance rules, taking into account the social, cultural and economic context of a particular community.

This article will examine and discuss the general principles of Islamic law of intestate succession, testate succession and succession to women. It will also focus on the operation of Islamic law of succession in South Africa and includes

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1 Al-Hibri *Family Planning and Islamic Jurisprudence* 1 www.karamah.org (accessed 12-01-2010).

2 *Inheritance, Reform on Rights* 10 www.sistersinislam.org (accessed 12-01-2010).

practical illustrations of this throughout the article. This discussion is important because Muslims in South Africa as well as legal practitioners need to be aware that Muslims can draft wills which are *Sharia'ah* and South African law compliant.

2 BASIC PRINCIPLES OF ISLAMIC LAW OF SUCCESSION

According to the *Qur'an*[3] every Muslim with property to bequeath must have a will before death. The *Qur'an* contains eleven verses which deal with succession.[4] For example, the *Qur'an* in Chapter 2, verse 180 states the following

> "It is prescribed when death approaches any of you,
> If you leave any property, that you make a bequest to
> Parents and next of kin according to equity,
> This is a duty on the God-fearing."

There is also the saying of the prophet that "it is the duty of a Muslim who has anything to bequest not to let two nights pass without writing a will about it".[5]

Islamic law of succession consists of both testate and intestate succession rules. The rules can be divided into two parts, namely voluntary succession (*khilafa ikhtiyariyya*)[6] and compulsory succession (*khilafa ijbariyya*).[7] The voluntary aspect could be regarded as testate succession. It relates to the right of every Muslim to bequeath up to one-third of his estate to third parties who do not qualify at the time of his death as his legal heirs under the Islamic law of succession. The remainder of the estate automatically and compulsorily devolves upon the legal heirs of the deceased at the time of his death in proportions prescribed by the *Qur'an*. If the right to bequeath one-third to outsiders is not exercised, it then forms part of the residue of the estate and devolves upon the prescribed heirs.[8]

In Islamic law of succession there are three conditions which must be fulfilled before the transmission of property by inheritance. The first condition is the death of the deceased. It must be clear and actual or decreed by the court in the case of a missing person. The second condition is that the beneficiaries must be alive at the time of the death of the testator. The final condition is that there must be no barrier or impediment to inherit.[9]

Islamic law of succession is based on blood relationship. This general principle is found in the following verse of the *Qur'an*:

> "For men there is a share of what their parents and relatives had left behind for them, and for women-folk too there is a share of what their parents and relatives have left behind for them, be it abundant or less. These are stipulated shares ordained (by Allah)."[10]

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3 Ch 2, verse 180.

4 See Goolam "Law of Succession" in Bekker *et al Introduction to Legal Pluralism in South Africa* (2006) 297. For example, *Qur'an* ch 4, verse 7 & 11; ch 5, verse 33.

5 Narrated by Sahih Al-Buhari.

6 Also referred to as optional succession.

7 See Abu Zahra "Family Law", a reprint from Khadduri & Liebesny (eds) *Law in the Middle East* (1955) 27.

8 See Omar *The Islamic Law of Succession and its Application in South Africa* (1988) 3.

9 Zahra 32.

10 Ch 4, Surah Al Nisa, verse 7.

The principles governing distribution are dependent on the closeness of the heir's relationship to the deceased. For example, the children of a predeceased heir (sons) are excluded by the surviving sons of the deceased. Extra-marital children and adopted children are also excluded from inheriting as *Qur'anic* heirs. However, an extra-marital child may inherit from the mother and a father may bequeath one-third of his estate to his extra-marital child.[11]

The surviving spouse, both parents and the children of the deceased constitute the first class of heirs (primary heirs) who can never be excluded under any circumstances. The surviving spouse inherits by reason of marriage.[12] Prior to the *Qur'anic* injunction in pre-Islamic Arabia, women and children were excluded from inheriting. Women were regarded as property and they themselves often were bequeathed at the death of a husband, father or brother.[13] The *Qur'anic* verse above removed this injustice suffered by women. Unlike South African law, a testator in terms of Islamic law of succession is not allowed to exclude his wife and children from his will. Thus, whether women can inherit in terms of Islamic law is not the issue. The bone of contention centres on the "share" that the woman is entitled to inherit.

An unborn child conceived at the time of the death of the deceased is entitled to inherit if born alive. In the case of simultaneous deaths (ie where a group of people die at the same time who are related to each other, and there is no way to determine who died first or who died later) the deceased do not inherit among themselves. The respective estates of the deceased devolve upon his or her heirs.[14]

As mentioned above, primary heirs can never be excluded. However, all other heirs may be excluded by the presence of other heirs. For example, a person (brother) who is related to the deceased through another (father) is excluded by the latter; a person nearer in degree to the deceased excludes a person who is remoter within the same class of heirs (a son excludes all grandsons) and a full blood excludes half-blood through a father (a full brother will exclude a consanguine brother but not a uterine brother.[15]

Heirs may be precluded from inheriting. For example, murderers are precluded from inheriting from the person they kill, which is the case in terms of South African law too. The Prophet said that "[t]he murderer does not get anything from the estate of the testator whom he has killed".[16] The four *Sunni* schools of law are in agreement that homicide, whether intentional, unintentional or accidental, is a valid impediment to inheritance.[17] Most jurists are also in agreement that a non-Muslim cannot inherit from a Muslim or vice versa. However, there is no restraint on a Muslim recieving a gift from a non-Muslim during his lifetime. There are some scholars who believe that if a Muslim wishes to leave some of his riches to his non-Muslim family, he may do so as Islamic

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11 Minty "The Attorney's Guide to Islamic Law of Inheritance" 2004 (May) *De Rebus* 40.

12 Omar *The Islamic Law of Succession* 3.

13 Minty 2004 *De Rebus* 40.

14 *Ibid*.

15 There are several rules of exclusion; however, it is not possible to discuss all these rules in detail. See Hussain *Islamic Laws of Inheritance* 4 http://www.Islam101.com/sociology/inheritance.htm (accessed 12-01-10).

16 See Doi *Shariah: The Islamic Law* (1984) 288–291 for a detailed discussion.

17 Goolam *Introduction to Legal Pluralism* 297.

law of succession allows a testator to dispose of one-third of his estate according to his wishes.[18]

"A person who, after accepting the Islamic faith, repudiates Islam and converts to any other religion or becomes an atheist is referred to as an apostate (*Murtad*)."[19] The majority of Islamic scholars believe that an apostate heir may not inherit from a Muslim. However, the *Hanafi* jurisprudential school is of the view that a Muslim heir may inherit from an apostate.[20] An apostate is also deprived of the property which she or he has acquired after apostasy and such property is said to revert to the public treasury (*bait-ul-mal*).[21]

3 ADMINISTRATION OF THE ESTATE

3 1 Payment of debts

Before the distribution of the estate to the heirs, the executor appointed in terms of the will is mandated to pay all the debts of the deceased. In order of priority, payments from the estate are as follows: [22]

- Satisfaction of religious obligations, such as satisfaction of all *zakat* (mandatory charity payments calculated according to the value of the deceased's assets) payments that are unpaid; performance of the *Hajj* (pilgrimage to Mecca) through and acceptable proxy and making specified donations to redeem fast days unobserved.
- Payment of funeral expenses.
- Redemption of mortgaged property.
- Payment of all other debts owed by the deceased.
- Payment of legacies under the will.
- After all debts are paid the prescribed heirs are paid out of the net of the estate.

3 2 Testate Succession

3 2 1 General Principles of Islamic Law of Testate Succession

The Islamic will is called *al-wasiyah* and it can be oral or in writing. The will needs to be attested by two competent witnesses. According to the *Hanbali* and *Maliki* jurisprudential schools if there are no witnesses to a written will, it will be valid provided that the will is written in the known handwriting or has the known signature of the testator. [23]

The testator must be an adult Muslim and must have the mental capacity to understand the nature and effect of his testamentary act. Evidence of a Muslim being an adult is puberty, which is menstruation in girls and night pollution in boys. In the absence of evidence, puberty is presumed to be completed at the age

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18 Salie *A Comparative Study on Inheritance in Islam* (1995) 119.

19 Goolam *Introduction to Legal Pluralism* 297.

20 For a more in-depth discussion, see Salie 122–124.

21 Goolam *Introduction to Legal Pluralism* 297.

22 Law Society of Singapore *Faraid or Muslim Inheritance Law* http://www.lawsociety.org.sg/html/awareness/faraid.htm (accessed 05-09-2009).

23 *Ibid.*

of fifteen.[24] The testator must not be under any undue influence. The testator has the right to revoke his will by a subsequent will, which can be done expressly or impliedly. A revocation clause could possibly read as follows:

> I, Ali Ismail [identity number] revoke, cancel and annul all previous wills and codicils and testamentary writings made or executed by myself and declare this to be my last will and testament.[25]

As mentioned before, according to traditional *Sunni* views, the general rule is that a Muslim may not bequest more that one-third of his net estate to a third party or third parties who do not qualify as heirs in terms of the Islamic law of succession.[26] However, there is an exception to this rule where a bequest is made to a prescribed heir, or a bequest that exceeds one-third may be valid if the other major heirs consent thereto. The bequest may be made to natural and juristic persons, such as adopted children, needy relatives, and charitable, religious or educational institutions.[27] A person to whom a bequest has been made has a right of election to either adiate or repudiate the benefit. If the person dies after the testator without adiating, the benefit will be passed onto his heirs. If the person predeceases the testator, and in the absence of substitution in the will, the bequest will fail and it will form part of the residue of the estate.[28]

3 2 2 Practical application of the one-third rule

South African law does not recognise a similar rule as the one-third rule of Islamic law. In essence, the rule places a restriction on a Muslim testator's freedom of testation, because he or she is only allowed to bequeath one-third of the deceased estate to other beneficiaries than those mentioned in the *Qur'an*. In fact, placing a restriction on the testator by prohibiting him to make a testamentary bequest to one of the *Qur'anic* beneficiaries is not in accordance with the South African concept of freedom of testation. This fact might create tension between the South African and Islamic concepts of freedom of testation. Despite this, the South African concept of freedom of testation is wide enough to allow for the application of the Islamic one-third rule by allowing a Muslim testator to include it in his or her will. This can be illustrated by the following practical example:

You are consulted by a Muslim testator. He has a wife and adopted daughter. No children were born from their marriage. You are instructed to draw up a will according to Islamic law making maximum provision therein for his adopted daughter. The clause could read as follows:

I hereby give, devise and bequeath my entire estate and effects as follows:

(a) One-third of my estate shall devolve to my adopted daughter, Fatima. In the event of her predeceasing me, such share shall devolve upon her children in equal shares, and failing children, the share shall devolve according to the provisions of sub-paragraph (b) hereof;

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24 Hussain *Islamic Laws of Inheritance* 3. In terms of South African law, a testator must be 16 years or older.

25 This example is taken from a specimen of a will from the South African Awqaf organisation. See http://www.awqaf.org (accessed 05-09-2009).

26 See Omar *The Islamic Law of Succession* 8.

27 *Ibid.*

28 *Ibid.*

(b) The rest and residue of my estate and effects shall devolve upon my heirs to be determined at the time of my death in accordance with, and in the proportions prescribed by, the Islamic law of succession. A certificate furnished by an expert in said law setting forth my heirs and their shares shall be final and binding.[29]

As mentioned earlier, Islamic law of succession is based on blood relations. As a result, an adopted daughter does not qualify as an heir. Therefore, it would be permissible to bequeath one-third of the estate to her. The residue goes to the heirs. However, it is preferable not to mention the names of the heirs and their specific shares in the will in order to avoid amendments at a later stage. For instance, if the wife were to predecease the testator, she would be excluded and the will would then have to be amended if the heirs and their shares were specified in the will.[30]

3 2 3 Views of Modern Scholars regarding the one-third rule

There are modern Muslim scholars who dispute the one-third restriction in the distribution of assets. They argue that jurists have incorrectly construed a famous *hadeeth* (saying) of the Prophet Muhammad, wherein the Prophet said the following in a response to a question asked from Sa'd Ibn Abi Waqqas, a man who was sick and who believed he was about to die.[31] The following story has been narrated by him:

> "I was stricken by an ailment that led me to the verge of death. The Prophet came to pay me a visit. I said, 'O Allah's Apostle! I have much property and no heir except my single daughter. Shall I give two-thirds of my property in charity?' He said, 'No.' I said, 'Half of it?' He said, 'No.' I said, 'One-third of it?' He said, 'You may do so, though one-third is also too much, for it is better for you to leave your offspring wealthy than to leave them poor, asking others for help . . ."[32]

Modern Islamic scholars argue that the Prophet, when making the above ruling, was thinking logically and had the testator's and his child's best interest at heart. In suggesting that even one-third was too much to bequeath to charity, he was taking the particulars of that individual case into consideration and was giving his personal opinion. They argue that he was not setting limits on the use of wills and certainly not laying down precedent. They argue further that nothing in the tone of the *hadeeth* indicates that the Prophet intended that the maximum amount to be willed was one-third of the legacy. Jurists have misconstrued the Prophet's words and misinterpreted his intent thereby robbing Islamic laws of inheritance of their flexibility and equability.[33] However, the majority of Muslims follow the traditional rule that only one-third of the estate can be bequeathed by a testator.

3 3 Intestate Succession

3 3 1 General Principles of Islamic law of intestate succession

According to the Islamic law of succession heirs are divided into three categories: "*Qur'anic* heirs" are heirs who receive the prescribed portions as set out in the

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29 *Ibid*.

30 Omar *The Islamic Law of Succession* 9.

31 Ismaeel *Inheritance and Wills in Islam* http:// www.submission.org/islam/wills.htm (accessed 01-09-2009).

32 Narrated by the following narrators of *hadeeth* Sahih Al-Bkhari, Sahah Muslim, Muwatta, Tirmidhi Abu Dawud and Ibn Majah.

33 Ismaeel *Inheritance and Wills*.

Qur'an; "residuaries" are the heirs who receive the residue of the estate once the *Qur'anic* shares have been allotted and "uterine relations" are the heirs who are neither *Qur'anic* or residuary heirs.[34]

There are twelve *Qur'anic* heirs[35] (four males and eight females). The four males are: father, grandfather, uterine brothers and husband. The eight females are: wife, single daughter, son's daughter, mother, grandmother, full sister, consanguine sister and uterine sister. A residuary heir[36] is generally a male relative (for example, a son or son's son) between whom and the deceased no female intervenes. A uterine relation on the other hand is a relative generally related to the deceased through a female (for example, a daughter's son).[37]

The following *Qur'anic* injunction is made in respect of shares of the wife or husband of the deceased:

> "In what your wives leave, your share is half, if they leave no child. But if they leave a child, you get a fourth after payment of legacies and debts. In what you leave, their (wives) share is a fourth, if you leave no child. But if you leave a child, they get an eighth after payment of legacies and debts. If the man or woman whose inheritance is in question, has left neither ascendants or descendants, but has left a (uterine) brother or sister each one of the two gets the sixth; but if more than two they share in a third, after payment of legacies and debts; so that no loss is caused (to any one). Thus it is ordained by Allah and Allah is All-Knowing, Most-Forbearing."[38]

The husband is therefore entitled to one-fourth to one-half share in the net estate. If there is no child or grandchild surviving the deceased the husband will receive a half share. If there is a surviving child or grandchild of the deceased the husband will receive a quarter of the net estate.[39] The wife is entitled to one-fourth to one-eighth of the estate. If there is no child or grandchild surviving the deceased the wife will receive a quarter of the net estate. If there is a surviving child or grandchild of the deceased the wife will receive a share of one-eighth. [40]

With regard to children, the *Qur'an* states the following: "For a male share equivalent to that of two females."[41] This injunction which states that a male receives a share equal to that of two females applies only to the inheritance of children by their parents.[42] The male and female children must be of equal degree and in the same class. This general principle is not universally applied. For example, insofar as children sharing a mother but not a father are concerned, they inherit equally.[43]

If there is only a single surviving daughter she receives one-half of the net estate. If there are two or more daughters they share two-thirds equally. If there is a son, the sister will share with her brother, she is entitled to one share for every two shares her brother receives.

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34 Omar *The Islamic Law of Succession* ch ix.
35 In Arabic they are referred to as *Ahl Al-Faraid* "those entitled to prescribed portions".
36 In Arabic they are referred to as *Asaba* "male agnate relatives".
37 Omar *The Islamic Law of Succession* ch ix.
38 *Qur'an* ch 4, verse 12.
39 For an in-depth discussion see Doi 300–303 and Salie 134 –136.
40 Minty 2004 *De Rebus* 40.
41 *Qur'an* ch 4, verse 11.
42 *Position paper on Islamic Inheritance* http://www.Jannah.org/sisters/inheritance.html (accessed 01-09-2009).
43 Minty 2004 *De Rebus* 40.

According to the *Qur'an* parents are entitled to the following shares:

> "And for his parents for each of them there is one-sixth of the inheritance if he has a child, but if he does not have a child and the parents are the heirs then for the mother one-third."[44]

Thus, if there are children and/or agnatic grandchildren (son's children) then the father and mother will receive a share of one-sixth. However, if there are no children or agnatic grandchildren the father will receive the residue of the estate.[45] On the other hand, in these circumstances, the mother will receive only a one-third share. The father may also inherit in his capacity as "*Qur'anic* heir *cum* residuary", which means he would receive his one-sixth *Qur'anic* share and the residue of the estate.[46] For example, the sole surviving relatives of the deceased are his father, wife and his daughter. The wife would receive her one-eighth share, the daughter one-half and the father would receive the one-sixth basic *Qur'anic* share, plus the residue of the estate of five-twenty fourths, which totals three-eighths.[47]

In regard to siblings, if the deceased is survived by a father, son or grandson then the brothers and sisters of the deceased will not inherit. If the deceased is not survived by a father, son or grandson then his surviving brother will receive the residue of the net estate. If the deceased is survived by one sister, she will receive half of the net estate. However, if the deceased is survived by two or more sisters, they share equally and receive two-thirds each of the net estate. If the deceased is survived by both brothers and sisters then they will receive the residue of the estate. Note that a sister will share in a 2:1 ratio with a brother. [48]

If the testator is not survived by parents or children then predecessors and descendants inherit by substitution. For example, a grandfather will substitute the deceased father, and a granddaughter would take the place of a deceased's daughter. The deceased's nephews and nieces will take the place of his siblings. Note once again the 2:1 male preference will also apply in these cases.[49]

3 3 2 Practical application of the half rule

The following are examples of clauses which could be used by practitioners when drafting a will for a Muslim client where they have to deal with the disposal of property to *Qur'anic* heirs[50]

1 Residue of the estate

I hereby bequeath the entire residue of my estate and effects of whatsoever nature or kind where so ever the same may be situated, whether movable or immovable, corporeal or incorporeal whether in possession, reversion, remainder or expectancy to my lawful heirs to be determined at the time of my

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44 *Qur'an* ch 4, verse 12.

45 A residuary heir receives whatever remains of the inheritance after the *Qur'anic* shares have been allocated their shares. Residuary heirs are generally male agnates. See Hussain *Islamic Law of Inheritance* http://www.islam.com/sociology/inheritance.htm (accessed 12-01-2010).

46 Omar *The Islamic Law of Succession* 38.

47 Minty 2004 *De Rebus* 40.

48 Law Society of Singapore *Faraid or Muslim Inheritance Law*.

49 Minty 2004 *De Rebus* 40.

50 Standard Islamic wills can be obtained from most Muslim judicial councils and Muslim organisations. See also Scharffenorth *The Science of Inheritance and its Application in the Context of South African Law* (2004) and Omar *The Islamic Law of Succession*.

death in accordance with and the proportions specified by the Islamic law of succession.

2 For this purpose of giving effect to this clause, my executor(s) shall file with the Master of the High Court a certificate executed by an authorised person appointed by [insert name of an accredited Muslim institution]. The certificate shall set out the full names of my lawful heirs at the time of my death, and their respective shares in accordance with the rules of the Islamic law of succession.

3 Minor beneficiaries

The share of income or capital which may be payable to minors upon my death in terms of this will shall not be paid into the Guardians Fund, but shall be held in trust by my administrator(s) who shall have the right to invest such income or capital in such investments as they may in their sole discretion decide and shall further have the right to apply the whole or portion of the income or capital for the maintenance, education or other benefit of the minor beneficiary, provided that such investment is not in conflict with Islamic law.

OR

A general distribution clause could also read as follows:

I hereby bequeath my whole estate to my heirs to be determined at the time of my death in accordance with, and in the proportions specified by, the Islamic law of Succession. A certificate furnished by an expert in that law, or a qualified Muslim theologian, setting forth my heirs and their respective shares according to the Islamic law of succession, shall be final and binding.[51]

3 3 3 Al-Radd *and* Al-Awl *Doctrines*

With regard to the division of shares, there are non-*Qur'anic* legal doctrines which allow for the abatement or addition of shares proportionately when fractional shares do not add up to a full share.[52] After the distribution of the prescribed shares amongst the heirs there may be circumstances where there is a residue left over, but there are no residuaries. This residue (called *al-radd*) is returned to those sharers who are entitled to it, in proportion to their original shares. Conversely, a situation may arise where the sum total of the *Qur'anic* heirs exceed unity and therefore, the total amount of the estate. Thus the shares of the *Qur'anic* heirs have to be reduced proportionately, using the doctrine of *al-awl*. This doctrine involves increasing the denominators of the respective fractional shares to equal the sum total of the numerators.[53]

The following is a practical example of how an attorney would apply the *al-awl* doctrine:

> A deceased is survived by a wife, a father, a mother, and two daughters. The wife receives her allotted share of one-eighth in the presence of children. The father and mother take one-sixth each. The two daughters receive a collective two-thirds. When added together the respective shares amount to 27/24 (reduced the common denominator of twenty-four). In the result, the numerators (3+4+4+16) of the respective fractional shares are added to give a new increased denominator of twenty-seven. In consequence the net estate is divided into twenty-seven parts: four parts to each parent, three parts to the wife and eight to each daughter.[54]

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51 Goolam *Introduction to Legal Pluralism* 308.

52 Minty 2004 *De Rebus* 40.

53 See Hussain *Islamic Laws of Inheritance* and Omar *The Islamic Law of Succession* for a more detailed discussion on this matter.

54 Omar *The Islamic Law of Succession* 88.

3 3 4 Views of Modern Scholars

There are scholars who argue that the fixed distribution rules of inheritance laid down in the *Qur'an* as discussed above only apply where no valid will has been left by the deceased and that division can be changed by a will. They argue that verse 7, ch 4 of the *Qur'an* which states that "the men shall share of what the parents and the relatives leave behind and the women shall get a share of what the parents and the relatives left behind, be it small or large, a definite share", does not specify any fixed share. They argue therefore that it is fair to assume that though the right to inherit is established, the value of the share, depending on the circumstances is discretionary. Furthermore, they point out that it is noteworthy to note that verse 12, ch 4 of the *Qur'an*, which addresses the inheritance shares of the spouses, includes the phrase "after the fulfilment of a will and after the payment of any debt". Such phrase is repeated three times. They believe that this is further indicative of the fact that the fixed shares prescribed in the *Qur'an* are provided by God to cover intestacy.[55]

These scholars set out the following scenario: a man has two sons, one son is god-fearing, obedient and kind to his parents, while the other son is a rebellious, uncaring, insensitive and profligate. They ask: would it be equitable to give the latter a share equal to that of his good brother? The obvious answer would be no. In fact, they argue giving him anything would most probably speed his decline. The father may deem it necessary to protect the interests of his wayward son's children, if he had any, to disinherit him, and bequeath his share to his grandchildren by way of a trust if they are minors, or directly if they are majors.[56]

In his book entitled *Al-Khitab wal-Quran: Quran Mu'asira*, Mohammed Sharour advocates what he calls a "theory of limits". He believes that the *Qur'an* and *Sunnah* set a lower limit (minimum) and upper limit (maximum) for all human actions and man-made legislation is permitted anywhere in between these limits.[57] In relation to inheritance, he believes that the lower and upper limits are co-joined. He provides the following example:

> "In Quran 4:11, it is stated that regarding inheritance provisions for children, 'to the male, a portion equal to that of two females'. Sharour's theory holds that instead of laying out an inflexible, rigid amount or share for male and female, this section of the verse sets the upper limit (maximum) for men and lower limit (minimum) for women in which the man's share cannot be more than 66,6 percent and the woman's cannot be less than 33,3 percent of the estate. Within those bounds, a woman could inherit more than the lower limit, or minimum, and a man could inherit less than the upper limit, or maximum, depending on their circumstances, as long as both limits are not breached. This type of limit could be applied to all inheritance provisions that are set forth in the Quran."[58]

These differences of opinions between traditional and modern scholars continue to be discussed by Muslim scholars, academics and jurists. However, the majority

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55 Ismaeel *Inheritance and Wills*.

56 *Ibid.* The deceased is allowed to distribute his property to anyone during his life time with the proviso that he maintains righteousness.

57 Cammack "Inching toward equality: Recent Developments in Indonesian Inheritance law" Women *Living Under Muslim Law*s *Dossier* 22 January 2000. *http://www.wluml.org/english/pubs/rtf/dossiers/dossier22/D22-11-toward-equal.rtf* (accessed 01-09-2009).

58 *Inheritance, Reform on Rights* 11.

of jurisprudential schools and most Muslims believe that the rules of succession set out in the *Qur'an* are binding on every Muslim. These are divine rules which cannot be changed to suit the needs of an individual. It is said that a true Muslim is always aware of the injunction of the following verse of the *Qur'an*:

> "It is not fitting for a believer, man or woman, when Allah and His Messenger, have decreed a matter that they should have any option in their decision. And if anyone disobeys Allah and His Messenger, he is indeed on a clearly wrong path."[59]

4 SUCCESSION TO WOMEN

During pre-Islamic Arabia women were objects of inheritance and they were considered part of the possessions of men. At such a critical juncture of history Islam brought about a revolution in the outlook towards women and established the right of women to inherit.[60]

There has been much debate around the share that Muslim women receive. Many believe that in Islam, a woman's share in inheritance is unfair and unjustified. In examining this issue it is important to note that the rules of succession under Islamic law are closely connected to the rules of financial support. In fact, in Islamic law as a whole, women are much more favoured financially than their male counterparts for the following reasons: On marriage a woman is entitled to receive a marriage gift (*mahr*/dowry) and this becomes her own property; a man is obliged to support his wife irrespective of her means and independent wealth; any income the wife earns through investment or work is entirely her own; in the case of divorce, if any deferred part of the *mahr* (dowry) is left unpaid, it becomes due immediately; and the divorced woman is entitled to maintenance from her husband during her waiting period (*iddat*) and some scholars argue that maintenance is also payable thereafter.[61]

The generalisation is often made with regard to succession that Islamic law grants men twice the share of women in all cases. It is not my intention to inflict the arithmetical complexities of Islamic law of succession upon the reader. However, it should be noted that there are instances where women acquire equal shares to men. For example, where the deceased is survived by a mother and father, each is entitled to an equal share of the estate. Uterine brothers and sisters also acquire an equal share of the deceased estate. There are additional instances where women acquire a larger share than men. An example would be where a single daughter is entitled to one-half of the estate and other heirs, irrespective of their numbers and gender, are entitled to the balance. Also, where the deceased is survived by more that one daughter they are entitled to two-thirds of the estate. We have to recognise that laws of succession, Islamic or otherwise, embody complex arrangements to accommodate an infinite number of considerations.

The rationale behind a brother receiving double his sister's share is based on the Islamic legal presumption that he has an obligation to provide for her support. However, there are scholars who argue that Islamic laws of succession, such as the 2:1 rule are only applicable in an Islam-based legal system and government, where women would have recourse against her brother (or relatives)

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59 *Qur'an* ch Al-Ahzab, verse 36.

60 Ara *Inheritance Law in Islam and Women* http://www.jamiaat.org/digest/ inharitance.html (accessed 04-09-2009).

61 *Ibid.*

who are obligated to provide for her but have failed to do so. Thus, in the absence of a complete application of Islamic law, where the rights of Muslim women cannot be legally enforced, modern Muslim scholars argue that Muslims should turn to the spirit of that law, ie justice, and find ways to accomplish this goal.

For example, in Indonesia, the Indonesian Minister of Religion, Munawir Sjadzali, consulted a religious scholar (*ulama*) in regard to the distribution of his assets after his death:

> "Munawir told the ulama that he had six children, three sons and three daughters.
>
> All three sons been educated overseas, paid for out of his own resources, whereas the education of his daughters had cost far less. If, Muawir said, his sons were to receive twice the inheritance of his daughters, he would consider this grossly unfair. The ulama responded by relating how he had handled his own estate. Instead of waiting until he died for his property to be divided among his heirs, he distributed the bulk of his wealth to his children by way of gift, giving his sons and daughters equal shares, leaving only a small amount to be distributed according to Islamic inheritance rules. Other religious leaders, according to the ulama, used the same or similar methods to evade the application of the rule granting sons a double share. Munawir considered this telling of the Islamic attitude towards Islamic law. The fact that the country's religious leaders did not themselves follow the rule granting males a double share indicated that traditional Islamic legal rules were inconsistent with Islamic legal sensibilities, and demonstrated the need for a 'reactualisation' of traditional doctrines."[62]

Finally with regard to succession to women, it must be noted that

> "the inequality between the legal shares of certain males and females must not be seen as confirmation of superiority of males over females. The share of the daughter is determined, not by inferiority inherent in her, but as a result of her social and economic standing in the social structure of which she is part and parcel."[63]

5 THE OPERATION OF ISLAMIC LAW OF SUCCESSION IN SOUTH AFRICA

In South Africa, when a Muslim dies intestate the rules of the South African law of intestate succession[64] will apply. These rules materially differ from that of the Islamic law of succession. For example, if a deceased is survived by only his parents and two sons, each son would receive half of his estate and the parents would be excluded under the South African law of succession. In terms of Islamic law, each parent would take one-sixth, and the balance of two-thirds would devolve in equal shares to the sons.[65]

In *Daniels v Campbell NO*,[66] the Constitutional Court recognised the right of spouses to inherit in terms of the Intestate Succession Act[67] where they had not been married according to South African civil law, but were only married according to Islamic law. The court ruled that the word "spouse" in terms of s 1(4) of the Intestate Succession Act should include a husband and wife married

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62 Cammack 7. See also *Inheritance, Reform on Rights* 13.
63 Goolam *Introduction to Legal Pluralism* 306.
64 The Intestate Succession Act 81 of 1987 will apply.
65 Omar *The Islamic Law of Succession* 5.
66 2003 9 BCLR 969 (CC).
67 Act 81 of 1987.

in accordance to the prescripts of Islamic rites in a *de facto* monogamous union.[68] This means that if the sole surviving relatives of the deceased are his wife and brother's son, then the wife would be the sole intestate heir in terms of s 1(d) of the Intestate Succession Act. However, under Islamic law of succession, a quarter of the estate would devolve upon the wife and the remainder upon the brother's son. Even though Muslim spouses in a monogamous marriage are now protected in terms of the Intestate Succession Act, it does conflict with Islamic law of succession. Ultimately it would be for Muslim couples to decide whether they want to have their estates devolved in terms of South African law of intestate succession or not. They can do so by ensuring that they execute a valid will in terms of which they stipulate that their deceased estate must devolve according to the Islamic law of succession.

The *Daniels* case, although far-reaching, did not offer protection to multiple wives in a polygynous Muslim marriage. A second surviving wife would be excluded from inheriting in terms of s 1(d) of the Intestate Succession Act. The *Daniels* case also did not address other legislation that also refers to the word "spouse". For example, in *Davids v The Master*[69] the court held that a woman married by Muslim rites is not a spouse in terms of s 49(1) of the Administration of Estates Act.[70]

The situation of the exclusion of a further wife or wives has been remedied by the recent Constitutional Court case of *Hassam v Jacobs NO and Others*,[71] where the court recognised the right of surviving spouses of a Muslim polygynous marriage to inherit in terms of the Intestate Succession Act.

It must be noted that with the influx of immigrant Muslims to South Africa since the 1990's there has been an increase of polygynous marriages within the Muslim community. The judgment therefore hails a victory to multiple wives married according to Islamic rites who are now able to inherit intestate.

Where an attorney is faced with a situation of multiple wives and the testator wants to devolve his assets according to Islamic law of inheritance, it is important to note that multiple wives share equally. An attorney may also be faced with a situation where the first wife is married according to South African law and Islamic law. In other cases, the one wife may be married according to the South African law whilst the other wife or wives might be married in terms of Islamic law only. Despite the *Hassam* judgment, I still think it is important, in order to ensure that the deceased's will is legally binding and that the shares of both wives are protected, that the wives be specifically mentioned by name and their inheritance be spelt out clearly in the will. Should an attorney merely draft a clause which reads that the two wives share the one-eighth share of the net estate equally, the danger may be that the second wife will not inherit at all because she will not be a legal spouse according to South African civil law, as Muslim marriages are yet to be legally recognised in South Africa.[72] This would result in

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68 The same reading in of the word "spouse" took place in terms of the Maintenance of Surviving Spouses Act 27 of 1990.

69 1983 1 SA 458 (C).

70 Goolam & Rautenbach "Still a Whore in terms of South African Law?" 2004 *Stell LR* 380.

71 2009 11 BCLR 1148 (CC).

72 Minty 2004 *De Rebus* 40.

unnecessary litigation should the second wife dispute the will based on her marriage to deceased.[73]

Goolam, in his chapter on "Law of Succession" in *Introduction to Legal Pluralism*, highlights the material differences between Islamic law of Succession and South African Law of Succession. He summarises the differences as follows:

> "Islamic Law of succession does not distinguish between real and personal property, movable and immovable property and joint and separate property. In terms of South African law it is necessary to distinguish between these two concepts, since the transfer of property differs depending on the nature of the property.
>
> The testator in Islam has limited freedom of gestation in that he may only bequeath one third of his estate by means of a will. The rest of his estate must devolve according to the rules of Islamic intestate succession. In South Africa the testator has, in principle, unlimited freedom of testation.
>
> In Islamic law of succession, ascendants inherit alongside with descendants; whilst in the South African law of intestate succession, the existence of descendants exclude intestate succession to ascendants.
>
> There is no right of representation in the Islamic law of succession. A beneficiary must be alive at the death of the testator to inherit from him. In South African law, representation takes place if a beneficiary is predeceased, unworthy to inherit or if he or she repudiates the bequest.
>
> In the South African law of intestate succession an adopted child has the same rights as the natural children of the adoptive parents. Therefore he has the right to inherit from the adoptive parents as if he was their natural child. On the other hand, the Islamic law does not recognise 'adopted' children as natural children of the adoptive parents and they will therefore not inherit as the natural children of the Muslim testator."[74]

Presently no legal recognition is given to Muslim Personal Law in South Africa. The long awaited Muslim Marriages Bill[75] has not yet been introduced as legislation. It is important to note that the Bill does not make provision for the recognition of Islamic law of succession. However, in his minority judgment in the *Daniels* case, Moseneke J states that "pending the legislative recognition of Islamic law of succession in a way that conforms to foundational values of the Constitution, the applicant is entitled to appropriate relief".[76] Thus there seems to be the idea or move towards the possible legal recognition of Islamic law of succession in South Africa.

In the meantime, it is possible for Muslims to draft their wills according to the tenets of the Islamic law of succession. In order to ensure that a will is legally binding according to South African law of succession, it is imperative that all the South African statutory provisions provided for in the Wills Act[77] and the

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73 Our courts in *Khan v Khan* 2005 2 SA 272 (T) have recognised the existence of a duty to support in the form of maintenance with regard to a claim for maintenance by a second wife from her husband. The couple were married according to Islamic law only. Our courts in this landmark decision recognised for the first time a duty of support arising from a potentially polygynous marriage. Whether this recognition of polygynous marriages will be extended to other areas of law remains to be seen.

74 Goolam *Introduction to Legal Pluralism* 307.

75 See South African Law Reform Commission Project 106 *Islamic Marriages and Related Matters* (2003).

76 *Daniels* para 109.

77 Act 7 of 1953.

Administration of the Deceased Act[78] is followed. Another method to ensure that a Muslim's estate devolves according to the prescripts of Islamic law of succession is to create a trust *mortis causa* or *inter vivos*. A trust administered by a trustee may ensure that the estate of the deceased devolves to the beneficiaries according to Islamic law of succession.[79]

6 CONCLUSION

This article is not an in-depth discussion of the Islamic law of succession. It merely highlights the fact that Muslims in South Africa are able to draft wills which are *Shari'ah* compliant and they need not fear that they will violate South African law. The Islamic law of succession is a dynamic process which is based on specific texts in the *Qur'an* and traditions of the Prophet Muhammad. It continues to be discussed in each Islamic age by Muslim scholars addressing changing issues and times, as well as responding to the many challenges and opportunities that world changes present.[80]

The brief overview of the Islamic law of succession that has been discussed above can legitimately be accommodated and practically implemented within the South African legal system. It becomes imperative and essential for those Muslims who do not want their estates governed by the South African Intestate Succession Act to draw up a will. However, the will has to comply with the formalities of South African law of testate succession so that it can be executed after the death of the testator without any unnecessary legal problems.[81]

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78 Act 66 of 1985.

79 Goolam *Introduction to Legal Pluralism* 308.

80 Ismaeel *Inheritance and Wills*.

81 Hussain *Islamic Laws of Inheritance* 5.

Rosmini's Socio-philosophical Foundation of Human Rights: with Reference to Human Dignity

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1 INTRODUCTION

In this qualitative research, a text-analytical reading of Rosmini's ontology, cosmology and anthropology, which form the basis of his social philosophy, will be dealt with in order to postulate a human rights doctrine on a divine basis.

Rosmini's study of the nature of man (anthropology) motivates him to investigate reality as a whole (cosmology). Under cosmology he deals with the origin, or cause, of the world; and under anthropology, he deals with the doctrine regarding man. Rosmini discusses man's knowledge of the existence of God under ontology. According to Rosmini, knowledge about God's existence is an indispensable prerequisite for man, so that man may be enabled to understand God's ordination of natural laws.

Rosmini's cosmology eventually brings us to a study of human society. Only in human society can the relevance and practical implication of Rosmini's social philosophy be judged. The establishment of a human society exists in the desire of man to congregate in order to reach a goal otherwise impossible for the individual to attain.[1] In this respect, Rosmini aligns himself with classic or traditional Thomism.[2] The social context provides the frame of reference for other areas of philosophy such as political and juristic philosophy respectively.[3]

1 1 Cosmological Foundations

According to Rosmini's cosmology, man stands in relation to God and the world (cosmos). In connection with cosmology, Rosmini is of the opinion that if man exhibits the same characteristics as God, for example, essentiality, universality, and eternity, then he must have always been in existence.[4] If there is evidence to the contrary, and man possesses the characteristics of contingency, particularity, and temporality, he must have had a beginning (origin). The latter is acceptable, since cosmology determines that man is not responsible for his own existence, but has an origin. The acceptance of the former implies that cosmology can be

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1 Cleary *Antonio Rosmini: Introduction to his Life and Teaching* (1992) 33.

2 D'Entréves *Aquinas: Selected Political Writings* (1965) 9.

3 Cleary *Antonio Rosmini* 32.

4 This sentiment indicates the Platonic doctrine of the pre-existence of the soul.

equated with natural law, or that it presupposes natural law, because natural law also displays the characteristics of universality and eternity (which characteristics are likewise attributed to God). If one comprehends the foundations of Rosmini's philosophical and legal-philosophical thinking, it is evident that he wishes to found human rights on the framework of universality, essentiality, and eternity. These characteristics indicate divinity and must therefore be everlasting. Rosmini suggests that natural law should serve as the yardstick for maintaining human rights.

In connection with natural law, man is, however, also relative and incomplete. Man differs from God who is absolute and complete, but shares in that which belongs exclusively to God. According to this, man is equal to the image of God on the strength of the Thomistic *analogia entis* and participation.[5]

According to Rosmini, we cannot comprehend cosmology (existence of the world), without discussing the nature and activity of its author, God.[6] Therefore, cosmology cannot stand alone as a complete or independent science.

1 2 Ontological (Theological) Foundations

Ontology pertains to the being in its essence. With regard to the essence of being, Rosmini identifies three forms, namely, the ideal, the actual or essential, and the moral form.[7] The three forms of the being constitute God. Man shares in the ideal, the actual, and the moral form by means of the soul.[8] In its ideal function and through its divine characteristic, the soul or reason, man must arrange his affairs in such a way that he can imitate the loftiness of these divine characteristics. Under the influence of Aristotle and subsequently Aquinas, human reason was viewed as the sign of the image of God. Under Stoic influence, the *imago Dei* was seen as the spark of divinity which is present in man. This thought of *analogia entis* between God and man is presupposed by the *imago Dei* (image of God in man).[9]

Although man is equal to the divine image, God and man differ in essence from one another. The ideal Being (God) is infinite and perfect. According to this, we can begin with the supposition that moral goodness by its very nature is infinite, since God is the eternal Being. This eternal, perfect Being can therefore not be human. Rosmini believes that the imperfect, limited being (man) is not independent, but is usually united with the ideal Being, who is perfect and infinite. To the extent that the being is moral, it possesses the capacity to be the subject, or man, brought into harmony with its object, God. By man's centeredness on God, man becomes perfected as subject and completed in relation to the compliance with his rights and obligations in human society. Thus, by means of natural law (divine law/ideal law) and positive law/actual law, for example, legislation, judicature, and the constitution of a country), man is now able to pass a moral judgment on his actions.

According to Rosmini, man does not possess the ability to come to a complete knowledge of the perfect/moral Being (God). The perfect or moral Being in His totality and completeness is therefore not subject to human knowledge or

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5 Cleary *Antonio Rosmini* 53.

6 Davidson *The Philosophical System of Antonio Rosmini-Serbati* (1882) 321.

7 Davidson *The Philosophical System* 326.

8 Davidson *The Philosophical System* 328–329.

9 Davidson *The Philosophical System* 333.

existence. The human reason can only know that which is revealed to it through nature. On the question "in which way does human intelligence know God?", Rosmini believes, as does Thomas Aquinas, that when we say that God is intelligent, it does not mean that God is subject to the same norms for human intelligence.[10] However, Rosmini is of the opinion that we may know God in a way that exceeds the human intelligence. According to him, we cannot form a positive conception of God, but rather a negative one.[11] Rosmini explains that the negative knowledge which man has regarding God is nestled, for instance, in the fact that it is illogical to declare that God also possesses human rights. We cannot know more about God than that which is allowed by the necessity of the essence of the Being. According to Davidson, Rosmini believes that this forms the restriction of our knowledge regarding God on the natural domain.[12] We are unable to form a perception of God without transcending the human intelligence or reason.[13]

This article asserts then that human rights can only be applied with regard to people, and not to God. God does serve as an ontological source, from whom human rights in society originates.[14] Cleary thus believes that human rights, according to Rosmini, can be traced back ontologically to God.[15]

1 3 Anthropological Foundations

Anthropology is the study of man. Rosmini asserts that an anthropological doctrine cannot be discussed without insights from cosmology (and ontology (theology)). He believes that each well-rounded philosophy is needed to develop an anthropological doctrine. Anthropology investigates the nature and role of man in the real world. Rosmini's cosmology and ontology thus form the point of departure for anthropology. In his study regarding anthropology, Rosmini concentrates mainly on the soul (intellectual) and the physical (natural/sense impression) of man.[16] Rosmini is of the opinion that these two elements (soul and body) are needed to formulate an adequate doctrine of anthropology.[17] However, these two substances may not be dealt with in isolation from each other. Man is the result of both the rational (soul) and the physical (natural/observable) body. He writes further: ". . . myself is not two subjects but one, which undertakes simultaneously animal and rational activities. I who understand, feel, and I who feel, understand."[18] The union between the rational (soul) and the physical (natural/observable) body is unique to the Aristotelian-Thomistic form/matter doctrine.

This approach motivates Rosmini to define man. He says that man is ". . . an intellective subject in so far as it contains a supreme active principle . . . ".[19]

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10 Copleston *Medieval Philosophy* (1952) 93.

11 Davidson *The Philosophical System* 334: ". . . this sort of cognition is called negative and is the only sort possible in natural theology, which treats of being in its absoluteness, of being, not as known to man, but as it is in itself."

12 Davidson *The Philosophical System* 338, 342–347.

13 Davidson *The Philosophical System* 337.

14 Rosmini *Anthropology as an Aid to Moral Science* (1991(a)) vii–xii.

15 Cleary *Antonio Rosmini* 29.

16 Cleary *Antonio Rosmini* 22.

17 *Ibid*.

18 Cleary *Antonio Rosmini* 24.

19 Rosmini *Anthropology as an Aid* x.

This elevated active principle, known as the "soul/intellect", indicates divine characteristics. Therefore, an analogy between God and the human soul is hypothesised. Rosmini's view of man shows similarities with Thomism, in which the soul is also viewed as divine, whereas the physical is not divine. This anthropological substructure of Rosmini's theological, philosophical, and jurisprudential doctrine is essential to his societal doctrine. For this reason, Rosmini's anthropological doctrine serves as the basis of moral acts and the source of rights and obligations in human society: ". . . we show that (anthropology) must have been created in justice . . . ".[20]

As already mentioned, the soul reveals a presence of the divine in man: "the incorporeal, immaterial feeling to which we refer, . . . is spiritual in nature . . . ".[21] This (the soul) thus gives rise to the divine, which constitutes man, the subject of moral acts.[22] On this basis, people will show respect for others. In addition, the maintaining of rights and obligations, which form the subject of human rights, will be successfully implemented in human society. Man acts of necessity and must let himself be led by the principles of natural law, such as *suum cuique tribuere* (give each their due) and *neminem laedere* (do no harm to anyone).[23] These principles of natural law, which serve as the basis for the upholding of human rights in society, thus make man a subject of moral acts. From this thought framework, Rosmini uses the approach that man is a rational and moral being, and thus a bearer of human rights. His anthropological doctrine therefore provides a basis for a human rights theory. Thus, on the basis of the anthropological points of similarity between God and man (which are established by the soul), Rosmini believes that man possesses inalienable human rights, which must be respected by all, even the civil authority.[24]

2 HUMAN SOCIETY AND AUTHORITY

Rosmini is of the opinion that before the existence of the civil *societas,* man did not enjoy any political rights; they did not form a body or unit. Therefore, they were not viewed as people because they did not have a government.[25] In this natural state, man had no rights or obligations.[26] Consequently, no distinction existed between right and wrong. According to Hobbes, man lives in this natural state in enmity with his fellow man, a *bellum omnium contra omnes,* and each one strives for his own self-preservation and the obtaining of the means thereto.[27] On this basis, man has left the natural state and thus concludes a social contract by means of an agreement between himself and the civil *societas*.[28]

Man leaves this natural state for the sake of the protection that he enjoys in the civil *societas*.[29] In this civil *societas* people come together and choose one or more persons to whom they wish to confer power.[30] This social agreement

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20 Rosmini *Anthropology as an Aid* 448.
21 Cleary *Antonio Rosmini* 24.
22 On this basis human rights are established.
23 Van Zyl *Justice and Equity in Cicero* (1989) 739–741.
24 Rosmini *Anthropology as an Aid* xii.
25 Rosmini *The Philosophy of Right. Rights in Civil Society* (1996) 106.
26 *Ibid*.
27 Hobbes "Leviathan" in Rosmini *Rights in Civil Society* 99.
28 Rosmini *Rights in Civil Society* 106.
29 Rosmini *Rights in Civil Society* 99.
30 Rosmini *Rights in Civil Society* 105.

indicates a *pactum unionis,* an original agreement to form a political society, the civil *societas.* With the increase in the number of people, a need exists for a joint administration for the regulation of the rights and obligations of people.[31] Thus, people eventually come together and, with one accord, form a government. This is known as a *pactum subiectionis*, through which the majority confer their power to a civil government, so that their rights and obligations, as well as other rights, are protected by the government. The will of the government now serves as source of law. The citizens must, due to the *pacta sunt servanda* principle, respect the civil government or authority. The application of the *pacta sunt* principle is therefore dependant on necessity. People thereby give permission that their rights be enforced. For example, a murderer must be arrested after being successfully sentenced. The mandate given to a civil government contains a measure of compulsion, but it is necessary for the successful upholding of rights and obligations in the civil *societas*. The function of the authority is therefore to protect the citizen or individual.[32]

This right to rule presupposes the upholding of the rights and obligations of the citizen or individual in the Rosminian context. The upholding of the rights and obligations must be to the advantage of both the citizens and the civil *societas*.[33]

It is apparent that Rosmini's formulation of rights and obligations overturns Locke's theory regarding absolute, inalienable, and subjective rights. Absolute rights can only place an individual outside a legal community, where power is equal to law. Rosmini supposes that, should an authority maintain absolute rights, a misuse of rights would exist. On this basis, Rosmini is of the opinion that governments make a mistake when they believe that they possess unlimited power. This is especially the case with a majority rule. He believes that in a majority rule, according to the principles of *veteres migrate coloni* and *salus reipublicae suprema lex*,[34] the rights of the individual are encroached upon. In terms of the former principle, the majority is favoured. Rosmini refers to this as the ". . . tyranny of the majority over the minority."[35] He implies that the rights of the minority under the *veteres migrate* principle are encroached upon at the expense of or by the demands of the majority.

According to the second principle, *salus reipublicae suprema lex,* the safety of the nation is viewed as the highest law. A definition of the proverb, *salus reipublicae suprema lex,* was formulated as follows in *S v Essop*: "The safety of the State is the supreme law of a state."[36] Similar occurrences of this proverb can be found in the judicature, such as in *Africa v Boothan*,[37] *S v Baker* and *S v Doyle*.[38] Emmerson concludes the definition of state security by describing it as the "[w]elfare of the society viewed as a collective."[39] It is obvious from both definitions that individual rights will of necessity be curtailed to the benefit of

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31 *Ibid.*

32 Rosmini *Rights in Civil Society* 34, 86.

33 Rosmini *Rights in Civil Society* 87.

34 Rosmini *Rights in Civil Society* 97.

35 Rosmini *Rights in Civil Society* 34, 97.

36 1973 2 SA 815 (T).

37 1958 2 SA 459 (A) 462–463.

38 1965 1 SA 821 (W).

39 Emmerson "National Security and Civil Liberties" 1982 *The Yale Journal of World Public Order* 78 79.

the majority, and that individual or minority rights are viewed as of lesser importance. This amounts to a violation of human rights. In a civil *societas*, such as South Africa, where for the most part a constitutional system is in place, this state of affairs will presuppose a possibility of conflict between state security on the one hand and constitutional liberties on the other.

The conflict is caused by the demands of the *salus reipublicae suprema lex* doctrine (state security), in which the foundations for the expansion of governmental authority are expressed at the expense of the individual citizen. These demands are more prominent now than ever before, on both national and international level. The reason for this development is rooted in our current political, economical, and social conditions. This includes, on the one hand, the radical nature of the problems with which we are confronted at home (national level), and on the other, the changes occurring in the world around us: the position of the United States of America in global affairs, the phenomenon of nuclear warfare, and the defensibility of the modern political civil *societas* against terrorist attacks (international level), etc. The latter changes can be viewed as a threat to state security which, in turn, places pressure on our government system, the custodian and upholder of constitutional liberties.[40] Emmerson writes: "Under these circumstances it is not easy to devise a system which would assure that constitutional liberties are not completely subordinated to the demands of national security."[41]

3 ROSMINI'S VERSION OF CONSTITUTIONALISM

Under the above-mentioned two principles it can happen that the government or authority misuses its power. It is therefore the task of the constitution to counteract this abuse of power. The Constitution of South Africa, 1996, which is the highest authority, dictates that the rules and principles contained therein are binding on all branches or spheres of the state, and that it therefore takes precedence over every other law of the government, the legislature, and the courts: "Any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law."[42] Article 2 confirms the supremacy of the South African Constitution, what Rosmini would have called its divine or ideal form. It (art 2) states that the "Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".[43] But the supreme authority of the constitution is of no consequence if it is not applied in a just or equitable way. Rosmini would have called this "way" the actual aspect of ontology. For the supreme authority of the constitution to be effective, the judicial authority must be able to enforce the regulations of the constitution. Article 172 of the Constitution determines that, if a court has jurisdiction, such a court must "declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency". Article 165(5) states: "[A]n order or decision issued by a court binds all persons to whom and organs of state to which it applies."

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40 Currie and De Waal *The Bill of Rights Handbook* 5 ed (2005) 8–17.

41 Emmerson 80.

42 Currie and De Waal *The Bill of Rights Handbook* 9. *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) para 62.

43 Currie and De Waal *The Bill of Rights Handbook* 9.

In view of the principle of constitutionalism, the decision by the majority may not violate the rights of the individual or citizen. The principle of constitutionalism is in contrast with the principles of *veteres migrate* and *salus reipublicae*. It (the principle of constitutionalism) plays an important role in the protection and enforcing of human rights. But what if the government employs its powers in such a way as to be in conflict with the function for which it was instituted? Rosmini describes that the function of the state is the protection and improvement of all the rights of its members. He argues that the state acts against this function if it harms rather than helps a single one of its members even if for the sake of benefiting all the others.[44] If Rosmini's approach is not to be followed in this regard, the principle of constitutionalism would likewise be suppressed by the government or state, whose duty it is to maintain constitutionalism, which is the guardian of human rights.

Consequently, the power of the government or state (under *veteres migrate* and *salus reipublicae*) can be remedied by the principle of "the rule of law", which is entrenched in art 1 of the Constitution of South Africa, 1996. Approximately a century ago, Dicey, who first formulated this principle, wrote:

> "[T]he purpose of the rule of law was to protect human rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures."[45] This rule implies that the government and political institutions must act according with the directives of the law. In terms of "the rule of law", all must be obedient to the law – both the individual and political institutions – as can be seen from the *dictum* of a Zimbabwean High Court in *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement, Zimbabwe*: "The government has . . . has enacted, and amended, the Land Acquisition Act. It has then failed to obey its own law . . . The Courts are doing no more than to insist that the State complies with the law."[46]

During the 20th century, the development of, *inter alia*, a human rights culture took place. As a result, respect for civil and political rights, and even social and economic rights, is now considered under the umbrella of "the rule of law". This principle has both a procedural and a substantive component. In terms of the procedural component, arbitrary decision-making is prohibited, while the substantive component involves that the government should respect basic individual rights. The latter component includes respect for human dignity.[47] Regarding the elements of human dignity, court cases from the South African and American Constitutions will be considered.

4 ROSMINI'S STANDPOINT ON HUMAN DIGNITY

On the basis of Rosmini's socio-philosophical perspectives, every person possesses dignity which may not be encroached upon. He says: "The State, for example, cannot absorb the inalienable rights proper to persons, nor can it be considered as more than its individual members in such a way that persons can be sacrificed for the sake of society: 'Let civil society perish . . . or be dissolved

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44 Rosmini *Rights in Civil Society* 34.

45 Dicey *An Introduction to the Study of the Law of the Constitution* 10 ed (1959) xcvi–cli.

46 2001 2 SA 925 (ZS).

47 Currie and De Waal *The Bill of Rights Handbook* 13.

if this is needed for the salvation of individuals.'" Furthermore, he states that: "[n]ot a single right of individual citizens . . . can be sacrificed for the sake of the public good . . . ".[48]

On the grounds of Rosmini's socio-philosophical perspectives, human dignity can be founded in a Christian way in the sense that every man is the image of God. Insofar as man is the image of God, the Christian principle of love is applicable. Furthermore, man is the image-bearer of God, as revealed in the Scriptures, and thus possesses human dignity.[49]

Human dignity is also especially applicable because of the second part of the central law on love: "You must love your neighbour as yourself."[50] This means that you must not do to another that which you do not want done to yourself.[51] Therefore, man must also respect the rights and demands of other people. Rosmini believes that this approach forms the underpinning for ethics as a whole.[52]

In view of the claim to human dignity in terms of certain Biblical texts, a doctrine of human rights can be based on the fact that Christian love "does not behave indecently,"[53] "does not look for its own interests,"[54] and "does not rejoice over unrighteousness."[55] According to Rosmini, these Scriptural directives can be placed under the category of a single thought, namely: "[d]o not harm your neighbour."[56]

The protection of human rights as a consequence of human dignity is a fundamental issue regarding human ethics. For this reason, universal, basic human rights and fundamental liberties are inalienable. With regard to Rosmini's socio-philosophical views, he delivered an evangelical founding for the concept of human dignity.

Rosmini also aligns himself with Cicero, who uses the term *"dignitas"* to indicate human dignity. According to Cicero, *dignitas* alludes to the manifestation of dignified conduct.[57] This term also indicates merits or dignity worthy of honouring people of good conduct. In addition to this, Augustine views

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48 Rosmini *Rights in Civil Society* 37.

49 Rosmini 7: ". . . humans become like God." These Scripture citations are taken from the Holy Bible, International Version (1984) International Bible Society. Used by permission of Zondervan. All rights reserved.
2 Corinthians 3:18: "And we, who with unveiled faces all reflect the Lord's glory, are being transformed into his likeness with ever-increasing glory, which comes from the Lord, who is the Spirit."
Ephesians 4:24: ". . . and to put on the new self, created to be like God in true righteousness and holiness."
Colossians 3:10: ". . . and have put on the new self, which is being renewed in knowledge in the image of its Creator."

50 Deuteronomy 5, 6.

51 Rosmini *Principles of Ethics* (1988) xiii "Do what is morally good, and avoid moral evil . . . For instance, when I say: 'Do not harm your neighbour,' I am stating an application or consequence of the universal law, 'Flee moral evil.'"

52 Rosmini *Principles of Ethics* (1988) xiii.

53 1 Corinthians 13:5. *New World Translation of the Holy Scriptures – with references*, revised ed (1984).

54 *Ibid*.

55 *Ibid*.

56 Rosmini *Principles of Ethics* (1988) xiii.

57 Cicero *Pro Lege Agraria* 2.2.3: ". . . *sed dignitate impetratus esse videatur*."

dignitas as an important value in the promotion of virtue and rational acts.[58] According to the Scriptural perspective of *dignitas* by Aquinas, Aquinas explains: "[i]t appears that whatever is contained in the notion of *dignitas* must be attributed to God because creation is universally subject to God, and God has the governance of the whole universe in His hands. Therefore all virtue must finally be attributed to divine intervention."[59]

Human dignity lies in the honouring of God. To love God's creatures also means honouring God by means of his creation. Human dignity and love is dependant on and derived from Divine love: "Human dignity, therefore, which exalts us above the entire feelable universe, springs from absolute, infinite being towards which we, as intelligent subjects, are ordered. When we consider ourselves from this point of view, we become cognisant of our divine excellence, and realise where our end and ultimate aim lies . . . ".[60] Human dignity in civil society is a manifestation of God. On the basis of this observation, Rosmini shows similarities with Aquinas' *analogia entis* and participation principles. If the civil society or state were to make it impossible for its citizens to worship God, it would be a serious violation of their human dignity. Rosmini states: "[t]he person has the right not to be impeded in the decent development of his natural faculties . . . ".[61] If, for example, a tyrant were to act contrary to the will of God and disregard the highest good of the citizens, such actions would not only be contrary to the law of God, but would lead to the disregarding of human dignity.

Any person who desires the ultimate purpose of the civil society or state must at the same time also desire the welfare of those who make up that social body. Rosmini writes: "If a government has to promote the moral good, it must consequently persuade all those who are governed to respect the rights of others."[62] For Rosmini, dignified conduct involves man's virtuous acts. A civil society that brings forth justice will therefore provide a tendency toward human dignity as the highest source of every good thing. God's laws, as expressed in the *Decalogue* and in the directives of natural law, will form the basis for achieving the greatest good in the civil society. The achievement of the greatest good in the civil society is only possible by glorifying God and respecting man, thus promoting his dignity. Man must therefore be treated as a moral entity, created in the image of God. Any action in conflict with moral law would thus constitute a violation of the dignity of man.

4 1 The practical implications of Rosmini's standpoint regarding human dignity in the South African and American Constitutions

The practical implications of Rosmini's 17th century Christian viewpoint of human dignity can be illustrated with reference to the South African Constitution and the American courts' interpretation of the 8th and 14th Amendment to the American Constitution.

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58 Augustine *De Civitate Dei* Bk. 3, chap. 1 : "In the 'true city' (of God) citizenship is an everlasting dignity."

59 *Summa Theologiae* 1, q. (22), a. (3).

60 Rosmini *Principles of Ethics* (1988) 60–1.

61 Cleary *Antonio Rosmini* 39.

62 Rosmini *The Philosophy of Right. The Essence of Right* (1993 (a)) 22.

According to art 1 of the Constitution of South Africa, 1996, the Republic of South Africa is founded on the values of human dignity. In terms of the element of human dignity, the goal of the Constitution should not only be to protect individual liberties against the power of the state, but some of that very state power should be used to ensure the goals of dignity. Currie *et al* quotes the writings of Chaskalson: "[s]ocial and economic rights . . . are rooted in respect for human dignity . . . how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves, without appropriate assistance?"[63] On this basis Currie *et al* formulates a definition for human dignity: "Human dignity is the source of a person's innate rights to freedom and to physical integrity, from which a number of rights flow. Accordingly, the value also provides the basis for the right to equality, inasmuch as every person possesses human dignity in equal measure everyone must be treated as equally worthy of respect."[64] This sentiment also resounds in *National Coalition for Gay & Lesbian Equality v Minister of Justice*.[65]

Respect for human dignity also requires that the community treats the poor fairly by making resources available in such a way that the conditions that perpetuate their unfortunate situation can be changed. Respect for human dignity is rooted in the Kantian commandment to treat each person as an end and not as a means. This entails that man should not merely be treated as an object of others. Judge Ackermann writes in *S v Dodo*: "Human beings are not commodities to which a price can be attached; they are creatures with inherent worth and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end."[66] The constitutional protection of the dignity of man requires that we acknowledge all individuals or citizens as members of the civil society. Besides being the cornerstone of civil rights, the right to dignity also serves as a basis for political and economic rights in relation to democratic government. These rights are, in terms of arts 26 and 27 of the Constitution access to adequate housing, health care services, sufficient food and water, and social security. In *Khosa v Minister of Social Development*[67] it was determined that the benefits in ss 26 and 27 are not limited to citizens, but also include non-citizens of the country. Without doubt, human dignity is denied, in terms of *Government of the Republic of South Africa v Grootboom*,[68] if food, clothing, or housing is not supplied to needy ones. The Constitution thus requires the state: "to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."[69] In terms of the standard of reasonableness which was applied in this case, the court decided that the state had failed in this regard. The state already had legislation and policy measures in place, which made provision for relief in times of housing shortages. Despite these precautions, the state neglected its duty to provide temporary housing for the people in the *Grootboom* case. The unreasonableness of the reasonability test in the *Grootboom* case has to do with the state's (legislative and policy framework) disregard for the pitiful situation of these people. It was

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63 Currie and De Waal *The Bill of Rights Handbook* 273.

64 *Ibid*.

65 1999 1 SA 6 (CC) para 29 (Ackermann J).

66 2001 3 SA 382 (CC) para 38.

67 2004 6 SA 505 (CC) paras 46–7.

68 2001 1 SA 46 (CC) para 23.

69 Currie and De Waal *The Bill of Rights Handbook* 568.

an action that was unreasonable, since it was also in conflict with other constitutional obligations that cherish human dignity. The court thus decided in the *Grootboom* case that reasonableness presupposes that the necessity and protection of those in need may not be excluded, and that the state must therefore be held responsible for neglecting its obligations under art 26(2). The same sentiment resounds in the foreword of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (1996): "[T]he ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights."[70]

Sexual integrity offers one aspect in which values should be protected by moral law. In the American case of *Boxer v Harris*,[71] a male prisoner was forced by a female warder to engage in acts of masturbation. If the inmate (Boxer) refused, the warder (Harris) would file disciplinary charges against Boxer. On appeal, the majority decision was upheld that the abuse that Boxer suffered was not a violation of the 8th Amendment, insofar as forced masturbation only constituted "*de minimis* harm." The panel decided that Boxer only suffered minimal sexual abuse: ". . . not constituting 'the unnecessary and wanton infliction of pain' as demanded for constituting 'cruel and unusual punishment forbidden by the Eighth Amendment'."[72]

The panel was also convinced that the forced masturbation did not presuppose a constitutional violation "objectively 'harmful enough' ". In a dissenting judgment, Chief Justice Barkett claimed that the decision of the appeal court denied the "broad and idealistic concepts of dignity, civilized standards, humanity, and mercy" which are guaranteed in the 8th Amendment. Barkett explained that, in terms of the directives of the 8th Amendment, the alleged harm to the prisoner (Boxer) resided in the violation of his human dignity, as well as in the standards that have been established for decency's sake. Barkett was of the opinion that the chief cause of Boxer's complaint was the violation of his human dignity. He (Barkett) claims that the Higher Court maintained that sexuality is central to human dignity ". . . and even to the very meaning of human existence".[73] Barkett therefore concluded that forced masturbation is sexual abuse and that a most basic aspect of human dignity was violated.

Barkett's dissenting judgment tends to be more sensitive about the nature, value, and status of sexual integrity in relation to human dignity. According to him, Boxer's moral status as a person and his treatment as a moral object (means) for the self-gratification of Harris were not sufficiently considered by the Higher Court. Consequently, Barkett is of the opinion that Harris' encroachment on Boxer's duty to avoid moral evil contributed to the seriousness of Harris' denying Boxer his dignity as a moral person.

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70 *Ibid*.

71 437 F.3d 1107 (11th Cir. 2006).

72 437 F.3d 1107 (11th Cir. 2006). See *Whitley v Alberts* 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251, 54 U.S.L.W. 4236.

73 For the purpose of the court's decision, Barkett relied on the authority of other court cases, for example *Laurence v Texas* (539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed.2d 508, 71 U.S.L.W. 4574, 03 Cal. Daily Op. Serv. 5559, 2003 Daily Journal D.A.R. 7036, 16 Fla. L. Weekly Fed. S. 427).

The innate dignity of man because of his status as a moral being is a fundamental, inalienable right, which should be acknowledged everywhere. In the constitutional judicature of the USA, the moral value of man's physical integrity has evoked much interest in the context of the 8th Amendment. This formulation states: ". . . the right not to be subject to cruel and unusual punishment and the corollary measure in the Fourteenth Amendment due process clause, regarding the right to liberty, containing the right to be secure in one's person." The thought is similar to certain directives of the South African Constitution. The seriousness of the right to human dignity is emphasised in art 1, which states that the Republic of South Africa was founded on the values of ". . . human dignity, the achievement of equality and the advancement of human rights and freedoms." In terms of art 7(1) of the South African Constitution, the Bill of Rights is described as an instrument ". . . which enshrines the rights of all the people in our country and affirms the democratic values of human dignity, equality and freedom". In terms of art 10 of this Constitution, the right to human dignity is one of the fundamental constitutional rights. On this basis, Judge Chaskalson maintained in *S v Makwanyane*[74] that the right to human dignity involves not being tortured or being treated in a cruel, inhuman, or degrading fashion. In terms of this finding, Harris's inhuman or degrading acts violated Boxer's dignity. This is much closer to Rosmini's Christian legal-ethical standpoint than the finding in the above-mentioned *Boxer* case.

In the American court case *Meredith v State of Arizona*,[75] a prisoner with a medical history of emphysema was struck on his peritoneum without cause by a warder, after which he became "totally handicapped". The prisoner, Meredith, received oxygen for four hours "to counteract the damage that had been done". The facts of this case brought Meredith within the bounds of the Civil Rights Act,[76] which guaranteed to each person the right to dignity: ". . . under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action of law, suit in equity, or other proper proceeding for redress."

The court found that a right which is violated by an attack and assault presupposes "the right to be secure in one's person, and is grounded in the due process clause of the Fourteenth Amendment", which is an aspect of the right to freedom. The court maintained, with reference to *Rochin v California*,[77] that the attack and assault in the *Meredith* case "shocks the conscience"[78] and leads to conduct including exercise of force which is "brutal" and "offensive to human dignity".[79] The court ruled that the warder's conduct toward Meredith was wilful, unfair, brutal, and reprehensible regarding human dignity. The requirement that physical force must be brutal and shocking to the conscience sets

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74 1995 3 SA 391 (CC).
75 523 F.2d 481.
76 42 U.S.C. 4 1983.
77 342 U.S. 833.
78 342 U.S. 172.
79 342 U.S. 174.

the bar too high for what constitutes the violation of a person's dignity. In this regard it appears that Rosmini's approach is much more acceptable.

In the American court case *Schy v State of Vermont* [80], the court ruled that a plaintiff who had been bound with his hands behind his back and attached to a chain embedded in a wall for more than two hours, did not supply sufficient facts to prove that the handcuffs were brutal and a degradation of his human dignity. As already mentioned above, such conduct, according to Rosmini, constitutes a violation of the victim's human dignity.

The treatment of persons as moral objects constitutes an encroachment of their moral liberty. The case of *Felix v McCarthy* [81] emphasises that the moral context of human dignity must not be undermined. In this case, Felix, a prisoner in San Quentin, brought a civil action against prison warders who used excessive force against him and consequently encroached on his constitutional rights, for example, the right not to be subjected to cruel and unusual punishment as guaranteed in the 8th Amendment. Warders handcuffed Felix and flung him against a wall, which resulted in bruising, injuries, and emotional anguish. Judge Canby, who relied on the *Meredith* case, declared: "It is not the degree of injury which makes out a violation of the Eighth Amendment, but rather it is the use of official force or authority, that is 'intentional, unjustified, brutal and offensive to human dignity'."[82] This standpoint is evidently more in line with Rosmini's inclusive approach.

The application of fundamental rights on human dignity requires serious discourse and understanding regarding morally bad acts. The natural individual rights regarding being a moral person are those rights which are guaranteed in terms of moral law. Encroachment of such rights is morally objectionable. The person should be treated as a moral subject, and not as a moral object. This provides the basis for human rights.

5 CONCLUSION

Fundamental rights, which discount the fundamental moral context in which they figure, leave an opening for a relativistic and positivistic application regarding natural rights. If Rosmini's ideas are not discussed in connection with human dignity, it will lead to an a-normative contextual consideration of human dignity. This has resulted in fundamental rights to dignity being relativised to a mere cliché in constitutional judicature.

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80 2 Fed.Appx. 101 C.A.2 (N.Y.), 2001.

81 939 F.2d 699 Jul. 10, 1991.

82 523 F.2d at 484.

Claiming Proprietorship of a Trade Mark for purposes of its registration

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1 INTRODUCTION

No one can claim that which does not exist. A sterile truism, no doubt. The South African and English courts have, however, raised the question whether or not a trade mark exists at the time a person applies for *its registration*. The courts have not given a definitive answer because they have not decided when a trade mark comes into existence.[1] A *bona fide* claim to proprietorship of the trade mark is one of the principal requirements an applicant must meet for the creation of a registered trade mark; hence the importance of the question.[2]

The courts have ruled that a *bona fide* claim to proprietorship of a trade mark[3] must be a present claim, which it cannot be if the trade mark does not exist. The doubts that the courts have expressed as to a trade mark being *in esse* at the time of the application for registration, stem from the courts perhaps not paying sufficient attention to the statutory definition of a trade mark. This has resulted in the common law criteria being applied, erroneously, to determine whether or not a trade mark has been created in terms of the *statutory* scheme.[4]

This article suggests a solution to the problem, and places the solution within the context of a broader discussion of the characteristics of a *bona fide* claim.

The common law and statute law, sub-systems of South African law, each provide a mechanism for the creation of trade marks.[5] This article focuses

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1 See para 4 below.

2 This is provided for by s 10(3) of the Trade Marks Act 194 of 1993 (the TMA). There are two groups of substantive requirements for registration of a trade mark: those that concern the qualities of the symbol which is to be used or used to constitute the trade mark and those which concern the relationship between the applicant and the symbol. The claim to proprietorship is the most important requirement of the latter group, the other requirements being that the applicant must *bona fide* intend to use the trade mark (s 10(4)) and that the applicant must not make the application *mala fide* (s 10(7)).

3 A *bona fide* claim to proprietorship of a trade mark is hereafter referred to as "a *bona fide* claim".

4 See para 2 1 below.

5 The notion of a common law trade mark is not uncontested. Some of the reasons for the reservation mentioned are: (a) A leading case on passing-off, *Capital Estate & General Agencies (Pty) Ltd v Holiday Inns Inc* 1977 2 SA 916 (AD), refers to a "so called common law trade mark" (925H); (b) in *Inter Lotto UK Ltd v Camelot Group plc* [2003] 3 All ER 191 (ChD); [2003] 4 All ER 575 (CA) the courts eschewed the use of the expression "common law trade mark", notwithstanding its use in the legislation referred to in the decisions; and (c) the common law cause of action on which a plaintiff sues in cases in which another has used a signification which is distinctive of his or her goods is passing-off,

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primarily on statutory trade marks, in respect of goods[6] under the Trade Marks Act 194 of 1993 (the TMA).

The common law is examined briefly since its interaction with the TMA has implications for the content of a *bona fide* claim, and also influences interpretation of the requirement.

2 CREATION OF TRADE MARKS

There are significant differences between the common law and statutory (TMA) processes for creating a trade mark. These differences are outlined below.

2 1 The common law process

A common law trade mark is created by: (a) public use of a distinctive symbol[7] in relation to goods;[8] (b) for the purpose of distinguishing the goods of the

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not trade mark infringement, suggesting that it is not the trade mark *per se* that is being protected, at least, not *directly*. The following are reasons why I do not share the reservation: (a) Webster & Morley *Webster & Page: South African Law of Trade Marks, Unlawful Competition, Company Names and Trading Styles* 4 ed (1997) say: "A trade mark is a form of property under the common law when it has been so used by a trader that in the minds of the purchasing public it distinguishes the goods or services in connection with which it is used from similar goods and services of others" (para 11.22); (b) in *McAndrew v Bassett* 33 LJ Ch 566 the court held that in order to establish that he or she was proprietor of a trade mark the person had to prove that he or she had used the trade mark properly (ie that they have not copied any other person's mark, and that the mark did not make any false representation) and marketed the goods (see Sebastian *The Law of Trade Marks* (1878) 50) – the absence of a mention of registration means it is a common law entity; (c) the finding in *Sidewalk Café's (Pty) Ltd t/a Diggers Grill v Diggers Steakhouse (Pty) Ltd* 1990 1 192 (T) that "the applicant became proprietor of the trade mark, at least in Natal" (198H–I) means that the applicant for registration was the proprietor of a common law trade mark; (d) the finding in *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* (*Kettle Grill*) 1992 2 SA 489 (AD) demonstrates the difficulty of someone, other than the person who has the right to sue for passing-off, using identical or confusingly similar functional features for his or her goods (see especially 499C–D and 504A–B), and I submit that the same situation prevails with regard to trade marks, which must be distinctive. The essence of proprietorship of a trade mark is the exclusive right to use it (see para 7.1 *infra*). I submit, therefore, that in accordance with the principles set out in the *Kettle Grill* case, a person who has the right to sue for passing-off where someone else uses the trade mark by which his or her goods are known, has the exclusive right to use the trade mark; (e) identical common law and registered trade marks can be created using the same symbol because, *inter alia*, the common law and statutory processes operate semi-independently of each other (see para 2 below): each process creates its own product (a legal construct), a trade mark. The notion that two identical items of intellectual property can exist is supported by copyright law, in terms of which two persons operating independently of each other can create identical copyright works: see Copeling & Smith "Copyright" in Joubert (ed) *The Law of South Africa* 2 ed 1st1Re-issue (2000) vol 5 part 2 para 25; and Skone-James, Mummery, Rayner-James & Garnett *Copinger and Skone-James on Copyright* 13 ed (1991) para 88. I submit that the same position prevails in relation to trade marks: separate processes, governed by separate legal provisions, produce separate trade marks. The existence of separate identical common law and registered trade marks is argued more fully in Martin "Creation of a Trade Mark in South African Law: A View with some Unconventional Elements" 2009 *Stellenbosch Law Review* (forthcoming).

6 The same principles apply with regard to trade marks used in relation to services.

7 The word "symbol" has been chosen for the conceptual entity which the TMA calls a "mark", because as Kerly & Underhay *The Law of Trade-Marks, Trade-Name and Merchandise Marks* 2 ed (1901) 24 say, "A trade mark is a symbol". Avoiding the use of the word "mark" in the definition of a trade mark, makes it clearer that a trade mark, and

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person using the symbol from the goods of other persons;[9] (c) until the goods in relation to which the symbol is used amass goodwill, by acquiring a reputation among a substantial number of customers.[10]

A person makes public use of a symbol by placing it on, or in relation to, goods, and placing the goods on the market. A trade mark comes into existence when the exclusive right[11] to use it to represent his or her trade mark vests in the person who used the symbol in public: [12] he or she becomes its proprietor.

2 2 The statutory process

A registered trade mark is created by successful application for its registration.[13] The registration process requires the fulfilment of both administrative[14] and material requirements. My focus is on the latter requirements.

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the entity from which it is created, are separate entities. Section 2(1) of the TMA defines a "mark" as "any sign capable of being represented graphically, including a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or any combination of the aforementioned". The TMA, by defining "mark" and a "trade mark" separately, indicates that they are separate entities; if they were the same entity the one could not be defined in terms of the other.

8 See Webster & Morley para 11.22; *Protective Mining & Industrial Equipment Systems (Pty) Ltd v Audiolens (Cape) (Pty) Ltd* (*Pentax*)1987 2 SA 961 (AD) 979B–C in which the court issued the following *dicta*:

"To be capable of being the subject-matter of property a trade mark had to be distinctive, that is to say, it had to be recognisable by a particular purchaser of goods to which it was affixed as indicating they were of the same origin as other goods which bore the same mark and whose quality had engendered goodwill. *Property in a trade mark could therefore only be acquired by public use of it as such by the proprietor and was lost by disuse*" (emphasis added).

Kerly & Underhay 24 argue (correctly, I submit) that "the element of public user . . . creates the trade mark."

9 *Holiday Inns* 925H; see also *Royal Beech-Nut (Pty) Ltd t/a Manhattan Confectioners v United Tobacco Co Ltd t/a Willards Foods* 1992 4 SA 118 (AD) 122E.

10 See Martin 2009 *Stellenbosch Law Review* para 3.4.

11 The right to prevent other persons from using the trade mark to identify their goods only accrues once the goods have acquired goodwill among a substantial number of persons. "Goodwill" was defined in the English case *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HL) as the attractive force that draws custom, a *dictum* which was approved by the Appellate Division (as it then was) in *Botha v Carapax Shadeports (Pty) Ltd* 1992 1 SA 202 (AD) 212A. In *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 3 SA 938 (SCA) 949G–H the court indicated that "goodwill" is to be replaced by a "reputation". In *AM Moola Group Ltd v The Gap Incorporated* [2005] 4 All SA 425 (*The Gap*), the SCA confirmed that it was correct in adopting reputation as the criterion for passing-off (para 15). In my respectful submission, the replacement of "goodwill" by "reputation" may not be justified, as it results in the need to draw custom being underemphasised. However, consideration of whether "goodwill" or "reputation" is required must stand over for another occasion.

12 There is a "delay" in the vesting of the exclusive right. Since the common law does not have an action that is specifically aimed at giving direct protection to trade mark, the passing-off action has been invoked for this purpose. Passing-off is a delict, consisting of a misrepresentation by one person, A, that his or her goods are those of, or associated with, the goods of another person, B, resulting in damage to the goodwill or reputation of B, generally by filching B's custom: see *Greaterman's Stores (Rhodesia) Ltd v Marks & Spencer (Southern Rhodesia) Pvt Ltd* 1963 2 SA 58 (FC) 64C; *Holiday Inns* 931A; *Coachworks* 950A–C (where it is implied).

13 Section 16(1) of the TMA.

14 The most important requirements are set out in regulation 11, promulgated under s 69 of the TMA.

There are two groups of material requirements for the creation of a *registered* trade mark:[15]

(i) those that relate to qualities which a symbol, which is used to constituted a trade mark, must possess: the main requirement is that the symbol must be capable of distinguishing the applicant's goods from goods that are connected in the course of trade with other persons;[16] and

(ii) those that relate to the attributes that an applicant for registration must possess; the pivotal requirement, in my submission, is that the applicant must have a *bona fide* claim to proprietorship of the trade mark.[17]

The TMA definition of a trade mark results in *a* trade mark being created prior to registration;[18] however, the exclusive right to use the trade mark does not vest until a *registered* trade mark is created, when registration is effected.[19]

3 ORIGINS OF THE REQUIREMENT OF A *BONA FIDE* CLAIM

The requirement that the applicant should have a *bona fide* claim to proprietorship of the trade mark[20] is a legacy of South Africa's reliance on English legislative precedents.[21]

The 1875 English Trade Marks Act only permitted registration of trade marks that had already been used publicly in trade.[22] Many of those trade marks were, therefore, common law trade marks.[23] In respect of such trade marks the applicant for registration was truly the *common law* proprietor.[24] The 1883 English Trade Marks Act allowed registration of trade marks that had not been used publicly.[25] The 1883 English Act introduced the requirement of "claiming

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15 In the discussion in para 5 below, a distinction is drawn between a registered trade mark and another type of statutory trade mark, the "registrable" trade mark.

16 This requirement is contained in the definition of a trade mark (s 2(1)). The qualities that the symbol must have are described positively in s 9 and negatively in s 10 of the TMA.

17 The other requirements, which relate to the proprietor, are that he or she should have the *bona fide* intention to use the trade mark (s 10(4)), and should not have made the application *mala fide* (s 10(7)).

18 See para 5 below.

19 *Shalom Investments (Pty) Ltd v Dan River Mills Inc* (*Dan River*) 1971 1 SA 689 (A) 706C; *Nino's Coffee Bar & Restaurant CC v Nino's Italian Coffee & Sandwich Bar CC*; *Nino's Italian Coffee & Sandwich Bar CC v Nino's Coffee Bar & Restaurant CC* (*Nino's*) 1998 3 SA 656 (C) 673C.

20 The requirement, contained in s 10(3) of the TMA, is couched in negative terms, prohibiting the Registrar from registering as a trade mark "a mark in relation to which the applicant for registration has no *bona fide* claim to proprietorship". Its predecessors were s 110 of Act 9 of 1916 (the 1916 Act) and s 20(1) of Act 62 of 1963 (the 1963 Act).

21 The significance of English authority for South African trade mark law is well documented: see Gardiner *The Nature of the Trade Mark Right in SA Law* (LLD-thesis UNISA, 1995, 83 and 288); *Pentax* 978I, 982C–983H; *Coachworks* 947G–I.

22 This was provided for in s 10 of that Act. Webster & Morley para 5.3 indicate that because the requirement was introduced into English Law at a time when use was a prerequisite for registration, it was justified. The requirement was justified because the applicant was often the common law trade mark proprietor.

23 Sebastian *The Law of Trademarks* 49.

24 This would have been the case even though common law proprietorship of the trade mark was not made a requirement for registration under the statute.

25 The concept of "public use" is explained in para 2 above.

to be proprietor",[26] because symbols that had not been used publicly as trade marks were not *common law* trade marks. A person that applied for registration of an unused symbol was, therefore, neither a common law trade mark proprietor, nor yet the proprietor of a registered trade mark constituted using the symbol.

An applicant was required to have a *bona fide* claim to proprietorship to ensure that the applicant had a relationship with the symbol which was sufficient to justify him or her obtaining registration of a trade mark constituted using the symbol.[27] The 1883 English Act overcame the problem of the applicant not being the actual proprietor of a common law trade mark by providing that an *application* for registration was deemed to be the equivalent of public use of the trade mark.[28] Section 75, one notes, also determined that if the application succeeded, registration was deemed to take place on the date that the application for registration was lodged. In that way the registered trade mark came into existence when the application was lodged, and the requirement that the applicant have a *bona fide* claim to proprietorship was satisfied, because the trade mark was in existence when the application was lodged.

4 A PRESENT CLAIM

The main problem that the requirement of a *bona fide* claim to proprietorship gave rise to in terms of South African law was that, even though this requirement was incorporated in the TMA and its predecessors,[29] the presumption, that application for registration was the equivalent of public use, was never included in South African law. The interpretational difficulties created by the requirement of a *bona fide* claim, without providing that an application is the equivalent of public use, were clearly articulated in an English decision, *In Re Application of Vitamins Ltd* (*Vitamins*):[30]

> "In my judgment the form which an applicant is required to sign wherein he claims to be the proprietor, indicates an assertion of a present proprietary right. *The respondents urge that he claims to become the proprietor or to assume proprietary rights as and when the application is granted.* I do not accept that as the true interpretation of a form intended to be completed before registration can be applied for. A proprietary right in a mark sought to be registered can be obtained in a number of ways. The mark can be originated by a person or it can be acquired but in all cases it is necessary that the person putting forward the application should be in possession of *some proprietary right* which, if questioned, can be substantiated."[31]

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26 Section 62(1) of the 1883 English Act read: "The Controller may, on application by or on behalf of any person claiming to be the proprietor of a trade-mark, register the trade-mark."

27 See para 5 below.

28 Section 75 of the 1883 English Act, as amended in 1888, read: "Application for registration of a trade mark shall be deemed to be equivalent to public use of the trade mark, and the date of the application shall for purposes of this Act be deemed to be, . . . the date of registration."

29 These were s 110 of the 1916 Act and s 20(1) of the 1963 Act.

30 [1955] All ER 827 (ChD); (1956) RPC 1.

31 834F–G (emphasis added). The Court was interpreting s 17(3) of the 1938 English Act, which was the first English Act that did not contain the presumption that an application was equivalent to public use.

Oils International (Pty) Ltd v Wm Penn Oils Ltd (Lifesaver)[32] mirrored these difficulties.

Vitamins and *Lifesaver* show that the primary difficulty the courts experienced was in reconciling the need for a *present claim* to proprietorship, which the legislation required, with their view that the trade mark was not *in esse* at the time the application was made. The reference to goodwill in *Lifesaver*[33] also suggests that the court was thinking in terms of the common law, because goodwill, a common law not statutory requirement for creating a trade mark, can only be acquired by actual use of a trade mark.[34] The courts were, therefore, requiring actual use of the trade mark, which is not a requirement for creating a *statutory* trade mark.

Victoria's Secret Incorporated v Edgars Stores Ltd (*Victoria's Secret*),[35] which contains some of the clearest pronouncements on a *bona fide* claim, did not deal directly with the question of whether or not it regarded the trade marks as being *in esse* in South Africa at the time of Edgars' application; hence my submission that the issue has not been resolved completely.[36]

5 SIGNIFICANCE OF THE TMA DEFINITION OF A TRADE MARK

The South African courts should not have had the problem of not regarding a trade mark as being *in esse* at the time an application is lodged[37] because of the manner in which a trade mark is defined. The relevant portion of the definition of a trade mark reads as follows:

> "means a mark *used or proposed to be used* by a person [the applicant] in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person."[38]

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32 1965 3 SA 64 (T); confirmed on appeal: 1966 1 SA 311 (AD). In *Lifesaver* 70F–G the court said:
"The use of the word 'proprietor' in the provision [s 110 of the 1916 Act] is a legacy from early English trade mark legislation and, as has been judicially pointed out, the word is unfortunately chosen. It gives rise to no difficulty when the mark to be registered is one which has been extensively used by the applicant before registration is sought; in such a case the mark will ordinarily have become a valuable item of intangible property, of which *he can properly claim to be the owner*. But in relation to a mark that has never been used, the concept of *ownership* becomes a more difficult one, because no goodwill has yet became attached to it, and it will not necessarily be an invented word, or an original design for which copyright could be claimed."

33 See the passage quoted in footnote 32 above.

34 See discussion in para 2 above.

35 1994 3 SA 739 (AD).

36 The question of when the trade mark comes into existence is not academic in the pejorative rather than complimentary sense; the TMA preserves the pre-existing rights of a person who is not the first to submit her or his application, whether those rights be common law or statutory (see s 10(16)). How can one establish whether or not there are any pre-existing rights if one cannot determine when the trade mark, the entity in which the rights subsist, came into existence?

37 See *Vitamins* 834F–G; *Lifesaver* 70F–G.

38 Section 2(1) of the TMA (emphasis added). The only significant difference between the definition of "trade mark" in the 1963 Act and the TMA was the inclusion of the word "upon"; the relevant portion of the definition in the 1963 Act read: "mark used or proposed to be used upon or in relation to goods."

This is an exhaustive definition. Therefore once its requirements are fulfilled, *viz* that a symbol "is used or proposed to be used" by a person for the requisite purpose, a trade mark exists.

The trade mark that is created when an applicant proposes to register a trade mark that is constituted using a particular symbol, or, as it is expressed in the TMA, proposes to use a symbol as a trade mark,[39] is obviously not a registered trade mark.[40] An apposite name for such a trade mark, which is created purely by compliance with the definition (one that it is only proposed to register), is a "registrable trade mark".[41] This further proliferation of terminology is, in my submission, necessary if we are to avoid the conceptual disarray and linguistic infelicity of the past. The registrable trade mark is distinct, and must be distinguished, from the registered trade mark, because it is only in respect of the latter that the proprietor enjoys an exclusive right.[42]

The word "used" in the definition of a trade mark implies a mark that is being used, or has been used, and does not present difficulties of interpretation.[43] However, the concept of a "mark proposed to be used" as a trade mark requires examination.

5 1 Proposing to use a symbol as a trade mark

The English case *In re Ducker's Trade Mark* (*Duckers*)[44] found that "proposed to be used", in the definition of a trade mark,[45] meant the applicant had to have "a real intention to use, not a mere problematic intention, not an indeterminate possibility, but a resolved or settled purpose".[46]

The question arises: at what point in time can it be said that a person proposes using a symbol as a trade mark? Three possible dates suggest themselves as each one marks a distinct phase in the process of applying for registration: (a) The date on which the applicant *decides* which symbol to use; (b) the date on which the applicant *completes the* application *form*; and (c) the date on which the applicant *lodges* an application. Each of these possibilities is now considered.

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39 The phrase "as a trade mark" means: for the purpose indicated in the definition, ie distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with any person other than the proprietor or his or her duly authorised licensee.

40 A registered trade mark is defined in s 2(1) of the TMA as "a trade mark registered or deemed to be registered under this Act".

41 The term "registrable trade mark" is used in s 9 of the TMA, where the statute describes the qualities a trade mark must have to be capable of registration. The sense in which I have used the term does not differ significantly from the sense in which it is used in s 9 of the TMA, and the absence of a definition of a "registrable trade mark" means there is no clash of meanings.

42 The exclusive registered right is conferred by s 34(1), the relevant portion of which reads: "[t]he rights acquired by registration of a trade mark"; see *Dan River* 706C and *Nino's* 673C–E.

43 Public use is discussed in para 2 above. Whether or not there has been public use is a question of fact.

44 [1929] 1 Ch 113 (CA).

45 Section 3 of the 1905 English Act contained the definition.

46 See *Duckers* 121 23–25. The Appellate Division approved this *dictum* in *Victoria's Secret* 745F. See also *McDonalds Corp v Joburgers Drive-Inn Restaurant (Pty) Ltd; Dax Prop; Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC* (*McDonalds*) 1997 1 SA 1 (AD).

5 1 1 The date on which the applicant decides which symbol to use

A trade mark exists in concept only on the date on which a prospective applicant decides which symbol he or she is going to use to create a trade mark in terms of the *statutory* scheme.[47] The symbol is then reduced to material form and once it is in material form, on the face of it, the trade mark no longer exists just in concept. The *symbol* in material form is, in my submission, really still a trade mark in concept, because the symbol is only associated with the goods in the applicant's mind.[48]

Other reasons why the date on which an applicant decides to use a particular symbol as his or her trade mark is not an appropriate date are that: (a) It allows too much scope for fraud; (b) it is difficult to prove the date;[49] and (c) on that date no step has been taken towards creating *public awareness* of the association between the symbol, the applicant and the goods.[50]

5 1 2 The date on which the applicant completes the application form

Completion of the form TM 1 does provide evidence of a clear and definite, fixed and settled, purpose and intention to use a particular symbol as a trade mark.[51] The demerits of accepting the date of completion of the form as the date on which a person proposes to use a symbol as a trade mark are, however, largely the same as those in respect of the previous possible date, since that date is not independently verified.[52] One cannot attach too much significance to the fact that one of the details that has to be included in form TM1 is the date on which the form is signed.[53] The date on which the application form is completed should not, therefore, be accepted as the date on which the applicant proposes to use the symbol as a trade mark.

5 1 3 The date on which the applicant lodges an application

The following considerations militate in favour of the lodgement date being the appropriate date: (a) Registration is made retrospective to that date if the

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47 The situation would hardly be any different where the symbol is, or has been, used as a trade mark. If the applicant is already the proprietor of a common law trade mark, which is constituted using the symbol, she or he would still be proposing to create a *registered* trade mark constituted using the same symbol: a common law trade mark is a different entity to a registrable trade mark. This is my view, notwithstanding that in *Lifesaver* the court held that origination (one of the methods by which a person acquires a claim to proprietorship of a trade mark: see discussion in para 6 below) of a trade mark "would cover a decision" to use a particular symbol as a trade mark (71A).

48 Association is referred to in para 2 above. A trade mark can only be created by public association of the goods with the proprietor. Association is necessary for a trade mark to fulfill its function of indicating the origin of the goods in the proprietor (*Pentax* 978B–C; *Beecham Group plc v Triomed (Pty) Ltd* 2003 3 SA 639 (SCA) 646A; *Cowbell AG v ICS Holdings Ltd* 2001 3 SA 941 (SCA) 948A; *Verimark Ltd v BMW AG* [2007] SCA 53 para 5). In the case of common law trade marks the association is created by use, whereas in the case of statutory trade marks it is created by constructive notice which flows from registration.

49 In *Lifesaver* no one could recall the dates on which each party conceived the idea of using LIFESAVER as a trade mark.

50 The creation of the association by constructive notice when registration occurs cements the process of appropriating the symbol for use in creating the applicant's trade mark: see para 6 below.

51 See *Victoria's Secret* 745D–E.

52 See para 5 1 1 above.

53 Form TM1 is contained in schedule 1 of the Trade Mark Regulations.

application succeeds;[54] (b) the date can be independently verified;[55] (c) an applicant must have a *bona fide* claim to proprietorship of the trade mark on that date;[56] (d) the date on which an application is lodged determines which of a number of competing applications takes precedence;[57] and (e) an applicant must advertise acceptance of the application once it is lodged.[58]

The primary disadvantage of using the date on which the application is lodged is that it is not the earliest possible date. There is, however, no reason why a person cannot lodge an application within a relatively short time from the date on which she or he selects the symbol he or she is going to use. Therefore, in my submission, the considerations in favour of this date far outweigh this disadvantage.

The date on which the application is lodged should be regarded as the date on which the trade mark is proposed to be used, for the reasons advanced. The enormous significance of that date makes it imperative that a high degree of certainty attend its determination:[59] one would be hard pressed to find better evidence of a resolved and settled purpose than lodging the application for registration.

6 PROCURING A *BONA FIDE* CLAIM TO PROPRIETORSHIP

This part of the article deals with the manner in which an applicant procures a *bona fide* claim. It also considers the related question of proof that such a claim has been acquired. As a prelude to this discussion, a few remarks are addressed to the subject of proprietorship of a trade mark. Some of the clearest statements in regard to this are found in *Victoria's Secret*.[60]

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54 This is provided for by s 29(1) of the TMA.

55 The Registrar must provide an acknowledgement of receipt of the application: regulation 15(1).

56 See *Lifesaver* 67G–H.

57 Section 10(15) of the TMA. My argument is that this is the date on which the relevant applicant created the trade mark.

58 Regulation 18(1) provides: "Every application for registration of a trade mark shall be advertised once in the *Patent Journal* by the applicant." The advertisement starts the process of the public associating the trade mark with goods that fall within the class or classes in respect of which the application is made, or, if the symbol has been used as a trade mark, and there is an association, the association acquires *statutory* trade mark significance.

59 See para 4 above.

60 The following are the salient facts of *Victoria's Secret*. The appellant, Victoria's Secret Incorporated (VS Inc), was incorporated in the USA, where it was the proprietor of the trade mark, VICTORIA'S SECRET. VS Inc sold lingerie under that trade mark. Edgars, a South African company, decided to adopt the trade mark, VICTORIA'S SECRET, to market a range of lingerie in South Africa. VS Inc and Edgars each applied for registration of three almost identical trade marks in South Africa, each trade mark featuring the words VICTORIA'S SECRET. Section 17(1) of the 1963 Act prohibited the Registrar from registering trade marks that "so resemble each other that the use of such trade marks in relation to goods or services in respect of which they are respectively sought to be registered would be likely to deceive or cause confusion". The Registrar, acting in terms of s 17(3), refused to register any of the trade marks until the rights of the two competing applicants had been determined (742H). A determination was made and the Assistant Registrar applied the determination, ruling that Edgars' application should proceed to registration. VS Inc appealed directly to the AD, as provided for by s 65(3) of the 1963 Act. Each party, in its application, claimed proprietorship. Edgars had not used the trade mark VICTORIA'S SECRET in relation to any of its goods at the time it lodged each of its applications (750E). VS Inc had also not used the trade marks on goods *in South Africa*, so neither party had the exclusive *common law* right to use the trade marks.

6 1 Meaning of proprietor

In *Victoria's Secret* the court found that even though "proprietor" is not defined in the 1963 Act, it did not have the same significance as it did in relation to a common law right of property in corporeals and, also, that it did not import ownership of the "mark" as such.[61] The Judge decided that, in the context of that statute, "proprietor" meant "one who has the exclusive right or title to the use of a thing".[62]

6 2 Claiming proprietorship

Victoria's Secret found that "by the words 'claiming to be proprietor of a trade mark' in s 20(1) is meant 'asserting a claim to be proprietor of a trade mark'".[63] The court also found that "[i]n terms of s 20(1) one can claim to be the proprietor of a trade mark if one has *appropriated* a mark for use in relation to goods or services for the purpose stated, *and used it*".[64] These findings imply that a person can only assert a claim to proprietorship of a trade mark after he or she has appropriated the symbol as his or her trade mark. "Assert" and "appropriate" are highly significant terms, because they both demand that the person claiming proprietorship undertake some overt conduct: it is inconceivable that a person can either appropriate or assert something by means of a decision that remains unannounced.[65]

The court held in *Victoria's Secret* that "appropriate" means "to take for one's own", and explained that it included "*originate, acquire and adopt*", which were the terms preferred in *Moorgate Tobacco Co Ltd v Phillip Morris* (*Moorgate*).[66] In *Lifesaver* the court found that "[t]he concept of 'origination' within the meaning of these authorities is, I think, wider than invention; it would cover a decision to use, as a trade mark, a well-known word or phrase".[67] "Originate", as

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61 744D. The statement indicates that the court recognised that there was a clear distinction between the mark (symbol) as such, and the trade mark.

62 744F. The Judge also pointed out that the 1963 Act did not require that the symbol should have been invented (in the sense required by the Patents Act 57 of 1978), or that the symbol should be original (in the sense required in terms of the Copyright Act 98 of 1978).

63 744C.

64 744 I–J (emphasis added). The phrase "and used it" is problematic in that it tends to suggest that, even though a person has lodged an application for registration, he still has to exhibit the symbol in relation to goods, before he becomes the proprietor of the trade mark created by the placement of the trademarked goods on the market. The import of "and used it" is not easily reconciled with the finding in *Lifesaver* 71A–B, that "intended use is clearly sufficient [to invest an applicant with a claim to proprietorship]. If it were not, the registration of a mark not yet used by the applicant would be precluded by the terms of the statute. But there is a wealth of authority to show that, in proper cases, marks which have not yet been used may be registered."

65 This is my view notwithstanding the *dicta* in *Lifesaver* quoted in the footnote above.

66 *Victoria's Secret* 744 I–J. *Moorgate* was cited in *Victoria's Secret*. In *Moorgate* former Judge of Appeal Trollip made a written statement in regard to a determination he had made under s 17(3) of the 1963 Act. The Minister of Economic Affairs appointed him under s 6(2A) of the 1963 Act to make the determination. The combined effect of the remarks on appropriation and the territorial nature of trade marks (745G) effectively mean that Edgars, by adopting VICTORIA'S SECRET for use in South Africa (evidenced by its application for registration) created the trade mark VICTORIA'S SECRET as a legally relevant construct in South Africa.

67 70F–71A (emphasis added). The Judge referred to *Vitamins* as well as *Broadway Pen Corporation v Wechsler & Co (Pty) Ltd* 1963 (3) SA 434 (T) (*Everglide*). See also *Arndt &*

continued on next page

Arndt & Cohen v Lockwood Brothers (*Lockwood*) indicates, includes selecting a known symbol for use as a trade mark in respect of a particular class of goods. The selection of a known symbol from which to constitute a trade mark could also fall within the ambit of the term "adopt". In *Victoria's Secret*, Edgars' decision to use the symbol VICTORIA'S SECRET to constitute a trade mark in South Africa, even though VS Inc had constituted a trade mark using it in the USA, was a decision to "adopt" the symbol.

Moorgate does not make it clear what "acquire" means. In light of the meaning of "originate", as well as the interpretation of "adopt" suggested above, "acquire" appears to describe a derivative[68] mode of procuring a *bona fide* claim. "Acquisition", therefore, appears to describe a situation in which one person assigned, or ceded, the claim he or she had to a registrable trade mark, or ceded, or assigned, his or her common law trade mark, to another person.[69]

A person asserts proprietorship of a trade mark by lodging an application for registration.[70]

6 3 Proof of a *bona fide* claim

In both *Everglide* and *Vitamins* the respective courts indicated that if the claimant's right is challenged, he or she must be able to substantiate his or her claim.[71] In *Everglide* the Judge also held that since s 110 of the 1916 Act only requires a *bona fide* claim, the legislature had relieved the Registrar of the obligation of determining the question of proprietorship at the time an application was lodged.[72] In terms of this interpretation s 110 creates a rebuttable presumption that the applicant is the proprietor.[73] In *Everglide*[74] and *Sidewalk*

Cohen v Lockwood Brothers, (1905) 24 NLR 5 10 and *SAFA v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons* 2003 3 SA 313 (SCA) 323A. The decision to use a symbol as a trade mark, which would precede the application for registration, would not constitute a proposal to use the symbol (see para 5 above).

68 That is, as opposed to an original mode of acquisition.

69 The person assigning or ceding the right or trade mark would have originated or acquired the claim, or have created or acquired the common law trade mark.

70 This is the mechanism of the statutory process (see para 2 2 above). The mechanism the common law process prescribes is placing goods, in relation to which the trade mark is used, on the market (see para 2 1 above). In *Lifesaver* the two suggested methods of assertion are juxtaposed against each other. Penn alleged that it had become the proprietor of the trade mark by use, whereas International had submitted an application for registration, a course that resulted in success on the facts. Penn's use had not established goodwill for it, whereas International's appropriation of the symbol as its trade mark by applying for registration evidenced its *bona fide* claim to proprietorship, which entitled International to succeed (see para 7 below).

71 *Everglide* 444C and *Vitamins* 834G.

72 The Judge said it relieved the Registrar from deciding whether or not the applicant was the proprietor "in actual fact" (444C–D). The same interpretation applies to s 10(3) of the TMA.

73 My thanks are due to Prof I Leeman who suggested that the provision created a presumption. The statement in *Imperial Group Ltd v Phillip Morris & Co Ltd* 1982 FSR 72 (CA) 82 that a *bona fide* claim to proprietorship must be taken on trust tends to support this view. When one has regard to one of the objectives for creating a registration system being to spare trade mark proprietors the expense of proving proprietorship, it makes sense to create such a presumption (see Cornish *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 2 ed (1989) 394).

74 See para 7 2 below.

Café's (Pty) Ltd t/a Diggers Grill v Diggers Steakhouse (Pty) Ltd (*Diggers Grill*),[75] the presumption was successfully rebutted, each time by proof of actual proprietorship of an identical common law trade mark.

6 4 Conclusions regarding acquisition of a *bona fide* claim

An applicant can acquire a *bona fide* claim by originating or adopting a symbol from which a trade mark is created, or by obtaining it from another person who has such a claim. An applicant asserts his or her *bona fide* claim and provides proof of that assertion by lodging an application for registration.

7 CHARACTERISTICS OF A *BONA FIDE* CLAIM TO PROPRIETORSHIP

An examination of some of the major cases which deal with a *bona fide* claim reveals that such a claim has the following important characteristics, at a minimum.

7 1 It is non-exclusive

The clearest authority indicating the non-exclusivity of a *bona fide* claim is *Lifesaver*. International had applied for registration of the trade mark LIFESAVER in respect of brake fluids. Penn objected, claiming that it had become the proprietor of the trade mark by independently conceiving of, and using, the identical word to constitute its trade mark for the identical product. Penn was unable to establish that its limited use had vested it with common law rights, and so International's appeal succeeded. The view that the claim is non-exclusive is derived from the following passage:

> "insofar as the mere selection of the mark, the resolve to use it, and the conduct of the objector [Penn] in proposing to do so, may have given it any quasi-proprietorial rights, the Registrar appears to have overlooked the fact that the applicant, also, selected the mark."[76]

This implied that International acquired the same rights as Penn by originating the trade mark. Each party would, therefore, have been able to assert a *bona fide* claim to LIFESAVER, by originating the idea of using it as a trade mark.[77]

The view that a *bona fide* claim is non-exclusive can also be gleaned from the TMA which provides for situations in which two parties, acting independently of each other, originate a trade mark using the same symbol, and then submit competing applications for registration. The Registrar applies the *qui prior est tempore potior est iure* principle, as embodied in s 10(15) of the TMA.[78]

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75 See footnote 5 above and a discussion of the case at para 8 below.

76 72D.

77 66B. The Judge had earlier remarked that "it was not contended on behalf of either party to the appeal [from the Registrar's decision] that the other party had sought to filch the name from it" (66A–B).

78 Section 10(15) is, however, subject to: (i) honest concurrent user or other special circumstances (s 14 of the TMA: see para 9 below); (ii) s 10(16) of the TMA which prevents an earlier applicant from usurping the pre-existing rights of a person who applies later than him or her. A person brings his or her pre-existing rights to the Registrar's attention by objecting in terms of s 21, or making an application to court in terms of s 59 of the TMA.

A *bona fide* claim is non-exclusive, even though exclusivity is essential to proprietorship.[79]

7 2 A *bona fide* claim can only exist where the applicant intends to use the trade mark in relation to her or his own goods

This facet of a *bona fide* claim to proprietorship was a major consideration in *Everglide*.[80] In *Everglide*, Broadway applied for the expungement of the trade mark, EVERGLIDE, which was registered in Wechsler's name.[81] Broadway produced and marketed EVERGLIDE writing instruments in the USA. Wechsler had for some time sold such goods in South Africa, acknowledging that it was Broadway's trade mark.[82] The court found that "the facts point irresistibly to the conclusion that Wechsler's intention was to use the mark in South Africa either as sole representative of or otherwise for and on behalf of Burnham or Broadway so as to indicate that the writing instruments were the latter's and not its own goods".[83]

The court's finding implies that since Wechsler did not intend to use the trade mark to indicate its own goods, it had, therefore, not become entitled to claim proprietorship of the trade mark.[84]

7 3 The claim must be asserted *bona fide*

Moorgate brought this aspect to the fore. In this case, Trollip JA held that factors that would preclude a claim to proprietorship of a trade mark from being *bona*

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79 *Everglide* 444A–B; *Victoria's Secret* 744F; *International News Service v Associated Press* 248 US 215 223, where Justice Holmes said: "Property depends upon exclusion by law from interference."

80 This is implicit in the words "to take for one's own", the meaning the court ascribed to "appropriate" (744I). See also *Victoria's Secret*.

81 436D. Wechsler claimed proprietorship of the trade mark EVERGLIDE in its application.

82 This had been the case throughout Wechsler's negotiations with Broadway in an effort to become the exclusive distributor of EVERGLIDE writing instruments in South Africa (440E–441B). By selling goods bearing the trade mark EVERGLIDE, Wechsler, though in business on its own account, was indirectly conducting the business of the trade mark proprietor, the business of selling goods under its trade mark (445A–B). The court said:
"It was contended that as Broadway stated in its petitions that the writing instruments were sold in the U.S. to shippers for export to South Africa, the user in South Africa was not by Burnham or Broadway but the shippers or importers, but there is no substance in that contention because it is clear from the context of the statements that whoever used the mark used it as Burnham's or Broadway's mark to indicate *its* goods."
This was confirmed by the correspondence between the parties (440E–442C). No evidence as to the public understanding of the situation was presented, but it was not feasible for Wechsler to argue that it had acquired the common law trade mark right when it itself acknowledged that the trade mark belonged to Broadway. See also *Imperial Tobacco Co of India v Bonnan* 1924 AC 755.

83 446B.

84 See 445G to 446B where the reasons are set out fully. The *Everglide* approach was confirmed in *Valentino Globe BV v Phillips* 1998 3 SA 775 (SCA) and *Levi Strauss & Co v Coconut Trouser Manufacturer's (Pty) Ltd* 2001 3 SA 1285 (SCA). The requirement that the applicant must intend to use the trade mark in respect of his or her own goods is met where the applicant intends to license someone else to use the trade mark, provided that she or he has a specific intended licensee in mind at the time of the application (see s 38 of the TMA). There must be a specific intended licensee, because his or her intention must not be vague and problematic (see para 5 above).

fide would include "any factors that may have vitiated or tainted his right or title to the proprietorship thereof. Those factors would comprehend dishonesty, breach of confidence, sharp practice, or the like."[85]

In *Everglide*, Wechsler's claim to proprietorship was not *bona fide*, since it had earlier acknowledged that EVERGLIDE was Broadway's trade mark.[86] In *Diggers Grill*,[87] Steakhouse's claim to the exclusive right to the trade mark, DIGGERS GRILL, for the whole of South Africa, was not *bona fide*, because its manager knew that Sidewalk had a restaurant with that name in Natal.

The claim must be made *bona fide*, but the wording of s 10(3) makes proof of actual *mala fides* unnecessary.[88]

7 4 The claim is territorial

This aspect of a *bona fide* claim, which is of great significance in international trade, is also addressed in *Victoria's Secret*. VS Inc claimed that it was entitled to registration of the trade mark, VICTORIA'S SECRET (which Edgars had copied from it in the USA) on the basis that VICTORIA'S SECRET was known to be its (VS Inc's) trade mark in South Africa.[89] The court held that the evidence did not support this argument,[90] finding the following statement in *Moorgate* an apposite exposition of the law:

> "a trade mark is *purely a territorial concept*; it is legally operative or effective only within the territory in which it is used and for which it is to be registered. Hence, the proprietorship, actual use, or proposed use of a trade mark mentioned in s 20(1) are all premised by the subsection to be within the RSA."[91]

In *Victoria's Secret*, the court indicated its approval of the statement in *Moorgate*, when it said: "In the case of a foreign trade mark, there is no legal bar to its adoption in South Africa unless it is attended by something more."[92]

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85 *Victoria's Secret* 747H–I. See also *Lifesaver* 71B–C.

86 436G–H and 439A–D.

87 197B–C.

88 In any event, *mala fides* falls under another provision of the TMA (s 10(7)).

89 752G.

90 755G.

91 *Victoria's Secret* 745G (emphasis added); see also *Dan River* 706C–G, where the word "Republic" is emphasised. The view *Victoria's Secret* expressed was confirmed in *Gap*, in which the court found that "the [territoriality] principle is not peculiar to this country but is generally accepted" (para 9). The *Gap* court quoted the USA decision *Barcelona.com v Excelentisimo Ayuntamiento De Barcelona* 189 F Supp 2d 367 (ED Va 2002) para 10 which said: "It follows from incorporation of the doctrine of territoriality into US law through s 44 of the Lanham Act that United States Courts do not entertain actions seeking to enforce trade mark rights that exist *only under foreign law*" (emphasis added). The court in *Barcelona.com* quoted Thomas McCarthy *McCarthy on Trademarks and Unfair Competition* 4 ed (2002) who states (correctly, I submit): "The Paris Convention creates nothing that even remotely resembles a 'world mark' or 'an international registration'. Rather, it recognises the principle of territoriality of trademarks [in the sense that] *a mark exists only under the laws of each sovereign nation*" (*Gap* para 10; emphasis added). The Court in *Barcelona.com* also quoted *Person's Co Ltd v Christmas* 900 F 2d 1568-9 (Fed Circ 1990): "The concept of territoriality is basic to trademark law; trademark rights exist in each country *solely according to that country's statutory scheme*" (*Gap* para 10; emphasis added).

92 *Victoria's Secret* 746F. In explaining what "unless it is attended by something more" meant, the Judge again found assistance in *Moorgate*. In *Gap* the court had earlier found

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One person's proprietorship of a trade mark in one jurisdiction is, therefore, no bar to another person acquiring a *bona fide* claim to proprietorship of an *identical trade mark* in another jurisdiction.

8 THE INTERFACE BETWEEN THE COMMON LAW AND STATUTE

Since the common law and statute law (TMA) are sub-systems of South African law, and parts of the legal system of one jurisdiction (country), there is perforce a relationship between them. Their relationship, in trade mark matters, may be described as one of semi-independence because:

(a) a trade mark can be created in terms of the one sub-system, without having to comply with, or refer to, the requirements of the other sub-system;[93] and

(b) one cannot use the enforcement mechanism created by, and for, the one sub-system to directly enforce rights that were created by the other sub-system.[94]

Lifesaver shows that two persons, acting independently of the other, can decide to adopt the *same symbol* as a trade mark in respect of the same goods. If each person proceeds to use the symbol, he or she can create a common law trade mark.[95] One of them may then apply for registration of his or her trade mark. This raises the question: how do the courts reconcile the claim to proprietorship of the trade mark made by the one party in terms of the TMA with the rights of the other person in respect of the identical common law trade mark?

The proviso to s 33 of the TMA is pivotal to the relationship between common law and registered trade mark rights.[96] This provision protects the common law rights of persons, other than the registered trade mark proprietor.[97] Both *Diggers Grill* and *Everglide* cast light on the question of competing common law and statutory claims.

In *Diggers Grill* the applicant, Sidewalk, sought what was in essence an order excising the province of Natal from the registration of two trade marks, featuring

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that copying *per se* was not illegitimate or unlawful (746C, relying on *Pasquali Cigarette Co Ltd v Diaconicolas & Capsopolus* 1905 TS 472 479 and *Dunhill v Bartlett & Bickley* [1922] 39 RPC 426 438). The court's finding in *Victoria's Secret* is subject to s 35, which, however, requires proof that the trade mark is well known *in South Africa*: see *McDonalds*.

93 A statutory trade mark can be created from a symbol independently of the creation of a common law trade mark created from the same symbol. See the discussion of *Diggers Grill* below.

94 Registration is irrelevant to the passing-off action that enforces common law rights, whereas s 33 of the TMA precludes the statutory enforcement of common law trade mark rights.

95 See para 2 above.

96 Section 33 reads: "No person shall be entitled to institute any proceedings under s 34 in relation to a trade mark not registered under this Act: Provided that nothing in this Act shall affect the rights of any person, at common law, to bring any action against any other person."

97 Section 33 refers only to the right of action, but it is trite that rights of action only lie to protect substantive rights. No proprietor of a registered trade mark, when sued for passing off by a person claiming the common law right to use the identical trade mark, has raised the defence that s 33 does not preserve substantive rights. Given the ingenuity of counsel, were that avenue open, it is inconceivable that it would not have been pursued. The substantive rights of a common law trade mark proprietor are, therefore, also preserved.

the words DIGGERS GRILL, in the name of the respondent, Steakhouse.[98] Steakhouse operated three DIGGERS GRILL restaurants in the Transvaal province, while Sidewalk operated a restaurant under the same name in Durban.[99] Steakhouse registered two trade marks in its name, each one featuring DIGGERS GRILL. The court ordered the expungement in respect of Natal,[100] having concluded that "the applicant became proprietor of the trade mark, at least in Natal".[101] Sidewalk had become the common law proprietor of the trade mark DIGGERS GRILL, since it had not applied for its registration.

Diggers Grill, in effect, found that the enrolment of the registered trade mark in Steakhouse's name, in respect of Natal, had been made incorrectly.[102] This was because at the time of its registration Sidewalk was already the proprietor of an identical common law trade mark.[103] Proprietorship of an existing common law trade mark, therefore, precludes other persons from asserting a *bona fide* claim to proprietorship of an identical registrable trade mark, except where there has been honest concurrent use.

9 HONEST CONCURRENT USER

Honest concurrent user impinges on the question of a *bona fide* claim where there are competing applicants. It occurs where a number of persons, each one acting *bona fide* and independently of the other(s), use identical or confusingly similar trade marks for a not inconsiderable period of time.[104] The common law allows each party to continue exercising his or her trade mark rights[105] despite

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98 193H.

99 The restaurant had a mining theme décor and Sidewalk, which was contractually obliged by contract to change the restaurant's name (194F–G), chose DIGGERS GRILL. Sidewalk had checked the telephone directories of Johannesburg, Pretoria, Bloemfontein, Cape Town, Port Elizabeth and East London to see if there already was a restaurant with the same name.

100 Steakhouse argued that there was no evidence that by 20 September 1984 (the date on which the two trade marks were registered in its name) Sidewalk had a reputation in the trade mark DIGGERS GRILL (195I–J). The court held further that "because of applicant's vested interest in the trade mark, . . . respondent was *not entitled to claim exclusive proprietorship in the whole country* and to obtain exclusive rights to the trade mark thereby depriving applicant of his vested rights in the trade mark" (198H–I; emphasis added). In arriving at this decision, the judge relied on *Everglide* 444A–E and *Lifesaver* 715C). The court rejected the argument that courts were unlikely to impose territorial limitations in terms of their power to impose limitations, holding that "[i]n the present situation there seems to be no alternative" (199B). The court exercised power in terms of s 20(4) of the 1963 Act. See Webster & Page *The South African Law of Trade Marks, Unlawful Competition, Company Names and Trading Styles* 3 ed (1986) 178.

101 198H–I.

102 See *Everglide* 444D–E, where it is indicated that if the person registered as proprietor was not the proprietor at the time of registration, the registration was erroneous.

103 198H–I.

104 See *Ex Parte Chemisch-Pharmazeutische Aktiengesellschaft* 1934 TPD 366.

105 In *Barlow & Jones Ltd v Elephant Trading Co* 1905 TS 637 646, Solomon J referred to *In re Jelly, Son & Jones Application* (51 LJ Ch 639), in which it is clearly stated that where two people have the right to make lawful use of a trade mark they both have the right to register it: the right to use the trade mark must have its source in law, the common law.

the risk of confusion[106] because it would be unjust to deprive any of them of the goodwill they have amassed.[107]

Numerous provisions of the TMA prohibit the Registrar from registering identical or confusingly or deceptively similar trade marks in the names of different persons. The Registrar may, however, override some of the prohibitions in cases of honest concurrent user.[108]

In *Ex Parte Chemisch-Pharmazeutische Aktiengesellschaft* (*Transpulmin*),[109] the court found that the legislature's intention in enacting the provision allowing registration in cases of honest concurrent user "was to allow the Court to weigh against that possibility of deception or confusion in the minds of the public, the *commercial claims* which a *proprietor of a common law trade mark* might have acquired through a considerable amount of concurrent user".[110]

Each person who engages in honest concurrent user, therefore, has a *bona fide* claim to proprietorship of a registrable trade mark which is identical to the common law trade mark that he or she has created.[111] This makes it possible to recognise the *bona fide* claims to proprietorship of more than one person in respect of identical trade marks.

10 CONCLUSION

A *bona fide* claim to proprietorship, in terms of the TMA, is a present claim, because a registrable trade mark comes into existence when the applicant

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106 The risk would, however, have been significantly reduced by the period of concurrent use.

107 In an English case, *Alexander Pirie & Sons Ltd's Application* [1933] All ER 956 (HL) 962I, the court said that "the hardship to the applicants in refusing registration appears out of all proportion to any hardship to the objectors or inconvenience to the public which can possibly result from granting it".

108 In terms of s 14 the Registrar may on the basis of honest concurrent user register a trade mark that is:

"(a) A reproduction, imitation or translation of an internationally well-known trade mark, or the essential part of which is a translation, imitation or reproduction of a well-known trade mark (registration of such a trade mark is otherwise prohibited by s 10(6)). Provision for the protection of well-known trade marks is contained in s 35(1) TMA which transposed South Africa's obligations under Article 6*bis* of the Paris Convention for the Protection of Industrial Property of 1883 into South African law. In terms of s 35(1) protection is afforded to the well-known trade marks of a person who is a national of, domiciled in, or has a real and effective industrial or commercial establishment in, a country that subscribes to the Convention, whether or not such person carries on business or has goodwill in South Africa;

(b) Similar or identical to a trade mark that is already registered in the name of a person other than the applicant, without that person's permission (registration is otherwise prohibited by s 10(14));

(c) Similar or identical to a trade mark in respect of which a person other than the applicant has made a prior application, without the prior applicant's consent (registration is otherwise prohibited by s 10(15));

(d) Similar or identical to a trade mark that is well-known in the Republic even though registration would likely take unfair advantage of, or be detrimental to, the distinctive character or repute of the registered trade mark, without the consent of the proprietor (registration is otherwise prohibited by s 10(17))."

109 See footnote 104 above.

110 370 (emphasis added). The court was interpreting s 107 read with s 105 of the 1916 Act, a precursor to s 14 of the TMA.

111 This underlines the non-exclusivity of a *bona fide* claim discussed in para 7 1 above.

proposes using a specific symbol to create her or his trade mark.[112] The applicant proposes to use a trade mark by lodging his or her application for registration.[113] The lodgement of an application creates a presumption that the applicant, who has a *bona fide* claim,[114] is the trade mark proprietor.[115] An applicant's *bona fide* claim to a registrable trade mark entitles him or her to become proprietor of a *registered* trade mark which is created at registration.

A person acquires a *bona fide* claim to proprietorship, by (i) originating the trade mark (inventing a symbol, or adopting a known one);[116] or (ii) acquiring a claim to proprietorship from another person.[117]

A *bona fide* claim is non-exclusive,[118] it only exists where the claimant intends to make use of the trade mark in respect of his or her own goods,[119] it must be made *bona fide*,[120] and it is territorial.[121]

One person's proprietorship of a common law trade mark precludes another person from having a *bona fide* claim to an identical registrable trade mark.[122] However, different honest concurrent users of identical common law trade marks can each maintain a *bona fide* claim.[123]

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112 See para 5 above.
113 See para 5 above.
114 See the discussion in para 6 above.
115 The applicant must substantiate his or her claim if it is challenged (see para 6 3 above).
116 See para 6 2 above.
117 See para 6 above.
118 See para 7 1 above.
119 See para 7 2 above.
120 See para 7 3 above.
121 See para 7 4 above.
122 See para 8 above.
123 See para 9 above.

The *Gumede* judgment: Another lost opportunity to develop customary law and protect women's rights?

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1 INTRODUCTION

On 8 December 2008, the Constitutional Court handed down judgment in the case of *Elizabeth Gumede (born Shange) v President of the Republic of South Africa* (the *Gumede* judgment).[1] In short, the Constitutional Court confirmed the High Court order that ruled that ss 7(1) and (2) of the Recognition of Customary Marriages Act (RCMA);[2] s 20 of the KwaZulu Act on the Code of Zulu law (KwaZulu Act);[3] and ss 20 and 22 of the Natal Code of Zulu Law Proclamation (Natal Code)[4] that deal with the issue of ownership, including access to and control of family property by women during and upon dissolution of their customary marriages, inconsistent with the Constitution of the Republic of South Africa, 1996 (the Constitution) and invalid because each one of them unfairly discriminates against the applicant on the ground of gender.[5]

At face value this judgment brings the tension between the right to culture and the right to equality, with regard to women's right to property under customary law, to a quick respite. It also confirms the extent to which constitutional guarantees of freedom from discrimination include sex.[6] However, this judgment raises many issues, including the impact of court judgments on the enjoyment of women's rights under customary law; and the implications of human rights on legal pluralism in South Africa. More importantly, this judgment represents another lost opportunity for the courts to develop living customary law jurisprudence so as to bring it up to pace with the dictates of the Bill of Rights.[7]

In this article, we make reference to both codified and living customary laws.[8] The former denotes the form of customary law that is recorded in textbooks,

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1 2009 3 SA 152 (CC).
2 Act 120 of 1998.
3 Act 16 of 1985.
4 Proclamation R151 of 1987.
5 Para 49.
6 Section 9 of the Constitution.
7 For example, in *Bhe v Magistrate Khayelisha* 2005 1 SA 580 (CC) the Constitutional Court also declined to develop customary law.
8 To understand why this distinction is made, see a discussion on South Africa's legal history by Grant "Human Rights, Cultural Diversity and Customary Law in South Africa" 2006 *Journal of African Law* 2 13–17. See also Kerr "Role of Courts in Developing Cus-

continued on next page

court precedents and in the form of legislation, while the latter refers to customary practices or norms observed by people living under customary law in their day-to-day lives.[9] These forms of customary laws are often different.

After introducing the subject matter, the second section starts with a discussion of the codified customary law that was applicable to women before the *Gumede* judgment. It then provides a brief summary of the facts leading to the *Gumede* judgment. This is followed by a brief discussion of the judgment itself. The third section analyses the judgment and underscores what level of contribution the *Gumede* judgment makes. This section also raises questions about the ways in which customary law is perceived and dealt with, given that legal pluralism is a fact of life for many in South Africa. The central argument advanced is, how courts deal with the internal pluralism, particularly between the right to culture and women's rights and how courts accommodate or resist living customary law, has grave implications for the enjoyment of human rights by women governed by customary law. The last section is a conclusion.

2 CONSTITUTIONAL CHALLENGE TO CUSTOMARY LAW: THE *GUMEDE* JUDGMENT

2 1 Customary Law before the *Gumede* Judgment

The statutes applicable to the right to property under customary law before the *Gumede* judgment were the RCMA, the KwaZulu Natal Act and the Natal Code.

2 1 1 Recognition of Customary Marriages Act (RCMA)

For purposes of the equality analysis of this judgment, a useful starting point is s 6 of the RCMA.[10] It provides that a wife to a customary marriage has equal status and capacity to her spouse.[11] The significance of this provision is that any rights that a husband may previously have had over his wife under codified customary law now fall away.[12] Application of the RCMA has the effect of overriding the proprietary customary laws, which, as will be discussed below, treated women as minors under guardianship, regardless of their age or capacity.[13]

Section 6 is buttressed by s 7 of the RCMA which relates to the proprietary consequences of marriage and in particular, the contractual capacity of spouses. Section 7 comes as a welcome relief to many women who, under codified customary law, had no rights in respect of marital property.[14] However, the

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tomary Law" 1999 *Obiter* 41 47; Venter and Nel "African Customary Law of Intestate Succession and Gender (In)equality" 2005 *TSAR* 86 98–99; and Mbatha "Reforming the Customary Law of Succession" 2002 *SAJHR* 259 269–272.

9 Nhlapo "African Family and Women's Rights: Friends or foes?" 1991 *Acta Juridica* 135.

10 Para 25.

11 Section 6 of the RCMA provides that:
"A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law."

12 Bennett *Customary Law in South Africa* 4 ed (2004) 253; and Himonga "The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of the Customary Law of Marriage and Succession" 2005 *Acta Juridica* 82 88.

13 Bennett *Customary Law* 254.

14 Himonga 2005 *Acta Juridica* 88.

relief brought about by this provision is momentary when one reads the first subsection.[15] It states that the proprietary consequences of customary marriages entered into before the commencement of the RCMA continue to be governed by customary law.[16] Customary law is neither in community of property nor out of it.[17] Instead it is based on a patriarchal system handed down from father to son and which places women in an inferior position.[18] The implication of this provision is that women who married prior to the commencement of the Act are in no better position than what they are after the Act. So, for all intents and purposes, this piece of legislation has no bearing on them. Part and parcel of this argument is that if s 7(1)[19] maintains that customary law continues to apply, what is the relevance of s 6 which purports to give with the one hand what s 7(1) takes away with the other?

That being said, we will momentarily turn to the position of marriages that were concluded after the RCMA. Provision is made for these marriages in s 7(2). It states that marriages entered into after the promulgation of this legislation will be marriages in community of property and of profit and loss.[20] The radical change brought about by this provision is that a wife in a monogamous customary marriage is no longer excluded from benefitting on the dissolution of a marriage, whether by death or divorce, but in terms of a marriage in community of property. A wife becomes the joint owner of any assets acquired in the marital estate. The significance of this is that half of the marital assets belong to the wife. Any husband who chooses to leave his wife must be willing to do so with half of what would previously have been his assets.

So where does this leave those women who married prior to the RCMA? During the period of drafting the RCMA, there was debate on whether or not the Act should apply retrospectively. However, it was decided that it would be unfair to the various parties concerned if this was to be the case.[21] The result: husbands in customary marriages continued to be in control of the matrimonial property. What has been unfortunate about this provision is that women who married before the commencement of the RCMA continued to be disadvantaged, hence, the case of Mrs Gumede.

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15 Section 7(1) of the RCMA.

16 But the parties are free to adopt any of the new property regimes by following the prescribed procedure (s 7(4) of the RCMA).

17 Dhlamini "The Ultimate Recognition of the Customary Marriage in South Africa" 1999 *Obiter* 14 35. See also the discussion on how matrimonial property is governed under customary law in para 2 1 2 below.

18 Jansen "The Recognition of Customary Marriages Act: Many Women Still Left Out in the Cold" 2002 *Journal for Juridical Science* 115 117.

19 Section 7(1) provides: "The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law".

20 Section 7(2) provides:
"A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouse in an antenuptial contract which regulates the matrimonial property system of their marriage."

21 The views expressed both in favour of and against retrospectivity are evidenced in the South African Law Commission *Project 90: The Harmonisation of the Common Law and Indigenous Law – Report on Customary Marriages* (1998) 119–121. Vorster "Legislative Reform of Indigenous Marriage Laws" 1998 *Codicillus* 38 46 also shares the view that allowing the RCMA to apply retrospectively would be unfair.

2 1 2 The KwaZulu-Natal Act and Natal Code

What made Mrs Gumede's position even more untenable was the fact that she resided in KwaZulu-Natal. In addition to feeling the brunt of s 7(1) of the RCMA, as discussed above, Mrs Gumede also had to deal with the provisions of the KwaZulu Act and the Natal Code. Both of these acts were promulgated prior to the new constitutional dispensation. The sad reality for women in Mrs Gumede's position was that it was only the women of this province who were bitten twice.

Section 20 of the KwaZulu Act[22] and s 20 of the Natal Code[23] provide that a family head is the owner and has control of all family property in the family home. Section 22 of the Natal Code further states that the "inmates" of the family home shall be under the control of and "owe obedience" to the family head.[24]

Both of these pieces of legislation were adopted following a decision by the Apartheid Government to recognise customary law.[25] While the KwaZulu Act was nearly identical to the Natal Code in many respects, it did much more for the status of women than the Natal Code. The KwaZulu Act ushered in "profound changes which enhanced the legal status of Zulu women and sought to reverse the patriarchal nature of the official version of customary law which was reinforced by the Natal Code".[26] According to the KwaZulu Act any person may acquire property. Furthermore, a person becomes a major on marriage or on attaining the age of 21 years.[27] Women in KwaZulu-Natal are accordingly no longer minors once married.[28] Despite these changes, s 20 still maintains that

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22 Section 20 of the KwaZulu Act states:
"The family head is the owner of all family property in his family home. He has charge, custody and control of the property attaching to the houses of his several wives and may in his discretion use the same for his personal wants and necessities, or for general family purposes or for the entertainment of visitors. He may use, exchange, loan or otherwise alienate or deal with such property for the benefit of or in the interests of the house to which it attaches, but should he use property attaching to one house for the benefit or on behalf of any other house in the family home an obligation rests upon such other house to return the same or its equivalent in value."

23 Section 20 of the Natal Code provides:
"The family head shall be the owner of all family property in his family home. He shall have charge, custody and control of the property attaching to the houses of his several wives and may in his discretion use the same for his personal wants and necessities, or for general family purposes or for the entertainment of visitors. He may use, exchange, loan or otherwise alienate or deal with such property for the benefit of or in the interests of the house to which it attaches, but should he use property attaching to one house for the benefit or on behalf of any other house in the family home an obligation shall rest upon such other house to return the same or its equivalent in value."

24 Section 22 of the Natal Code reads: "The inmates of a family home irrespective of sex or age shall in respect of all family matters be under the control of and owe obedience to the family head."

25 According to Bennett and Pillay "The Natal and KwaZulu Codes: The Case for Repeal" 2003 *SAJHR* 217, the Natal Code is a product of early colonialism while the KwaZulu Act is a product of the Apartheid era.

26 Mamashela "New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act" 2004 *SAJHR* 616 629.

27 Horn and Janse van Rensburg "Practical Implications of the Recognition of Customary Marriages" 2002 *Journal for Juridical Science* 54 61.

28 Janse van Rensburg "The True Capacity of Women under Customary Rule to Acquire Land: An Exposé on the Law, Land and the Rules of Succession" 2003 *Stellenbosch Law Review* 282 288.

the family head is the owner of and has control over all family property in the family home. This provision is a duplication of the same provision in the Natal Code which leaves women in the vulnerable position of, in theory, being able to own property but not in practice.

Thus, the prominent feature of the right to property under customary marriages, as codified, is male domination of the family household and its proprietary arrangements.[29] This position can be further explained as follows: when parties marry, their union creates a single household.[30] This household is regarded as "an undivided economic unit under the control of the head of the family,"[31] namely the husband.[32] This is the position only in respect of monogamous customary unions. The position is somewhat different in the case of polygynous marriages. However in view of the fact that the *Gumede* judgment turns on the former type of marriage, we will restrict ourselves to the position in such unions.

The implication of this headship is that all property belongs to the husband. The wife has no proprietary capacity.[33] Part of the reason for this inequality between spouses is because in most provinces, with the exception of KwaZulu-Natal, as explained above,[34] the wife in a customary marriage is regarded as a minor under the guardianship of her husband.[35] As minors, wives were accordingly not permitted to own property and were in fact, in many respects, children without legal freedoms. The result of this is that upon divorce, the wife has no right to the marital property and virtually has to leave as she came. She may thus only take her personal effects and has no claim to the marital property regardless of the fact that she may have contributed significantly thereto.[36]

2 2 Facts of the case

The facts in the *Gumede* judgment were as follows: Mrs Gumede entered into a customary marriage in 1968. It was the only marriage to which her husband was party to, and was accordingly a monogamous marriage. Both Mr and Mrs Gumede were domiciled and permanently resided in the province of KwaZulu-Natal. Mrs Gumede did not work during the marriage, but maintained the family household as well as their four children. In this time, the Gumedes also acquired two properties as well as other movable assets. The marriage broke down irretrievably and in 2003 her husband instituted divorce proceedings. Mrs Gumede did not dispute that the marriage had broken down irreparably and that it could not be salvaged. Before a divorce was granted, she approached the High Court with a view to procuring an order invalidating the statutory provisions that regulate

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29 Para 17.

30 In such households, as Bennett *Customary Law* 256 reports, the emphasis is not so much the husband-wife relationship, but rather the relationship between the different houses.

31 Herbst and du Plessis "Customary Law v Common Law Marriages: A Hybrid Approach in South Africa" 2008 *Electronic Journal of Comparative Law* 1 10.

32 Horn 2002 *Journal for Juridical Science* 62.

33 Bennett *Human Rights and African Customary Law under the South African Constitution* (1995) 123.

34 Pursuant to the KwaZulu Act, wives attain the status of a major upon marriage.

35 Bekker *Seymour's Customary Law in Southern Africa* 5 ed (1989) 141; and Bennett *Customary Law* 255.

36 Herbst 2008 *Electronic Journal of Comparative Law* 11.

the proprietary consequences of her marriage on the ground of discrimination on the basis of sex.[37]

The impugned statutory provisions that aroused Mrs Gumede's protests, as discussed above, were those in the RCMA which determined that couples who entered into a valid monogamous customary marriage after 15 November 2000 were automatically regarded as married in community of property, unless the parties chose to marry out of community of property by entering into an antenuptial agreement. Customary marriages concluded before 15 November 2000 would then continue to be governed by customary law. In terms of the codified provincial codes of KwaZulu-Natal (where the Gumedes resided during their marriage) customary law determined that the husband was regarded as the family head and owner of all family property.[38]

Effectively this meant that if an order of divorce was granted, Mrs Gumede would have lost her home and everything she had contributed to the marriage over the years. Upon obtaining legal assistance, the divorce proceedings were halted pending the outcome of a challenge to the constitutionality of certain provisions of the RCMA and the KwaZulu-Natal provincial ordinances.

Under the Constitution, the principle of equality and non-discrimination is enshrined in s 9.[39] Mrs Gumede, aware of this provision, challenged the Government of the Republic of South Africa on the basis that ss 7(1) and (2) of the RCMA; s 20 of the KwaZulu Act; and ss 20 and 22 of the Natal Code violated her fundamental right to equality as guaranteed under the Bill of Rights in the Constitution. The basis of her argument was that she and women similarly situated were prejudiced by these pieces of legislation because, being female, they had no claim to the family property during and upon dissolution of a marriage.

2 3 The *Gumede* judgment

As noted in the introduction, the Constitutional Court confirmed the order of invalidity made by the High Court.[40] More specifically, it held, first, that ss 7(1) and (2) of the RCMA; s 20 of the KwaZulu Act; and ss 20 and 22 of the Natal Code that deal with the issue of ownership, including access to and control of family property by women during and upon dissolution of their customary marriage, inconsistent with the Constitution and invalid because each one of them unfairly discriminated against the applicant on the ground of gender.[41] Since the discrimination was on the listed ground of gender, it was found to be unfair.[42]

After declaring these provisions to be unfairly discriminatory, the court then went on to consider whether the provisions in question would pass the test in

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37 Paras 6–8.

38 Paras 10–11.

39 In particular, s 9(3) of the Constitution provides:

"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

40 *Gumede v President of the Republic of South Africa and Others* No 4225/2006 Durban and Coast Local Division, 13 June 2008, unreported.

41 Para 49.

42 Para 34.

s 36, the limitation clause. The respondents argued that a remedy exists for women in Mrs Gumede's position; namely, that they may approach a court in terms of the RCMA[43] requesting a transfer of assets on divorce. In considering this issue, the court opined that the challenge posed by this argument was that such an order "does not cure the discrimination which a spouse in a customary marriage has to endure during the course of the marriage". The court added that, "[e]ven if Mrs Gumede approached the divorce court relying on s 8(4)(a) . . . she might be severely prejudiced . . . under the codified customary law [because] all the family property belongs to her husband".[44] The Constitutional Court went further to hold that if ss 7(1) and (2) of the RCMA were declared inconsistent with the Constitution, there would be no distinction between marriages concluded before and after the RCMA and all women would be in the same position in light of s 6, namely equal owners of the marital property. The court found that, on the evidence supplied by Government, there was no justification for the unfair discrimination.[45] The impugned legislation was accordingly found to be invalid.

Secondly, the court had to decide on the practical implications of its order of invalidity, ie whether it should operate retrospectively or not. It found that it was unnecessary to limit the retrospective effect of the declaration of invalidity for three reasons. First, it would not be just and equitable to order that only those marriages concluded after the RCMA should be in community of property as the problem with the RCMA lay with those marriages concluded before the RCMA. Secondly, the provisions of ss 7(1) and (2) were under-inclusive; and thirdly, an order having retrospective effect would bring pre- and post-recognition marriages in line with one another. This was necessary in light of the Constitutional Court's decision that all customary marriages should be in community of property.[46]

Thirdly, on the task of deciding whether it was appropriate and necessary to develop customary law to bring it in line with the Constitution, the Constitutional Court held that it was neither necessary nor appropriate for a number of reasons. First, the Constitutional Court maintained that while it is the duty of the courts to develop customary law, the question did not arise in this instance, as the offending provisions were found in codified customary law.[47] In this instance, the Constitutional Court maintained that the role of the court is very different. Courts in such instances do not have a duty to develop legislation, but to interpret it in a manner that is consistent with the Constitution.[48] Secondly, even if a good reason to develop customary law existed, it was ill-advised in the circumstances to develop customary law due to the fact that Parliament conducted much in the way of research before deciding that what the court termed "new marriages", ie marriages concluded after the RCMA, should be in community of property. The Constitutional Court further ruled that it could find

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43 Section 8(4)(a) of the RCMA provides: "A court granting a decree for the dissolution of a customary marriage – (a) has the powers contemplated in ss 7, 8, 9 and 10 of the Divorce Act, 1979, and s 24(1) of the Matrimonial Property Act, 1984 (Act 88 of 1984)."

44 Para 45.

45 *Ibid*.

46 Para 30.

47 Para 29.

48 *Ibid*.

no evidence to suggest that Parliament's decision was flawed in any way.[49] Thirdly, the Constitutional Court maintained further that it would be unnecessary to develop customary law because by merely declaring ss 7(1) and (2) inconsistent with the Constitution and invalid, the court would be rendering customary law consistent with the Constitution.[50] Accordingly, the question of developing customary law did not apply.

In summary, the *Gumede* judgment is meant to add to the reform of customary laws and represents a landmark development in the protection of women from gender-based discrimination under customary law. Women ordinarily subject to the codified customary law that was abolished by the Constitutional Court will now be able to acquire and control property. This was of course not the first time the Constitutional Court had to reform customary law. The *Bhe* case,[51] for example, dealt with the rights of females to inherit under customary laws. The Constitutional Court ruled that the principle of male primogeniture, applied in the customary law of succession applicable in South Africa, offended the right to equality protected under s 9 of the Constitution and was consequently declared invalid. However, the *Gumede* judgment dealt with, for the first time, the issue of equal rights of spouses to family property during and upon dissolution of marriage.

Notwithstanding its merits, the *Gumede* judgment is unlikely to benefit most women living under customary law. It is generally accepted that the codified customary law that was changed by the Constitutional Court in *Gumede* is often different from the living customary law which, in reality, regulates the lives of most women living under customary law, especially in rural areas.[52] Just like in the *Bhe* case, living customary law has escaped constitutional scrutiny once again.[53] It also means that the Constitutional Court's decision has had very little meaning on these women's realities. Furthermore, what the Constitutional Court did not take into account is the fact that most individual women, who depend on their family and community for survival, cannot act against those norms. If the court had relied on living customary law, it might perhaps have found ways to develop living customary law in a manner that does not exclude the communities that live under this system of law.[54]

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49 Para 30.

50 Para 31.

51 *Bhe* was heard together with two other cases, namely *Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*. Both the *Shibi* and *Bhe* cases concerned the customary law of succession as embodied in the Black Administration Act 38 of 1927 and the constitutionality of the principle of primogeniture. The only difference between them is that the female excluded from succession to the deceased estate in *Shibi* was the deceased's sister as compared to the deceased's daughters in *Bhe*.

52 Modified customary is widely accepted to be a distortion of living customary law. See, for example, Bennett *Customary Law* 7; van der Meide "Gender Equality v Rights to Culture: Debunking the Perceived Conflicts Preventing the Reform of the Marital Property Regime of the Official Version of Customary Law" 1999 *SALJ* 100 105; Venter 2005 *TSAR* 98–99; and Bekker and van Niekerk "Gumede v President of the Republic of South Africa: Harmonisation, or the Creation of New Marriage Laws in South Africa" 2009 *South African Public Law* 208 220.

53 Himonga 2005 *Acta Juridica* 97.

54 See similar sentiments as expressed by Bekker 2009 *South African Public Law* 219.

In the following section, we discuss the implications of the Constitutional Court's refusal to develop living customary law on the enjoyment of women's rights.

3 ANALYSIS OF THE JUDGMENT

3 1 Duty to develop Customary Law

A solution for developing customary law entails the maintenance of separate systems of customary and common law on the basis of the right to equality. The Constitution clearly envisages legal pluralism, providing for the application of both customary law as well as common law.[55] What is particularly important about customary law (which has always been inferior to common law under colonial rule and apartheid) is the fact that under the Constitution, it enjoys the same status as common law. However, like some other African constitutions, notably Malawi,[56] both customary law and common law are subject to the rights protected in the Bill of Rights.[57] Maintaining legal pluralism is, therefore, mostly in tune with the Constitution.[58]

However, in their mandate to develop customary law in terms of s 39(2) of the Constitution, as mentioned earlier, the Constitutional Court in the *Gumede* judgment declined to develop the offending customary law because, *inter alia*, the court opined that the offending provisions were not found in customary law. This was because no rule of living customary law had been relied upon or impugned in *Gumede* but rather, reliance was placed on what amounted to a codification of customary law.[59] It is our submission that the Constitutional Court erred. The reasons proffered in support of the decision not to develop customary law, as outlined above, are not convincing.

Before discussing what options the court had in developing this branch of customary law, we briefly narrate the position of the right to property under living customary law. Traditional customary law accorded rights, including rights to property, to family or groups with the members sharing in the group's rights to property.[60] Under colonial influence heads of families, who were normally married males, were perceived as the only persons with full legal capacity in terms of customary law.[61] This did not, however, imply that other members of the family could not acquire rights to property. It has been stated that customary law protected, and still protects, the rights of individuals through families to which they belong.[62] Thus an individual in customary law is deemed to have acquired or to acquire a right through his or her family head. The co-operation of the family members represented by the family head is of utmost importance in the acquisition and disposal of property rights.

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55 Sections 211(3) and 39(2) of the Constitution.

56 Section 10(2) of the Constitution of the Republic of Malawi.

57 Section 39 of the Constitution.

58 Para 22.

59 Para 29.

60 Bekker, Rautenbach and Goolam *Introduction to Legal Pluralism in South Africa* 2 ed (2006) 55.

61 *Ibid.*

62 Bekker *et al Legal Pluralism* 55.

What is the customary law position with regard to women's rights to property? As noted, under customary law any property may be allotted to a person. For example, there could be the allocation of property by the family head to the wife or children. Property given to a wife is allotted to her house. The property allotted becomes what is known as house property.[63] House property is to be used for the benefit of the house to which it belongs. It has also been noted that in his use and control of house property, the family head has to consult the wife as well as the eldest son of such house. Any interest that a member of the family has in the house and its property is a collective, rather than personal one.[64] Thus, we see that although in theory the wife does not obtain control over such property, it belongs to her house and the property cannot be used without her consent or authorisation. Thus, for all practical purposes, she is the owner of this property. Moreover, she in fact also has control over her personal property which includes items such as clothing and items of a personal nature.[65] Moreover, as a result of modernisation and urbanisation, Bekker *et al*[66] have observed that new types of property were acquired, notably houses held in terms of customary or statutory law which are regarded as house property.[67]

From the above position, we see that the living customary law is different from the codified version of customary law which some commentators have described as representing an invented version of customary law.[68] For example, it has been noted that the idea that women were minors under the guardianship of their husbands was derived from an antiquated common law doctrine which treated women in the same way as children. Under common law, this incapacity means that the individual concerned has neither the power nor the freedom to use property without reference to a guardian.[69]

Nevertheless, this portrayal of female status was superficially mentioned by the Constitutional Court in the *Gumede* judgment.[70] The Constitutional Court accepted that the codified version of customary law is based on a distorted view of customary law and skewed by considerations of gender issues.[71] Obviously, the starting point for the development of customary law must therefore be living customary law. Instead the Constitutional Court, having accepted that the codified customary law is a distortion of living customary law, went ahead and made orders on this distorted version of customary law. The Constitutional Court, perhaps, might have pursued the analogy with a minor by construing a wife's incapacity protectively and interpreting it to her advantage. Sadly, the Constitutional Court maintained that its duty was to interpret codified law and

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63 House property is to be used for the benefit of the house to which it belongs.

64 Bennett *Customary Law* 258; and Bekker *et al Legal Plualism* 58.

65 Herbst 2008 *Electronic Journal of Comparative Law* 10. This also includes any gifts that may have been received from the husband. See also Bennett *A Sourcebook of African Customary Law for Southern Africa* 1 ed (1991) 232.

66 Bekker *et al Legal Pluralism* 56.

67 Strydom *Die Sake-, Kontrakte- en Deliktereg van die Suid-Sotho van Qwaqwa* (1985) 35 as cited by Bekker *et al Legal Pluralism* 56.

68 *Bennett Customary Law* 251.

69 Bennett *Customary Law* 255.

70 Paras 17–20.

71 Para 17.

declined to develop living customary law.[72] As rightly noted, the failure of courts in customary law cases adds to the challenge of protecting women's rights.[73] Bonthuys' analysis of the Bill of Rights and developments in family law has, *inter alia*, shown the courts lack of depth and superficial commitment to customary law and its development.[74] It has also brought to the fore how courts undermine the constitutional rights of women living under customary law.[75]

While it is acknowledged that the court was asked to interpret codified customary law in the *Gumede* case, the court should have taken this as an opportunity of developing living customary law. Of course living customary law has its own problems of ascertainment and proof.[76] On the authority of s 1(2) of the Law of Evidence Amendment Act,[77] however, the court could have referred the matter back to the court *a quo* for the hearing of evidence in support of the living customary law.

This proposed approach, unfortunately, requires a court to move away from traditional and accepted ways of determining and ascertaining customary law.[78] Instead, the approach necessitates some degree of judicial activism. However, if the courts are to be seen to be taking their constitutional mandate seriously in reconciling customary law with the Bill of Rights, this is what is needed. The court's argument that while it is the duty of the courts to develop customary law, the question does not arise in this instance (as the offending provisions are not found in living customary law but in what amounts to a codification of customary law)[79] is problematic and threatens the very existence of customary law which theoretically the Constitution has conferred as a source of law.[80]

3 2 Balancing the Right to Culture and the Right to Equality: Implications on legal pluralism in South Africa

As the *Gumede* judgment clearly shows, reconciling the right to equality and the right to culture is simply a matter of identifying those aspects of customary law which offend the constitutional guarantee of equality and striking them down. Furthermore, the judgment shows that reconciling the right to equality and the right to culture is a matter of replacing a customary rule that offends the constitutional guarantee of equality with a common law rule.[81] This entailed, in

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72 In a related issue, Mbatha 2002 *SAJHR* 259, in her research, for example, confirmed that communities that lead a customary life have no problem with allowing women to inherit. This position was different to codified customary law before the *Bhe* case. Such research findings, however, show the importance of courts looking at living customary law.

73 Himonga 2005 *Acta Juridica* 98.

74 Bonthuys "The South African Bill of Rights and the Development of Family Law" 2002 *SALJ* 748 757–761.

75 *Ibid*.

76 See, for example, sentiments also expressed by Kerr 1999 *Obiter* 50; and Grant 2006 *Journal of African Law* 19.

77 Section 1(2) of the Law of Evidence Amendment Act 45 of 1988 makes possible the proof of living customary law by providing that evidence may be adduced during the proceedings on the substance of a legal rule in issue.

78 The conventional way of determining customary law would be by means of relevant legislation or case law.

79 Para 29.

80 Bekker 2009 *South African Public Law* 216.

81 As previously noted, customary law marriages were neither in nor out of community of property.

the first instance, the invalidation of ss 7(1) and (2) of the RCMA and ss 20 and 22 of the Natal Code which determined the applicability of customary proprietary interests solely on the basis of sex. Secondly, it required striking down the customary proprietary interests as being incompatible with the right to equality as provided for under s 9 of the Constitution. Quick as the problem seems to have been solved by the Constitutional Court, what to put in place is more complicated. The question that is asked is: whether striking down the proprietary customary law is the way to go in addressing the contradictory demands of the right to culture and maintenance of legal pluralism in South Africa?

It is certainly efficient and quicker to proceed on the basis of amendment of the existing legislation.[82] It ensures equality of treatment for women married pre- and post-RCMA. Moreover, it brings about an immediate improvement in the rights of women married pre-RCMA. However, this solution, while catering for property rights of women, is premised on a particular model of the family and ignores the very existence of the extended family which forms the basis of traditional African society.[83] Whatever the benefits, the symbolic implication of replacing customary law with common law is disturbing. It is doubtful that such an approach will protect the rights of women married under customary law. Moreover, Himonga has argued that the outstanding feature of the RCMA is largely an extension of the rules of marriage under common law.[84]

3 3 Broader dimension of *Gumede* judgment

This judgment also raises issues that are pertinent elsewhere in Africa. At the heart of this judgment lies the concern of how to reconcile women's human rights with cultural life, particularly where such claims result in the violation of women's human rights. So, for example, the African Charter on Human and Peoples' Rights ('the African Charter'),[85] while promoting women's rights in certain contexts,[86] also provides for respect for positive African values.[87] This raises questions about how these values are to be perceived and the extent to which they can, if ever, take precedence over women's human rights. Banda[88] asserts that commentators have taken the view that positive African cultural values have to be read as being compatible with the rest of the African Charter, especially its provision on non-discrimination. This, however, has not prevented others from resisting such an interpretation by resorting to the language of culture.[89]

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82 This is exactly what the Constitutional Court did in this case.

83 The position under customary law can be summarised as follows: there is non-individuality of property. What this in effect means is that property is communal in nature and does not belong to one individual in particular.

84 Himonga 2005 *Acta Juridica* 98.

85 The African Charter was adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 and entered into force on 21 October 1986.

86 Article 18(3) of the African Charter prohibits discrimination against women in the context of the family; Article 2 prohibits discrimination; and Article 3 upholds equal protection before the law.

87 Article 29(7) of the African Charter.

88 Banda *Women, Law and Human Rights: An African Perspective* (2005) 251.

89 See, for example, Chanock "Human Rights and Cultural Branding: Who Speaks Up and How" in An Na'im (ed) *Cultural Transformation and Human Rights in Africa* (2002) 38 who asserts that any construction of new rights depends on an active revolution in culture, not just a passive resignation to rights slowly evolving over time.

It was just such an argument that the Government used to resist confirmation.[90] In its response to Mrs Gumede's challenge, the Government contended that the legislative measures in issue could be defended constitutionally because, first the Constitution obliges courts to apply customary law when it is applicable.[91] And second, the differentiation the legislation makes between old and new customary marriages is justifiable under the Constitution. This meant that s 9 which deals with discrimination expressly declined to cover sex. This was so because the whole fabric of the right to property under customary law as discussed is based on a patrilineal society which is gender-discriminatory in its nature. In other words, the Government was invoking a right to culture argument that supports the continued existence of a customary law which is patrilineal in nature in order to deflect Mrs Gumede, an individual human rights claim.

In resorting to culture, the Government was attempting to mobilise one view of the society while Mrs Gumede supported the constitutional and international law on the other, promoting the concept of non-discrimination and equal treatment of women.[92] At the end of the day, the Constitutional Court interpreted that customary law was subject to such non-discrimination provision.

4 CONCLUSION

This judgment may signify a welcome breakthrough in the advancement of women's rights to property under codified customary law. For that reason, the Constitutional Court is to be commended for descending into the showground of conflicts between customary law and the Bill of Rights in order to protect rights of women to property under codified customary law.

However, by invalidating codified law and not paying any regard to living customary law, the court missed an opportunity to bring this judgment closer to the lives of those women who live according to customary laws. In completely ignoring living customary law, the Constitutional Court missed a crucial opportunity to develop customary law jurisprudence so as to bring it up to pace with the dictates of the Bill of Rights. It is therefore important that court judgments, designed to enhance women's rights, focus on living customary law because such legal change has a far greater impact.

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90 Para 12.

91 Section 211(3) of the Constitution.

92 South Africa has ratified a number of International Conventions, which demand the protection of the human rights of women in various areas, including family law. Among these is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Among others, CEDAW requires states to take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations (Art 16(1)). Thus, men and women are to have the same rights, among others, to own, acquire, manage, enjoy and dispose of property.

Directors' duty of care and skill and thematic guidelines from the King Code on Corporate Governance in South Africa 2002*

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1 INTRODUCTION

As a separate legal entity or juristic person which exists apart from its management and shareholders, a company must necessarily act through individuals.[1] Company directors are the personnel usually entrusted with the management function of the company.[2]

Directors are subject to the common law duties which exist in addition to the various statutory duties contained in the Companies Act,[3] and any duties which a company's articles of association or a separate agreement may specify. In terms of the common law, a director is subject to fiduciary duties requiring him[4] to exercise his powers *bona fide* and for the benefit of the company and the duty to display reasonable care and skill in carrying out his office.[5] This article focuses on the directors' duty of care and skill alongside the issue of corporate governance.[6]

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* *Editor's note:* At the time of writing, the Report for Corporate Governance for South Africa and the Code of Governance Principles (King III) had not yet been published. This article therefore remains within the parameters of *t*he King Report on Corporate Governance for South Africa 2002 (King II).

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1 Cilliers, Benade, Henning, Du Plessis, Delport, De Koker & Pretorius *Corporate Law* 3 ed (2000) 5.

2 It is usual for the articles to provide that the business of the company shall be managed by the directors (see art 59 of Table A and art 60 of Table B in Schedule 1 of the Companies Act 61 of 1973).

3 Act 61 of 1973. Hereinafter the Act.

4 The masculine also refers to the feminine for the purposes of this article.

5 Cilliers *et al Corporate Law* 137.

6 In 1992 the King Committee on Corporate Governance (chaired by Mervyn King, a former judge of the Supreme Court of South Africa) was established at the instance of the Institute of Directors in Southern Africa. It obtained support from the South African Chamber of Business, the Institute of Chartered Accountants, the JSE Securities Exchange South Africa and the African Institute of Business Ethics. Corporate governance in South Africa was institutionalised by the publication of the King Report on Corporate Governance on 29 November 1994 (hereinafter King I). Since it was the duty of the King Committee to review corporate governance on an ongoing basis, the second report on corporate governance in South Africa was issued on 26 March 2002 *viz the* King Report on Corporate Governance for South Africa 2002.

Corporate governance is generally understood to mean the way in which companies are directed and controlled.[7] Thus, one of the most important elements of corporate governance is the board and its directors.[8] In this article *only* corporate governance principles relating to the duties of directors will be analysed. The aim of such an analysis is to extract possible guidelines for directors that will serve the important function of minimising cases of breaches of the duty of care and skill.

2 THE DIRECTOR'S DUTY OF CARE AND SKILL

South African company law recognises that a director must exercise his powers and carry out his office in good faith and for the benefit of the company. In so doing, the director *must* exercise the required degree of care and skill. In *Fisheries Development Corporation of SA Ltd v Jorgensen: Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd*,[9] the court summarised the principles governing the duty of care and skill. Margo J confirmed that the extent of a director's duty of care and skill depends to a considerable degree on the nature of the company's business and on any particular obligations assumed by or assigned to the director. If in the performance of his duties a director fails to exhibit the required degree of care and skill, he will be liable to the company in delict[10] for damages.[11] Liability is typically *Aquilian*.[12]

In situations where a director fails to perform his duties, he acts wrongfully. Furthermore, if in the performance of his duties or functions a director fails to display the same care as a reasonable person would display in the conduct of his own affairs, he is negligent. It is submitted that he also acts negligently if he fails to display the degree of skill which may reasonably be expected from a person of his knowledge and experience.[13] He is then liable to the company for any loss it may in consequence have suffered.[14]

It is important to note that if, in addition, there had been a contract between the director and his company (as is usually the case with full time directors) he will be guilty of breach of contract as well.[15] Delictual liability for breach of the

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7 Mongalo "The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa" 2003 *SALJ* 173.

8 All companies should be headed by an effective board which can both lead and control the company.

9 1980 4 SA 156 (W) 165F–166E.

10 The researcher will not enter upon a comprehensive discussion of delictual principles as these fall outside the scope of this article.

11 See Cilliers *et al Corporate Law* 148; McLennan "Directors' Fiduciary Duties and Misapplication of Company Funds" 1982 *SALJ* 394 398; Botha "Holding and Subsidiary Companies: Fiduciary Duties of Directors (conclusion)" 1984 *De Jure* 167 178. Under English law, liability is based on the tort of negligence.

12 McLennan "Duties of Care and Skill of Company Directors and Their Liability for Negligence" 1996 *SA Merc LJ* 95 101.

13 *Fisheries Development Corp of SA Ltd v Jorgensen* 166A; *Ex Parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T) 106I–J.

14 In *Fisheries Development Corp of SA Ltd v Jorgensen* 156F, Margo J, pointing to the "relative paucity of cases in South Africa," said that the essential principles of this branch of our company law are the same as those in English law and that English cases provide a valuable guide.

15 Cilliers *et al Corporate Law* 144.

duty of care and skill may be imposed on all directors (executive and non-executive), whereas contractual liability may only be imposed on the particular director who is a party to the contract, for example, the managing director, chief executive officer or the executive directors. It is also important to note that a contract may expressly or impliedly impose more onerous duties on executive directors.

3 NEGLIGENCE

There has been a relative paucity of cases in South Africa dealing with the issue of negligence with regard to the duty of care and skill. However, the courts have dealt extensively with the issue of recklessness in cases where liability was sought under s 424[16] of the Act. Analysing what amounts to recklessness or gross negligence in these cases, as opposed to negligence, can be of assistance in establishing what (by analogy) will amount to wrongfulness and negligence. To this extent, the judgements and remarks made by the judges regarding the meaning of recklessness may be relevant and helpful.

A matter of concern has always been how one differentiates between conduct that is reckless and conduct that is negligent. It is submitted that the distinction between conduct that is reckless and conduct that is negligent lies in the test for recklessness. For instance, one is negligent if one does not meet the objective standard of the notional reasonable person, whereas one is grossly negligent if even a person who is as ignorant or incompetent as oneself would have done better.

Furthermore, it is submitted that another determining factor is the degree of deviation from the standard of conduct of the notional reasonable person. If the deviation is gross, recklessness will be found on the part of the director and if it is not, there will only be negligence.

In *Philotex (Pty) Ltd v Snyman: Braitex (Pty) Ltd v Snyman*[17] the creditors successfully used s 424 against the directors. In this case the directors of a company (a subsidiary in a group of companies) allowed the insolvent company to keep on trading for the purposes of creating a good impression in relation to the whole group of companies. Not knowing that the company's financial statements contained misleading information, creditors were prepared to extend credit limits to the company. The company had, for instance, incurred a debt of R1,7 million while there was no prospect of the company becoming a going concern again. It is submitted that by allowing the court to trade in insolvent circumstances, the directors acted in a wrongful manner and were grossly negligent (reckless). They ought to have applied for an order to have the company placed in liquidation.

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16 The section states that when it appears, whether it be in winding up, judicial management or otherwise, that any business of the company was or is being carried on *recklessly* or with intent to defraud creditors of the company or creditors of any other person or any fraudulent purpose, the court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

17 2 SA 138 (SCA) 145B.

In dealing with the concept of recklessness, Howie JA[18] cited with approval the *dictum* in *Shawinigan v Vokins and Co Ltd*[19] in which the court defined recklessness as:

> "gross carelessness – the doing of something which in fact involves a risk, whether the doer realizes it or not; and the risk being such, having regard to all the circumstances, that the taking of that risk would be described as reckless."

Howie JA held that the test for recklessness is objective insofar as the respondents' actions are measured against the standard of conduct of the notional reasonable person. The test is subjective insofar as the court has to postulate that notional being as belonging to the same group or class as the respondent, moving in the same spheres and having the same knowledge or means to acquire such knowledge.[20] It was further held that the subjective consideration requires that regard should be had to any additional knowledge, experience or qualification that the evidence reveals the director to possess and which is relevant to the question whether recklessness has been proved.[21] Thus, subjective considerations, for example, the fact that almost all directors were qualified auditors, may be taken into consideration in a particular case.

It is submitted that this highlights the fact that a more onerous duty rests on those who bring additional skills and expertise to the company. An application of the wrongfulness test should also clarify this point. Public policy demands more from a director who brings expertise and experience to the company than from a director with no expertise and experience.

In *Nel v McArthur*[22] it was held that a director who takes on a mere supine attitude in regard to a risk can be accused of recklessness whether he or she realises it involves the taking of a risk or not.[23] It was further held that in the application of the recklessness test, a court should have regard *inter alia* to the scope of operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties and the prospects, if any, of recovery.[24] In *Triptomania Twee (Pty) Ltd v Connolly,*[25] it was held that in determining whether the respondent had behaved recklessly, the scope of the operations of the company, the functions and powers of the director, the range of his or her responsibility, his or her background, knowledge and expertise, are all relevant in examining the director's conduct.

It is submitted that these factors are also relevant to the test for wrongfulness in delict. It is important to note that within the context of this test and having regard to the complexities of a large business organisation, a director may properly leave certain tasks to a competent official who, in the absence of any reasonable ground for suspicion, can be trusted to perform such a duty honestly.[26]

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18 *Philotex* 143C–D.
19 [1961] 3 All ER 396 (QB).
20 *Philotex* 143G–H.
21 *Philotex* 148F.
22 2003 4 SA 142 (T).
23 *Nel* 151B–C.
24 *Nel* 151F.
25 2003 3 SA 558 (C) 563B–E.
26 *Fisheries Development Corp of SA Ltd* 166G–F.

In the case of *Fourie v Braude*[27] the learned judge held:

> "A director may well be regarded as a party to the reckless or negligent conduct, in the sense envisioned by s 424(1) . . . where he does nothing, provided his supine attitude can on the facts be interpreted as condonation of and concurrence in the conduct complained of. It is a far cry, however, from this situation to one where the director has no knowledge at all of the conduct complained of. Knowledge does not mean detailed knowledge but at least knowledge that something fishy is being perpetrated and the refusal or willful neglect to make enquiries. One cannot, however, go one step further and impute knowledge to a director who did not have it but should, had he been diligent, have acquired it."[28]

It is submitted that in the case where the director did not have knowledge that something fishy was being perpetrated but should have known better had he been diligent, such a director should be held to have been negligent. Thus, there will be mere negligence on his part, falling short of recklessness.[29]

4 CORPORATE GOVERNANCE IN SOUTH AFRICA

In 1992 the King Committee on Corporate Governance was formed at the instance of the Institute of Directors in Southern Africa. Corporate governance in South Africa was then institutionalised by the publication of the King Report on Corporate Governance[30] on 29 November 1994. King 1 contained a Code of Best Practice which emphasised the responsibilities of company directors regarding corporate governance. Since it was the duty of the King Committee to review corporate governance on an ongoing basis, the second report on corporate governance in South Africa was issued on 26 March 2002, namely, the King Report on Corporate Governance for South Africa 2002.[31] The purpose of King II is to promote the highest standards of corporate governance in South Africa.[32]

The King II recommendations are not prescriptions. They are guidelines designed to produce an outcome of efficiency. King II does not adopt a "one size fits all" approach to corporate governance. Instead, it formulates guidelines of best practice for optimising corporate performance and accountability in the interests of shareholders and the broader economy. The general approach is one of flexibility. If a company considers that a recommendation is inappropriate to its particular circumstances, it is free not to adopt it. Companies are encouraged to use the guidelines provided in King II as a focus for re-examining their corporate governance practices and to determine whether and to what extent the company may benefit from a change in approach, having regard to the company's particular circumstances.

Thus, the King Code is not prescribed law but is based on self-regulation. The underlying principle of the Code is therefore that directors should act not only in accordance with the letter of the law, but also in the spirit of their common law duties.

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27 1996 1 SA 610 (TPD).

28 *Fourie* 614G–J; *Howard v Herrigel* 1991 2 SA 660 (AD) 673I–674H–I.

29 See generally *Howard*.

30 Hereinafter King I.

31 Hereinafter King II.

32 King II, para 3 5.

However, the JSE Securities Exchange South Africa has a listing requirement that entails extensive corporate governance requirements. In particular it requires listed companies to disclose a narrative statement in their annual reports of how the company has applied or intends to comply with the requirements of corporate governance. This statement must contain explanations enabling shareholders to evaluate how the corporate governance principles have been applied, and to deal with the reasons for non-compliance. If investors, with their knowledge, shy away from companies that do not comply with the King II guidelines, the impact on the share prices of those companies will be adverse. Thus, directors who otherwise would be reluctant to go along with King II might feel the need to consider its recommendations in order to improve the market standing of their companies.[33]

The fact that there is no law to enforce the King II recommendations offers important advantages in terms of flexibility. Legislation suffers from a number of drawbacks which make this feature important. First, once requirements are set out in statutory form, limitations associated with the law-making system mean that revising the standards which are in place is usually a slow, incremental process. The problem may be significant with other corporate governance issues since the field is a rapidly moving one, with challenges occurring constantly both in terms of the behaviour of institutional investors and company practice. Moreover, defining a 'correct' corporate governance relationship for the purposes of a statute would be a difficult task. Companies vary widely, depending on the size and type of the company, the personalities and skills of the directors, the particular attributes of the Chief Executive Officer (CEO), and so on. A single set of standards will thus have to be carefully structured to be suitable for all. This is virtually impossible.

The problems associated with legislation are less likely to arise in the light of the approach adopted by King II. With regard to the changing corporate governance environment, the King Committee was well aware of the situation and correspondingly recommended that the Code should be seen as a living document that may require to be updated from time to time to ensure the currency of the recommended principles of corporate practices and conduct.[34] Furthermore, with regard to the recommendations the committee made pertaining to the board of directors, a notable feature is that companies remain free to ignore what the Committee has said.[35] Thus, King II provides the executive directors with a discretion that is unlikely to be available with legislation to disregard those corporate governance principles which they think will have a significant negative impact. Therefore it is submitted that, to the extent that doubts remain about whether a single corporate governance format is

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33 It is also important to note that the guidelines of the King Committee may, for instance, add to the pressures exerted by market forces upon executives to adopt the kind of governance structures investors value. Since a company's executives are concerned about investor sentiment, they have incentives to accede to regulation of their own behaviour so as to signal that there is no need to fear excessive managerial discretion. King II may therefore facilitate this process.

34 King II Code of Corporate Practices and Conduct (hereinafter "King II") para 1 6 21.

35 King II para 40 19, it is stated that "it is the submission of the King Committee that it would be in the enlightened self-interest of every enterprise to take careful cognizance of the recommendations outlined in the Report and to adhere to these to an extent that is practicable and applicable."

appropriate for all public companies, there is much to be said for the King II approach.

5 THEMATIC GUIDELINES FROM THE KING CODE

All directors, both executive and non-executive, are bound by the fiduciary duties and the duty of care and skill,[36] and the law does not recognise any distinction between executive and non-executive directors in this regard. Hence it is submitted that in relation to these duties, the legal rules are the same for all directors.[37] However, in the application of these rules, one must obviously take into account any such factors as may be relevant in judging the conduct of a particular director. These may include the fact whether the director is an executive or non-executive, his access to particular information, and the justification for relying upon the reports he receives from others. According to King II, some general guidelines require that:

(i) Directors must ensure that they have the time to devote to properly carry out their responsibilities and duties to the company.[38]

It is submitted that where a director fails to act in the said manner, he breaches the duty of care and skill.[39] Directors must actively participate in the management of the affairs of the company. If a director should fail to devote adequate time to discharge his duties to the company, he should resign. Failure to do so amounts to wrongful and negligent conduct on his part and hence a breach of the duty of care and skill.

(ii) Directors must, in line with modern trends worldwide, not only exhibit the degree of skill and care as may be reasonably expected from persons of their skill and experience (which is the traditional formulation) but must also;

- exercise both the care and skill any reasonable person would be expected to show when looking after his own affairs as well as having regard to his actual knowledge and experience; and
- qualify themselves on a continuous basis with a sufficient understanding of the company's business and the effect of the economy so as to discharge his duties properly, including where necessary to rely on expert advice.[40]

It is submitted that this is a welcome contribution to the standard of care required of the modern director. Indeed, it has become apparent that community attitudes and expectations have changed in relation to directors' duties generally, and in particular the duty of care and skill. Early judgments no longer correctly reflect the standard of care that is expected from directors.

The King II formulation contains both an objective and a subjective element. With regard to the objective element, a director cannot escape liability by

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36 King II , s 1 ch 2 para 1 24.

37 *Howard* 678A where the court considered it unhelpful and even misleading to classify company directors "executives" and "non-executives" for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them.

38 King II , s 1 ch 4 para 2 1 55.

39 *Howard*; *Cronje NO v Stone* 1985 3 SA 597 (T).

40 King II , s 1 ch 4 para 2 3 55.

pleading that he lacked the ability to perform the job he undertook. The subjective element is equally plain. Account must also be taken of the actual position the director occupies in the particular company. If a director brings specific skills or experience to the company, he must apply them. It is also interesting to note that King II evidently extends liability by requiring that directors must qualify themselves on a continuous basis with sufficient understanding of the company's business and seek expert advice where necessary. It is submitted that where a director fails to act in the aforesaid manner, he breaches the duty of care and skill.

(iii) Directors must insist that board papers and other important information regarding the company are provided to them in time for them to make informed decisions.

It is submitted that this recommendation by King II suggests that accepting board papers at face value may no longer be considered diligent. Sufficient diligence may now entail proper analysis of the information before the director. Indeed, it is not an overstatement to submit that the onus lies on the director to familiarise himself with the business and finance of the company and to ask appropriate questions. By implication, directors will have to become increasingly interested in corporate governance in general and in their own effectiveness in particular. It is submitted that where directors fail to make enquiries regarding the information given to them with the result that an uninformed decision is arrived at, such directors must be found to have breached the duty of care and skill.

(iv) Directors must be diligent in discharging their duties to the company, regularly attend all meetings and must acquire a broad knowledge of the business of the company so that they can meaningfully contribute to its direction.[41]

In the light of this guideline, it is proper to submit that what was said of the non-executive director in the case of *Fisheries Development Corp of SA Ltd v Jorgensen*[42] may no longer suffice without qualification. In this case it was stated that the non-executive director is not bound to give continuous attention to the affairs of the company or to attend all meetings, although he ought to, whenever he is reasonably able to do so.[43] However, recent cases have shown that more is now expected of the non-executive director. In *Howard v Herrigel*[44] for example, Goldstone JA rightly stated that the legal rules are the same for all directors.[45] However, an important point to note is that, in the application of these legal rules to the facts, the responsibilities of the director, his access to particular information and justification for relying upon the information he receives from others are indeed relevant factors to take into account, whether or not the person is classified as an 'executive' or 'non-executive' director.

The modern non-executive director is thus, now required not only to attend meetings regularly but also to acquaint himself with the issues underlying the agenda and to acquire a broad knowledge of the business of the company. Active

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41 King II , s 1 ch 4 para 2 11 56.

42 *Fisheries Development Corporation of SA Ltd.*

43 *Fisheries Development Corporation of SA Ltd* 165 H.

44 *Howard* 673I–674H–I.

45 *Howard* 678D.

participation in the management of the affairs of the company is now the call of all directors. In this regard, King II is in line with the modern day expectations of directors and hence the guideline serves a useful purpose of judging conduct that amounts to a breach of the duty of care and skill.

(v) Directors must be prepared and able, where necessary, to express disagreement with colleagues on the board including the chairperson and the chief executive officer.[46]

It is submitted that this guideline is based on the premise that directors should effectively participate in the affairs of the company. Effective participation entails debating ideas where necessary before resolving to adopt a particular course of action. It is submitted that where a director adopts an indifferent attitude towards the affairs of the company, he is in breach of the duty of care and skill.

(vi) Directors must, if in doubt about any aspect of their duties, obtain independent professional advice at the earliest opportunity.

This guideline is also useful for testing for breach of the duty of care and skill. A director does not exercise reasonable care in the management of the affairs of the company where the situation is such that there is need for him to obtain professional advice and he fails to obtain it.

(vii) The Company Secretary must comply with his duties[47]

Following the recommendations of King I, the appointment of a company secretary in public companies with a share capital is now mandatory. In terms of s 268A of the Act, the directors of a public company with a share capital are obliged to appoint a secretary who is a natural person permanently resident in South Africa.[48] The duties of the company secretary are stated in s 268G[49] of the Act. Of particular interest[50] is the duty to guide directors as to their duties,[51] the duty to make directors aware of the law affecting the company, and reporting any failure to comply with the law to meetings of directors and of shareholders.[52]

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46 King II , s 1 ch 4 para 2 12 56.

47 It is important to note that the reason why the duties of the company secretary are analysed relates to question whether the company secretary has discharged his duties relating to directors, and whether this will affect the determination of the degree of negligence of a particular director.

48 A share block company, a company without a share capital and a private company are not obliged to appoint a company secretary but may do so.

49 The duties include (but are not restricted to) the following:
(a) guiding directors as to their duties;
(b) making directors aware of the law affecting the company and reporting to meetings of directors and of shareholders any failure to comply with the law;
(c) ensuring the recording of minutes of all meetings of shareholders, directors and committees of directors;
(d) certifying in the company's annual financial statements that the returns required of a public company by law have been lodged up to date in the true and correct form; and
(e) ensuring that a copy of the company's annual financial statements is duly sent to every person entitled thereto by law.

50 For the purposes of this article.

51 Section 268G(a).

52 Section 268G(b).

King II provides a more detailed account of the duties of the company secretary.[53] The company secretary must guide the board collectively and each director individually as to their duties and responsibilities and make them aware of all legislation and regulations relevant to the company in question.[54] He should also assist in the proper induction and orientation of directors, including assessing the specific training needs of directors and executive management in regard to their fiduciary and other responsibilities.[55] The company secretary also needs to be available to provide comprehensive practical support and guidance to directors, with particular emphasis on supporting the non-executive directors and the chairperson.[56] He should ensure unhindered access to information by all board and committee members, so that they can contribute to board meetings and other discussions.[57]

The effect of these duties is that directors, especially non-executive directors in public companies with a share capital, will be more enlightened as to what their duties entail than their counterparts in other companies that do not have a company secretary. In this regard it is not an overstatement to submit that where the company secretary has complied with his duties relating to directors, the chances of directors breaching the duty of care and skill will be reduced. Furthermore, where a director has been made aware of his duties, it is submitted that a more onerous duty of care and skill is imposed on that particular director.

In a nutshell, the principles contained in King II are important in testing for conduct that can amount to a breach of the duty of care and skill by a director. The courts should have regard to the guidelines contained in King II whenever a director's compliance with the duty of care and skill is in question.

6 RECOMMENDATIONS

(i) The question whether a director owes a more onerous duty of care and skill should not be based solely on whether the director is an executive or non-executive.

A contentious issue has always been whether the duty of care and skill that is imposed on executive directors should be more onerous than the one imposed on non-executive directors. While it is true that the courts have held that the legal rules in relation to the duty of care and skill are the same for all directors, irrespective of whether they are executive or non-executive directors, it is equally true that in reality more is expected from directors who for example, bring special skills to the company or are actively involved in the day-to-day management of the company than from those who are not so skilled or involved.

It is submitted that the question whether more can be expected from one director than from another should be answered without putting any tags to the type of directorate held by the particular director. Indeed, the fact that one is a non-executive director does not *per se* indicate that he has less onerous duties than would otherwise have been the case.

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53 Section 1 ch 10 74–75.
54 King II , s 1 ch 10 3.1 74.
55 *Ibid.*
56 *Ibid.*
57 *Ibid.*

If the duty of care and skill is considered in the context of the *Lex Aquilia*, this matter can be resolved by asking what public policy would demand in each individual case. Therefore, it is submitted that the question whether more can be expected from a director in a given situation should be answered first and foremost by applying the wrongfulness test, in line with the general principles of the South African law of delict. This should be determined with reference to the legal convictions of the community or *boni mores*.[58] The legal convictions of the community are an objective test based on reasonableness.[59] The question whether a director who failed to take action or should have taken action in a particular situation should also be answered with reference to the legal convictions of society.

With regard to directors, in answering the question whether a director has acted wrongfully, various factors should be considered. These will include whether the director holds a full time position or not, his access to relevant information, particular experience and the skills that he undertook to bring to the company, functions delegated by or assigned to him, any relevant provision in the articles of the company in question as well as the nature of the company. In the light of this reasoning, it will not be an overstatement to submit that in terms of the *boni mores* more will be expected from a director who, for example, undertook to bring expert knowledge to the company than from one with no or less expertise. The test, however, remains an objective one in the sense that regard must be had to what would be expected from a person in that situation in terms of the convictions of the community.

(ii) A company secretary's omission to enlighten directors as to their duties is a factor to be considered when determining whether a director who has been negligent in the performance of his duties should be excused from liability in terms of s 248.

It is recommended that where a director acts negligently in situations where the company secretary omitted to enlighten him as to his duties, such a director may be relieved from liability in appropriate cases in terms of s 248.[60] This may be the case where "having regard to all the circumstances" it is only fair to excuse a director who was not aware of what exactly was expected of him, but should have been so aware had the necessary guidance been given by the company secretary.

(iii) Directors should consider the corporate governance principles found in King II as they inter alia provide useful guidelines as to the type of conduct that would render them in breach of the duty of care and skill.

It is submitted that if directors observe the important recommendations of King II, the possibility of them breaching the duty of care and skill will be reduced to

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58 Neethling, Potgieter and Visser *Law of Delict* 4 ed (2001) 37–38.

59 The question is whether society condemns the particular conduct as unreasonable and improper.

Reasonableness entails a balancing process between the interest which the defendant promoted and those which he actually infringed. See also Neethling *et al Law of Delict* 51.

60 Section 248 empowers the court to relieve a director or other officer of a company from liability that he may appear to have incurred, "in respect of negligence, default, breach of duty or breach of trust," if it appears to the court, "that he has acted honestly and reasonably and that, *having regard to all the circumstances of the case* including those connected with his appointment, he ought fairly to be excused." (my emphasis).

a minimum. Directors in companies other than listed companies should also be encouraged to observe them.

(iv) The courts, when judging the negligence of a new director, should consider whether and to what extent the director was subjected to an orientation program to familiarise him with the company's operations, senior management, his duties and responsibilities.[61]

It is submitted that if the courts are to take this aspect into consideration, board members will be more inclined to ensure that new directors receive a formal orientation program and that they are sensitised as to their duties and responsibilities. This may have the effect of reducing the chances of directors breaching their duty of care and skill to the company.

(v) The courts, when judging the negligence of a director, should consider whether the company secretary has observed his duties.

It is submitted that the fact that the company secretary has performed his duties will be relevant when determining the degree of negligence of a director where there has been a breach of the duty of care and skill. It is further submitted that the courts, when determining whether a director had been negligent in conducting the affairs of the company and whether he ought to be excused in terms of s 248, should consider whether the director had been provided with the necessary guidance as to his responsibilities and duties and how to properly discharge them in the interests of the company. Where the company secretary has neglected to provide the necessary guidance, it is submitted that the director may be excused, depending on the circumstances of the case. If the circumstances of the case are that the director cannot be excused, it is submitted that where a delictual action is brought against the director, he can rely on the secretary's contributory negligence as a defence. However, where the director had been made aware of his duties, it is submitted that a more onerous duty of care and skill is imposed on that particular director.

(vi) The development of a healthy boardroom culture should be encouraged

The development of a healthy boardroom culture is important. It is submitted that while the rules and regulations in relation to the governing process are important, the way directors work together as a team is also vital. A healthy boardroom culture would create a climate of trust and candour with full access to relevant information, effective governing body teamwork which avoids "groupthink"[62] and "social loafing"[63]and encourage open dissent and debate, individual accountability of directors for their roles to the rest of the board and regular reflection and evaluation of the board's own performance. It is submitted that where a healthy boardroom culture exists, instances of breach of the duty of care and skill by directors are less likely to arise.

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61 See King II , para 2 4 6 25.

62 Baker, Barret & Roberts *Working Communication* (2002) 328–331 cited in Van Rhyn & Holloway "Corporate Governance Reforms and Implications for Company Directors: An Australian Perspective" http://www.niagara.edu/ciaer/2005/documents/ 169AustCorpGov Directors Submitted.pdf (accessed 06-01-2006). According to these authors, groupthink refers to group mediocrity in decision-making by chasing consensus (falsely) at all costs.

63 According to Baker *et al Working Communication* social loafing is where group members do not participate effectively in their groups and rely on other members to do the work.

(vii) Directors must be expected to meet an objective standard of competence in the exercise of their duties

The concept of a "sleeping director" is not compatible with the requirements of modern company law. Therefore, directors must be expected to meet an objective standard of competence in the exercise of their duties.

7 CONCLUSION

This article has highlighted the fact that King II serves a useful purpose by providing guidelines that can be used and indeed should be used by the courts when determining conduct that would amount to breach of the duty of care and skill. Furthermore, these guidelines enlighten directors as to the type of conduct that would render them in breach of the duty of care and skill. Thus, the King II guidelines, if implemented, will create a corporate environment in which the risk for breach of the duty of care and skill is reduced to a minimum.

Woman-to-woman marriages among the Lovedu: The need for official recognition

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1 INTRODUCTION

Prior to colonisation, customary law regulated the local indigenous people's daily lives and affairs. Marriage, like every other part of their lives, was regulated by custom and culture providing for both monogamous and polygamous marriages.[1] According to Robinson *et al*, polygamy refers to "two situations, namely that a husband may have more than one wife and that a wife may have more than one husband".[2] Jansen concurs with this definition.[3] A common interpretation of polyandry refers to a woman with multiple husbands[4] while the common interpretation of polygyny refers to a man with multiple wives. A number of African communities practise(d) polygyny as commonly interpreted. At present, there is no term that specifically identifies a certain type of cultural marriage, namely woman-to-woman marriages, as concluded in terms of the Lovedu custom. A number of writers[5] have referred to these cultural woman-to-woman marriages as gynaegamy[6] and this is the term that will be used to refer to these marriages. Although other indigenous communities such as the Pedi, Venda and Zulu practised (and some of them still do) woman-to-woman marriages,[7] this culture has in some communities disappeared, while in others it is practised on a very small scale. For the purposes of the discussion, I have chosen to focus on the Lovedu community as it still actively engages in this practice on a wider scale than any other indigenous South African community.

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* I wish to express my gratitude towards the reviewers and other people who commented on this paper and who gave me invaluable input and guidance, in particular Mr H Oosthuizen and Prof M Carnelley.

1 Ndima "The place of Customary law in the general law of South Africa" 2002 *Speculum Juris* 235.

2 Robinson, Human, Boshoff & Smith *Introduction to South African Family Law* 3 ed (2008) 45.

3 Jansen "Family Law" in Bekker, Rautenbach & Goolam *Introduction to Legal Pluralism in South Africa* 2 ed (2006) 33.

4 Jansen *Introduction to Legal Pluralism* 33. According to Robinson *et al South African Family Law* 45, "terminologically, 'polyandry' refers to a woman marrying many husbands and "polygyny" refers to a man marrying many wives".

5 Oomen 'Traditional woman-to-woman marriage, and the Recognition of Customary Marriages Act' 2000 *THRHR* 276; O'Brien "Female Husbands, AKA gynagamie" http://unauthorised.org/anthropology/anthro-l/october-1994/0288.html (accessed 28-10-09); Morgan & Wieringa *Tommy Boys, Lesbian Men and Ancestral Wives Female same sex practices in Africa* (2005) 299.

6 Oomen 2000 *THRHR* 276.

7 Oomen 2000 *THRHR* 276.

Historically, marriage as envisaged in South African civil law[8] is said to be "a union of one man with one woman[9] to the exclusion, while it lasts, of all others".[10] Since African cultures permitted polygamous marriages, civil society, structured on a Western model could not acknowledge these unions as valid. As a result, such polygamous marriages were held to be *contra bonos mores*.[11] Apart from s 31 of the Black Laws Amendment Act[12] (which permitted the customary widow to claim damages for loss of support arising from the death of her husband) there was no recognition of African customary marriages in South Africa for many years.

This article seeks to first establish the existence of the Lovedu community which, largely because of its size, is not widely known. Secondly, it will be shown that the practice of woman-to-woman marriages is a long-standing cultural practice which is widely accepted and observed among the Lovedu community. Thirdly, it will be argued that the Recognition of Customary Marriages Act[13] recognises only heterosexual marriages and does not cater for woman-to-woman marriages. Finally, the discussion will conclude with an examination of the Civil Union Act[14] to ascertain if woman-to-woman marriages are recognised by this statute.

2 HISTORY OF THE LOVEDU COMMUNITY

2 1 Background

According to the ethnographic classification of the main Black South African group as identified by Hammond-Tooke,[15] the Lovedu are part of the Sotho group. According to him, the Sotho group is divided into three sub-groups, namely the Western, Northern, and Southern Sothos. The Lovedu along with the Pedi and Kgaga community, form part of the North Sotho. Currently, this community is located in Nkowankowa in the Limpopo Province in South Africa. The Lovedu community is significantly smaller than the Xhosas, Zulus and Sothos, but nonetheless form part of South Africa's rich diverse culture. What sets this community apart is the conclusion of "marriages" which include a woman taking on a wife. From the outset, it is emphasised that these marriages lack any sexual overtures[16] and can be seen as simply constituting a *peculiar* cultural practice.[17]

The reign of King Mugodo who ruled the Lovedu community from sometime after 1750 ended around 1800.[18] The reign was marred by violence and suspicion

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8 Although not defined as such in the Marriages Act 2 of 1961.

9 This is no longer the case as the Civil Union Act 17 of 2006 has given recognition to same sex marriages.

10 *Seedat's Executors v The Master (Natal)* 1917 AD 309.

11 Maithufi "The Recognition of Customary Marriages Act 1998: A Commentary" 2000 *THRHR* 509.

12 Act 76 of 1963.

13 Act 120 of 1998.

14 Act 17 of 2006.

15 Hammond-Tooke *The Roots of Black South Africa* (1996) 21.

16 Krige & Krige *The realm of the Rain Queen: A study of the pattern of Lovedu society* (1943) 290.

17 My emphasis.

18 McGregor "Who killed the Rain Queen?" in McGregor & Nuttall *At Risk: Writing on and over the edge of South Africa* (2007) 23.

as evidenced by the "wholesome executions" of all his perceived enemies.[19] At the end of the civil strife and before the death of the King, King Mugodo performed a sacred dance during which he prophesied about various things including that the "country would be ruled by a frontal skirt,[20] meaning that from thereon, a woman would lead the Lovedu Community. His daughter and his wife Mamujaji (later to become the first famed Rain Queen, Mujaji I) embraced this divine vision.[21] The daughter thereafter succeeded her father as the ruler.

In the Lovedu custom, the ancestors choose the ruler of the people. Traditionally, after the death of the Queen (which is at her own hands),[22] the royal house would queue outside the sacred hut and the door would supernaturally open for the individual chosen by the ancestors to succeed the queen. According to the Lovedu tradition, the heir to the throne may not have any children before she ascends to the throne and may not marry.[23] The challenge over the years has been that by the time the queen ascends to the throne, she is past her childbearing years, or alternatively, as was the case with the Queen Mujaji II, the queen may be barren. To ensure that there is an heir to the throne, the queen took on wives who would bear the heir to the throne. The queen, as the "husband", appoints a progenitor who will have liaisons with her "wife" and father the children. The appointed genitor has no claims over the children and they (the children) bear the name of the female husband (the queen).[24]

Now that the existence of the Lovedu community has been demonstrated, the way that woman-to-woman marriages came about will be discussed before examining some of the possible fundamental shortcomings of the Recognition of Customary Marriages Act.[25]

2 2 Lovedu Marriages

In the Lovedu community marriage is not restricted to a marriage between a man and a woman. A woman may also take on a wife[26] and both types of marriages, heterosexual and gynaegamous, are potentially polygamous in nature. The applicability of the Customary Marriages Act to customary heterosexual marriages is not an issue, thus it is not discussed here.

There are two ways in which a Lovedu woman may take on a wife, and these are as follows: First, a Lovedu woman who so desires, may marry a woman and pay bride wealth. This practice, as has already been established above, began during the reign of Queen Mujaji II. Other women who also needed an heir[27] either because they were barren, never married or who were confronted by the death of all their children or for other reasons needed someone to care for them when they got older, soon embraced this practice and also married wives. This practice was noted mostly among the women of status as only they could afford

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19 Krige & Krige *The realm of the Rain Queen* 15.
20 Krige & Krige *The realm of the Rain Queen* 16.
21 Krige & Krige *The realm of the Rain Queen* 18.
22 Krige & Krige *The realm of the Rain Queen* 165.
23 Krige & Krige *The realm of the Rain Queen* 171.
24 McGregor *At Risk* 25.
25 Act 120 of 1998.
26 Morgan & Wieringa *Tommy Boys* 300.
27 *Ibid.*

the bride wealth. During the subsistence of the marriage, the "wife" performs all wifely duties (cooking, cleaning and tending to the farm etc.) and her "female husband"[28] provides for the wife like any male husband would. Culturally, the female husband does not address her wife as "her wife" but refers to her as daughter-in-law.[29] Krige states that the reasoning behind this form of identification is indicative of the absence of sexual overtones.[30] If the sole purpose of taking on a wife was to ensure that the female husband has someone to care for her during old age, the female husband could insist that the wife remain childless.[31] However, if there is a need for an heir, the female husband would, upon consultation with her "wife", appoint a progenitor for purposes of conceiving a child. As a rule, the progenitor receives no recognition or rights whatsoever regarding the child(ren), and his name is only remembered to ensure that incest is not committed should that man have other children.

The second way in which a woman may take on a wife is as a result of the relational links created by another marriage. Marriage in this culture, like in many African cultures, affects not just the two individuals who marry but the entire families of the parties concerned. Through marriage, there is a creation of "perpetual alliances" between people as the parents are involved in the decision of whom their child will marry. In the Lovedu culture, cross-cousin marriages are practised, prevalent, and encouraged. A good marriage is one where the man marries his mother's brother's daughter and a woman marries her father's sister's son. The man will not marry any ordinary cousin, but will marry any of his cousins borne to the man who used his mother's cattle to obtain a wife for himself.[32] Thus, a uterine brother and sister become cattle-linked if the herd of cattle paid for the sister at her marriage is utilised by her brother for him (the brother) to obtain a wife.[33] Once the brother is married and has a daughter, in terms of culture, he should give his daughter's hand in marriage to the sister's son (the sister whose cattle he, the brother, used to obtain his wife). In the event that the uterine sister has no son to marry her niece, she (the uterine sister) will marry the girl on behalf of the supposed son.[34] Like any "wife", the niece will perform all wifely duties and live with her "husband" for her entire life. Social anthropologists contend that a niece married in such a manner (to her aunt) is performing her "obligation towards the cattle linked aunt".[35]

3 SOUTH AFRICA'S LEGAL POSITION ON SAME SEX MARRIAGES

3 1 Legislation Recognising Same sex Relations

A number of statutes in South Africa presently afford limited rights to persons in a life partnership, including same sex life-partnerships. A gynaegamous relationship falls within the ambit of the definition of a life partnership as defined by

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28 Oboler "Is the Female Husband a Man? Woman/woman Marriage among the Nandi of Kenya" 1980 *Ethnology* 75 defines a female husband as a "woman who pays bride wealth for and thus marries a woman". In this article, I have adopted Oboler's term of female husband.

29 Krige & Krige *The realm of the Rain Queen* 290.

30 Krige *Woman Marriages, with special reference to the Lovedu Africa* (1974) 36.

31 Krige & Krige *The realm of the Rain Queen* 36.

32 Krige & Krige *The realm of the Rain Queen* 142.

33 *Ibid.*

34 Krige & Krige *The realm of the Rain Queen* 143.

35 *Ibid.*

Heaton and Cronje in *South African Family Law*[36] as this union, at best or at worst, has most of the characteristics of a marriage. Over the years, various legislative provisions recognised and protected persons in a valid life partnership which recognition would also possibly apply to the Lovedu marriages as illustrated by the provisions mentioned below. Some of these statutes are the following:

The Insolvency Act[37] was among the first legislative measures to extend the definition of spouse to include persons married in accordance to any law or custom and or a partner in a life partnership. Section 1(c) of the Compensation for Occupational Injuries and Disease Act[38] takes cognisance of a widow or widower married to the employee by indigenous law, customary law as well as any person with whom the employee was in the opinion of the Commissioner as the time of the accident, living as husband and wife. The Special Pensions Act[39] has also extended the definition of "spouse" to include a partner in a marriage relationship. This marriage relationship is any "continuous cohabitation in a homosexual of heterosexual partnership for a period of at least 5 years".[40]

In *Langemaat v Minister of Safety and Security and Others,*[41] it was held that the stability and permanence of a same sex union creates a duty of support between the spouses. As a result of this case, the Medical Schemes Act[42] extended its definition of a dependent to include the "spouse or partner, dependent children or other members of the members' immediate family in respect of whom the member is liable for family care and support".[43] The Domestic Violence Act[44] (s 1(vi)) and the Maintenance Act[45] (s 2(1)) also apply to same sex partnerships and heterosexual relations.

An argument can be made that these developments are indicative of the lawmaker's acceptance of the different forms of family systems. However, while the Lovedu wife may enjoy the basic protection offered by these Acts, this would mean relegating the union to just a "partnership" and not a valid marriage. The other danger posed by referring to it as a life partnership is that "most South African sources limit life partnerships to just between two persons".[46] This means that these marriages cannot be covered as life partnerships and also are not protected in terms of the Recognition of Customary Marriages Act. This may be contrary to the constitutional provision for equality of all and human dignity.[47]

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36 Heaton & Cronje *South African Family Law* 2 ed (2004) 277.
37 Act 24 of 1969, s 21(13).
38 Act 130 of 1993.
39 Act 69 of 1996.
40 Special Pensions Act, s 31.
41 1998 3 SA 259 (T).
42 Act 131 of 1998.
43 Section 1.
44 Act 116 of 1998.
45 Act 99 of 1998.
46 Heaton & Cronje 227.
47 Constitution of the Republic of South Africa, 1996, ss 9 & 10.

Section 9 of the Constitution provides for the equality of all and s 10 provides for the right to human dignity. If the Constitution allows for diversity, the Lovedu marriages should be viewed as a valid marriage. After all, as stated in *Langemaat*:

> "a plural society requires the law not merely to tolerate but rather to recognise and support diversity in the family formation. In other words, to authenticate a range of family forms".[48]

3 2 Recognition of Customary Marriages Act 120 of 1998 and the Protection of the Lovedu Wives

At the outset, it must be stated that the Recognition of Customary Marriages Act was a great step towards the acceptance of the indigenous people's marriage practices. However, the Lovedu woman-to-woman marriage practices may have been overlooked by legislators. The writer will argue how the wording of the Recognition of Customary Marriages Act does not, in its present form, cater for the Lovedu customary marriages practices.

The purpose of the Customary Marriages Act is to:

(a) make provisions for the recognition customary marriages;
(b) specify the requirements for a valid customary marriage;
(c) regulate the registration of customary marriages;
(d) provide for the equal status and capacity of spouses in customary marriages;
(e) regulate the proprietary consequences of customary marriages and the capacity of spouses within such marriages; and
(f) regulate the dissolution of customary marriages.[49]

As already demonstrated in the introduction, the Recognition of Customary Marriages Act clearly recognises polygamous marriages insofar as they relate to polygyny as commonly or terminologically understood,[50] that is the right of a husband to have more than one wife at a time.[51] Bekker[52] identifies the characteristics of a valid customary marriage to be "polygynous, that is one man can enter into a conjugal relationship with more than one woman at the same time." De Waal also states that polygyny is permitted by the Customary Marriages Act as long as the "*husband* has a written contract approved by the court which will regulate the matrimonial property system of his marriages".[53] And, according to Nkosi,[54] s 2(3) and 4 of the Customary Marriages Act refers to the right of a husband to have more than one wife. She points out that polyandry (the right of a wife to have more than one husband at a time) is neither prohibited nor allowed in the Customary Marriages Act. This highlights that while polygamy recognises the right of an individual to have more than one spouse at a time, the Customary Marriages Act restricts itself to only polygynous marriages.

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48 *Langemaat* 312.
49 Recognition of Customary Marriages Act, s 1.
50 Jansen 33.
51 Robinson *et al South African Family Law* 17; Nkosi; "Indigenous African marriages and same sex partnerships: conflicts and controversies" 2007 *International Journal of Africa Renaissance Studies* 211.
52 Bekker "The requirements for validity of customary marriages" 2001 *South African Journal of Ethnology* 42.
53 Currie & De Waal *The Bill of Rights Handbook* 5 ed (2005) 356.
54 Nkosi 2007 *International Journal of Africa Renaissance Studies* 211.

Notwithstanding that same sex practices have existed in the African culture for many years, marriage occurs between parties of the opposite sex under customary law.[55] For years, many African communities have denied the existence of homosexual or same sex relationships. In fact, as Bekker points out, "the marriage of a man to a man is inconceivable" in customary African law.[56] The reference to same sex relationships as being taboo[57] also indicates that the most widely known and perhaps accepted customary marriages have always been heterosexual in nature. Therefore, to aver the Customary Marriages Act would recognise a customary practise that is largely unknown and not accepted by many cultures is an erroneous conclusion.

In Bekker's list of the essential elements for a valid customary marriage, he includes the consent of the *bridegroom,*[58] while Olivier[59] in his list of these essential elements identifies the "consent of the father of the *man* (under certain circumstances)". Other academics who have commented on the Act all appear to interpret the Act as recognising polygyny. For instance, Maithufi[60] in his commentary on the Recognition of Customary Marriages Act consistently refers to a "man and a woman between whom a customary marriage exists"[61] indicating the general understanding of the parties involved in these marriages, that is, a heterosexual marriage. In the Recognition of Customary Marriages Act's guidelines (which provide for a change in a marriage system), s 10(1) states that "a man and a woman between whom a customary marriage . . .". Moreover, s 7(4)(b) of the Act provides for a *husband* in a polygamous marriage to join all other interested parties should *he* want to amend the proprietary consequences of the customary union. Furthermore, the husband that wishes to enter into another customary marriage must make an application to the court to approve a written contract which will regulate the future matrimonial property systems of "his" marriages. Society has always emphasised "gender assumptions regarding sex role"[62] thus a term such as "husband" or "bridegroom" refers to a person of the male sex which inadvertently excludes a female husband. Terminologically, in every instance where the Act refers to a husband, it refers strictly to a "he" meaning a man unless one contends that a "female husband" acquires a different gender by virtue of marrying a woman.

Prior to the promulgation of the Customary Marriages Act, the principles governing marriage in terms of South African common law did not recognise polygyny, polyandry, polygamy or same sex marriages. Maithufi states that a:

> "a valid customary marriage envisaged by this act [the Recognition of Customary Marriages Act] is one that does not conflict with principles governing marriages in terms of South African common law and furthermore complies with the requirements laid down by customary law."[63]

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55 Nkosi 2007 *International Journal of Africa Renaissance Studies* 213.

56 Bekker 2001 *South African Journal of Ethnology* 46.

57 Hutchinson "My gay problem, your black problem" in Constance-Simms *The greatest taboo: Homosexuality in black communities* (2001) 4.

58 Bekker *Seymour's Customary Law in Southern Africa* (1989) 165.

59 Olivier *Die Privaatreg van die Suid Afrikaanse Bantoetaalsprekendes* (1989) 44.

60 Maithufi 2000 *THRHR* 516.

61 *Ibid.*

62 Njambi & O'Brien. "Revisiting Woman-Woman Marriage: Notes on Gikuyu Women" 2000 *National Woman's Studies Association Journal* 13.

63 Maithufi "Do we have a new type of voidable marriage" 1992 *THRHR* 628.

At the promulgation of the Recognition of Customary Marriages Act, same sex marriages were regarded as being in conflict with the South African principles governing marriages. This view ceased only in 2006 with the promulgation of the Civil Union Act. In this sense, to infer that same sex marriages which were in conflict with common law principles on marriages were considered as "valid marriages" in terms of the Recognition of Customary Marriages Act appears weak.

Oomen[64] has argued that a Lovedu gynaegamous marriage will be viewed as a valid marriage in terms of the Recognition of Customary Marriages Act. Oomen correctly argues that these marriages are recognised primarily due to the definition of a customary marriage.[65]She avers that it is this definition that has empowered the legislator to determine what constitutes a customary marriage.[66] Oomen's view can be criticised on various grounds. First, the non-reference to gynaegamy during the discussions held prior to the enactment of the Act[67] is indicative of the almost non-recognition of these marriages. In fact, the SALC's Discussion Paper is also void of any reference to polyandry but often refers to polygyny as commonly interpreted. To aver that by necessary implication the Recognition of Customary Marriages Act recognises woman-to-woman marriages, is tenuous at best. Robinson *et al* argues that the Act allows for polygynous marriages concluded in terms of customary law and therefore, any marriages that fail to comply with the Recognition of Customary Marriages Act are void. In his book, Robinson *et al* states that any other marriage that fails to comply with the Act is void.[68] It is argued here that this view is correct.

Bekker provides that woman-to-woman marriages are so rare "that one is tempted to say that for practical purposes they may be left out of account".[69] In fact, save for the Lovedu community, the writer could not locate any other South African community that still engages in gynaegamy. Even among this community it is rumoured that such marriages are on the decline[70]. Moreover, the scarcity of literature on woman-to-woman marriages indicates that researchers have also not focussed much on this practice. Thus those claiming that legislators (who possibly might not have known woman-to-woman marriages) intended or recognised this custom in the legislation must be criticised. Indeed, the wording in the statute does not support this claim. Lastly, the assumption that because the Recognition of Customary Marriages Act acknowledges polygamous marriages it therefore takes cognisance of woman-to-woman marriages ought not to be sustained given that polygyny, as commonly defined, permits a man to have many wives as opposed to a woman having many wives.

3 3 Civil Union Act 17 of 2006

As already stated, the pre-2006 common law definition of marriage limited marriage to one between a man and a woman to the exclusion of all others. Over

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64 Oomen 2000 *THRHR* 278.

65 Recognition of Customary Marriages Act, s 1.

66 Oomen 2000 *THRHR* 278.

67 South African Law Commission Project 90 *The Harmonisation of the common law and the indigenous law Discussion Paper 74 Customary Marriages* (1997).

68 Robinson *et al South African Family Law* 45.

69 Bekker *Seymour's Customary Law* 45.

70 Cadigan "Woman-to-woman marriages: Practices and Benefits in Sub-Saharan Africa" 1998 *Journal of Comparative Family Studies* 35.

the years, questions arose regarding the failure by the legislators to allow "partners in same sex relationships to marry".[71] At issue was whether this lack of recognition of same sex marriages unfairly discriminated against same sex partnerships. Political, social and religious groups argued against the legal recognition of same sex marriages as it threatened the marriage institution and the growth of society (as people of same sex could not conceive children).[72] In the *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs*,[73] the court gave the legislators a choice to either read in the word "or spouse" after the words "or husband" in s 30(1) of the Marriages Act or to enact legislation recognising same sex unions. The result of this court order was the enactment of the Civil Union Act which came into force on the 30th November 2006. The fact that the Civil Union Act recognises same sex marriages should not be taken to mean that woman-to-woman marriages are accommodated. First, if we understand the term homosexuality to mean same sex attraction, then one cannot reasonably submit that Lovedu marriages fall under this statute as they are a cultural marriage not based on same sex attraction (or orientation) at all, even if between persons of the same sex. In fact, research has shown that the woman-to-woman marriages among the Lovedu and other communities in Africa are void of sexual intimacy between the spouses.[74] Therefore, to recognise woman-to-woman marriages under this Act could potentially be offensive as it is tantamount to inferring lesbianism in the marriages.

Secondly, s 1 of the Civil Union Act makes it abundantly clear that any union solemnised in accordance with this Act shall be between "two persons" and to the "exclusion of all others while it lasts". In addition, the requirements for the solemnisation and registration of a civil union states that a spouse or partner can only be in one such marriage. As already argued above, the woman-to-woman marriages are potentially polygamous thus permitting the "female husband" to have as many wives as she desires. Should a "female husband" whose marriage is registered in terms of this statute attempt to take on another wife as customarily accepted she will be guilty of bigamy which is a criminal offence.[75] Moreover, in the event of a bigamous marriage, only the first marriage will be deemed as valid.[76] Thus the second wife is not recognised as a valid spouse in terms of law. Another challenge that will arise with trying to recognise the gynaegamous marriages under this Act is the aspect of "to the exclusion of all others". Although the marriage is between the "female husband" and her wife/wives, a male consort is involved for purposes of procreation. Is his involvement in this marriage viewed as a breach of the requirement of the "to the exclusion of all others" or is the fact that he is needed for purposes of having children mean that he is not viewed as a third party?

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71 Nkosi 2007 *International Journal of Africa Renaissance Studies* 201.

72 Williams "I do or we won't: Legalizing same sex marriages in South Africa" 2004 *SAJHR* 44.

73 2006 1 SA 524 (CC).

74 Krige *Woman Marriages* 144. Krige further argues that the reasoning behind the 'female husband' referring to her wife as 'daughter in law' is a further indication of the absence of sexual overtones between the married couple. Cadigan 1998 *Journal of Comparative Family Studies* 30 writes that the women in gynaegamous marriages are adamant about the absence of sexual and inferences of such conduct is "shocking and offensive".

75 Milton *South African Criminal Law and Procedure* 2 ed (1996) 262.

76 Burchell *Principles of Criminal Law* 3 ed (1997) 769.

4 POSSIBLE SOLUTIONS?

According to the Customary Marriages Act, customary law refers to, "customs and usages traditionally observed among the indigenous African peoples of South Africa which forms part of the culture of those people."[77] The Recognition of Customary Marriages Act proceeds to define a customary marriage as one concluded in accordance with customary law.[78] From background of the Lovedu customary practice described above, it is clear that the practice of woman-to-woman marriages is a long-standing custom that is traditionally observed by the Lovedu and forms part of their culture. Furthermore, the Lovedu marriage is concluded and celebrated in terms of their culture (negotiations, bride wealth payment and cultural rites performed), thereby authenticating the marriage in terms of the Recognition of Customary Marriages Act as set out in s 1(iii).[79] The woman-to-woman marriages are customary practice, and s 3 of the Recognition of Customary Marriages Act sets out the requirements necessary for a customary marriage entered into after the commencement of the Act to be recognised as valid.[80] These requirements are all complied with in a Lovedu marriage, therefore, we look to the Recognition of Customary Marriages Act. This definitional anomaly could be remedied by reading in the words "or woman" and "or her" into all areas wherein the Act refers to "a man" and "or his".

5 CONCLUSION

Three different statutes regulate marriages in South Africa; these are the Marriage Act which regulates monogamous heterosexual marriages; the Civil Union Act which regulates monogamous same sex marriages and the Recognition of Customary Marriages Act that regulates polygynous heterosexual customary marriages. Despite the fact that woman-to-woman marriages among the Lovedu have been practiced for many decades, they are not regulated by any of the three statutes at present.

The woman-to-woman marriage system does not conform to either the stereotypical heterosexual norm or the homosexual norm but such marriage is still worthy of protection. As de Vos eloquently put it:

> "There are many different kinds of intimate relations that are not sufficiently protected or regulated by the law because they do not conform to the idealised heterosexual norm . . . The extension of legal rights and benefits to only those couples in intimate relationships that mirror the idealised heterosexual marriage (or homosexual) will have the potential of marginalising other often vulnerable individuals' in the kinds of non-traditional relationships."[81]

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77 Recognition of Customary Marriages Act, s 1(ii).

78 Recognition of Customary Marriages Act, s 1(iii).

79 A Lovedu woman seeking a wife identifies a young lady that she is interested in. Once bride wealth negotiations are entered into and concluded, the amount paid and all customary rites performed, the parties are married in terms of the culture. The issue of consummation of a marriage is not referred to here as it is not a requirement in term of law, neither does it affect the validity of a customary marriage. Even if consummation was key, one would have to accept that lack of sexual relations between the spouse parties should not carry much weight especially when parties and their society view them as married.

80 Both parties must be above the age of 18, must consent to be married to each other under customary law (s 3(1) a (i & ii) and the marriage must be negotiated and entered into or celebrated in accordance with customary law (s 3(1) b).

81 De Vos "Same sex sexual desire and the re-imagining of the South African family" 2004 *SAJHR* 182.

Given that ss 30 and 31 of the Constitution accords everyone the right to participate in and maintain the cultural, religious, or linguistic life of their choice and recognises the freedom of religion, thought, belief and conscience,[82] these Lovedu marriages concluded under a tradition or system of personal and family law are worthy of recognition. After all, the Constitution states in s 15(3) that nothing prevents the legislature from "recognising marriage concluded under any tradition or system of personal and family law which is what the Lovedu community does".[83]

82 Section 15(1) and 15(3)(a) of the Constitution.

83 Himonga & Bosch "The application of African Customary law under the condition of South Africa: Problems solved or just beginning?" 2000 *SALJ* 313.

COMMENT

TRANSFORMATION OF CUSTOMARY LAW BY TRADITIONAL LEADERS

1 INTRODUCTION

Recently the superior courts have acknowledged in at least three judgments the fact that "indigenous law (customary law) is a dynamic system of law which is continually evolving to meet the changing circumstances of the community in which it operates. It is not a fixed body of classified rules".[1]

In *Alexkor Ltd v The Richtersveld Community*[2] the same court expressed substantially the same view.[3] Despite these important judicial pronouncements regarding the character of indigenous law, it seems to the writer that the legislative arm of government either does not agree with the above assessment or is unhappy about the pace of change. This is apparent from the government's directive in s 2(3) of the Traditional Leadership and Governance Framework Act[4] which sets out that:

> "a traditional community must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by–
> (a) preventing unfair discrimination;
> (b) promoting equality; and
> (c) seeking to progressively advance gender representation in the succession to traditional leadership positions".

In the Traditional Leadership and Governance Framework Amendment Bill published on 3 June 2008,[5] the mandate to transform and adapt customary law has been assigned to a kingship in the new s 2A in substantially the same language. Bekker and Boonzaaier[6] see the directive in s 2(3) of the Framework legislation as an evolutionary process not as necessitating a conferment of legislative powers on traditional authorities to change the law.

In the Traditional Courts Bill published on 27 March 2008,[7] the issue of transformation is taken a step further in ss 3(1) (a) and 3(2)(a), (b), (c) and (d). Section 3 deals with the guiding principles to be taken into account by a

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1 Ngcobo J in *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA* 2005 1 BCLR 1 (CC) para 153.
2 2004 (5) SA 460 (CC).
3 See para 53. See also Du Plessis J in *Mabena v Letsoalo* 1998 2 SA 1068 (T) 1074.
4 Act 41 of 2003 (hereafter referred to as the Framework Legislation).
5 *Government Gazette* No. 31121 (hereafter referred to as the Framework Amendment Bill).
6 Bekker and Boonzaaier "Succession of Women to traditional leadership: is the judgment in *Shilubana v Nwamitwa* based on sound legal principles?" 2008 *CILSA* 449 459.
7 *Government Gazette* No. 30902 (hereafter referred to as the Traditional Courts Bill).

traditional court in the day to day administration of justice. In s 3(1)(a) the Bill declares–

> "in the application of this Act, the following principles should apply:
> (a) The need to align the traditional justice system with the Constitution in order for the said system to embrace the values enshrined in the Constitution, including –
> (i) the right to human dignity;
> (ii) the achievement of equality and the advancement of human rights and freedoms; and
> (iii) non racialism and non sexism".

The Bill goes further and incorporates the important provisions which have been extracted almost verbatim from the Bill of Rights of the new Constitution[8] and some from the Promotion of Equality and Prevention of Unfair Discrimination Act.[9] For example, s 3(2) of the Bill provides that:

> "in the application of this Act, the following principles should be recognised and taken into account:
> (a) the constitutional imperative that courts, tribunals or forums,
> (b) when, interpreting the Bill of Rights must promote the values that underlie an open and democratic society, based on human dignity, equality and freedoms;
> (c) interpreting any legislation, and when developing the common law or customary law, must promote the spirit, purport and objects of the Bill of Rights;
> (d) the existence of systemic unfair discrimination and inequalities, particularly in respect of gender,
> (e) the need to promote and preserve the African values of justice which promote social cohesion, reconciliation and restorative justice."

In order to give effect to these aspirations, the envisaged traditional courts (composed of kings, traditional leaders and members of the royal families) will be given some form of training by the Department of Justice and Constitutional Development. In terms of s 4(1), the envisaged training will take place after the presiding officers (kings) have been designated as such. In terms of s 21(1)(f) there will be a register of all traditional leaders who have completed the prescribed training programme. It is neither clear whether the training will be a precondition for designation nor whether the standard and duration of training will be effective to equip traditional leaders with the requisite skills.[10]

2 PURPOSE OF THIS NOTE

The purpose of this note is to examine the implications of s 2(3) of the Framework Legislation read with the new s 2A of the Framework Amendment Bill with emphasis on the meaning of the terms "adaptation and transformation". The note examines the question whether it is realistic for Parliament to expect traditional leaders to transform the institution of traditional leadership in the same way as the Constitutional Court did in the *Bhe* case.

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

9 Act 4 of 2000.

10 On the role of traditional authorities see further Koyana "Chieftainship and headmanship are not hereditary" 2002 *Speculum Juris* 144 and Bekker "Traditional Authorities as Organs of State" 2003–2004 *Speculum Juris* 121.

2 1 The meaning of transformation and historical perspective

Section 39(2) of the Constitution deals with the approach to be adopted by a court in dealing with the development of the common law or customary law so as to bring it in harmony with the spirit, purport, and the object of the Bill of Rights. It has always been the function of the superior courts to modify, adapt or adjust the law to fall in line with modern conditions. See *Blower v Van Noorden*[11] where Innes CJ made the following important remarks:

> "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision and when they are so important or so radical that they should be left to the legislature."

From early on after the establishment of the special courts which were created for the administration of customary law in 1927 in terms of the Black Administration Act[12], the development of customary was the responsibility of those courts. These special courts endeavoured to ensure that a rule of customary law was consistent or compatible with the principles of public policy or natural justice. See, for example, *Silinga v Nowaka,*[13] *Motini v Selepi*[14] and *Zulu v Mdhletshe*[15] to mention just a few. In the first case the Native Appeal Court held that when customary law was in conflict with justice and equity and was in conflict with the provisions of the Proclamations for the governance of the Native territories, it had to give way. The courts of chiefs and headmen were not required to defer to the principles of public policy as they were expected to apply the law as understood by the chief-in-council. There was no need to adjust the law as the law "grew" with them so to speak.

In the *Bhe* case, Ngcobo J[16] acknowledged this when he referred the following statement of the law made in *Alexkor Ltd*:[17]

> "In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that is known to the community, practised and passed on from generation to generation."

There are numerous examples of the changes that have come about with the changing ways of life and which the traditional courts take into account in resolving disputes in the rural communities. For example, the law relating to the payment of a fine in the settlement of civil wrongs was changed with the introduction of money with the result that instead of paying damages in livestock, a defendant would tender the alternative value of the livestock in money.[18]

2 2 Transformation

The definition section of the Framework Legislation does not define the terms "adaptation and transformation". However, the explanation of these terms given

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11 1909 TS 890 905.
12 Act 38 of 1927.
13 NAC 301 (1919).
14 (1941 NAC (T&N) 106.
15 (1952) NAC 203 (Nongoma).
16 *Bhe* para 153.
17 *Alexkor Ltd* para 53.
18 See generally Bekker (ed) *Seymour's Customary in Southern Africa* 5 ed (1989) 345. See also Bekker and Boonzaaier 2008 *CILSA* 456 and 461.

by Allott[19] is instructive. According to Allott, legal revolution (which in the present writer's submission is the equivalent of transformation) takes place when the existing basis and character of a legal system is destroyed. The author gives as examples of legal revolution: "the supplanting of Tsarist law in Russia by Soviet law; the Napoleonic revolution in France; the introduction of 'socialist' legal systems in some of the African States".

It seems to the writer that what is described above is what is intended to be achieved by the Framework Legislation and the two bills noted above. In the Framework legislation transformation of "customary law and customs" is the responsibility of a traditional community through its traditional council. In the Framework Amendment Bill this task is assigned to a kingship, presumably by reason of seniority.

In the recent judgment of the Constitutional Court in *Shilubana and Others v Nwamitwa*,[20] there was an indication that the royal family recommended a change in the law relating to succession to the position of traditional leadership to the Tribal Council. The recommended change was carried out even though the meetings at which the changes were allegedly discussed were poorly attended.[21] Although this was a radical change, the Constitutional Court treated it as an instance of the development of customary law by the traditional authority.[22]

In the Traditional Courts Bill transformation of "customary law and customs" will be the responsibility of the traditional court. This means that, when the Bill becomes law, traditional courts will be competent to develop customary law or common law, a function that is currently exercised by the superior courts. The present writer opines that Parliament has now delegated to a traditional council a function which ought to be exercised by the elected members of Parliament after public hearings on the envisaged change.

2 3 Adaptation of the law

Allott[23] contrasts legal revolution with law reform. The latter entails a "planned activity" which includes updating the law in the sense of modernisation. In legal parlance modernisation, modification or adjustment of the law are used synonymously to refer to "those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."[24] In the new constitutional dispensation courts of law are expected to develop the common law or customary law in order to be in line with the spirit, purport and objects of s 39(2) of the Constitution.[25]

During the pre-colonial period the chief-in-council could bring about changes in the law. Currently substantial changes such as the alteration of the rules of

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19 Allot "Reforming the law in Africa, aims, difficulties and techniques" in Sanders (ed) *Southern Africa in Need of Law Reform* (1981) 229.

20 2009 2 SA 66 (CC).

21 See the figures of the people who attended the meetings at 81 of the judgment in note 43.

22 *Shilubana* paras 67 and 71.

23 Allott *Southern Africa* 231.

24 Kentridge AJ in *Du Plessis and Others v De Klerk and Another* 1996 5 BCLR 658 quoting with approval Iacobucci J in the Canadian Court of *R v Salituro* (1992) 8 CRR (2d) 173. See also Chaskalson P *In Re Ex Parte Application of President of RSA* 2000 3 BCLR 241 (CC).

25 In addition to the cases cited above, see also *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC).

intestate succession would require the sanction of the traditional community at an *imbizo* (a large gathering of the tribe). One is, however, aware of instances where some powerful chiefs could bring about changes in the law without seeking the approval of the traditional community. For example, in the leading case of *Sigcau v Sigcau*[26] it appears that Nyauza, the grandfather of Faku, established the custom whereby Pondo chiefs nominated their great wives. See also the example given by Van Tromp[27] where King Sarili is said to have appointed his hunch-backed daughter, Nongqolosa, a substantive chieftainess and a ruler over a portion of the tribe between 1858 and 1865. He gave her *amaphakathi* (councillors) and instructed that she should be looked upon as 'indoda' (a male).[28]

Koyana[29] quotes with approval the Native Appeal Court judgment in *Mkanyi v Masoka*[30] where the court accepted a change in the law relating to the deduction of a beast upon the dissolution of a customary marriage in respect to wedding outfit "in addition to the beast for the service of the women because that position was in line with a decision taken at a meeting of chiefs and headmen at Port St Johns in or about 1946."

2 4 Development of customary law by the traditional authorities

Ever since the enactment of the Framework legislation, only the chiefs of the Valoyi traditional community in the Limpopo Province have taken a bold step to transform their law relating to succession to a traditional leadership position. They have done so by adapting their custom to extend the right of succession to the eldest child of a chief regardless of gender.

The recommendation of a chief's daughter who was married to another family was successfully challenged by her cousin in the High Court in *Nwamitwa v Phillia and others*[31] and the Supreme Court of Appeal in *Shilubana and Others v Nwamitwa,*[32]but the Constitutional court upheld the decision of the Royal Family and the Tribal Authority in *Shilubana and Others v Nwamitwa.*[33]

The Constitutional Court commended the Valoyi community's action in adapting their customary law. At para 76 of the judgment, Van der Westhuizen J states:

> "the importance of respecting community-led change has to be balanced with the value of legal certainty and the need to protect rights. In Bhe these considerations led this court to install interim measures pending legislation in order to protect vulnerable parties affected by intestate succession."

On the issue of development of customary law by the courts as distinct from its development by a customary community, Van Der Westhuizen J observed at para 48 that:

> "a court engaged in the adjudication of a customary-law matter must remain mindful of its obligation under s 39 (2) of the Constitution to promote the spirit,

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26 1944 AD 67.
27 Van Tromp *Xhosa law of Persons* (1947).
28 Kerr *The Customary law of Immovable Property and of Succession* (1990) 25–26 gives further examples of changes that have been made to customary law at the instance of African kings.
29 Koyana *Customary Law in a Changing Society* (1980) 96–97.
30 INAC (1949 (S)) 145.
31 2005 3 SA 536 (T).
32 2007 2 SA 432 (SCA).
33 2009 2 SA 66 (CC).

> purport and objects of the Bill of Rights. This court held in *Carmichele v Minister of Safety and Security* that the section imposes an obligation on courts to consider whether there is a need to develop the common law to bring it into line with the Constitution, and to develop it if so [considered]. The same is true of customary law."

The appointment of Mrs Shilubana was supported by the National Movement of Rural Women but was opposed by Contralesa. It remains to be seen whether other traditional communities in South Africa will follow the example of the Valoyi traditional community by responding to the challenges of s 2(3) of the Framework legislation.

Mmusinyane[34] is of the view that the judgment "must be seen as a classic example of the application of customary law by the traditional authorities that is in line with the Constitution as well as the principles of public policy and natural justice." The author also makes a valuable point that in developing customary law traditional authorities should follow a consultative process, taking into account both the views of the majority and the minority. On the contrary Bekker and Boozaaier[35] question whether the judgment of the Constitutional Court was based on sound legal principles. They express themselves as follows in this regard: "The essence of our argument is that the choice is to be made by the followers of customary law not a learned peroration."

Commenting on the alleged amendment of the law by the Royal Family of the Valoyi tribe, the authors state: "We do not know of a custom or rule in terms of which a royal family could meet and situ-situ make a law. After a reference to the traditional council as a whole, a proposed law would have to be referred to a community gathering or pitso for confirmation."[36] It seems to the writer that Kerr[37] raises the same concern as the above authors when he asked: "What did the Valoyi traditional authorities lawfully do to change their customary law?"

3 CONCLUSION

The following two conclusions can be drawn from the reaction of Contralesa to the appointment of Mrs Shilubana as a substantive traditional leader, coupled with the fact that no traditional community has as yet emulated the initiative of the Valoyi tribe. First, it would seem to the writer that transformation of customary law on this contentious principle of succession will take time to materialise. This may be similar for the adaptation or transformation of other customs yet to be challenged. Secondly, it also seems as if kings and the traditional courts are called upon to dismantle the traditional leadership and thereby destroy the basis of the social cohesion that Parliament seeks to achieve.

The Traditional Courts Bill in s 3 (dealing with "Guiding Principles" in s (1)(a)) refers to the need to "align the traditional justice system with the Constitution in order for the said system to embrace the values enshrined in the Constitution" and in s 3(2)(c) the Bill refers to "the need to promote and preserve African social cohesion". The obvious question raised by these aspirational

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34 Mmusinyane "The Role of Traditional Authorities in Developing Customary Laws in accordance with the Constitution: *Shilubana and others v Nwamitwa* 2008 (9) BCLR 914 (CC)" 2009 *PER/PELJ* 136 147.

35 Bekker and Boonzaaier 2008 *CILSA* 459.

36 *Ibid*. The authors rely on Schapera *A Handbook of Tswana Law and Customs* (1959) 70.

37 Kerr "The Constitution and Customary law" 2009 *SALJ* 39 47.

provisions is whether it is realistic to expect non-legally trained court officials to give effect to these constitutional imperatives. Allott[38] makes the following observation:

> "Governmental law making has most chance of success when it has the consensus of the people behind it, when it confirms attitudes and patterns which people by their behaviour, have demonstrated that they hold and value. Reforming laws can succeed and has succeeded. Social change is often desirable, law can be a potent tool in aiding that change. But it is a precision tool and one which, like the carpenter's chisel is easily blunted in unskilful hands."

In the present writer's view, transformation – in the sense of radical change to the existing customs – should be the function of Parliament.

Richman Mqeke
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38 Allot *Southern Africa* 229.