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Torture and Sexual Violence as *Jus Cogens*? A Critical Reflection on the Emerging Norms in International (Humanitarian) Law

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"The right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus* cogens."[1]

"Although torture is nowadays universally accepted as repugnant and prohibited under customary international law and generally recognised as achieving the status of *jus cogens*, in many parts of the world State-sponsored torture continues to go unabated and those responsible remain in power and unaccountable for their actions. Despite the multitude of regional and international instruments condemning torture, its practice has not receded; in fact the opposite is the true case."[2]

1 INTRODUCTION

Torture was widely practised and endorsed up until the eighteenth century,[3] but it gradually fell into disfavour in response to a philosophical consensus that culminated in the adoption of the Universal Declaration of Human Rights in 1948.[4]

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1 *Siderman de Blake v Republic of Argentina* 965 F2d 699 717 (9th Cr 1992), cited in Wallace *International Law* 4 ed (2002) 33 fn 88. In this instance, the claimants argued that a foreign state that breaches *jus cogens* norms is not entitled to sovereign immunity with respect to the breaching act.

2 De Than and Shorts *International Criminal Law and Human Rights* (2003) 181 § 7-001.

3 For slaves in Roman times, torture was the rule when they were called upon to testify or appear in judicial proceedings. Their testimonies were admissible only if extracted by torture, for it was believed that slaves could not be trusted to reveal the truth voluntarily. Torture during and after medieval times, especially during the Inquisition, was infamous. Well into the eighteenth century, the infliction of acute suffering was a legitimate means to obtain testimonies and confessions from suspects or accused persons for use in judicial inquiries and trials. The general assumption was that no innocent person would be prosecuted: Pfanner "Editorial" September 2007 *International Review of the Red Cross* 501.

4 The Universal Declaration of Human Rights was approved by the United Nations General Assembly on 10-12-1948 by forty-eight votes in favour, none against, and eight abstentions. The Union of South Africa (then under a National Party government) abstained, together with the Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Saudi Arabia, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics

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The prohibition of torture is contained in a wide variety of international human rights and humanitarian law instruments and is generally considered to have become part of customary international law.[5] Torture is thus widely understood to constitute a violation of a peremptory norm of general international law and its prohibition is consequently regarded and treated as *jus cogens*.

This article explores the conceptual link between acts of sexual violence committed against women, and the definition(s) of torture under international human rights law and international humanitarian law, respectively. In particular, the degree to which the discourse on torture within international humanitarian law has been informed by both international human rights law and international criminal law is considered within the specific context of crimes against humanity. This task is undertaken with a view to ascertain whether the prohibition of both torture and sexual violence could be regarded as *jus cogens* within the meaning that this notion has acquired in international law.

2 *JUS COGENS*

Jus cogens is the technical term given to those norms of general international law which are of peremptory force. No derogation may be made from such a norm except by a subsequent norm of the same character. Article 53 of the Vienna Convention on the Law of Treaties between States (hereafter "the Vienna Convention")[6] defines a "peremptory norm of general international law" as "a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permissible".

A treaty which at the time of its conclusion conflicts with a peremptory norm of international law is void[7] and "if a new peremptory norm emerges, any existing treaty which is in conflict with that norm becomes void and terminates".[8] Examples of *jus cogens* include the prohibition of (a) unlawful use of force by states;[9] (b) trade in slaves; (c) piracy; (d) genocide; and (e) torture. The principle of self-determination is also regarded as *jus cogens*.[10] However, in its Commentary to

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and Yugoslavia: Dugard "International Human Rights" in Van Wyk *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 172.

5 Shaw *International Law* 5 ed (2003) 303. Yet according to Amnesty International and Human Rights Watch, nearly two-thirds of the world's States still practise torture in some form or another. Amnesty International reported that the number of States practising torture and ill-treatment techniques in 1999 was 132, compared to 125 states in 1998: *Amnesty International Report 2000* as cited in De Than and Shorts *International Criminal Law and Human Rights* 181.

6 Signed in Vienna on 23-05-1969 and entered into force on 27-01-1980: (1969) 1155 *United Nations Treaty Series*; (1969) 8 *International Legal Materials* 679.

7 Article 53 of the Vienna Convention of 1969.

8 Article 64 of the Vienna Convention.

9 See *Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua v The United States*) *Case* (*Merits*) 1986 ICJ Report 100.

10 See Mujuzi "An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights" 2006 *African Human Rights Law Journal* 425 fn 6. See also De Wet "The prohibition of torture as an international norm of *jus cogens* and its implication for national and customary law" 2004 *European Journal of International Law* 97.

Article 63 of the Draft Articles on the Law of Treaties,[11] the International Law Commission refrained from including specific examples of *jus cogens* in the fear that "the mention of some cases . . . might even with the most careful drafting, lead to misunderstanding as to the position concerning other cases".[12]

Jus cogens is similar to obligations *erga omnes*,[13] both having strong claims to constitute customary international law.[14] For a rule to qualify as *jus cogens*, a two-stage approach is envisaged by art 53 of the Vienna Convention. The first is the establishment of the rule in question as a rule of general international law, and the second, the acceptance of that rule as a peremptory norm by the international community of states as a whole. Thus by being superior and by placing obligations on states, *jus cogens* norms take precedence over other international norms.[15]

The fact that the prohibition of torture is *jus cogens* has practical consequences for the international community in general. Every state has a general duty to punish the crime of torture for so long as the perpetrator is within its jurisdiction,[16] irrespective of whether the offence was committed within its territory or in another state, or whether the crime was committed against the nationals of that particular state or not.

Moreover, state immunity is not a defence in cases where torture has been alleged.[17] It has been explained that the prohibition against torture prevails over state immunity because of the normative characteristics of the prohibition rather than on the rules of state immunity.[18] Nor can former heads of state claim immunity from prosecution for the crime of torture,[19] as continued immunity could indeed be seen as a violation of the spirit of the 1984 United Nations Convention

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11 Commentary of the Commission to Article 63 of "Draft Articles on the Law of Treaties" *International Law Commission Yearbook* 1966 II 247, cited in Harris *Cases and Materials on International Law* 5 ed (1998) 836 fn 20.

12 *Ibid*.

13 These are "obligations owed towards all other members of the international community, each of which then has a correlative right . . . the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued": *Prosecutor v Furundžija* Case No IT-95-17/1-T ICTY (Trial Chamber) (10-12-1998) para 151.

14 Harris *Cases and Materials on International Law* 837. See also Simbeye *Immunity and International Law* (2004) 139-146.

15 See Simbeye *Immunity and International Law* 140.

16 In *Ex Parte Pinochet Ugarte (NO 3)* [2000] 1 AC 147 198 (HL 1999) the House of Lords observed that "the *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture whenever it is committed". See also Amann "Abu Ghraib" 2005 *University of Pennsylvania Law Review* 125.

17 In *Jones v Saudi Arabia* [2005] UKHRR 57, cited in Miéville "Anxiety and the sidekick state: British international law after Iraq" 2005 *Harvard International Law Journal* 441, victims of Saudi Arabia torture could claim compensation in the United Kingdom despite Saudi Arabia's claim of state immunity.

18 See Orakhelashvili "Restrictive interpretation of human rights treaties on the recent jurisprudence of the European Court of Human Rights" 2003 *European Journal of International Law* 562.

19 See Sullivan "A separation of powers perspective on Pinochet" 2004 *Indiana International and Comparative Law Review* 499.

against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter "Convention against Torture").[20]

The seriousness with which the international community ought to regard torture was starkly highlighted in June 2000 by the then Secretary-General of the United Nations, Kofi Annan, in commemoration of the International Day in Support of Victims of Torture. He declared:

> "[t]orture is not only one of the vilest acts that one human being can inflict on another, it is also among the most insidious of all human rights violations. All too often, it is veiled in secrecy – except from those who, cowering in nearby cells, might be its next victims. Victims are often too shamed or traumatised to speak out, or face further peril if they do; often they die from their wounds. Perpetrators, meanwhile, are shielded by conspiracies of silence and by the legal and political machinery of states that resort to torture."[21]

Yet, feminist scholars have rightly questioned whether the notion of *jus cogens*, which purports to protect the most fundamental interests of the international community, is entirely devoid of prejudicial gender assumptions.[22] A careful study of these norms reveals that although women receive equal protection with respect to those harms that are generally recognised at the international level, the harms against which women stand most in need of protection are not reflected in the norms of *jus cogens*. The realities and intricacies of women's lives and their experiences are not, therefore, adequately considered. To this end, Hilary Charlesworth and Christine Chinkin have argued that:

> "*jus cogens* norms reflect a male perspective of what is fundamental to international society that may not be shared by women or supported by women's experiences of life. Thus the fundamental aspirations attributed to communities are male and the assumptions of the scheme of the world order assumed by the notion of *jus cogens* are essentially male. Women are relegated to the periphery of community values."[23]

A gender(ed) perspective[24] of what constitutes conduct sufficiently "serious"[25] to warrant attention at the international level is therefore of critical importance.

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20 (1984) 23 *International Legal Materials* 1027 and (1985) 24 *International Legal Materials* 535. This convention was adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 39/46 of 10-12-1984. The Convention against Torture entered into force on 26-06-1987.

21 Statement made by Secretary-General Kofi Annan on the International Day in Support of Victims of Torture on 26-06-2000, cited in De Than and Shorts *International Criminal Law and Human Rights* 181 § 7-000.

22 See for example Gardam and Jarvis *Women, Armed Conflict and International Law* (2001) 184-185; Quénivet *Sexual Offences in Armed Conflict and International Law* (2005) xii; Buss "Going Global: Feminist Theory, International Law, and the Public / Private Divide" in Boud (ed) *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (1997) 360 and Chinkin *et al* "Feminist approaches to international law" 1991 *American Journal of International Law* 613.

23 See Charlesworth and Chinkin "The gender of *jus cogens*" 1993 *Human Rights Quarterly* 63.

24 The term "gender" is widely used and conceptualised in feminist discourse to signify the socially constructed identity of men and women expressed in terms of being "male" and "female". Whereas "sex" is understood to be a biological term, "gender" is a politically and culturally defined one. A "gender(ed)" perspective of actions that would be deemed sufficiently grave to warrant attention at the level of (criminal) international law is thus one which proceeds from the politically and culturally constructed perspective of what it means

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Sexual violence perpetrated against women is of particular relevance. Increased levels of domestic violence and female genital mutilation directly associated with armed conflict are, for example, not addressed,[26] nor is the failure to provide adequate access to shelter[27] or protective equipment during armed conflict addressed, thus facilitating the treatment of women as mere collateral damage.[28] The general failure of international law to recognise many of the gender specific experiences of women during armed conflict thus increases their vulnerability. As a consequence, women enjoy no real prospect of meaningful legal redress.

The so-called "comfort women" is a case in point. During World War II, approximately 200 000 women (some as young as twelve years of age)[29] were recruited to render services of a sexual nature to the forces of the Imperial Japanese army.[30] These women were, at the time, classified as subjects of the Japanese Empire and were, for the most part, of Korean, Chinese, Taiwanese and Japanese nationality.[31] These "comfort women" were either recruited by means of offers of work (as cleaners or cooks)[32] or were brought by violence and coercion to render a controlled on-site prostitution service ("comfort station") for officers and enlisted men in the Imperial Japanese army. Although several such "comfort women" did testify about their ordeal before the International Military Tribunal for the Far East (hereafter "Tokyo Tribunal"), the need for prosecution was not identified.[33]

More than thirty years passed before the harrowing narratives of the "comfort women" eventually received some public acknowledgment.[34] These re-surfaced in the early 1990s with the emergence of new testimony by survivors about their

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to be "female". See also Van der Poll "The emerging jurisprudence perpetrated against women during armed conflict" 2007 *African Yearbook of International Humanitarian Law* 8 fn 43.

25 See Gardam and Jarvis *Women, Armed Conflict and International Law* 181 who refer to a "two-tiered hierarchy" to determine whether the harms associated with armed conflict are addressed by international criminal law. Such an act must be both of a sufficiently serious nature and must shock the conscience of mankind. See also Werle *Principles of International Criminal Law* (2005) 26 §74.

26 Gardam and Jarvis *Women, Armed Conflict and International Law* 184.

27 Gardam and Jarvis *Women, Armed Conflict and International Law* 33-35.

28 Gardam and Jarvis *Women, Armed Conflict and International Law* 185.

29 See Hung "For those who had no voice: the multifaceted fight for redress by and for the 'comfort women'" 2008 *Asian American Law Journal* 183.

30 *Ibid.*

31 Hung 2008 *Asian American Law Journal* 183 n 26.

32 Hung 2008 *Asian American Law Journal* 185.

33 Hung 2008 *Asian American Law Journal* 186. Only the Dutch government took action against the Japanese for forcing women into military prostitution with the Batavia Military Tribunal conducting trials in the Dutch East Indies (now Indonesia) in 1948. The prosecutions of the Batavia Tribunal were, however, mounted only on behalf of Caucasian "comfort women" of Dutch nationality. Not a single native Indonesian or other Asian woman was the subject of the trials of the Batavia Military Tribunal: Hung 2008 *Asian American Law Journal* 186 fn 55 and 187 fn 56.

34 The Japanese writer, Senda Kako, published the first extensive account of the experiences of the "comfort women" in 1978, drawing on firsthand accounts of former "comfort women" and Japanese war veterans. Despite attaining the status of a bestseller with a high volume of sales in Japan, the publication was not openly discussed or even publicly acknowledged: Hung 2008 *Asian American Law Journal* 187 fn 61 and fn 62.

wartime experiences, coupled with an exposé of the Imperial Japanese government's key and active role in conceptualising and operating the comfort station system.[35] Justice was finally served only in December 2000 when the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery[36] found many accused, including Emperor Hirohito, guilty of sexual slavery and rape as crimes against humanity. Although this initiative is to be welcomed, in reality it constitutes no more than a hollow victory for the few surviving victims against their former captors and perpetrators.[37]

The conceptions of torture in international law, with particular reference to international human rights law and international humanitarian law, is considered next.

3 TORTURE IN INTERNATIONAL LAW

3 1 Torture in international human rights law

Various human rights instruments and monitoring bodies have been established with a view to address torture at the international level.[38] These include the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "ECHR");[39] the 1966 International Covenant on Civil and Political Rights (hereafter "ICCPR");[40] the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter "Declaration on Torture");[41] the Convention against Torture; the 1985 Inter-American Convention to Prevent and Punish Torture (hereafter "Inter-American Torture Convention");[42] the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading

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35 Hung 2008 *Asian American Law Journal* 188.

36 This was a people's tribunal set up by Asian women and human rights organisations. The purpose of the tribunal was to acknowledge that "comfort stations" did exist during World War II and that the Japanese government at the time had to assume responsibility. Sixty-four survivors from nine countries and areas in the Asia-Pacific region took part in the tribunal. The tribunal was presided over by judges from the United States, Argentina, the United Kingdom and Kenya: McEvoy "Addressing Impunity: Sexual Violence and International Law" in Ward *et al The Shame of War: Sexual Violence against Women and Girls in Conflict* (2007) 57.

37 See for example Gardam and Jarvis *Women, Armed Conflict and International Law* 144-145.

38 Article 5 of the 1948 Universal Declaration of Human Rights reads: "No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment". This article is widely regarded as expressing customary international law.

39 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 CETS No 005.

40 United Nations General Assembly Resolution 21/2200A GAOR 21st Session Supp 52 UN Doc A/6316 999 UNTS 171.

41 Adopted by United Nations General Assembly Resolution 3452 (09-12-1975): UN Doc GA Res 3452 (XXX).

42 The Inter-American Torture Convention was adopted at Cartagenade de Indias, Colombia, by the Organisation of American States on 09-12-1985 and entered into force on 28-02-1987: OAS Treaty Series No 67 OEA/SerA/42 (SEPF).

Treatment or Punishment (hereafter "ECPT");[43] and the 1988 United Nations Committee against Torture (hereafter "Committee against Torture").[44]

Paola Gaeta rightly points out that due to the increasing fragmentation of international law and the unavoidable overlap among its different branches, one should bear the particular normative framework within which legal notions are used in mind.[45] This holds particularly true for a phenomenon such as torture which international law attempts to proscribe on the basis of different theoretical positions. As a consequence, specific yet complementary obligations are imposed upon states and individuals. Depending upon the context within which it is used, the legal definition of torture[46] may thus require certain elements additional to the notion that the infliction of acute pain and suffering upon a human being in control of another is required.[47]

In the field of international criminal law, for example, the notion of torture as a crime *per se* (in other words as a crime which is punishable as such, even if perpetrated sporadically and regardless of whether it is perpetrated in time of peace or war) requires the involvement of a state official.[48] This requirement is expressly included in art 1(1) of the 1984 Convention against Torture which provides that:

> "the term 'torture'[49] means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[50]

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43 Adopted by the member States of the Council of Europe in Strasbourg on 26-10-1987 and entered into force on 01-02-1989.

44 Established under Part II arts 17-24 of the Convention against Torture.

45 Gaeta "When is the involvement of state officials a requirement for the crime of torture?" 2008 *Journal of International Criminal Justice* 192.

46 See Rodley "The definition(s) of torture in international law" 2002 *Current Legal Problems* 468.

47 Gaeta 2008 *Journal of International Criminal Justice* 193.

48 State agents would include police forces, certain paramilitary forces, prison wardens (irrespective of whether they are employed by a private or public company) and armed forces. State liability for actions committed by its agents is part of customary international law. See Quénivet *Sexual Offences in Armed Conflict and International Law* 58.

49 An important characteristic of the United Nations Convention against Torture is its introduction of a significant difference between "torture" and "other acts of cruel, inhuman or degrading treatment or punishment". The Convention against Torture prohibits torture completely and absolutely in art 2, while imposing on states merely the obligation to "undertake to prevent" cruel, inhuman or degrading treatment in art 16. Other legal instruments do not differentiate between the two terms. The ICCPR, for example, prohibits both torture and inhuman or degrading treatment in absolute terms in art 4 and art 7 respectively. See also Reyes "The worst scars are in the mind: psychological torture" September 2007 *International Review of the Red Cross* 593-594.

50 My emphasis.

However, the United Nations Committee on Human Rights (hereafter "UNCHR"),[51] found the involvement of a public official to be irrelevant[52] in its interpretation of provisions of the ICCPR proscribing torture.[53] The European Court of Human Rights has adopted a similar approach. In a number of instances the court expressly recognised that the relevant provision of the 1950 ECHR also affords protection against torture when severe pain and suffering is inflicted by *private individuals* regardless of the participation, consent or acquiescence of a state official in the acts of torture.[54]

The question has been raised whether the definition of torture contained in the Convention against Torture is generally applicable in international *criminal* law.[55] Although the Convention against Torture is undoubtedly a creature of international human rights law, it embodies unique features that renders it significantly different from more traditional human rights instruments, such as the ICCPR and the ECHR. Admittedly the Convention against Torture seeks to protect a fundamental human right, the right not to be subjected to torture or to inhuman or degrading treatment. In addition the Convention against Torture follows the pattern of other human rights instruments in that it establishes a monitoring body, the Committee against Torture. This committee examines reports of state parties on the measures implemented to give effect to treaty obligations,[56] and can also be vested with the competence to pronounce upon inter-state or individual communications claiming that a state party had breached its commitments under the Convention against Torture.[57]

However, unlike other human rights instruments, the Convention against Torture also imposes obligations in criminal matters on contracting parties.[58] It obliges

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51 A/RES/48/141 adopted on 20-12-1993.

52 In General Comment no 20 (1992), the UNCHR expressly stated that "[i]t is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7 [of the ICCPR], whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity": Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/SGEN/S1/SRev1 30 (1994) para 2. In addition, the UNCHR held that art 7 protects "in particular, children, pupils and patients in teaching and medical institutions": para 5. The UNCHR did not specify that these institutions had to be public in nature. One could, therefore argue that art 7 ensures the right to be free from torture also when children, pupils and patients are held in private institutions and ill-treatment is inflicted by private individuals without the involvement of a state official.

53 See art 7 of the ICCPR.

54 See for example *A v United Kingdom* [1998] 2 FLR 959; [1998] 3 FCR 597; (1999) 27 EHRR 611 ECHR (23-09-1998) para 22. See also *HLR v France* 11/1996/630/813 (29-04-1997) para 40 where the court observed: "Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk of providing appropriate protection." See also in particular Nowak (United Nations Special Rapporteur on Torture) *Report* UNGA/A/60/316 (30-08-2005).

55 See for example Gaeta 2008 *Journal of International Criminal Justice* 186-191.

56 Article 19 of the Convention against Torture.

57 Article 20 of the Convention against Torture.

58 In this respect, the Convention against Torture exhibits the features of treaties on judicial co-operation, such as those concluded to repress crimes such as counterfeiting, slavery,

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state parties to adopt national legislation to criminalise torture as a distinct crime,[59] ie. as a crime separate and autonomous from torture as a war crime, a crime against humanity, or any other international crime of a similarly complex structure and nature.[60] In addition, the Convention against Torture compels state parties to establish domestic criminal jurisdiction over torture. State parties are thus compelled to take an alleged perpetrator into custody, to extradite him, or to submit the case to the applicable competent prosecuting authorities.[61] The Convention against Torture furthermore requires state parties to include torture, attempt to commit torture, and complicity or participation in torture,[62] as extraditable offences in terms of extradition treaties,[63] and invites them to consider the Convention against Torture itself as the legal basis for extradition in respect of these offences.[64] Finally, the Convention against Torture imposes the obligation on state parties to ensure that their competent authorities proceed to a prompt and impartial investigation where there is reason to believe that an act of torture has been committed in any territory under their jurisdiction.[65]

3 2 Torture in International Humanitarian Law

3 2 1 The involvement of state officials

Historically, torture is not defined in international humanitarian law.[66] The question whether the involvement of a state official is an element of the definition of torture was thus raised before the International Criminal Tribunal for the Former Yugoslavia (hereafter "ICTY").[67] The Statute of the ICTY, while vesting the Tribunal with jurisdiction over torture as a crime against humanity[68] and as a war crime,[69] similarly does not define it. As a consequence, the Trial Chamber in *Prosecutor v Furundžija* drew upon art 1(1) of the Convention against Torture to

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trafficking in women and children, terrorist crimes, money laundering, corruption, etc.: see Gaeta 2008 *Journal of International Criminal Justice* 187-188.

59 Article 4.

60 See in general Association for the Prevention of Torture and Center for Justice and International Law *Torture in International Law: A Guide to Jurisprudence* (2008) 18.

61 Article 5.

62 Articles 4(1)-(2).

63 Article 8.

64 Article 8(2).

65 Article 6(2) and art 6(4).

66 See Gardam and Jarvis *Women, Armed Conflict and International Law* 188 fn 55 and *Prosecutor v Furundžija* para 159.

67 The Statute of the International Criminal Tribunal for the Former Yugoslavia was adopted on 25-05-1993 by virtue of two resolutions of the United Nations Security Council: Annex to the *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808* (22-021993) UN Doc S/25704 (1993) approved by the United Nations Security Council Resolution 827 (25-05-1993).

68 Article 5.

69 See art 2 of the Statute of the ICTY with regard to torture as a grave breach of the Geneva Conventions of 1949. The ICTY is, however, considered to be vested with jurisdiction over torture also under art 3 of its Statute which deals with war crimes not amounting to grave breaches of the Geneva Conventions. According to the jurisprudence of the ICTY, torture is proscribed as a war crime in non-international armed conflicts both by virtue of common art 3 of the Geneva Conventions and due to the fact that this provision gave rise to an identical rule of customary international law.

formulate a conception of torture for the purposes of international criminal law related to armed conflicts. The Trial Chamber defined torture as consisting of five elements.[70] In the Trial Chamber's view, torture:

> "(i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discrimination, on any ground, against the victim or a third person; (iv) it must be linked to an armed conflict; *(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity*."[71]

The ICTY thus adopted a constrained approach[72] and considered the definition of torture enshrined in art 1(1) of the Convention against Torture to reflect the content of customary international law and accordingly to be applicable for the purposes of the Tribunal's jurisdiction. The question whether it was a requirement that torture must be committed by a state official (or at his instigation) in a *non-international* armed conflict was specifically considered by the Trial Chamber in *Prosecutor v Delalic*.[73] The Trial Chamber clarified its position by stating that:

> "[i]n the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts involving some non-State entities".[74]

However, in *Prosecutor v Kunarac*[75] the ICTY reconsidered its position. After careful deliberation, the Trial Chamber found that the notion of torture under (customary) international humanitarian law differs from the definition embodied in art 1 of the Convention against Torture. According to the Trial Chamber, international humanitarian law does not restrict torture to acts committed by state officials (or at their instigation, with their consent or their acquiescence). On the contrary, "the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law".[76]

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70 *Prosecutor v Furundžija* para 162. See also in general Droege "'In truth the leitmotiv': the prohibition of torture and other forms of ill-treatment in international humanitarian law" September 2007 *International Review of the Red Cross* 525-530.

71 My emphasis.

72 See Gaeta 2008 *Journal of International Criminal Justice* 185.

73 *Prosecutor v Delalic* Case No IT-96-21-T ICTY (Trial Chamber) (16-11-1998).

74 *Prosecutor v Delalic* para 459.

75 *Prosecutor v Kunarac* Case No IT-96-23/-23/1-T ICTY (Trial Chamber) (22-02-2001) para 459.

76 Paras 470-471. The Trial Chamber referred, by way of example, to the US Alien Torts Claims Act which grants jurisdiction to US district courts for any civil action by an alien for a tort committed in violation of international law, including treaty law. With reference to *Kadic v Karadži* 70 F 3d 232 (2d Cir 1995) cert Denied 64 US 3832 (18-06-1996), the Trial Chamber found that within a human rights context, torture is proscribed by international law only when committed by state officials or under domestic criminal law. However, torture is actionable under the Alien Tort Claims Act "regardless of state participation to the extent that the criminal act was committed in pursuit of genocide or war crimes".

The Trial Chamber based its new interpretation on three main arguments. First, it noted that in the absence of a treaty-based definition of torture in international humanitarian law, it could be misleading to borrow the definition of torture from international human rights law without taking into account the specificities of the former.[77] Secondly, the Trial Chamber directed attention to the *caveat* expressed in art 1(1) of the Convention against Torture, stressing that the definition contained therein was meant to apply only for the purposes of the Convention itself.[78] Moreover, it accentuated art 1(2) which stipulates that the definition of torture adopted by the Convention against Torture is "without prejudice to any international instrument or national legislation which does or may contain provisions of wider application".[79] For the Trial Chamber these were factors that "should be kept in mind when considering the possibility that the definition of the Torture Convention produced an extra-conventional effect".[80] Thirdly, it observed that other international human rights instruments and the case law of human rights bodies, such as the European Court of Human Rights (hereafter "European Court")[81] and the European Commission on Human Rights (hereafter "European Commission")[82] point to a definition of torture broader than that enshrined in art 1 of the Convention against Torture.[83] As a consequence "the definition of torture contained in the Torture Convention cannot be regarded as the definition of torture under customary international law which is binding regardless of the context in which it is applied".[84]

As for the requirement that torture must be committed by a state official or with his involvement, the Trial Chamber considered the requirement to be an element of the definition of torture under international human rights law, and consequently not a necessary element for the definition of torture under international humanitarian law.[85] Thus art 1(1) of the Convention against Torture "can only serve as an interpretational aid".[86] Moreover, the definition of torture under international humanitarian law

> "does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or any other authority-wielding person in the torture process is not necessary for the offence to be regarded [as] torture under international humanitarian law."[87]

This particular interpretation of torture was subsequently confirmed by the Appeals Chamber of the ICTY.[88]

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77 *Prosecutor v Kunarac* para 473.
78 *Ibid.*
79 *Ibid.*
80 *Ibid.*
81 See for example *Ireland v UK* (18-01-1978) Series A No 25 para 167.
82 See for example the *Greek* case 1969 *European Yearbook of Human Rights* 186.
83 *Prosecutor v Kunarac* paras 474-481.
84 Para 482.
85 Paras 465-497.
86 Para 482.
87 Para 496.
88 *Prosecutor v Kunarac* Case No IT-96-23/-23/1-A ICTY (Appeals Chamber) (12-06-2002) paras 145-148.

The contention by the Trial Chamber that the definition of torture enshrined in the Convention against Torture cannot be applied without careful deliberation for the purpose of exercising criminal jurisdiction has been criticised.[89] It has been argued that the definition of torture contained in the Convention against Torture mainly (though not exclusively) serves a criminal law purpose.[90] The definition of torture is thus meant to apply within national legal systems to reach uniformity in national criminal legislation. This will allow national authorities to prosecute an alleged perpetrator on the basis of the same legal definition and "in accordance with multiple heads of jurisdiction,"[91] and will oblige the custodial state to extradite the perpetrator to another contracting state in the event of a lack of prosecution.[92]

However, the critique directed at the Trial Chamber's reasoning does not seem to suggest that the Trial Chamber erred when it held (as was confirmed by the Appeals Chamber)[93] that, for the exercise of jurisdiction, the involvement of a state official in the commission of torture is not required. But the correctness of the Trial Chamber's interpretation appears to be unrelated to the human rights nature of the Convention against Torture.[94] By arguing that the Convention against Torture is a human rights instrument and that the ICTY should thus be cautious to import the definition of torture contained therein into the realm of international humanitarian law, the Trial Chamber runs the risk of a fatal contradiction.[95]

The Trial Chamber states that human rights instruments have a different scope and object than the rules of international humanitarian law and that one therefore should proceed extremely cautiously when transposing notions of human rights law into the rubric of international humanitarian law. Yet, when deliberating whether the involvement of a state official as stipulated in the Convention against Torture constitutes an element of the crime of torture, the Trial Chamber focuses, *inter alia*, on the jurisprudence of the European Court and the pronouncements of the European Commission. It notes that these bodies have adopted a definition of torture that does not contain this requirement.[96] It appears peculiar that the Trial Chamber would insist upon the human rights character of the Convention against Torture to explain why it cannot mechanically import the definition of torture contained therein for the purposes of exercising jurisdiction, and yet endeavours to demonstrate that the definition of torture is broader than that included in the Convention against Torture by placing emphasis on the pronouncements and jurisprudence of human rights bodies.

Such a deliberation would appear to contain an inherent contradiction, which is indeed underscored by the following observation by the Trial Chamber:

> "the human rights conventions consider torture *per se* while the Tribunal's Statute criminalizes it as a form of war crime, crime against humanity or grave breach. The

89 Gaeta 2008 *Journal of International Criminal Justice* 188-189.
90 Gaeta 2008 *Journal of International Criminal Justice* 188.
91 Gaeta 2008 *Journal of International Criminal Justice* 189.
92 See in particular art 7 and art 8 of the Convention against Torture.
93 *Prosecutor v Kunarac* (Appeals Chamber) paras 145-148.
94 See Gaeta 2008 *Journal of International Criminal Justice* 189 fn 10.
95 *Ibid.*
96 *Prosecutor v Kunarac* (Trial Chamber) paras 465-497.

> characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it".[97]

The rationale for the identification of torture as a distinct crime within the context of international criminal law differs significantly from the considerations that apply within the sphere of international humanitarian law. These distinctive considerations are considered next.

3 2 2 International criminal law versus international humanitarian law

It must be emphasised at the outset that within the context of international criminal law, torture as a distinct crime cannot be assimilated with torture as a crime against humanity (or even as a war crime).[98] In the case of international criminal law, torture is considered a crime at the international level for reasons profoundly different from those relating to war crimes or crimes against humanity. International law only addresses criminal conduct in exceptional cases on account of the prerogative of states arising from state sovereignty. At present international law has evolved to the point where it (directly) criminalises and punishes conduct constituting so-called "state criminality".[99] This involves conduct by state officials in their official capacity, or supported by the apparatus of the state, or within the context of widespread and systematic violence such as armed conflict generally.[100]

This serves to clarify why art 1(1) of the Convention against Torture includes the requirement of the involvement of state officials in the commission of torture. This definition of torture thus reflects the willingness of contracting parties to oppose, by way of domestic criminal law, torture when committed on behalf of, or with the acquiescence of a state.[101] Every single instance of torture thus committed constitutes a punishable offence, irrespective of whether it has been perpetrated sporadically, or committed in time of peace, or during an armed conflict.

For this reason an infliction of severe mental or physical pain or suffering committed by a private individual for private purposes would not fall foul of the definition of torture under the Convention against Torture. Such an act is thus precluded from being elevated to the level of international (criminal) law. Similarly, by virtue of the scope and purpose of human rights instruments generally, the protection from torture does not require the necessary involvement of a state official in the infliction of torture, where such instruments do not afford criminal protection, as in the case of the Convention against Torture.[102] Thus, in human rights instruments generally – unlike in the case of international criminal law – torture is not made contingent upon particular requirements, such as the status of the perpetrator and his specific purposes (as is the case with torture as a distinct crime), or the status of the victim and the *nexus* with an armed conflict (as is the

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97 Para 495.
98 See Gaeta 2008 *Journal of International Criminal Justice* 189.
99 *Ibid.*
100 See Quénivet *Sexual Offences in Armed Conflict and International Law* 58. See also Meron "State responsibility for violations of human rights" 1989 *Proceedings of the American Society of International Law* 375.
101 See Gaeta 2008 *Journal of International Criminal Justice* 192.
102 *Ibid.*

case with torture as a war crime), or upon the existence of a systematic or widespread attack against a civilian population (as in the case of crimes against humanity).

As was pointed out above, a state can be held accountable for every single instance of torture, including pain or suffering inflicted by a private individual against another private individual in its custody under international human rights law. The international responsibility of the state arises not (only) due to the fact that the perpetrator acted in an official capacity (or that the act occurred with the acquiescence or consent of a state official), but due to the state's failure to guarantee that the right not to be subjected to torture be respected by private individuals.[103] In such cases, it is the failure in question (and not the act of torture itself) that is imputable to the state for its international responsibility to arise on the basis of its obligations under treaty law.

It is noteworthy that the Statute of the International Criminal Court (hereafter "Rome Statute")[104] dispenses altogether with the requirement of official involvement. The definition of torture as a crime against humanity (or as a war crime) does not require the involvement of a state official in the commission of the crime. The Rome Statute contains the following definition of torture:

> "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising from, inherent in or incidental to, lawful sanctions."

The conceptual link between crimes against humanity, torture and sexual violence is examined next. To this end a brief (historical) introduction of crimes against humanity is considered first.

3 3 Crimes against humanity: a brief (historical) introduction

Crimes against humanity, manifesting as "mass crimes committed against a civilian population",[105] were first explicitly formulated in art 6(c) of the Charter of the International Military Tribunal Nuremburg (hereafter "Nuremburg Charter").[106] The Nuremburg Charter expressly included in its definition:

> "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic laws of the country where perpetrated."

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103 See Quénivet *Sexual Offences in Armed Conflict and International Law* 57.

104 The Statute of the International Criminal Court was adopted in plenary session with 120 votes on 17-07-1998. The 60 ratifications required under art 126 were exceeded on 11-04-2002 and the Rome Statute thus came into effect on 01-07-2002. The International Criminal Court began its operations in The Hague, Netherlands on 11-03-2003.

105 See Werle *Principles of International Criminal Law* 216 § 633.

106 See "Charter of the International Military Tribunal Nuremburg" 1945 *American Journal of International Law* 257. Article 1 of the London Agreement (concluded by the four victorious powers in 1945) provided for the creation of an international military tribunal "for the trial of war criminals whose offences have no particular geographical location". These major war criminals were to be tried on the basis of the Nuremburg Charter which was included as an appendix to the Agreement. For more on the London Agreement and the Nuremburg Charter, see Werle *Principles of International Criminal Law* 7-11 § 17-29.

Unlike war crimes, crimes against humanity would include acts committed against the perpetrator's own nationals. A general provision in the Preamble to the Hague Regulations of 1899 and 1907 obligated the belligerent parties to obey the "laws of humanity".[107] However, the idea of criminalising violations of such laws of humanity was not yet hinted at in the Martens clause,[108] the application of which was limited to wartime. The term "crimes against humanity" was coined in 1915 when France, the United Kingdom and Russia employed it to refer to the massacres of the Armenian population in Turkey.[109] Crimes against humanity were also included in art 5(c) of the Charter of the International Military Tribunal for the Far East (hereafter "Tokyo Charter").[110] Yet, in contrast to the proceedings in Nuremburg, no convictions of crimes against humanity followed the proceedings in Tokyo.[111]

Apart from the trial of Adolf Eichmann in Israel[112] and the conviction of Claus Barbie in France,[113] no other particularly noteworthy trials for crimes against humanity were conducted before the commencement of the work of the ICTY and the International Criminal Tribunal for Rwanda (hereafter "ICTR") in the 1990s. The Statutes of the Yugoslavia and Rwanda Tribunals have both affirmed the customary law character of crimes against humanity. The significance of this,

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107 Respectively, the Second Convention with Respect to the Laws and Customs of War on Land of 29-07-1899 and the Fourth Convention Respective the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land of 18-10-1907 http://ww.icrc.org/ihl (accessed 12-01-2009).

108 The Martens clause (which is a tribute to the Russian delegate who proposed it) prescribes that in cases not covered by treaties (and traditional customary international law) "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience". The Martens clause also appears in the Preamble to the United Nations Weapons Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons of 1980; in arts 63, 62, 142 and 158 respectively, of the four Geneva Conventions of 1949; and in art 1(2) of Additional Protocol I of 1977. The Preamble to Additional Protocol II of 1977 contains similar wording. For more on the Martens clause, see Sassòli and Bouvier *How Does Law Protect In War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law Vol I* 2ed (2006) 139 and Kalshoven and Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* 3ed (2001) 22.

109 Declaration of 28-05-1915 reprinted in United Nations War Crimes Commission (ed) *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) 35, cited in Werle *Principles of International Criminal Law* 217 § 636 fn 7.

110 The second trial of major World War II war criminals took place at the International Military Tribunal for the Far East in Tokyo from 1946 to 1948. The subject of the trial was Japan's aggressive policies in the years prior to 1945. The defendants at the Tokyo Tribunal were the political and military elites – a total of 28 former Japanese generals and politicians. For political reasons, however, no indictment was brought against the Japanese Emperor. For more on the Tokyo Tribunal and Charter, see Werle *Principles of International Criminal Law* 11-13 § 30-39.

111 See Werle *Principles of International Criminal Law* 217 § 637 fn 10.

112 See *Attorney General of the Government of Israel v Eichmann* District Court of Jerusalem (12-12-1961), cited in 1968 *International Law Reports* 18; *Attorney General of the Government of Israel v Eichmann* Supreme Court of Israel (29-05-1962), cited in 1968 *International Law Reports* 277.

113 See *Féderation National des Deportées et Internés Resistants et Patriots et al v Barbie* Cour de Cassation (20-12-1985), cited 1995 *International Law Reports* 330.

with particular reference to the impact of the human rights discourse on torture linked to acts of sexual violence, is examined next.

3 3 1 The significance of international human rights discourse

It was pointed out above that the discourse on torture within international human rights law has had a significant impact on the development of both international criminal law and international humanitarian law. The same holds true in so far as the possible legal implications (at the international level) of sexual violence committed against women are concerned.[114] Catharine MacKinnon was among the first to question traditional conceptions and applications of torture when she noted that:

> "[t]orture . . . is widely recognised as a core violation of human rights. Inequality on the basis of sex is equally widely condemned, and sex equality affirmed as a core human rights value and legal guarantee, both nationally and internationally. My question is, given these two facts, why is torture on the basis of sex in the form of rape, domestic battering, and pornography not seen as a violation of human rights."[115]

The crux of her argument is thus: while men are tortured in a particular way, women suffer sexual violence as a distinct method of torture. In recognition, both the European Court[116] and the Inter-American Commission on Human Rights (hereafter "Inter-American Commission")[117] have on occasion found that sexual violence, notably the act of rape, could amount to torture in breach of the 1950 ECHR[118] and the Inter-American Convention on Human Rights (hereafter "Inter-American Convention").[119] In these instances both the European Court

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114 See in general Werle *Principles of International Criminal Law* 244-245 § 712-713 and Meron *Human Rights in International Strife: Their International Protection* (1987) 10-14.

115 See MacKinnon "On Torture: A Feminist Perspective on Human Rights" in Mahoney and Mahoney (eds) *Human Rights in the 21st Century: A Global Challenge* (1993) 21.

116 See for example *Aydin v Turkey* Application 23178/94 ECtHR (2002) para 86 where the European Court held that "the accumulation of acts of physical and mental violence inflicted on the applicant and especially the cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the [European] Convention". In this instance, Turkish forces sought to extract information from and/or politically repress the applicant, a young Kurdish woman.

117 See in particular *Fernando and Raquel Marti de Mejia v Peru* Case 10.970 Report No 5/96, Inter-Am Ct HR, OEA/Ser.L/V/II.91 Doc 7 (1996) (01-03-1996), where the Inter-American Commission found that the rape of Raquel Marti de Mejia, a school principal, by a member of the counter-insurgency unit of the Peruvian military amounted to torture in breach of art 5.2 of the Inter-American Convention. The Inter-American Commission found that the applicant "was a victim of rape, which caused her physical and mental pain and suffering . . . [she] was raped with the aim of punishing her personally and intimidating her . . . the man who raped [her] was a member of the security forces" (157). This jurisprudence was confirmed in the *Cantoral Benavides* case (2000) Inter-Am Ct HR, Ser. C. No 69 (Peru) para 97.

118 Article 3 of the 1950 ECHR stipulates that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". Also compare the 1987 ECPT. Although no definition of torture is contained in the provisions of the ECPT, art 3 of the ECHR is acknowledged as the basis upon which the ECPT operates: De Than and Shorts *International Criminal Law and Human Rights* 208 §7-021.

119 Pact of San Jose, Costa Rica (22-11-1969). See also art 2 of the 1985 Inter-American Torture Convention which contains a definition of torture that differs slightly from the UNCAT. For a basic discussion of these two Inter-American instruments, see De Than

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and the Inter-American Commission emphasised that the physical and mental violence inflicted on the victim through the act of rape constituted torture, and thus a violation of fundamental human rights guaranteed under the ECHR and the Inter-American Convention. Some twenty years earlier the European Commission on Human Rights expressed the view that widespread rape amounts to inhuman treatment and indirectly alluded to the idea that rape may constitute torture.[120] These particular conceptions of sexual violence as torture – albeit in a human rights context and thus perpetrated by a state actor – have established a jurisprudential framework that has greatly enabled the ICTY and the ICTR to consider whether sexual violence could constitute torture within the contexts of the Balkan and Rwandan armed conflicts.

The jurisprudence of the ICTY and the ICTR on torture as a crime against humanity is considered next.

3 3 2 Torture as a crime against humanity

The definition of torture in the Convention against Torture is narrower than that of torture as a crime against humanity. Torture as a crime against humanity is addressed under art 7(1)(f) of the Rome Statute. This provision is based on art 5(f)[121] and art 3(f)[122] of the Statutes of the ICTY and ICTR, respectively. Article 7(2)(e) of the Rome Statute defines torture as a crime against humanity in terms of:

> "[t]he intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions".

Although art 7(2)(e) of the Rome Statute is in part based on art 1(1) of the Convention against Torture, it contains neither the purposive requirement, nor the official capacity requirement contained in the latter.[123] But similar to art 1(1) of the Convention against Torture, art 7(2)(e) of the Rome Statute also defines torture to include pain or suffering caused without a distinct or particular

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and Shorts *International Criminal Law and Human Rights* 2003 186-190 §7-005-7-008 and Dörmann *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2004 reprint) 47 fn 13-14.

120 See *Cyprus v Turkey* 1976 Application 6780/74 6950/75 paras 358-374.

121 Article 5 of the Statute of the ICTY provides that the ICTY shall have the power to "prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts".

122 Article 3 of the Statute of the ICTR stipulates that the ICTR shall have jurisdiction to "prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts".

123 Under the Rome Statute, as in the jurisprudence of the ICTY, individuals acting outside of a legal or official framework may, however, be held liable for torture.

purpose,[124] such as for purely arbitrary reasons.[125] Historically, the identified purpose of torture was to obtain information from the victim, but the jurisprudence of the ICTY reveals that the Tribunal both considered and accepted additional motives,[126] in concert with the purport and object of the Convention against Torture.

The characteristic objective criterion for torture as a crime against humanity is the infliction of severe physical or mental pain or suffering. And, as illustrated above, since this criterion is also a core element of the definition of torture under international human rights law, the ICTY considered, *inter alia*, reports by the United Nations Human Rights Committee and/or relevant jurisprudence on the prohibition of torture.[127] The question whether acts of sexual violence could be conceptualised as torture is explored next.

3 3 2 1 Acts of sexual violence as torture

The evolution of the prohibition of rape and serious sexual violence in customary international law was first mapped by the ICTY in *Prosecutor v Furundžija*, which led both the Trial Chamber[128] and the Appeals Chamber[129] to confirm that art 1(1) of the Convention against Torture reflects customary international law. The existing jurisprudence of the ICTY on torture affirms[130] that all the circumstances of the individual case should be considered, in particular the duration of the abuse and its psychological effects.[131] Indictments issued by the prosecutor of the ICTY conceptualised sexual violence as torture under applicable articles of the Statute of the ICTY, namely art 2 (grave breaches of the Geneva Conventions of 1949);[132] art 3 (violations of the laws and customs of war);[133] and

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124 But compare *Ilhan v Turkey* Application 22277/93 ECtHR (2000) paras 85-88 and *Salman v Turkey* Application 21986/93 ECtHR (2000) para 115 where the purposive element of torture was stressed as an important factor in distinguishing between torture and other forms of ill-treatment.

125 See Werle *Principles of International Criminal Law* 244 § 711.

126 See Droege September 2007 *International Review of the Red Cross* 529-530.

127 See for example *Prosecutor v Mucić*Case No IT-96-21-T ICTY (Trial Chamber) (16-11-1998) para 461 and *Prosecutor v Kvočka* Case No IT-98-30/1-T ICTY (Trial Chamber) (02-11-2001) para 142.

128 *Prosecutor v Furundžija* para 160.

129 Case No IT-95-17/1-A Appeals Chamber (21-07-2000) para 111.

130 While the ICTY conceded on various occasions that it is not possible to formulate a complete list of torture practices, the following conduct is, as a rule, classified as torture *per se*: (a) pulling out of teeth, fingernails or toenails; (b) electric shocks to sensitive parts of the body; (c) blows to the ears that cause the eardrums to burst; (d) breaking bones; (e) burning parts of the body; (f) spraying eyes or other sensitive parts of the body with acid; (g) hanging from a pole; (h) submersion in water till symptoms of drowning occur; (i) plugging nose and mouth to cause asphyxiation; (j) causing hypothermia with strong fans; (k) administration of medication (psychotic drugs); (l) withholding food, water or sleep; and (m) rape. See also Reyes September 2007 *International Review of the Red Cross* 612.

131 For more on the psychological effects of torture, see Reyes September 2007 *International Review of the Red Cross* 591-617. Severe mental pain and suffering, such as forcing a person to be present during the torture of a family member, as was the case in *Prosecutor v Furundžija* para 267, also conforms to the definition of the crime. See also *Prosecutor v Kvočka* para 149.

132 Article 2 of the Statute of the ICTY stipulates that the ICTY shall have the power to prosecute persons committing (or ordering to commit) grave breaches of the Geneva

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notably art 5 (crimes against humanity). Article 5 of the Statute of the ICTY stipulates that:

> "[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes against humanity when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts."

In *Prosecutor v Kunarac* the ICTY confirmed the possibility of prosecuting sexual violence committed during armed conflict as an act of torture. The Appeals Chamber acknowledged that sexual violence necessarily gives rise to severe pain or suffering; whether physical or mental, and agreed that it was accordingly not necessary to provide visual evidence of suffering by the victim as this could be assumed.[134]

The pertinent question whether rape could constitute torture was considered by the ICTY in *Prosecutor v Delalic*. In this instance, one of the four accused was charged with the rape of two women who were detained in the Celebici prison camp in the Konjic municipality in central Bosnia and Herzegovina during 1992. The prosecutor for the ICTY motivated that, in light of the circumstances, these rapes amounted to torture thus constituting a grave breach of the four Geneva Conventions of 1949 and a violation of the laws and customs of war.[135] In considering these arguments the Trial Chamber found that there was no question that the acts of rape could constitute torture under international law.[136] In their view, "rape causes severe pain and suffering, both physical and psychological". Moreover, the Trial Chamber argued that:

> "it is difficult to envisage circumstances in which rape by, or at the instigation of a public official, or with the consent or acquiescence of an official could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict".[137]

Conventions against protected persons and property, namely, (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity, and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement; and (h) taking of hostages.

133 Article 3 of the Statute of the ICTY stipulates that the ICTY shall have jurisdiction to prosecute persons violating the laws and customs of war, which shall include, but not be limited to (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; and (e) plunder of public or private property.

134 *Prosecutor v Kunarac* (Appeals Chamber) para 150.

135 *Prosecutor v Delalic* para 459.

136 Paras 494-497.

137 Para 495.

On the question of the identified purpose of the crime of torture, the Trial Chamber accepted that the required purpose could include:

> "obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind".[138]

In the course of its deliberation the Trial Chamber consulted the work of the Committee on the Elimination of Discrimination against Women,[139] which purports that violence directed against a woman merely because she is a woman constitutes a form of discrimination.[140] The accused was consequently found guilty of torture as a grave breach and violation of the laws and customs of war for the rape of the two women.[141] The Trial Chamber commented that the rapes were inflicted for the purposes specified in the definition of torture, including, to acquire information, to punish, to coerce and to intimidate.[142] Furthermore, the violence was inflicted on each of the victims solely on the basis of them being women.[143] This, the Trial Chamber found, was a form of discrimination that constitutes a prohibited purpose for the crime of torture.[144]

It is noteworthy that, subsequent to *Prosecutor v Delalic*, sexual violence has been duly recognised as torture in other ICTY judgments[145] and the ICTR has indicated its agreement on this point.[146]

The question whether rape and other acts of sexual violence could constitute crimes against humanity is examined next.

3 3 2 2 Rape and sexual violence as crimes against humanity

Crimes against humanity through sexual violence were not contained as such in the Nuremburg Charter,[147] but could be incorporated by way of the broad clause

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138 Para 494.

139 The Convention on the Elimination of All Forms of Discrimination against Women (hereafter "CEDAW") was adopted unanimously by the United Nations General Assembly on 18-12-1979 and entered into force on 03-09-1981, following receipt of the twentieth ratification. The task of monitoring the implementation of CEDAW has been entrusted to the Committee on the Elimination of Discrimination against Women set up in 1982 in terms of at 17 of CEDAW. The Committee reports annually to the United Nations General Assembly on its activities and may make suggestions and general recommendations based on the examination of reports and information submitted by states parties. For more on the work of the Committee see arts18-21 and Wallace and Dale-Risk *International Human Rights: Text and Materials* 2ed (2001) 31-33 § 2-025-2-028.

140 *Prosecutor v Delalic* para 493.

141 Para 943 and para 965.

142 Para 941 and para 963.

143 See in particular MacKinnon "Rape, Genocide, and Women's Human Rights" in Stiglmayer (ed) *Mass Rape: The War against Women in Bosnia-Herzegovina* (1993) 190 and Quénivet *Sexual Offences in Armed Conflict and International Law* 52-53.

144 *Prosecutor v Delalic* para 941 and para 963.

145 See for example *Prosecutor v Furundžija* para 267.

146 See or example *Prosecutor v Akayesu* Case No ICTR-96-4-T (Trial Chamber) (02-09-1998) para 598 and para 687 and *Prosecutor v Nyiramashuko* ICTR Indictment Case No ICTR-97-21, charging sexual violence (rape and forced nudity) as a violation of Common Article 3 to the 1949 Geneva Conventions by way of torture.

147 See "Charter of the International Military Tribunal Nuremburg" 1945 *American Journal of International Law* 257.

of "other inhumane acts".[148] Although rape was not expressly charged before the Nuremburg Tribunal, rape was included in the indictment of the Tokyo Tribunal where it was expressly categorised as constituting "inhumane treatment".[149] The Tokyo judgment also refers to acts of "torture, murder, rape and other cruelties of the most inhumane and barbarous character".[150] This provides some support for the recognition of rape as a crime against humanity, albeit that no definition or discussion of crimes against humanity as such appears in the Tokyo judgment.[151]

Both the Statutes of the ICTY[152] and the ICTR[153] expressly include rape as a separate crime. Yet other forms of sexual violence are still not expressly mentioned in these instruments and can thus only be incorporated as (other) crimes against humanity, or again through the catch-all clause of "other inhumane acts". The jurisprudence of the ICTR and the ICTY show that the latter could encompass behaviour such as the forced nakedness of women,[154] as well as the forced evacuation by bus of women, children and elderly persons in severely over-crowded and unbearably hot conditions.[155]

The Rome Statute effects a significant clarification on this point by bundling together various acts of sexual violence as crimes against humanity.[156] The Rome Statute, in art 7(1)(g), thus encompasses rape, sexual slavery,[157] enforced prostitution,[158] forced pregnancy,[159] enforced sterilisation[160] and any other forms of

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148 See in general Werle *Principles of International Criminal Law* 248 § 722 and Schabas *An Introduction to the International Criminal Court* 2ed (2004) 46.

149 Gardam and Jarvis *Women, Armed Conflict and International Law* 198 fn 127.

150 Gardam and Jarvis *Women, Armed Conflict and International Law* 198 fn 128.

151 Gardam and Jarvis *Women, Armed Conflict and International Law* 198.

152 Article 5(g).

153 Article 3(g).

154 See for example *Prosecutor v Akayesu* .

155 See for example *Prosecutor v Kristić* Case No IT-98-33-T ICTY (Trial Chamber) (02-08-2001) paras 50- 52 and para 519. However, under the Rome Statute the concept of "other inhumane acts" may indeed be narrowed by the addition of the words "of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". It remains to be seen whether the acts of sexual indignity condemned by the ICTR (see for example *Prosecutor v Akayesu*) would fit within the restrictive language of the Rome Statute. This provision was criticised by the Trial Chamber of the ICTY in *Prosecutor v Kupreškić* Case No IT-95-16-T ICTY (Trial Chamber) (14-01-2000) para 565 for failing "to provide an indication, even indirectly, of the legal standards which would allow us to identify the prohibited inhumane acts".

156 See Van der Poll 2007 *African Yearbook of International Humanitarian Law* 16.

157 Sexual slavery is a specific manifestation of enslavement, coupled with the element that the perpetrator must cause the victim to engage in sexual acts: see the Elements of Crimes for art 7(1)(g)-2 of the Rome Statute.

158 Enforced prostitution is for the first time recognised as a separate crime against humanity by the Rome Statute. According to the Elements of Crimes, the material element requires that the perpetrator cause one or more persons to engage in sexual acts through the exercise of force or threat of force or coercion. The perpetrator or another person must receive or expect financial or other advantages in exchange for or in connection with the sexual act: Elements of Crimes for art 7(1)(g)-3 of the Rome Statute.

159 Forced pregnancy as a crime against humanity is a unique feature of the Rome Statute. The material element requires the illegal imprisonment of a forcibly pregnant woman. It is sufficient if the perpetrator holds prisoner a woman who has been impregnated by someone else: Elements of Crime for art 7(2)(f) of the Rome Statute.

160 Although enforced sterilisation is listed for the first time as a special manifestation of a crime against humanity, the Rome Statute contains no definition of enforced sterilisation.

continued on next page

sexual violence of comparable gravity.[161] Since no definition of rape as a crime against humanity had been developed by the time that negotiations commenced on the Rome Statute, the Women's Caucus for Gender Justice in the International Criminal Court played a significant role in the development of the core elements of the crime of rape.[162]

Within a few months after the adoption of the Rome Statute, the deliberations of the ICTY and the ICTR had developed two somewhat different conceptions of the crime of rape. The first was proposed by the ICTR in *Prosecutor v Akayesu*, which cautioned that "the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts". The ICTR accordingly followed a contextualised approach and defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[163] However, in *Prosecutor v Furundžija*, the Trial Chamber of the ICTY reverted to a more mechanical and technical definition of rape instead. It defined rape as:

> "(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person".[164]

But after a period of three years, the Trial Chamber of the ICTY found the emphasis on the coercive element too restrictive and held in *Prosecutor v Kunarac* that a comprehensive comparison of international criminal law systems revealed a lesser accent on the exercise of coercion (or use of force) than on an absence of consent.[165] Element (ii) was therefore reformulated to read:

> "(ii) where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances".[166]

According to the Elements of Crimes, the perpetrator must permanently deprive at least one person of his or her biological reproductive capacity: Elements of Crimes for Article 7(1)(g)-5 of the Rome Statute.

161 The inclusion of other forms of sexual violence of comparable gravity suggests that the conduct must be of a coerced and sexual nature, comparable in gravity to the acts listed in Article 7(1)(g) of the Rome Statute: Elements of Crimes for Article 7(1)(g)-6 of the Rome Statute. The Elements of Crimes are based on the judgment of the ICTR in *Prosecutor v Akayesu* para 598. *In casu*, a female student was ordered to strip and forced to perform gymnastics naked before a large crowd of people: para 688.

162 See Werle *Principles of International Criminal Law* (2005) 248 § 722 fn 189. Article 2(g) of the Statute of the Special Court for Sierra Leone (established by virtue of United Nations Security Council Resolution 1315, UN Doc No S/2000/1315 (14-08- 2000)) adopted the rule in the Rome Statute. An identical definition of sexual violence constituting war crimes appears in art 8(2)(b)(xxii) of the Rome Statute. A comparable definition for non-international armed conflict is contained in art 8(2)(e)(vi) of the Rome Statute.

163 *Prosecutor v Akayesu* para 325. This definition was broad enough to encompass forced penetration by the perpetrator's tongue, a definition most legal systems would not classify as rape, although such an act might well be prosecuted as a form of sexual (or indecent) assault: see in general Schabas *An Introduction to the International Criminal Court* 48. This definition of the ICTR was confirmed in *Prosecutor v Mucić* para 478 and in *Prosecutor v Musema* Case No ICTR-96-13-T ICTR (Trial Chamber) (27-01-2000) para 229. See also *Prosecutor v Delalic* paras 477-478.

164 *Prosecutor v Furundžija* para 185.

165 *Prosecutor v Kunarac* para 441.

166 Para 460.

The Appeals Chamber of the ICTY has since affirmed the definition in *Prosecutor v Kunarac*,[167] with the result that the focus of the ICTY's conception of the crime of rape has shifted from the perpetrators' objective behaviour to the victim's opposing will. It need not be argued that an undeniable correlation exists between the presence of force, threats of force or coercion and the absence of genuine and freely given consent. Besides, in an armed conflict a nearly universal situation of coercion exists, with the result that no genuine consent on the part of the victim can, as a rule, be presumed.[168]

The ICTR too has since endorsed the definitions of rape suggested in *Prosecutor v Akayesu* and *Prosecutor v Kunarac*, and has found both definitions to be substantially aligned and compatible.[169] The Elements of Crimes of the Rome Statute lean towards the first of the two ICTY approaches to rape, albeit with some slight variations. A more specific definition of the criminal conduct is provided and the material element requires an invasion of the victim's body by the perpetrator which must result in penetration. Rape is thus defined as follows in the Elements of Crimes for Article 7(1)(g)-1 of the Rome Statute:

> "1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. 2. The invasion was committed by force, or by the threat of force or coercion, such as that caused by fear or violence, duress, detention, psychological oppression or abuse of power, against such a person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."

The conduct must be committed "as part of a widespread or systematic attack against a civilian population" and the element of *mens rea* requires that the perpetrator "knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population".

3 4 Gender sensitivity

It is significant to note that art 7(3) of the Rome Statute contains a specific provision that defines "gender" not only for the purposes of crimes against humanity, but also for all other purposes within the context of the Statute. The

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167 *Prosecutor v Kunarac* (Appeals Chamber) para 128.

168 This reality is further underscored by the rules of procedure of the Rome Statute applicable to evidence in cases of sexual violence, which expressly stipulate that "[c]onsent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking an advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent": see Rule of Procedure 70 "Principles of evidence in cases of sexual violence" of the Rome Statute. See also Van der Poll 2007 *African Yearbook of International Humanitarian Law* 19 n 121.

169 In *Prosecutor v Muhimana* Case No ICTR-95-1B-T (Trial Chamber) (28-04-2005) para 550 the Trial Chamber argued that the latter decision merely articulated the parameters of what could constitute a physical invasion of a sexual nature. It thus concluded that the "conceptual definition of rape established in *Akayesu* encompasses the elements set out in *Kunarac* For a critical evaluation of this judgment, see Williamson "Case commentary: *Prosecutor v Mikaeli Muhimana*" 2006 *African Yearbook of International Humanitarian Law* 173 and Van der Poll 2007 *African Yearbook of International Humanitarian Law* 18-19.

formulation (which is taken from the Beijing Conference of 1995)[170] states that "it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society." Consequently, the concept of "invasion" within the definition of rape is specifically intended to be broad enough to be gender neutral, as it is understood that both males and females can be victims of rape.

The particular conception of gender is to be welcomed as it is hoped that, together with the provisions on war crimes,[171] genocide[172] and crimes against humanity, art 7(3) of the Rome Statute will contribute significantly to end impunity for international crimes, including sexual violence committed during armed conflict.[173] As rightly observed by Amnesty International, the Rome Statute is the "first international treaty to expressly recognise a broad spectrum of sexual and gender-based violence as some of the gravest crimes under international law."[174] These sentiments were echoed by the United Nations Special Rapporteur on Violence against Women:

> "[t]he Rome Statute's gender provisions are an encouraging example of how the development of the international women's rights movement is positively impacting international human rights and humanitarian law despite the strong influence of conservative political forces . . . While much remains to be done, the progress made since 1994 is extraordinary."[175]

Under the Rome Statute, rape does not only include forced sex. The crime also proscribes sexual conduct connected with the insertion of the perpetrator's sexual organ into other body cavities or the insertion of other body parts of the perpetrator's body (or even objects) into the vagina or other parts of the body of the victim. The definition of the crime of rape under art 7(1)(g) also requires the use of violence or the threat of violence or force, thereby correctly acknowledging

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170 The theme of the Beijing Conference (1995) was "Action for Equality, Development and Peace". The objectives of the conference were: (a) to review and appraise the advancement of women since 1985 in terms of the objectives of the "Nairobi Forward-looking Strategies for the Advancement of Women to the Year 2000"; (b) to mobilise women and men both at the policy making and grass-roots levels to achieve those objectives; (c) to adopt a "Platform for Action" concentrating on the identified "critical areas of concern" that constitute obstacles to the advancement of women in the world; and (d) to determine the priority actions to be taken between 1996 and 2001 for the implementation of the "Nairobi Forward-looking Strategies for the Advancement of Women to the Year 2000" by the international community, including the United Nations system. See also Wallace and Dale-Risk "Women" *International Human Rights: Texts and Materials* 2ed (2001) 46-47 § 2-047-2-048and Van der Poll 2007 *African Yearbook of International Humanitarian Law* 19-20 n 122.

171 Article 8 of the Rome Statute.

172 Article 6 of the Rome Statute.

173 See in general McEvoy "Addressing Impunity: Sexual Violence and International Law" in Ward *et al The Shame of War: Sexual Violence against Women and Girls in Conflict* (2007) 61.

174 See Amnesty International "The International Criminal Court, Fact Sheet 7, Ensuring Justice for Women" Al Index 40/006/2005 (12-04-2005). http://web.amnesty.org/library/Index/ENGIOR400062005?open&of=ENG-373 (accessed 12-01-2009).

175 See Coomaraswamy (United Nations Special Rapporteur on Violence Against Women) *Report* UN Doc. E/CN.4/2003/75/Add.1.

that rape is a question of (sexual) power and violence[176] instead of (sexual) lust and/or desire.[177]

4 CONCLUSION

This article sought to explore the conceptual link between acts of sexual violence committed against women during armed conflict and the definition(s) of torture under both international human rights law and international humanitarian law. In particular, the extent to which the discourse on torture within international humanitarian law has been informed by both international human rights law and international criminal law within the specific context of crimes against humanity was examined. This task was undertaken with a view to ascertain whether both torture and sexual violence could be regarded as *jus cogens* within the meaning that this notion has acquired in international law.

A gender(ed) perspective of conduct sufficiently grave to warrant attention at the international level is thus of critical importance. Feminist scholars have rightly questioned whether the notion of *jus cogens* (which purports to protect the most fundamental interests of the international community) is entirely devoid of prejudicial gender assumptions. A careful study of these norms reveal that although women receive equal (ie. formal) protection with respect to those harms that are generally recognised at the international level, the harms against which women stand *most* in need of protection are not reflected in the norms of *jus cogens*. The realities and intricacies of women's lives and their experiences are therefore not adequately considered. In fact, *jus cogens* norms reflect a male perspective of what is fundamental to international society that may not be shared by women or even supported by women's experiences of life.[178] As such it reflects essentially male assumptions of the international world order. Consequently, women's causes are relegated to the periphery of community values.

The impact of international human rights discourse has, however, been instrumental in accentuating the plight of women, in particular in so far as the possible legal implications of sexual violence committed against women are concerned. Catharine MacKinnon was among the first to question traditional conceptions and applications of torture when she noted that while men are tortured in a particular way, women suffer sexual violence as a distinct *method* of torture. In recognition, both the European Court[179] and the Inter-American

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176 This particular conception of rape and sexual violence is widely endorsed in feminist jurisprudence. See in particular MacKinnon "Not a moral issue" 1984 *Yale Law and Policy Review* 321; Ashley and Ashley "Sex as violence: the body against intimacy" 1984 *International Journal of Women's Studies* 352; Bartlett "Feminist legal methods" 1990 *Harvard Law Review* 829; MacKinnon "Reflections on sex equality under law" 1991 *Yale Law Journal* 1281; Réaume "The social construction of women and the possibility of change: unmodified feminism revisited" 1992 *University of Toronto Law Review* 132 and Bartlett "Gender law" 1994 *Duke Journal of Gender Law and Policy* 1.

177 For an exposition of this particular understanding of rape within the context of international humanitarian law, see, in particular, MacKinnon in Stiglmayer (ed) *Mass Rape: The War against Women in Bosnia-Herzegovina* 190 and Quénivet *Sexual Offences in Armed Conflict and International Law* 52-53.

178 See in particular Charlesworth and Chinkin 1993 *Human Rights Quarterly* 63.

179 In *Aydin v Turkey* ECtHR Reports of Judgments and Decisions 1997-VI para 86.

Commission[180] have found that sexual violence, particularly the act of rape, could amount to torture in breach of the 1950 ECHR and the Inter-American Convention.[181] In these instances the physical and mental violence inflicted on the victim through the act of rape constituted torture, and thus a violation of fundamental human rights guaranteed under the ECHR and the Inter-American Convention. These particular conceptions of sexual violence as torture – albeit in a human rights context (and thus committed by a state actor) – have established a jurisprudential framework that greatly assisted the ICTY and the ICTR to find that sexual violence could constitute torture within the contexts of the Balkan and Rwandan armed conflicts.

The jurisprudence of the ICTY and the ICTR holding that sexual violence (rape in particular) could constitute torture and thus a crime against humanity, and that the involvement of a state official is not a constituent element of the crime, is to be welcomed. This signifies a willingness on the part of international law to appreciate the true harm of sexual violence and thus the stark reality and actual experiences of women during armed conflict.

Two United Nations Security Council Resolutions, adopted in 2000 and 2008 respectively, warrant specific mention. Resolution 1325 of 2000[182] on "Women, Peace and Security", expressed specific concern that civilians, particularly women, account for the vast majority of those adversely affected by, and increasingly targeted during armed conflict. As a consequence, the Security Council expressed the urgent need to mainstream a gender perspective into peacekeeping operations and indeed recognised the impact of armed conflict on women as a factor that significantly contributes to the maintenance and promotion of international peace and security. A call was therefore made on all parties to armed conflict to "take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict."[183]

Resolution 1820 of 2008[184] re-affirmed the Security Council's commitment to the full implementation of Resolution 1325 and noted that women are particularly targeted by the use of sexual violence. Sexual violence is used as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group. The Security Council noted that in some situations acts of sexual violence have become systematic and widespread "reaching appalling levels of brutality,"[185] and, therefore, rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide.

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180 In *Fernando and Raquel Marti de Mejia v Peru* Case 10.970 Report No 5/96, Inter-Am Ct HR, OEA/Ser.L/V/II.91 Doc 7 (1996) (01-03-1996), confirmed in the *Cantoral Benavides* case (2000) Inter-Am Ct HR, Ser. C. No 69 (Peru) para 97.

181 Pact of San Jose, Costa Rica, 22-11-1969.

182 S/RES/1325 (2000) adopted by the United Nations Security Council at its 4213th meeting on 31-10-2000.

183 See S/RES/1325 (2000) Recommendation 10.

184 S/RES/1820 (2008) adopted by the United Nations Security Council at its 5916th meeting on 19-06-2008.

185 See S/RES/1820 (2008) General Recommendation.

The above clearly shows that rape and other acts of sexual violence perpetrated against women during armed conflict appear to be viewed with the necessary gravity by the international community. However, these sentiments do not necessarily provide support for the argument that the prohibition of sexual violence committed against women *per se* constitutes a peremptory norm of international law. The prohibition of sexual violence could possibly only be deemed *jus cogens* in very specific instances and within a very specific context, notably where acts of sexual violence constitute torture and thus a crime against humanity.

The international community and international (humanitarian) law in particular, has sadly not yet advanced to the position where *all* sexual violence, and indeed even a *single* act of rape, *per se* constitutes a violation of a basic and general peremptory norm of international law. This situation prevails in spite of the pervasive nature of sexual violence and the specific, systematic and strategic targeting of women during armed conflict as starkly (and repeatedly) recognised by international instruments, tribunals and the accompanying jurisprudence.

Perhaps the failure to conceptualise and thus proscribe all sexual violence as violating *jus cogens* will only be resolved once the male bias inherent to this very notion has been exposed and suitably addressed. Although the recent advances in the conceptualisation of sexual violence during armed conflict as torture, and thus as a violation of *jus cogens*, is to be welcomed, much work remains to be done to end the scourge of violence and brutality purposefully directed against women in armed conflict. There exists an urgent need to challenge and counter the culture of impunity of rape in war. In the words of Nelson Mandela, the collective challenge, therefore, remains:

> "Safety and security don't just happen: they are the result of collective consensus and public investment. We owe . . . the most vulnerable citizens in [our] society a life free from violence and fear. In order to ensure this, we must become tireless in our efforts not only to attain peace, justice and prosperity for countries but also for communities and members of the same family. We must address the roots of violence. Only then will we transform the past century's legacy from a crushing burden into a cautionary lesson."[186]

186 Mandela *World Report on Violence and Health* (2002) cited in Ward *et al The Shame of War: Sexual Violence against Women and Girls in Conflict* (2007) 9.

Distribution of Death Benefits in terms of Section 37C of the Pension Funds Act – Rejecting the Dominant-Servient Test in Cases of Cohabitation

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1 INTRODUCTION

Section 37C of the Pension Funds Act[1] (hereafter "the Act") provides in pertinent part that:

> "(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund in respect of a deceased member, shall . . . not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:
>
> (*a*) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants."

This provision regulates the distribution of benefits payable by pension funds upon the death of a member of the fund. It overrides the deceased member's freedom of testation and confers the power to distribute such benefits to the board of management of a pension fund (hereinafter referred to as the board).[2] One of the duties imposed on the board by s 37C is to identify the dependants of the deceased.

In *Mashazi v African Products Retirement Benefits Provident Fund*[3] Hussain J, commenting on the objective of s 37C, explained that:

> "[s]ection 37C is a social protection type measure, [because] it places the benefit payable on a member's death under the control of the retirement fund with the discretion to pay it to the member's dependents in such proportions as it deems equitable, thereby reducing the state's liability in this regard."

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1 Act 24 of 1956.

2 *Mashazi v. African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W) 3705; Mhango "An examination of the accurate application of the dependency test under the Pension Funds Act" 2008 *SA Merc LJ* 126 discussing s 37C and the three duties it imposes on the board; and Mhango "The duty to investigate factual dependants: a comment on *De Beers & Others v Hosaf Fibre Provident Fund*" 2008 *IJL* 2439-2446 discussing the first duty imposed on the board under s 37C, namely the duty to identify dependants.

3 *Mashazi v African Products Retirement Benefits Provident Fund* 3705.

To achieve this objective s 1 of the Act adopts a broad definition of a dependant. A dependant is defined as:

> "(a) a person in respect of whom the member is legally liable for maintenance;
> (b) a person in respect of whom the member is not legally liable for maintenance, if such person -
> (i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
> (ii) is the spouse of the member;
> (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock;
> (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died."

According to this definition, the legislature creates various classes of dependants: a legal dependant in paragraph (a); a factual dependant, a spouse and a child in paragraph (b); and a future dependant in paragraph (c). This article focuses on cohabitants and whether they qualify as factual dependants in terms of paragraph (b)(i). The starting point of this discussion is *Hlathi v University of Fort Hare Retirement Fund*[4] where the issue was whether a cohabiting partner who was in a relationship for 17 years (nine of which the parties cohabited) with the deceased member, was a factual dependant in terms of the Act.

I focus on the Pension Funds Adjudicator's (hereafter "the Adjudicator") determinations on whether or not cohabitants are factual dependants in terms of the Act. I will do so by comparing early decisions in *Van der Merwe v Southern Life Association*[5] and *Van der Merwe v Central Retirement Annuity Fund*[6] with the *Hlathi* decision. In these decisions the Adjudicator applied two different tests to determine whether a cohabiting partner qualifies as a factual dependant in terms of the Act. I argue that the first test in *Van der Merwe v Southern Life Association*, which requires cohabitants to have a mutual dependence and share a common household (which has now been followed in *Hlathi*), should be welcomed. I reject the dominant-servient test as laid down in *Van der Merwe v Central Retirement Annuity Fund*. I conclude that *Hlathi* contributes positively to the largely unregulated issue of cohabitation and therefore gives hope to cohabitants especially women.

2 IDENTIFYING A FACTUAL DEPENDANT FROM A SPOUSE UNDER THE ACT

In order to understand the significance of the *Hlathi* determination it is important to identify two types of dependants in terms of paragraph (b)(i) and (ii) of the definition. These are "cohabitants" and "spouses" respectively. In terms of paragraph (b)(ii), a spouse is defined as a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act[7], the Recognition of Customary Marriages Act[8] or the Civil Union

4 2009 1 BPLR 46 (PFA).
5 2000 3 BPLR 31 (PFA).
6 2005 5 BPLR 463 (PFA).
7 Act 68 of 1961
8 Act 68 of 1998.

Act[9], or the tenets of a religion.[10] In other words, the Act recognises three classes of spouses, namely, civil marriage spouses, religious marriage spouses and civil union spouses. It is also evident that for a spouse to be recognised for the purposes of the Act, it must be proven that she or he is a spouse of a deceased member in accordance with the Marriage Act, the Recognition of Customary Marriages Act, or the tenets of a religion or a civil union partner in terms of the Civil Union Act. This means those who have gone through some form of a religious marriage such as Muslim or Hindu marriage, but whose marriage is not recognised,[11] are included in terms of the Act. This is also illustrated in the recent family law jurisprudence on Muslim marriages in relation to both monogamous and more recently polygamous marriages holding that family status is determined by family function rather than formalities.[12] *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* illustrates this point in that the Supreme Court of Appeal extended the dependent's action for loss of support of the surviving spouse to a spouse in a monogamous Muslim marriage.[13] Further, in *Khan v Khan* the high court decided that if the consequences of a monogamous Muslim marriage are recognised, then the consequences of a polygamous marriage should also be recognised. The high court therefore stated that in light of the Recognition of Customary Marriages Act which recognises polygamous customary marriages entered into before the promulgation of that Act that it would be a gross violation of the party's rights to equality to deny a maintenance claim in terms of the Maintenance Act[14] based on the fact that the Muslim marriage was polygamous.[15]

Excluded from the definition of dependant are heterosexual cohabitants who have not gone through any form of religious or traditional marriage ceremony. This is in line with the Constitutional Court decision in *Volks NO v Robinson*,[16]

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9 Act 17 of 2006.

10 Section 1(u) of the Pension Funds Amendment Act 11 of 2007.

11 Muslim Marriages are not recognised as valid marriages in terms of South African law. However, courts have recognised the consequences of Muslim marriages in specific circumstances. See *Ismail v Ismail* 2007 4 SA (E) 561C-E; *Daniels v Campbell NO* 2004 5 SA 331 (CC); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) and *Khan v Khan* 2005 2 SA 272 (T).

12 Martha Minow has argued that in order to ascribe legal rights to groups of people, we ought to determine whether they perform the functions of families rather than rely on marital or biological ties: Minow "Redefining families: who's in and who's out?' 1991 *Colorado LR* 269 as quoted in Clark and Goldblatt "Gender and Family Law" in Bonthuys and Albertyn *Gender, Law and Justice* (2007) 195 207.

13 *Amod v Multilateral Motor Vehicle Accidents Fund* and see also *Daniels v Campbell* where the meaning of the word "spouse" in the Maintenance of Surviving Spouses Act 27 of 1990 was extended to include a spouse from a monogamous Muslim marriage.

14 Act 99 of 1990.

15 *Khan v Khan*. Also see *Hassam v Jacobs NO (Muslim Youth Movement of South Africa and Women's Legal Trust as Amici Curiae)* 2009 11 BCLR 1148 (CC) where the Constitutional Court declared certain provisions of the Intestate Succession Act 81 of 1987 and Maintenance of Surviving Spouses Act unconstitutional for excluding Muslim spouses in polygamous marriages. Also see Bakker "Towards the recognition of diversity: Muslim marriages in South Africa' 2009 *THRHR* 394.

16 2005 6 BCLR 446 (CC). For a criticism of this judgment see Cooke "Choice, heterosexual life partnership, death and poverty 2005 *SALJ* 542; Bonthuys "Institutional openness and

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where the majority held that a person, who could have married a deceased but chose not to, should not be granted the rights of a spouse. Nevertheless, even if a person is not a spouse in terms of the said legislation he or she can still be considered a factual dependant in terms of s 1(b)(i). John Murphy, the first Pension Funds Adjudicator, in *Van der Merwe v Southern Life Association* stated that s 1(b)(i) of the Act cannot be interpreted literally and in isolation, and he therefore applied a purposive and contextual interpretation.[17] He held that the purpose of the legislature in enacting the provision was to broaden the category of persons entitled to share in death benefits by including persons involved in relationships which the law traditionally does not accept as constituting legal dependency. He reasoned that the provision has the progressive aim of recognising that modern society is tolerant of relationships besides the nuclear family arrangements sanctioned by the common law.[18] The dependants that fall under paragraph (b)(i) include persons who simply live together and for their own good reasons have not observed the formalities of entering into a formal marriage. Murphy held that the true intention of the definition of a dependant in s 1 is to grant trustees a discretion to accord the same-sex couples and unmarried cohabitants the same rights as legally married couples.[19] He also laid down a two-prong test for determining whether a person is a dependant in terms of paragraph (b)(i). The first prong under this test is concerned with determining whether the parties demonstrated mutual dependence. The second prong of the test is concerned with determining whether the parties ran a shared and common household.[20] The reason is that such an interpretation would be in keeping with the spirit of the bill of rights in terms of ss 7(2) and 9 of the Constitution which provides that neither the state nor any person may unfairly discriminate directly or indirectly against anyone on the grounds of that person's marital status.[21]

In contrast, a cohabitant partner was not recognised as a factual dependant in terms of the Act in *Van der Merwe v Central Retirement Annuity Fund.*[22] The second Pension Funds Adjudicator, Vuyani Ngalwana, rejected Murphy's test in *Van der Merwe v Southern Life Association* and stated that something more is required rather than for cohabitants to be financially mutually dependant.[23] He therefore held that to qualify as a factual dependant under paragraph (b)(i) required at the very least a dominant-servient relationship, in which one party is

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resistance to feminist arguments: the example of the South African Constitutional Court" 2008 *Canadian Journal of Women & Law* 1.

17 *Van der Merwe v Southern Life Association* 329.

18 329-30.

19 330.

20 Mhango 2008 *SA Merc LJ* 130.

21 Section 7(2) of the Constitution states that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights".

22 2005 5 BPLR 463 (PFA).

23 It is important to note that the decisions of the Pension Funds Adjudicator create a precedent and therefore the Adjudicator has to give reasons why she departs from the previous decisions. The Adjudicator ruled in *Beukes v Pepkor Retirement Fund* 2007 3 BPLR 288 (PFA) para 5.2 that in terms of section 30O of the Pension Funds Act her decisions create legal precedent and pension funds must apply their minds to the rulings by the Adjudicator.

the substantive provider.[24] In this case, the complainant was married to the deceased from 1978 until 1987 when the marriage was terminated by divorce. In terms of the divorce order, the deceased was obliged to pay monthly maintenance to her in an amount of R150, 00 per month in respect of each of the minor children, Mario and Melanie. From about three years after the divorce and shortly after the complainant's remarriage the deceased had started defaulting on his maintenance payments and paid no maintenance for the last ten years preceding his death, although he was still under legal duty to do so. The complainant (who acted as a guardian to Mario, the minor child) submitted that it was too costly for her to pursue her maintenance claims against the deceased, particularly since she was out of the country for a substantial part of the period concerned. Subsequent to the divorce, the deceased entered into a relationship with the second respondent (the cohabitant partner) culminating in the two of them setting up a common home for the last three years of the deceased's life. On the death of the deceased, a benefit became payable as a consequence of his membership of the fund which fell to be distributed in terms of the provisions of s 37C of the Act. The board identified the cohabiting partner and the deceased's two children as dependants and then divided the proceeds as follows: 65% to the cohabiting partner, 11% to Melanie and 24% to Mario. The complainant contended that most of the assets in the deceased's intestate estate, as well as the major portion of death benefits payable on his death were allocated to the cohabiting partner at the expense of his children. Ngalwana found that there was no evidence before him to suggest that the second respondent was factually dependent on the deceased for purposes of s 1(b)(i) as alleged by the fund. This is because it appeared from the papers that she was the substantial creditor in the deceased's estate and in her response she made the following statement: [25]

> "ons het alles gedeel in die sin as ek vir die bediende betaal het hy die tuinier betaal, die huishuur het ons gedeel asook al die ander uitgawes."

Ngalwana stated that on an ordinary construction this would indicate a pooling of resources, or mutual dependence, which does not suffice for the purposes of "factual dependence" as defined in the Act. It was also acknowledged by the fund that the cohabiting partner was employed and received maintenance from her previous husband. Ngalwana also found that the decision by the board to regard the cohabiting partner as a factual dependant was based on the fact that the deceased and the second respondent were mutually interdependent, having pooled their financial resources.[26] On this basis Ngalwana ruled that factual dependency was not established. The effect of this ruling was that boards of pension funds, in exercising their powers in terms of s 37C, could only include a surviving cohabitant as a factual dependant in circumstances where he or she is able to prove that the deceased member was a dominant financial provider in their relationship. Ngalwana therefore held that the board had erred in considering the cohabiting partner as a dependant of the deceased and the decision had to be set aside. This legal position prevailed until *Hlathi* was decided in 2009.

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24 Para 16.
25 Para 17.
26 *Ibid*.

3 THE BACKGROUND TO *HLATHI*

The *Hlathi* case is a determination by Mamodupi Mohlala, the third Pension Funds Adjudicator, concerning the distribution of a death benefit in terms of s 37C of the Act. The issue in this case was whether the board correctly identified the potential dependants and distributed the benefits pursuant to the Act. The facts of the case were as follows: the deceased was a member of the first respondent, a registered pension fund (Fort Hare Retirement Fund).[27] Following the deceased's death, a benefit in the amount of R400 000 before tax became available for distribution to his beneficiaries.[28] The board of trustees of the Fort Hare Retirement Fund's investigations established that the deceased had two dependants. The first dependant was the mother of the deceased, who was also the complainant in this matter. The second dependant was the deceased's surviving cohabiting partner who was joined as a third respondent in this matter pursuant to s 30G(d) of the Act.[29] The board resolved to allocate 33.3% of the benefit to the mother and 66.6% to the cohabiting partner.

The complainant lodged a complaint with the office of the Pension Funds Adjudicator in terms of s 30M of the Act. She was unhappy with the trustees' decision to include the third respondent in the distribution of the death benefit and she alleged that she was the sole beneficiary because the deceased was unmarried and did not have any children. The complainant also alleged that the cohabiting partner was not the deceased's dependant since she was employed in a high-paying job (the facts do not disclose the cohabiting partner's job). Accordingly, the complainant requested the Adjudicator to set aside the board's decision and replace it with the order allocating 100% of the benefit in her favour.[30]

As an interested party, the cohabiting partner submitted that she had a formal relationship with the deceased which lasted for a period of 17 years until his untimely death. She added that she and the deceased stayed together as husband and wife for a period of nine years until his death and she furnished proof that indicated the deceased regarded her as his lifelong partner. The cohabiting partner also provided a detailed proof of shared expenses ranging from 50% contribution towards bond repayments, household insurance, motor vehicle insurance and maintenance costs, telephone costs, family holidays and general entertainment costs. To further demonstrate that they lived as husband and wife, the third respondent stated that they could sign each other's cheques, and that they had a mutually supportive, loving and happy relationship.[31] She also disclosed that she contributed financially towards the deceased's tuition and maintenance whilst he was studying as she was the only source of financial support at the time. She also stated that they had plans to get married when the deceased completed his studies.

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27 Para 4.
28 *Ibid*.
29 Section 30G of the Act provides that "[t]he parties to a complainant shall be –
(d) any other person who the Adjudicator believes has a sufficient interest in the matter to be made a party to the complaint."
30 Para 6.
31 Para 13.

4 THE ADJUDICATOR'S DECISION AND REASONING

In resolving this complaint, Mohlala first addressed the question of whether the third respondent qualified as a spouse within the meaning of the Act. In analysing the meaning of spouse in terms of the Act, Mohlala found that the use of the word "permanent" in the definition of the spouse in terms of the Act clearly depicts that the legislature intended that parties or persons who profess to be spouses in this context have an element of permanency to their life partnership. Mohlala then referred to the ruling by the majority of the Constitutional Court in *Volks v Robinson*. In this case the majority held that the differential treatment of formally married spouses on the one hand, and cohabitants in a permanent life partnership on the other, for purposes of maintenance claims against the deceased's estate in terms of the Maintenance of the Surviving Spouses Act, was constitutionally acceptable.[32] In light of this ruling, Mohlala held that the third respondent could not qualify as a factual dependant by virtue of being regarded as a spouse for purposes of paragraph (b)(ii) for two reasons. The first is that the Act does not apply retrospectively in this instance. (The Act came into operation on 13-09-2007 while the deceased passed away on 27-03-2002.) The second is that the third respondent's relationship with the deceased was not solemnised and registered by way of either a marriage or civil union or partnership.[33]

Having found that the third respondent did not qualify in terms of paragraph (b)(ii) as a spouse, Mohlala proceeded to determine whether the third respondent qualified as a factual dependent in terms of paragraph (b)(i). Under this analysis, Mohlala scrutinised Ngalwana's decision in *Van der Merwe v Central Retirement Annuity Fund* and rejected the view that factual dependency requires a dominant-servient relationship in which one party is the substantive provider.[34] She reasoned that a purposive and contextual interpretation of paragraph (b)(i) reveals that the true intention of the legislature in enacting the provision was certainly to give effect to the purpose of s 37C of the Act which is to protect proven dependency even for persons who are involved in relationships that the law does not accept as constituting legal dependency.[35] Furthermore, Mohlala noted that since the legislature did not refer to "totally or wholly" dependent this means that the test for dependency under paragraph (b)(i) was not exclusive. In other words, she found that complete dependency is not the sole yardstick to determine or measure dependency for purposes of paragraph (b)(i). Accordingly, it would be contrary to the intention of the legislature to exclude a party for this subsection on the basis that he or she had an "inter-dependent" relationship with the deceased member, or alternatively that the parties had an equal relationship as opposed to the dominant and servient one.[36]

According to Mohlala, in such cases factual dependency is proven by sufficient evidence that the parties in a relationship are inter-dependent, and as a consequence of the other party's death the surviving partner is left in a financial predicament or financially worse off.[37] In this matter, Mohlala noted that the

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32 Para 60.
33 *Hlathi* para 28.
34 Paras 32-33.
35 Para 34.
36 *Ibid*.
37 *Ibid*.

evidence indicated that the third respondent and the deceased contributed equally towards bond repayments and other household expenses; and that the third respondent submitted that she and the deceased mutually supported each other in a relationship that lasted for a period of 17 years. Mohlala also noted that the financial position of the third respondent had changed dramatically since the death of the deceased.[38] As a result, Mohlala was satisfied that the third respondent and the deceased were inter-dependent and that without the deceased her lifestyle would no longer be the same. Therefore, according to Mohlala the third respondent qualified as a factual dependent in terms of s 1(b)(i) of the Act. She ruled that the third respondent was correctly identified as a dependant and awarded death benefits. In other words, Mohlala found that a cohabiting partner can qualify as a factual dependant in terms of the Act as long as it is proven that the parties had an inter-dependent or equal and mutual relationship.

The test by Mohlala is an expansion of Murphy's test in *Van der Merwe v Southern Life Association* for Mohlala understands that there must be a shared common household and mutual dependence between the parties before one can qualify as a factual dependant under the Act. Added to that is that the parties can also be inter-dependent or equal, and as a result of the death of one party, the surviving cohabitant is left in a financial predicament or is financially worse off.

5 DISCUSSION

This determination is relevant today because it pertains to the very important issue of cohabitation[39] which has largely been unregulated.[40] In *Volks v Robinson* the Constitutional Court acknowledged lack of regulation in this area and called on parliament to regulate it. Since parliament has not yet acted on this matter, the *Hlathi* determination is an important case that seeks to regulate this area in the context of pension fund organisations. It is my view that this determination gives some form of relief to the cohabitants who are left in a predicament by a death of their partner who is a member of a pension fund. I briefly discuss the legal status of cohabitants in South Africa for the purpose of illustrating how the *Hlathi* determination contributes to the regulation of this area of law.

The general rule in our law is that cohabitation (as compared to a marriage or a civil union) does not give rise to special legal consequences, no matter how long the relationship has endured. Apart from limited statutory interventions which have conferred some of the rights and duties which attach to spouses on cohabitants,[41] the law has largely ignored cohabitation. While married couples owe each other a reciprocal legal duty of maintenance according to their

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38 Para 35.

39 Brigitte Clark defines cohabitation as a stable, monogamous relationship where couples who do not wish to, or are not allowed to get married, live together as spouses: Clark "Families and domestic partnerships" 2002 *SALJ* 634 635. Also see Hutchings and Delport "Cohabitation: a responsible approach" 1992 *De Rebus* 121–122.

40 *Volks v Robinson* para 65.

41 See s 6(1)(f) of the Independent Media Commission Act 148 of 1993; ss 3(7)(a)(ii), 3(8) and 7(5) of the Lotteries Act 57 of 1997, s 27(2)(c)(i) of the Basic Conditions of Employment Act 75 of 1997; s 31(2)(a) of the Special Pension Act 69 of 1996, s 1 of the Employment Equity Act 55 of 1998; s 8(6)(e)(iii)(aa) of the Housing Act 107 of 1997; and ss 10(2) and 15(9) of the Road Traffic Management Corporation Act 20 of 1999.

means,[42] this duty does not arise in a cohabitation relationship. The majority in *Volks v Robinson* reiterated that there is a fundamental difference between the position of cohabitants and widows who are predeceased by their husbands. Cohabitation is a relationship "in which each [cohabitant] was free to continue or not and from which each was free to withdraw at will, without obligation and without legal or other formalities".[43] The majority held that the distinction between married couples and cohabitants cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage. The majority did not deny the fact that there is insufficient regulation of cohabitation relationships.[44]

In light of the call by the Constitutional Court in *Volks v Robinson* for parliament to regulate cohabitation relationships, the department of home affairs recently issued a draft Bill on domestic partnerships[45] for public comment[46] which has yet to be tabled in parliament. The long title of the draft Bill states that it is "to provide for the legal recognition of domestic partnerships; the enforcement of the legal consequences of domestic partnerships; and to provide for matters incidental thereto". This draft Bill deals with both registered and unregistered partnerships and seeks to provide legal protection to both. Consequently, clause 1 defines a domestic partnership as a registered or unregistered domestic partnership between two persons who are 18 years of age or older. This draft Bill, if it becomes law, will provide the relief needed by parties in a cohabitation relationship.

However, the legal protection of registered domestic partnerships differs from the legal protection of unregistered partnerships. Those who have registered their partnership will receive more protection than their counterparts in an unregistered partnership. To illustrate this point, when it comes to the maintenance of a partner

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42 In *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 33, O'Regan J remarked that in terms of common law, marriage creates a physical, moral and spiritual community life. The community life establishes a reciprocal and enforceable duty of financial support between spouses and a joint responsibility for the guardianship and custody of children born of the marriage.

43 Para 55.

44 The majority stated that the plight of a woman who is the survivor in a cohabitation relationship is the result of the absence of any law that places rights and obligations on people who are partners within relationships of this kind during their lifetime: para 65.

45 Domestic Partnerships Bill (draft), GN 36 of 2008, GG 30663 of 14-01-2008. Originally domestic partnerships were included in the Civil Union Bill, 2006 which was followed as a result of the Constitutional Court decision of *Minister of Home Affairs and another v Fourie (Doctors for Life and Others Amici Curiae): Lesbian and Gay Equality Project v Minister of Home* Affairs 2006 1 SA 524 (CC). The Civil Union Bill had two aims: first to provide same-sex couples with access to a "marriage-like institution" called "civil partnerships" and second, to extend some financial protection to same-sex and opposite sex couples, called "domestic partnerships". However, because of the pressures of a deadline granted by the Constitutional Court the final version of the Bill, passed as the Civil Union Act omitted all provisions dealing with domestic partnerships. For further discussions on domestic partnerships see Clark and Goldblatt in Bonthuys and Albertyn *Gender, Law and Justice* (2007) 195. For the criticism of the Civil Union Act see Bonthuys "Irrational accommodation: conscience, religion and same sex marriages in South Africa' 2008 *SALJ* 473 and Bonthuys "Possibilities foreclosed: the Civil Union Act and lesbian and gay identity in Southern Africa' 2008 *Sexualities* 726.

46 The due date for comment was 15-02-2008.

in a registered domestic partnership after termination of the partnership, a court may grant an order granting maintenance which is just and equitable for any specified period or until the registered partner dies, marries, enters into a civil union or enters into a registered domestic partnership.[47] Although partners in an unregistered partnership are not liable to maintain one another, an unregistered partner can apply to a court and a court may make an order which is just and equitable for maintenance for a specified period.[48] As surviving partners, a partner in a registered relationship is accorded the status of a "spouse" and will be eligible to be maintained in terms of the Maintenance of Surviving Spouses Act.[49] However, a surviving unregistered domestic partner can bring an application to a court for an order for the provision of her reasonable maintenance needs from the estate of the deceased until her death, remarriage or registration of another domestic partnership, in so far as she is not able to provide from her own means and earnings.[50] It can therefore be argued that cohabitants in an unregistered partnership will have fewer rights than those in registered partnerships, although they will still be entitled to legal protection.

Under the current legal regime cohabitants are left destitute at the termination of the relationship no matter how long they have been together. This is why *Hlathi* is important. It gives at least some form of legal relief to cohabitants. Mohlala recognises the predicament of a cohabitant who is left financially worse off by the death of her partner who is a member of a pension fund, and that is why she interpreted the Act progressively so as to include cohabitants in terms of paragraph (b)(i) whether they are inter-dependent or equal to the deceased member. Further, in cases dealing with other dependants as outlined in s 1 of the Act – legal and future dependants – there is no requirement that they have to be wholly dependent on the deceased member in order to qualify as dependants under the Act. To illustrate this point, Murphy in *Van der Merwe v Southern Life Association* acknowledged that had the cohabitant been legally married to the deceased member, she would have been entitled to be regarded as a dependant by virtue of the existence of a legal duty of support irrespective of her financial situation, and there would have been no obligation at all upon her to prove that she was in fact dependent on the deceased for maintenance.[51] Mohlala should be commended for her decision in *Hlathi*. She realises that cohabitants rely on each other emotionally as well as financially. Further with the changing forms of family there is no reason why cohabitants should not be legally protected.

5 1 Rejecting the dominant-servient test laid down in *Van der Merwe v Central Retirement Annuity Fund*

The other significance of the ruling in *Hlathi* is that it rejected the dominant-servient test to determine factual dependency in cases of cohabitation. It is my view that Mohlala's decision should be welcomed for a number of reasons. The first reason is that there is nothing in the Act that refers to a dominant-servient relationship or complete dependency as a standard for factual dependants. The

47 Clause 18.
48 Clause 27.
49 Clause 19.
50 Clause 29.
51 *Van der Merwe v Southern Life Association* 330.

second reason is that the use of the expression dominant-servient test[52] by Ngalwana in *Van der Merwe v Central Retirement Annuity Fund* is insensitive. This is based on a patriarchal notion that women are servants and men are masters, because the reality is that in most cases it is women who are in need of maintenance after the termination of a relationship. It has been reported that generally women earn less than men; it is women who are caught in a cohabitation relationship where men do not wish to get married but women do; it is women who are caught in a predicament whether to leave a non-committing man in a cohabitant relationship or leave the relationship and face poverty.[53] Ngalwana's attitude in *Van der Merwe v Central Retirement Annuity Fund* suggests an ideology of gender in which women are characterised as subordinates to men.[54]

The third reason is that it is surprising to find a determination by an Adjudicator in 2005 (after the adoption of a democratic Constitution) which still uses terms "dominant-servient" which have colonial, apartheid and patriarchal connotations. These terms employed by Ngalwana were previously used to oppress and indignify African people during the colonial and apartheid eras, and have been rejected by the Constitution. There is no doubt that the Constitution was adopted to improve the quality of life of all citizens of and those who live in South Africa.[55] It therefore is not surprising that South Africa is founded on the values which include human dignity, the achievement of equality and the advancement of human rights and freedoms.[56] The constitutional guarantee of equality entails a historical understanding of the type of society that South Africa once was and against which the new Constitution has set itself, because the past political and legal system was based on inequality and unfair discrimination.[57] What is worse is that these terms came from a judicial officer[58] who is required under s 7(2) of

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52 This is not the first time Ngalwana uses this test in his decisions. He used this test for the first time in *De Wizhem v South African Retirement Annuity Fund* 2005 2 BPLR 180 (PFA) para 10, where he stated that "factual dependence" contained within paragraph (b)(i) must comprise a financially dominant/subservient relationship. If this were not the case, casual relationships would fall within the definition of a factual dependant, provided the parties were pooling financial resources.

53 See Sachs J's dissenting opinion in *Volks v Robinson* para 164.

54 Swart "The Carfininan curse: the attitudes of South African judges towards women between 1900 and 1920" 2003 *SALJ* 540 discussing the attitudes of judges towards women in the early years of the last century and argues that judges then were happy to keep to the *status quo* that women are subordinates to men.

55 The Preamble to the Constitution of the Republic of South Africa, 1996.

56 *Ibid*.

57 Currie and De Waal *The Bill of Rights Handbook* (2005) 231.

58 The Pension Funds Adjudicator performs the functions of a judicial officer in terms of section 30O(1) of the Act, which states that any determination of the Adjudicator shall be deemed to be civil judgment of any court had the matter in question been heard by such court. This has been reaffirmed in *Otis (South Africa) Pension Fund and Another v Hinton and Another* 2005 1 BPLR 17 (PFA) 18C-G. Hurt stated that "[i]t is apparent from the provisions of sections 30D, 30E, 30F, 30L, 30M and 30O of the Act that the intention of the legislature was to constitute a complaints forum which would, for all practical purposes, be equivalent to a court of law but which was not bound by the formalities of procedure which might ordinarily have the effect of delaying adjudication and causing the parties to incur substantial expenses for legal representation. The absence of formal procedural requirements does not, however, detract from the nature of the function which the Adjudicator must perform which is, plainly, a judicial function. He is required to give reasons for his

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the Constitution to respect, protect, promote and fulfill the rights set out in the Bill of Rights. In *Van der Merwe v Southern Life Association* Murphy ruled that when interpreting the definition of a factual dependant in terms of the Act, regard must be had to the spirit of the bill of rights. It is my view that Ngalwana failed to discharge his duty under ss 7 and 39[59] of the Constitution. Instead, he employed terms which have a patriarchal connotation in his application of the law. This proves the observation by feminists who point out that patriarchy extends to the structure of legal and other forms of reasoning and that concepts of objectivity and reality are defined by male interests and perceptions.[60] In addition, feminists have correctly observed that "patriarchal interpretations of justice and equality exclude qualities like emotion, relationships and care, which characterise the lives of women, while valorising abstraction and independence, which is associated with male behavior in the public sphere".[61] Ngalwana's reasoning and decision in *Van der Merwe v Central Retirement Annuity Fund* validates these uncomfortable observations.

The terms dominant-servient have no relevance in the interpretation of the Act. The correct view is that of Murphy in *Van der Merwe v Southern Life Association*, as expanded by Mohlala in *Hlathi*, holding that the test for determining whether a person is a dependant in terms of section 1(b)(i) of the Act is whether the parties demonstrated a mutual dependence, interdependent or equal and ran a shared and common household and as a result of the death of the partner the surviving cohabitant finds herself in a predicament. This view should be welcome because it is in keeping with the spirit and purport of the Bill of Rights.

5 2 On equal status of cohabitants

In addressing the issue of whether s 1(b)(i) of the Act disqualifies a party who was inter-dependent or equal with a deceased pension member from being a dependant, Mohlala reasoned that the intention of the drafters would not have been to exclude a party on the basis that she had an interdependent or equal relationship with the deceased member as opposed to the dominant and servient one. In other words, cohabitants who are interdependent or contribute equally to the shared common household qualify as factual dependants in terms of s 1(b)(i) of the Act. The implication of this view is that its effect advances equality. Partners in a cohabitation relationship should be equal rather than having one that dominates the other.

Equality is one of the core values on which South Africa's democracy is founded. Section 1(a) of the Constitution provides that the Republic of South Africa is a sovereign, democratic state founded on, amongst other values, human dignity, achievement of equality and the advancement of human rights and freedoms. Sections 7(1), 36 and 39(1)(a) of the Constitution also refer to equality as one of the fundamental values. Therefore this means that the entrenchment of

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determination which, in itself, precludes him from making a determination capriciously or basing it on matters which are not of record before him".

59 Section 39(2) of the Constitution enjoins courts and tribunals to have regard to the bill of rights when interpreting any legislation.

60 Van Marle and Bonthuys "Feminist Theories and Concepts" in Bonthuys and Albertyn *Gender, Law and Justice* (2007) 15 21.

61 *Ibid.*

equality as a value is significant as it seeks to extend the influence of the principles of non-discrimination beyond the formal recognition of the right to equality. Thus, it becomes relevant even where the right is not directly invoked in judicial proceedings.[62] Equality is not only the value but a guaranteed right in the Bill of Rights.[63] Section 9 of the Constitution says that everyone is equal before the law and has the right to equal protection and benefit of the law.

When discussing equality a distinction should be drawn between formal equality and substantive equality. Formal equality is best described as the abstract prescription of equal treatment for all persons, regardless of their actual circumstances.[64] It perceives inequality as irrational aberrations in an otherwise just social order. These aberrations can be overcome by extending the same rights and entitlements to all, in accordance with the same "neutral" standard of measurement. As a result, a formal equality approach cannot tolerate differences. Its reliance on "neutrality" tends to mask forms of judicial bias and also ignores the actual social and economic differences between individuals and groups.[65] On the other hand, a legal understanding of substantive equality proceeds from the recognition that inequality not only emerges from irrational legal distinctions, but is often more deeply rooted in social and economic cleavages between groups in society.[66] Such inequalities are referred to as "systemic" as they are rooted in the structures and institutions of society. Legal claims that target such inequalities require an understanding of the underlying social and economic conditions that create and reinforce these inequalities, if such claims are to remedy inequality.[67] In *Minister of Finance v Van Heerden*[68] the Constitutional Court explained that

> "[the] substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complaints in society, their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise a flexible but 'situation sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society".[69]

This means that when deciding issues based on gender or previously disadvantaged groups such as women, courts or tribunals have to take into account the substantive nature of equality.[70] In that way, the courts will be contributing to the advancement of the disadvantaged group in society. Women in South Africa are generally poorer than men; are less likely to be employed; and often have lower

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62 Ntlama "*Masiya*: gender equality and the role of the common law" 2009 *Malawi Law Journal* 117 123.
63 See s 9 of the Constitution.
64 Albertyn "Equality" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2009) 35-6.
65 *Ibid*. Also see Bonthuys 2008 *Canadian Journal of Women & Law* 1.
66 Albertyn in Woolman *et al Constitutional Law of South Africa* 35-6.
67 *Ibid.*
68 *Minister of Finance and Others v Van Heerden* 2004 6 SA 121 (CC).
69 Para 27 (footnotes omitted).
70 See Sachs J's dissenting opinion in *Volks v Robinson* para 163.

paying and more precarious jobs.[71] Nevertheless, just because women are in a cohabitation relationship it does not mean that they cannot be equal partners. These are the times when women are also able to work and can contribute equally to the shared common household. However, when the other party in a relationship dies, the surviving cohabitee will be left in a financial predicament and her lifestyle will change. Judicial officers are therefore required by the Constitution to take into account the circumstances of the people in order to ensure the equality of the outcome. The implication of *Hlathi* is that during the cohabitation relationship partners can have a mutual relationship where they can contribute equally and be interdependent. It is after one partner's death that the surviving partner will find herself in a predicament and financially worse off. This is when s 37C comes into play. After all, as Mohlala has explained, there is nothing in the Act that says "wholly" independent.

It is therefore important to have progressive decisions such as *Hlathi* which is in keeping with the idea of advancing the disadvantaged in society. This is because substantive equality should develop to envisage "the kind of society we wish to live in, and that courts and tribunals should reflect the needs of 'individuals within communities' and 'solutions to unique problems'".[72] Further, in the words of Beth Goldblatt, "we need to shift the idea (of socio-economic rights) from handouts to the poor to that which is due to citizens to advance their potential as equal members of society".[73] Therefore, according to Mohlala, in the context of s 37C of the Act, if a woman can show that she and her deceased partner had a mutual and supporting relationship, she should be classified as a factual dependant in terms of the Act because this is what the legislature intended and what the Constitution requires. This is what Ngalwana rejected in *Van der Merwe v Central Retirement Annuity Fund*.

It could be argued that the objective of the legislature to protect the financially vulnerable may not be met if s 37C is construed to apply to those who were interdependent *vis á vis* the deceased member. However, this argument appears to be have been rejected by the *Hlathi* ruling when the Mohlala reasoned that s 37C cannot be construed as requiring wholly dependence on the deceased in order for a person to qualify as a dependant, but includes those who were interdependent with the deceased. Moreover, the above argument reveals the problems of application and interpretation brought about by s 37C. The difficulties brought about by s 37C arise out of the three duties this section imposes on the board: to identify the dependants of a member; to effect an equitable distribution of the benefits amongst the beneficiaries; and to determine an appropriate mode of payment. While the legislature's worthy intentions in enacting s 37C are commendable, Murphy[74] has critically commented that this section

> "is a hazardous, technical minefield potentially extremely prejudicial to both those who are expected to apply it and to those intended to benefit from its provisions. It creates anomalies and uncertainties rendering it most difficult to apply. There can be no doubt about its noble and worthy policy intentions. The problem lies in the

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71 Budlender "Women and poverty" 2005 *Agenda* 30.

72 Bohler-Muller "Drucila Cornell's 'Imaginary Domain': equality, freedom and the ethic of alterity in South Africa' 2002 *THRHR* 166 176.

73 Goldblatt "Gender and social assistance in the first decade of democracy: a case study of South Africa's child support grant" 2005 *Politikon* 239 245.

74 *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 299 41F-J.

> execution and the resultant legitimate anxiety felt by those who may fall victim to a claim of maladministration in trying to make sense of it. Any successful claim for maladministration will be borne ultimately by the other members, the participating employer, or perhaps even the members of the board of management.

From the above criticism, it seems clear that the main problem arising out the application of s 37C can best be addressed through legislative amendments of the Act, and not so effective through judicial interpretation. This also means that potential criticism of rulings like *Hlathi* should better be directed at the Act. It is also important to note that the Act was enacted before the coming into effect of the Constitution and therefore the values and principles governing the constitutional democracy were not taken into consideration by the legislature. Hence there is a need for the revision of the Act to reflect the constitutional values and also the need for the Adjudicator to decide in accordance with the ethos of the Constitution. Murphy has correctly called for the appropriate organs of state to respond speedily and in accordance with the values and principles governing public administration set out in s 195 of the Constitution.[75]

5 CONCLUSION

Cohabitants, especially women, are not legally protected. The legislature has been slow in adopting the law that will provide for this protection. However, one of the laws that give some form of legal relief to cohabitants is the Pension Funds Act. This Act does not only provide legal protection to married people (as compared to the Maintenance of Surviving Spouses Act), but also to the cohabitants (if they qualify as factual dependants in terms of s 1(b)(i) of the Act) who are not recognised as spouses in a traditional (and legal) sense. In order to qualify as a factual dependant, a person has to demonstrate that there existed a relationship (between her and the deceased member of the pension fund) which was based on mutual dependence and that they ran a shared common household. Mohlala in *Hlathi* added that even if cohabitants are interdependent or equals in the relationship and that as a result of the death of a partner the surviving cohabitant finds herself in a financial predicament or is financially worse off, she can still qualify as factual dependant in terms of the Act. I am of the view that this is a progressive decision based on the ethos of the democratic Constitution. Rejecting the dominant-servient relationship in *Van der Merwe v Central Retirement Annuity Fund* should be commended as Mohlala advances the disadvantaged in society (as required by the idea of equality).

It is important to note that not every dependant has an automatic right to receive payment of a portion of the benefit. Entitlement is contingent not only on dependency, but also on identification as a beneficiary by the board pursuant to the exercise of its equitable discretion.[76] As with all board decisions, the inclusion or exclusion of particular dependants within the distribution will be reviewable in terms of the complaints process established under chapter VA of the Act.[77] It is also important for the Adjudicator to take into consideration the spirit, purport and objects of the Bill of Rights when interpreting the Act as required by s 39(2) of the Constitution.

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75 *Dobie NO v National Technikon Retirement Pension Fund* 42.
76 *Dobie NO v National Technikon Retirement Pension Fund* 37.
77 *Ibid*.

The Operation of Democracy and the Role of the Judiciary in a Constitutional State

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1 INTRODUCTION

This article examines the compatibility of democracy and constitutionalism. Before investigating the operation of democracy and the role of the judiciary in a constitutional state,[1] the article outlines the operation of democracy and the role of the judiciary under a system of parliamentary sovereignty.

Fundamental to the idea of democracy and democratic decision-making, in both systems of parliamentary sovereignty and constitutional supremacy, is the principle of majority rule. According to this principle, a decision by the majority binds even dissenting minorities. Hence Hosten *et al* submit that "[i]n its simplest form, democracy may be seen to be nothing more than acceding to the wishes of the majority".[2] However, majority rule without some limitations conflicts with the principle of constitutionalism and presents a number of difficult issues. These include questions regarding the meaning of "majority", for example, whether the majority is an absolute or relative one. Further questions regarding the protection of minorities against inconsiderate imposition of the will of the majority also arise.[3] The principle of constitutionalism is intent on addressing these questions by providing that government should derive its authority from a written constitution, and that governmental powers should be limited to only those set out in the constitution.[4] The foundation of constitutionalism therefore is that the limits of state authority are defined and limited by law to ensure that public interest is protected against authoritarian rule.[5]

The two concepts therefore seem irreconcilable. There is an apparent paradox and tension between these principles; with democracy based on the rights of popular majorities, and constitutionalism founded on the fear of an abuse of power by the majority. Now the question is, if the essence of democracy is majority rule, does this entail unlimited power of the majority? Conversely, if

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* B Proc LLB LLM LLD.

1 A constitutional state is a state in which a constitution reigns supreme. As used in this article, the concepts "constitutionalism" and "constitutional state" have corresponding meanings.

2 Hosten *et al Introduction to South African Law and Legal Theory* (1995) 948.

3 Venter *Constitutional Comparison: Japan, German, Canada, South Africa as Constitutional States* (2000) 195.

4 Currie and De Waal *The Bill of Rights Handbook* 4 ed (2001) 7.

5 Boulle, Harris and Hoexter *Constitutional and Administrative Law* (1989) 20.

constitutionalism involves limitations on the exercise of political power, can it also limit the popular will? In attempting to answer these questions, two models, namely, that of parliamentary sovereignty and constitutional supremacy will be investigated to determine whether the paradox applies equally to both models and whether it is correct to talk of constitutionalism in a system of parliamentary sovereignty.

The article will also highlight how the courts reconcile the two seemingly conflicting values through interpretation to eventually appear compatible with, and even complimentary to, one another. The article is organised in five parts. Part 1 is the introduction; part 2 deals with democracy and constitutionalism and the role of the courts in systems of parliamentary sovereignty and constitutional supremacy; part 3 deals with judicial "veto" of majority decisions and part 4 outlines the inevitable tension between democracy and judicial activism. Part 5 concludes the article with a synthesis.

2 DEMOCRACY AND CONSTITUTIONALISM

2 1 Democracy and the role of the judiciary under parliamentary sovereignty

The principle of democracy demands that those who govern should do so in accordance with and on the sufferance of the will of the majority of the people. Constitutionalism, on the other hand, provides, as Henkin puts it, "that the government to be instituted shall be constrained by the constitution and shall govern only according to its terms and subject to its limitations, only with agreed powers and for agreed purposes".[6] It consequently prohibits arbitrary exercise of power by a majoritarian government. Constitutionalism is therefore a national commitment or compact to limit political power, and is intended to balance fundamental values against the exercise of political power.[7]

This limitation of political power is undoubtedly incompatible with the essence of the doctrine of parliamentary sovereignty. Constitutionally, parliament in a Westminster system of government is limited only by certain procedural constraints. Parliament must follow the procedures laid down by the constitution before it can be said to have enacted a law. The courts can only pronounce on whether these procedures have been correctly followed or not. Parliament is thus bound by the rules regulating its composition and procedure, and it can change these only if it follows the existing rules in doing so.[8] Other than on procedural matters, there seems to be no other limitation on the exercise of power. This lack of substantive limitation conflicts with both principles of constitutionalism and the rule of law.

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6 Henkin *Constitutionalism, Democracy and Foreign Affairs* (1990) 6. *Cf.* Licht and De Villiers (eds) *South Africa's Crisis of Constitutional Democracy: Can the US Constitution Help*? (1994) 19.

7 Davis, Cheadle and Haysom *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 3.

8 Currie and De Waal (eds) *The New Constitutional and Administrative Law Vol 1 Constitutional Law* (2001) 14.

In *S v Adams*[9] the court explained its dilemma and its apparent powerlessness under parliamentary sovereignty as follows:

> "[A]n Act of Parliament creates law but not necessarily equity. As a judge in a court of law, I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself and if I were sitting as a court of equity, I would have come to the assistance of the applicant."[10]

In *Nxasana v Minister of Justice*,[11] Didcott J also lamented:

> "[U]nder a constitution like ours, Parliament is sovereign . . . Our courts are constitutionally powerless to legislate or to veto legislation. They can only interpret it, and then implement it in accordance with the interpretation of it."

The argument advanced for strict adherence to the will of the majority in the Westminster system of government is that if sovereignty lies in the will of the majority, how can its representative organ (parliament) be bound by the norms and principles not emanating from the said majority?[12] In *Ndlwana v Hofmeyer*,[13] the Appellate Division of the South African Supreme Court found that "[I]t is obviously senseless to speak of an act of sovereign law-making body as *ultra vires*. There can be no exceeding of power if that power is limitless".[14]

This exposition raises the following question: if majority rule is the basic tenet of democracy, does it then follow that the majority has unlimited power? The modern view is that the sovereign will of the majority is exactly that that has been rejected by contemplative civilisation. This view is stated forcefully by the French philosopher Benjamin Constant (1767–1830) as follows:

> "When one assumes that the sovereignty of the people is unlimited, one is setting up and throwing into human society in haphazard fashion a degree of power too great in itself, and which is an evil regardless of in whose hands it is lodged . . . No authority on earth is unlimited, neither that of the people, nor that of those who claim to represent it, nor that of kings, under whatever title they reign, nor even that of the law, which being only the expression of the will of the people or of the kings, according to the kind of government, must be circumscribed within the same limitations as those of the authority which issues it . . . No duty can bind us . . . to those laws which not only restrict our legitimate liberties but order us to act in ways which run counter to those eternal principles of justice and pity which no man can cease to observe without degrading or denying his very nature. . . . The will of a whole people cannot make just what is unjust."[15]

In the Indian case of *Kesavananda v State of Kerala*[16] the court, by a majority of seven to six, adopted the view that democracy proceeds on the basic assumption that the representatives of the people in parliament will reflect the will of the people and that they will not exercise their powers to betray the people or to abuse the trust and confidence placed in them by the people.[17] The decision of

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9 1979 4 SA793 (T).
10 801 A-B per King J.
11 1976 3 SA 745 (D) 747 G.
12 Olivier "Constitutionalism in the New South Africa" in Licht and De Villiers (eds) *South Africa's Crisis of Constitutional Democracy: Can the US Constitution Help?* (1994) 22.
13 *Ndlwana v Hofmeyer NO* 1937 AD 229.
14 237.
15 Olivier in Licht and De Villiers (eds) *South Africa's Crisis of Constitutional Democracy* 23.
16 *AIR* 1973 SC 1461.
17 1937.

the majority of the court seems to have been motivated or influenced by parliamentary sovereignty. The minority of the court, however, expressed complete distrust of parliamentary majoritarianism:

> "Human freedoms are lost gradually imperceptively and their destruction is generally followed by authoritarian rule. That is what history has taught us. The struggle between liberty and power is eternal. Vigilance is the price that we like every other democratic society have to pay to safeguard the democratic values enshrined in our constitution."[18]

The exercise of absolute powers and the abuse thereof by many rulers must have necessitated the introduction of constitutionalism as a minimising factor. Thus in "Federalist 51"[19] lack of faith in human being's political agendas was expressed:

> "What is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[20]

To prevent miscarriage of justice constitutionalism thus establishes constitutional democracy; in other words, government by the majority with enough power to govern, but ensuring at the same time that such power is structured and controlled in such a way as to prevent excess or abuse of power. In essence, the idea is that government should derive its authority from a written constitution and that its powers should be limited to those set out in the constitution.[21] The courts are, under this arrangement, empowered to declare any legislation on both substantive and procedural grounds, invalid if it is in conflict with the provision of the constitution.

The idea that constitutionalism should be intent on protecting the interests of minorities is, however, a modern derivation. Under the earlier understanding of constitutionalism it merely described the institutions and functions of government.[22] This earlier understanding remains, as observed above implicit in the Westminster system of governance, where majoritarian or popular democracy is strictly adhered to.[23] In other words, the decision of the majority under parliamentary sovereignty cannot be challenged, even in the court of law. In the *Ndlwana v Hofmeyer*, this strict adherence to the doctrine of parliamentary sovereignty was reiterated. The court held:

> "Parliament's will therefore, as expressed in an Act of Parliament cannot now in this country, as it cannot in England, be questioned by a Court of law whose function it is to enforce that will, not to question it."[24]

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18 1629.

19 "Federalist" or the "Federalist Papers" are a series of letters, eighty-five in number, written by Alexander Hamilton, James Madison and John Jay, under the pseudonym of Publius, and published in New York City newspapers to persuade the people of the state of New York to ratify the constitution drafted in Philadelphia during the summer of 1787: Berns "Solving the problem of democracy" in Licht and De Villiers (eds) *South Africa's Crisis of Constitutional Democracy: Can the US Constitution Help*? (1994) 256.

20 Quoted by Berns in Licht and De Villiers (eds) *South Africa's Crisis of Constitutional Democracy* 180.

21 Currie and De Waal *The Bill of Rights Handbook* 7.

22 Currie and De Waal *The New Constitutional and Administrative Law* 12.

23 *Ibid*.

24 *Ndlwana v Hofmeyr NO* 237.

2 2 Democracy and the role of the judiciary under a constitutional state[25]

Constitutionalism is, as observed above, a commitment to the limitation of ordinary political power. In a constitutional state the idea of democracy is disentangled from the majoritarian premise. According to this approach, democracy also encompasses constitutional limitation of power and guarantees of individuals' and minorities' rights.[26] We thus speak of "constitutional democracy". Consequently protection of the guaranteed rights by the judiciary is not undemocratic, but instead it enhances democracy.[27] In a system of parliamentary sovereignty there is no question of limiting legislative powers as observed above. It is for this reason that constitutionalism is perceived as essentially anti-democratic by those who support government under parliamentary sovereignty.[28]

In a constitutional state where the constitution reigns supreme, the court is, unlike the court in a parliamentary sovereignty system of government, empowered and therefore able to articulate and "manipulate" the language of the constitution so as to harmonise the relation between the principles of democracy and constitutionalism. In a system of parliamentary sovereignty, the constitution does not empower the courts to pronounce on the validity of a parliamentary enactment, but the courts may instead pronounce on the validity of administrative actions. It would therefore, seem incorrect to speak of constitutionalism under system of parliamentary sovereignty.

Dworkin is one of the supporters of constitutional democracy. He too disentangles the idea of democracy from the majoritarian premise. He argues not only that judicial review makes a society more just, but also that it is not undemocratic. He is of the view that societies which embrace constitutional democracy are more democratic than societies that have adopted the majoritarian principle.[29] The democratic conditions that Dworkin insists on here include a guarantee of equitable political franchise, prevention of arbitrary discrimination and oppressive uses of state powers and respect for freedom of thought, expression and association.[30] Dworkin is concerned about ensuring that democratic procedures are legitimate, and for him the judicial enforcement of rights will endow democratic processes with moral legitimacy.

In arguing for the democratic legitimacy of judicial review, Dworkin's challenge is to offer citizens a reason or explanation for identifying their will with the decisions of constitutional courts. This is notwithstanding the fact that decisions about the content of rights have been "wrested away from the majority" and placed in the hands of a group of judges. This state of affairs suggests,

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25 A constitutional state is defined by Burns *Communications Law* (2001) 7 as a state in which constitutionalism prevails – in other words, a country in which the law is supreme. Accordingly, a "constitutional state" embodies the following principles: (i) a supreme constitution; (ii) the separation of powers; (iii) enforceable guarantee of individual rights; (iv) the principle of legality; (v) access to independent courts; and (vi) multi-party democracy.

26 This arrangement to control political power is termed constitutional democracy as opposed to majoritarian democracy of parliamentary sovereignty.

27 Lenta "Democracy, rights disagreements and judicial review" 2004 *SAJHR* 1 9.

28 See Devenish *A Commentary on the South African Bill of Rights* (1999) 5.

29 Dworkin *Freedom's Law* (1996) 11.

30 Dworkin *Freedom's Law* 17; Dworkin "Equality, democracy and the Constitution: we the people in court" 1990 *Alberta Law Report* 324.

ostensibly at least, that important matters of principle are placed beyond democracy's purview. In order to do this, Dworkin offers a substantive, non-majoritarian version of democracy in which the enforcement of limitations on the power of the legislature through judicial review establishes the substantive conditions under which collective decisions that are taken which treat individuals with equal concern and respect.

The central problem for constitutional courts is therefore, the resolution of what Bork termed the "Madisonian dilemma".[31] The "Madisonian system" contains two opposing principles that must be continually reconciled. The first is that majorities are entitled to rule or make laws as they wish. The second is that there are nonetheless some things majorities must not do to minorities; there are some areas of life in which the individual must be free of majority rule, for example, areas such as language, culture and religion. The dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty. To place that power in one or other would risk either tyranny by the majority or tyranny by the minority.[32]

The function of defining the irreconcilable principles of majority power and minority freedom is therefore, placed in a non-political institution – the judiciary.[33] The task of reconciliation cannot, however, be accomplished once and for all. The freedom of the majority to govern and the freedom of the individual not to be governed without their mandate remain forever in tension. The resolution of the dilemma must be achieved anew in every case, and is therefore a never-ending search for the correct balance.[34] In attempting to resolve this Madisonian dilemma, the courts must be energetic in protecting the rights of individuals, while being equally scrupulous to respect the rights of majorities to govern. Should judges make serious mistakes in either direction, such mistakes may abet either majority or minority tyranny.[35]

The liberal democratic tradition has therefore always experienced a tension between the principles of majoritarian democracy based on the rights of popular majorities, and constitutionalism, founded on the fear of an abuse of power by the majority.[36] As pointed out earlier, the modern view is that absolute sovereignty of the will of the majority is precisely the notion that has been rejected by civilised and peace-loving communities. If democracy were to mean or encompass majority rule only without limitation of the majority power thereby allowing the majority to trample on the minority interests, any person belonging to such minority group would have no reason to consider that system legitimate.[37]

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31 Bork "The Original Understanding" in Brison and Sinnott-Armstrong (eds) *Contemporary Perspectives on Constitutional Interpretation* (1993) 48.

32 *Ibid.*

33 Dworkin *Freedom's Law* 17.

34 Bork in Brison and Sinnott-Armstrong (eds) *Contemporary Perspectives on Constitutional Interpretation* 49.

35 *Ibid.*

36 Boulle *South Africa and the Constitutional Option* (1984) 1-3.

37 Welsh "Comparative Perspective on Parties and Government" in Licht and De Villiers (eds) *South Africa's Crisis of Constitutional Democracy: Can the US Constitution Help?* (1994) 205.

From the above it is apparent that the notion of a constitutional state is completely irreconcilable with uncontrolled exercise of power. A democratic system can only function satisfactorily if conflicts of interests of the majority and minority are resolved by compromise[38] in the constitution, either explicitly or implicitly as interpreted by the court. Thus although the basic tenet of democracy is majority rule in terms whereof a decision of the majority binds even dissenting minorities, the concept of majority rule is disentangled from the democratic conception in a constitutional state and it is instead accepted only as one of the elements of democracy and not as the sole determining factor. In this sense, democracy involves an interesting paradox: first, the democratic process determines which representatives or composite set of opinions currently enjoy the support of the majority of the citizens and it also empowers representatives to execute the wishes of the majority.[39] Secondly, constitutionalism provides a check upon the exercise of authority by the democratically elected majority. It prohibits arbitrary exercise of power by a majoritarian government.

In a constitutional state therefore, the question whether majority rule is the sole determining factor seems to be long settled. It is now an accepted principle that in a constitutional state, democracy also encompasses limitation of majoritarian power. The idea of a constitutional state and constitutionalism are inextricably linked. The binding effect of the provisions of a superior and entrenched constitution serves as the limiting framework within which the majority may exercise its authority. The operation of democracy in a constitutional state is correctly described by the following statement:

> "The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the Rule of Law. It is the law that creates the framework within which the 'sovereign will' is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the constitution . . . A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rest on an appeal to moral values, many of which are embedded in our constitutional structure."[40]

In a constitutional state, authority is therefore characterised by democratic legitimisation to which the democratic minority also acquiesced. Democracy is therefore never just simply the rule of the people (the majority) but always the rule of the people within certain predetermined channels, according to certain prearranged procedures.[41] One of the most persuasive justifications for the protection of the position of the democratic minority in a constitutional state is to be found in the 1956 judgment of the German *Bundesverfassungsgericht* in

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38 *Ibid.*

39 Venter *Constitutional Comparison* 193.

40 *Advisory Opinion of the Supreme Court of Canada in Reference re Secession of Quebec*, 1998 (1998) 2 SCR 217 251, as quoted by Botha "Democracy and rights: constitutional interpretation in a post realist world" 2000 *THRHR* 581.

41 Holmes "Pre-commitment and the Paradox of Democracy" in Elster and Slagstad (eds) *Constitutionalism and Democracy* (1988) 231.

which the Communist Party of Germany was banned.[42] The following is a freely translated passage from the judgment:

> "The constitutional dispensation of a free democracy must be intent upon the refinement and improvement of social compromise – in particular it should inhibit abuse of power. Essentially its task is to keep open the way for all conceivable solutions, always in accordance with the will of the factual majority of the people while simultaneously obliging this majority always to justify its decisions before the people as a whole, also the minority . . . The wish of the majority must be made known through carefully arranged procedures. But the expression of the wishes of the minority and a free discussion which, in a free, democratic dispensation, can take many possible forms allowing the risk-free expression of minority opinions, precedes the taking of the majority decision. Since the majority may always be replaced, also the minority opinions have a real chance to come to fruition . . . Thus, in the final majority decision, some of the intellectual work and criticism of the minority will be incorporated. Because dissatisfaction and criticism may take many, even drastic, forms, realisation of the insecurity of the position of the minority, forces them to thoroughly take the interests of the minority into consideration."[43]

The principle of constitutional democracy that minority should be protected and be given an important role in the balancing of power was further demonstrated in another judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht*) in 1978.[44] In this case, the court confirmed the right of the minority in the *Land Schweswig-Holstein* to call for the appointment of a parliamentary commission of inquiry and to determine its terms of reference without the interference of the majority. The court, according to Venter, found that since in a parliamentary system of democracy as opposed to a presidential system, the executive is associated with the majority in parliament, the principle of separation of powers requires a certain tension between the legislature and the executive. This tension can only be maintained by the opposition in parliament:[45]

> "In the parliamentary system of government it is not in the first place the majority that guards over the government, but this task is primarily undertaken by the opposition, ie. by a minority."[46]

However, where the courts have constitutional enforcement powers, they have the last word on the meaning of a constitutional text and its application to a particular area and they can overrule legislation that is inconsistent with the constitution as the court has interpreted it. Recognising that the exercise of the power of judicial review to strike down Acts of a democratically elected legislature "thwarts the will of the people," scholars have produced a range of justifications either discounting the difficulty or justifying the role of judicial review in upholding democracy and individual rights against the wishes of majorities.[47] Thus, most discussions of judicial review begin by considering the role of the courts in constitutional interpretation and inevitably shift towards what is termed the counter-majoritarian dilemma.

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42 As cited by Venter *Constitutional Comparison* 202.
43 *BVerfGE* 5, 85 (198-199) as cited by Venter *Constitutional Comparison* 207.
44 *BverfGE* 49 70 as cited by Venter *Constitutional Comparison* 207.
45 Venter *Constitutional Comparison* 207.
46 *Ibid*.
47 Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962)16-17.

The anti-majoritarian implications of judicial review cause concern for politicians who seem to believe that politics are increasingly judicialised. They fear that political issues will eventually be removed from the public debate and that decision-making (which is properly the duty of the elected officials) will instead become the subject of debate among lawyers and depend on the decisions of judges.[48] Thus, most constitutions of contemporary constitutional states are drafted with the aim of addressing the potential clashes between majoritarian democracy and constitutionalism. Constitutions empower the courts to pronounce on the validity of Acts of parliament and are found upon guiding values and principles[49] which "reflect the transcendent mores of the state and its citizenry detached from transient and variable political convictions."[50] The 1996 South African Constitution is one such example; s 1 for instance, provides that:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

The Constitution further authorises the court to declare any law which is inconsistent with its provisions, invalid;[51] and to make any order that is just and equitable; including an order suspending the declaration of invalidity,[52] or an order limiting the retrospective effect of the declaration of invalidity.[53] The Constitution also empowers the courts by providing that the courts are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice.[54] It further stipulates that no person or organ of state may interfere with the functioning of the courts[55] and that an order or decision issued by a court binds all persons to whom and organs of state to which, it applies.[56] Van Wyk *et al*[57] therefore remark:

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48 Corder "Lessons from (North) America (Beware the 'Legalisation of Politics') and the ('Political Seduction of the Law')" 1992 *SALJ* 204 209.

49 See for example, s 39(2) of the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution") which provides that "[w]hen interpreting any legislation, and when developing the Common Law or Customary Law, every courts, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

50 Venter *Constitutional Comparison* 204. The Preamble to the Constitution seems to confirm Venter's view. It reads: "We the people of South Africa, recognising the injustices of the past . . . believe that South Africa belongs to all who live in it, united in our diversity . . . adopt this Constitution as the supreme law of the Republic, so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. . ."

51 Section 172(1)(a).

52 Section 172(1)(b)(ii).

53 Section 172(1)(b)(i).

54 Section 165 (2).

55 Section 165 (3).

56 Section 165 (5).

57 Van Wyk *et al* (eds) *Rights and Constitutionalism – The New South African Legal Order* (1994) 26. See also Venter *Constitutional Comparison* 204.

> "The introduction of a Bill of Rights into the South African legal system will compel lawyers to engage with competing conceptions of democracy, thereby enjoining them to fashion a democratic model which accommodates both the will of a political majority, *albeit*, of a transient nature, and those core values established in the constitution which can on occasion trump such will."

The judiciary may argue that counter-majoritarianism is just a perception, because the court interprets the constitution which was drafted and adopted by the majority of the people who agreed to limit the authority or powers of the majority. Consequently it cannot be said that it is the court that counters the will of the majority, but instead the people themselves should accept responsibility.

3 JUDICIAL "VETO" OF THE DECISION OF THE MAJORITY

The question whether judicial intervention into the legislative and executive arena is an undemocratic exercise has been broadly explained by Laurence Tribe:[58]

> "Whether imposed by unelected judges or by elected officials conscientious and daring enough to defy popular will in order to do what they believe the Constitution requires, choices to ignore the majority's inclinations in the name of a higher source of law invariably raises questions of legitimacy in a nation that traces power to the people's will."

The democratic objection to judicial review originates in the counter-majoritarian difficulty – the problem of justifying the exercise of judicial review by unelected and "unaccountable" judges in a democratic system; the apparent threat to democracy by such unelected judges who invalidate laws enacted by elected representatives.[59] Thus the majoritarian democrats reject what they call "the politics of unelected and unaccountable judicial elite, immune from the wishes of the majority" as undemocratic.[60]

This problem occurs in systems where constitutions are supreme since such constitutions empower the judiciary to review legislation. In Britain and other systems where parliament is sovereign, case law considered to depart too much from popular feeling can simply be corrected by parliamentary enactment since parliament has the power to amend any law at will.[61] In a constitutional state where the constitution is supreme, such as the United States of America, Germany and South Africa, for example, such correction is not possible if the controversial case law is founded on the court's interpretation of the constitution. In a system where the constitution is supreme therefore, such a law can only be corrected by an amendment of the constitution itself. Efforts to overturn judicial decisions by constitutional amendment are politically risky since the procedures involved are cumbersome and protracted.[62] In a system where the constitution is supreme, judicial review is linked to the constitution and not to public opinion or consent,

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58 Tribe *American Constitutional Law* (1988) 10.
59 Bickel *The Least Dangerous Branch* 16-23.
60 Davis "Democracy – its influence upon the process of constitutional interpretation" 1994 *SAJHR* 103.
61 See for example *Harris v Minister of the Interior* 1952 2 SA 428 (A) and 1952 4 SA 769 (A).
62 See for example art V of the Constitution of the United States of America, art 79 of German Basic Law and s 74 of the Constitution.

and judges can occasionally be daring enough to defy popular will or opinions.[63] This is so because democracy in a constitutional state is constitutionalised; all political rules of the game are reflected or contained in the constitution which is to be interpreted by the court.

It has been pointed out above, that a judicial argument may be that democracy requires the constitution to be respected for the very reason that it expresses the will of the people or the majority. Democracy, therefore, means that the people or the majority share the values embodied in the constitution. But it does not follow that the people or the majority will be in favour of all the practical consequences resulting from these values.[64] The court's legitimacy to review legislative enactments is therefore sometimes justified by the fact that the notion of popular will is elusive, and sometimes unreliable. Frequently, elections are more about persons than about ideas. Traditional attitudes based on social, religious, regional or ethnic backgrounds always have a considerable influence on electoral behaviour. There are also occasions when the voters are all out to show that they are dissatisfied with the current political leadership and want a change.[65] Consequently, elections do not necessarily reflect what the population is thinking about any particular issue.

The judiciary is therefore the most legitimate organ capable of assessing and balancing conflicting interests by interpreting the constitution. Political institutions may be so obsessed by their policy options on matters like inflation, public health or asylum seekers that they occasionally forget or disregard fundamental constitutional requirements. Only the judiciary will then be able to recall the limits that supra-legal rules impose on politics, thus emphasising the traditional role of courts as the guardian of the rule of law. Koopmans therefore believes that in extreme cases constitutional courts should fulfil their specific role by giving priority to justice over positive law.[66] This practice is referred to as counter-majoritarianism. Majoritarianism exists, as observed, where the political party which wins an election is able to dominate the main institutions of the state to the exclusion of other parties.[67] This is always the case in a system of parliamentary sovereignty. The British electoral and party systems provide the basis for the majoritarian nature of the Westminster constitution, hence the assertion that the Westminster system is thoroughly majoritarian.[68]

Koopmans observes that law in Germany is not just a consequence of what legislative bodies lay down in their enactments. The norm is that certain legal principles (particularly those embodying human rights and the fundamental guarantees of the rule of law) have a superior legal value of their own; they are considered as "supra-legal" (*ubergesetzlich*).[69] Unlike in Britain, where the

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63 See for example *S v Makwanyane* 1995 3 SA 391 (CC) para 88 where the Constitutional Court found that public opinion may have relevance in the inquiry, but that such public opinion itself is not a substitute for the duty vested in it to interpret the Constitution. See also Tribe *American Constitutional Law* 61-66.

64 See Koopmans *Courts and Political Institutions: A Comparative View* (2003) 105.

65 Koopmans *Courts and Political Institutions* 106.

66 Koopmans *Courts and Political Institutions* 107.

67 Currie and De Waal *The New Constitutional and Administrative Law* 16.

68 *Ibid.*

69 Koopmans *Courts and Political Institutions* 107.

decision of the majority always prevails, the rule of law, in Germany, is considered to be more important than majority rule. Human rights and the guaranteed rule of law cannot be abolished or modified at the whim of whoever happens to be in power.[70] In Germany, natural law concepts are perceptible in the Basic Law itself. The Basic Law provides, for example, that certain constitutional rules cannot be amended at all.[71]

Although the judiciary in Britain is mandated to scrutinise the conformity of legislation with the Human Rights Act of 1998, it has no authority to strike down parliamentary enactments.[72] When faced with morally repugnant statutes, British courts often interpret the legislation so as to remove or limit the offending provisions. In the British view, judges are unelected officials and should not be responsible for shaping the law in terms of what they consider desirable.[73] A judge therefore should state the law as it is (*ius dicere, sed non dare*), and not fashion it in terms of what he or she thinks it ought to be. As a spokesperson for the community, a judge should represent the values and consensus of the community in his or her judgment. Judges are, however, entitled to their own opinions as to what the law ought to be, but these opinions should not be treated any differently from the opinions of any ordinary citizen, and consequently should not be reflected in the judge's decision.[74]

In the United States of America and South Africa where the constitutions are supreme and include bills of rights, all enactments of the legislature are measured against the bill of rights. The court consequently exercises reviewing powers. The judiciary is able to test the validity of legislation and the conduct of the executive against the values embodied in the bill of rights. Thus in both systems, the courts are the guardians and custodians of the constitution and therefore protectors of individual rights. It has become an established principle that the determination of what the law is, should be left to the courts. This means that the courts also exercise substantive judicial review. Since the meaning of the constitution and the bill of rights has not remained static throughout the years, the courts are required to reinterpret the constitution in the light of the changing social values.[75]

The judgment in *Marbury v Madison*[76] has elicited a fierce debate on the issue of the function of the judiciary in relation to the legislature. In this regard, Lively *et al*[77] have this to say:

> "Unresolved and as intensely debated now as it was even before *Marbury* is how and when the judiciary should exercise its power. Because federal judges and justices are unelected and appointed for life, and judicial review may trump exercises of power by representative branches of government, concern historically

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70 *Ibid.*
71 See for example art 79 s (3) of Germany's Basic Law.
72 Lenta 2004 *SAJHR* 2.
73 Motala "Independence of the judiciary, prospects and limitations of judicial review in terms of the United States model in a new South African order: towards an alternative judicial structure" 1991 *CILSA* 287.
74 *Ibid.*
75 Motala 1991 *CILSA* 288.
76 (1803) 1 Cranch 137 (US).
77 Lively, Haddon, Roberts and Weaver *Constitutional Law – Cases, History and Dialogues* (1996) 9.

> has existed with the anti-democratic potential of the judiciary. Criticism of the judiciary is especially intense when it strikes down legislation on grounds that it conflicts with a right or liberty not actually enumerated by the constitution."

The above remark is particularly relevant to the US model of judicial review since the US Constitution does not specifically provide for judicial testing of legislation nor was this apparently historically intended by the founding fathers of the Constitution of the 1787. In 1803 the court in *Marbury v Madison* led by Chief Justice John Marshall, dramatically claimed the power of judicial review for itself and invalidated portions of the Judiciary Act of 1789 as repugnant to the Constitution.[78] However, Marshall CJ held that since the Constitution is a superior law, its provisions must prevail if a conflict arises between it and some other laws. [79] The assertion was not effectively nor politically challenged throughout Marshall's long term of office and the practice has eventually became accepted and ingrained in constitutional custom.[80]

The cause of the judicialisation of the American politics – a departure from the subservience and passivity of the English judiciary – is attributed to the egalitarian nature of the US polity and the fact that the US is the epitome of modern democracy marked by universal equality.[81] Lawyers in the US dominated not only courtrooms but also legislative and executive chambers. For example, John Jay, the first chief justice (1789–1795), served simultaneously as US ambassador to England, and Oliver Ellsworth, the third chief justice (1796–1799), was both ambassador to France and chief justice for a period of six months.[82] It should be noted however, that this was a period marked by subservience of the justices to the executive branch[83] but this "subservience" tended instead, to work in favour of the judiciary. A second contributing factor to the emergence of the powerful judiciary was the Constitution's commitment to the protection of individual rights.[84] The third factor is that the US Constitution makes no specific provision for the curtailment of human rights in circumstances such as a state of emergency. In other words, the Constitution has no derogation clause. This is the most interesting feature of the US Constitution. In this regard the courts have played a major role in determining the limits of individual rights.[85]

Judicial review in the US, which is in essence the power that a court of law has to set aside legislation which is in conflict with the Constitution, was, as observed above, precipitated by the Supreme Court in *Marbury v Madison*. The court deduced, as pointed out, that as the US Constitution was intended to be the supreme law of the land and that congressional legislation in conflict with it had to be declared invalid. The Supreme Court was the legitimate body to effect such invalidation. The power of judicial review has since then been accepted as implied in the US Constitution. However, since members of the Supreme Court

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78 See also Holland *Judicial Activism in Comparative Perspective* (1991) 13.
79 *Ibid.* See also Carpenter *Introduction to South African Constitutional Law* (1987) 125.
80 See MacWhinney *Supreme Courts and Judicial Law-making: Constitutional Tribunal and Constitutional Review* (1986) 10.
81 See the Preamble to the United States of America Constitution.
82 Holland *Judicial Activism in Comparative Perspective* 12.
83 *Ibid*.
84 *Ibid.*
85 *Ibid*.

are appointed and not elected, the democratic legitimacy of appointed judges exercising an implied testing right and setting aside legislation of a democratically elected legislature is politically highly contentious.

The problem we are confronted with here is an axiomatic consequence of constitutional supremacy. Constitutional supremacy changes the role and function of the judiciary fundamentally so that the judiciary becomes the guardian of the constitution and protector of individual and minority rights. This role inevitably also involves the restriction of certain manifestations of majority rule. It prevents transient urges and passions of majorities and the vicissitudes of the legislative process being translated into a violation of the right of minorities or individuals; the judiciary is tasked with policing legislation against unjust exclusions or arbitrary individual deprivations.[86] But in striking down legislative enactments, the courts are open to the charge that they violate the ideal of popular sovereignty. Concern has therefore been voiced on the extent to which judicial decisions which strike down legislation, enacted by a democratically elected legislature, contradicts the wishes of the majority. Such restriction of the will of the majority tends to trigger and precipitate political and constitutional tension which is "at the heart of constitutional democracy".[87]

In those countries that have recently emerged from authoritarian political arrangements, such as South Africa, there has been broad support for an institution dedicated to realising the promise of freedom and equality contained within the idea of democracy and scripted in the bills of rights. But the enthusiasm has been accompanied by a lingering concern about the threat of judicial paternalism where constitutional review has been institutionalised in an unaccountable judiciary.[88] Therefore, to some South Africans, judicial review may seem to reproduce at least one feature of the old order, since it allows important political decisions to be decided by a small minority. This arrangement, however, is now clothed in legitimacy.[89]

In South Africa, the apparent tension between the power of courts under the bill of rights and an understanding of democracy as the rule of the majority is illustrated by the decision of the Constitutional Court in *S v Makwanyane*[90] to invalidate the death penalty in the face of overwhelming public opinion supporting its retention. According to Kleyn and Viljoen, opinion polls in South Africa, showed that the majority of the people from all race groups, favour the retention of the death penalty.[91]

The threat to democracy posed by judicial review has escalated. Many believe that, unlike the US Constitution, the South African Constitution provides a fertile soil for judicial activism. The South African Constitution, for example, does not only contains negative rights – rights which protect the individual from interference by the state or other citizens – but also justiciable positive rights, the

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86 Lenta 2004 *SAJHR* 3.
87 Kentridge and Spitz "Interpretation" in Chaskalson *et al The Constitutional Law of South Africa* (eds) (1996) 11-16.
88 See generally Du Plessis "Between apology and utopia – the Constitutional Court and public opinion" 2002 *SAJHR* 1.
89 Lenta 2004 *SAJHR* 2.
90 *S v Makwanyane* para 151.
91 Kleyn and Viljoen *Beginner's Guide for Law Students* 3 ed (2002) 154.

enforcement of which obligates the government to provide access to housing, health care, education, food, water and social security.[92] Under such circumstances, the judiciary may easily usurp legislative authority which is reserved for the majority.

Justiciable socio-economic rights permit citizens to turn to the judiciary when the political process fails to provide for their basic needs. But in enforcing these rights, the court is forced to make difficult policy decisions about resource allocation and strategy which, is generally argued, are better made by officials who are directly responsible to the electorate than by "unaccountable" judges.[93] This may create tension between these two organs of state. The typical example of the tension between the judiciary and the legislature is manifested in the Indian case of *Golak Nath v State of Punjab*.[94] In this case the court prevented the Nehru government from passing a constitutional amendment which purported to restrict one of the individual fundamental rights, that is the right to property. The court, per Subba Raj J held that:

> "No authority created under the constitution is supreme and all the authorities function under the supreme law of the land. The rule of law under the constitution has a glorious content . . . Having regard to the past history of our country (the constitution) could not implicitly believe the representatives of the people, for uncontrolled unrestricted power might lead to an authoritarian state. It, therefore, preserves the natural rights against the state encroachment and constitutes the higher judiciary of the state as the sentinel of the said rights."[95]

Devenish however submits that the creative role of the judiciary in interpreting and applying the Constitution and other statute law must be exercised within clearly defined parameters.[96] Consequently the courts must not interpret and apply the provisions of the Constitution merely to deter the will of the majority where there is no constitutional justification in doing so. However, where there is such justification, the court cannot be dictated to by public opinion (the majority), since it must at all times, subject itself to the prescriptions of the Constitution.[97] This is an inescapable implication of constitutionalism which is defined as a "commitment to limitations on ordinary political power, and very often involves an anti-democratic strategy."[98] This obviously has consequences on the issue of the legitimacy of the constitutional order and gives rise to the counter-majoritarian dilemma.[99]

Constitutional democracy, as observed above, requires that minorities and individuals be protected. In the *Makwanyane* case, the court found that some of these minorities may not be sufficiently powerful to make their influence felt in the institutions of government and state. It is therefore for the courts to ensure

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92 See ss 26, 27 and 29 of the Constitution. See also Lenta 2004 *SAJHR* 3.

93 See generally Haysom "Constitutionalism, majoritarian democracy and socio-economic rights" 1992 *SAJHR* 451 and Davis "The case against the inclusion of socio-economic demands in a bill of rights except as directive principles" 1992 *SAJHR* 475.

94 AIR 1967 SC 1643.

95 *Golak Nath* 1655. See also *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356 (T).

96 Devenish *A Commentary on the South African Bill of Rights* 4.

97 *S v Makwanyane* para 88.

98 Devenish *A Commentary on the South African Bill of Rights* 5.

99 *Ibid.*

that their rights which are guaranteed in the Constitution are upheld in terms of the letter and spirit of the Constitution.[100] Constitutional democracy is therefore potently more than simply majority rule. According to Devenish, democracy

> "is a complex phenomenon of political morality, in which the majority, minorities and individuals have rights and obligations, which the courts must interpret, apply and protect. In so doing a constitutional democracy must give expression to the universal values embodied in the Bill of Rights and the constitution. A majority cannot therefore trample on the guaranteed rights of minorities or the individual."[101]

In order to accommodate the political rights of minority political groups, provision must be made for their participation in the legislative process in a manner consistent with democracy. For example, the minority should not be allowed to easily frustrate the will of the majority. The system of proportional representation seems to cater for the majority, as well as minorities interests. Under this system all political parties which participate in an election, including the minority party (parties), obtain representation proportional to the votes gained during an election.[102] The electoral system of proportional representation is thus in direct contrast to the so-called majority electoral systems.

Before the 1993 constitutional dispensation, a system of relative majority applied in South Africa. According to this system, one member of parliament is elected for each constituency on the basis of a relative majority.[103] This system is known as the "winner-takes-all" or "first-past-the-post" electoral system. [104] The biggest disadvantage of the (constituency) majority system, particularly the relative majority system according to Basson, is that it leads to disproportionality between the actual votes cast and the eventual allocation of seats on the basis of the votes cast.

On the other hand it should be acknowledged that in a society which is racially and ethnically deeply divided, and where a person is voted to power because of his or her membership of such groups, the list system provides an opportunity for every capable person to be drawn into the political decision-making machinery. Proportional electoral systems therefore seem to address the inherent democratic shortcoming of the majority systems in ensuring that the number of votes obtained by a political party in an election is proportional to the number of seats which the party wins in that election. This means that even minority political parties are awarded seats according to their electoral strength. Proportional electoral systems however have, according to Basson, the disadvantage of resulting in a complete absence of a bond between the representative and his or her particular constituency, especially under the so-called list system.[105]

Basson[106]contends that the German electoral system at least seems to have addressed the above shortcomings by awarding two votes to every voter. This

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100 *S v Makwanyane* para. 88.
101 Devenish *A Commentary on the South African Bill of Rights* 5.
102 Basson *South Africa's Interim Constitution: Text and Notes* (1994) 66.
103 This means that a candidate who obtains the highest number of votes in that constituency wins the seat regardless of whether this number was higher than half of the total number of votes cast.
104 Basson *South Africa's Interim Constitution* 66.
105 Basson *South Africa's Interim Constitution* 67.
106 *Ibid*.

means that every voter has to vote in terms of both the constituency electoral system and the proportional list system. In other words, one half of the representatives in parliament are chosen according to each system. This dual system (of proportionality and constituency) seems to be more accommodative, as it addresses or remedies lack of both constituency by representatives (inherent in the proportionality system), and the exclusion of a large number of people from the legislative process (inherent in the constituent system). Therefore the legitimacy of the provision of the constitution which entrenches such dual system, is made difficult to attack. This also makes the "political" task of the judiciary, during adjudication, relatively easy.

In South Africa, the concern that counter-majoritarian dilemma could diminish the legitimacy of the new constitutional order seemed to be borne out by the initial public response to the Constitutional Court's first major decision; a politically significant and publicly contentious decision to declare the death penalty unconstitutional and invalid.[107] According to Currie and De Waal, the court's decision was initially attacked as out of step with public opinion, with the National Party calling on parliament to reinstate the death penalty.[108] However the question here is whether parliament can reinstate the death penalty thereby overruling the Constitutional Court's decision without first amending the relevant constitutional provision. It is submitted that the answer is no. Even in a case where the relevant constitutional provision is to be changed first, the court may be tempted to rule against such amendment if such amendment is intended to interfere with the rights of individuals.

From the above submissions, it is apparent that constitutional supremacy dictates that the rules of the constitution should be binding on all branches of the government and that priority be given to it over any other rule made by the government. 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. Constitutional supremacy would be of no value if the provisions of the constitution were not justiciable. For a supreme constitution to be effective, obviously the judiciary must have the power to enforce it. The idea of constitutionalism therefore provides an answer to the question as to why the courts and the unelected judges should be allowed to strike down the decisions of a democratic legislature and a democratic representative government.

The following cases are examples of the courts resolutely and fearlessly discharge their mandate or natural obligation of protecting constitutional democracy, even during difficult times. In *Golak Nath*,[109] the Indian court held by a six to five majority, that the Federal Parliament did not have the power to amend the Constitution (under art 368), so as to take away or abridge the fundamental rights (part III), entrenched in the Indian Constitution.[110] In *Minister of the Interior v Harris*,[111] the court declared the High Court of Parliament Act

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107 *S v Makwanyane* para 151.
108 Currie and De Waal *The New Constitutional and Administrative Law* 36.
109 *Golak Nath* 1643.
110 For more about this, see MacWhinney *Supreme Courts and Judicial Law-making* 135.
111 *Minister of the Interior v Harris* 1952 4 SA 769 AD.

invalid.[112] Ironically, this case was decided during apartheid, when parliament was "more sovereign" than any time in the history of South Africa. But regrettably, because of the judiciary's subservient position to the legislature, parliament managed to emerge victorious from such confrontation and it was therefore able to legislate as it pleased.

The *Makwanyane* case, on the other hand, was decided under the new constitutional dispensation and the Constitutional Court was therefore, able to firmly protect individuals' rights to life. The court in this case found that the death sentence sanctioned by the provisions of s 277 of the Criminal Procedure Act of 1977, was unconstitutional because the death penalty was in conflict with:

(a) the right to life which was guaranteed to every person by s 9 of the interim Constitution;
(b) the right to respect human dignity as guaranteed in s 10;
(c) the right not to be subjected to cruel, inhuman and degrading punishment as set out in s 11(2).[113]

The Constitution envisaged a society based on values of reconciliation and *ubuntu* and not vengeance and retaliation.

> "Retribution smacks too much of vengeance to be accepted, either on its own or in combination with other aims, as a worthy purpose of punishment in the enlightened society to which we South Africans have now committed ourselves."[114]

Referring to the likelihood that public opinion may favour the retention of the death penalty the court stated unequivocally that it would "not allow itself to be diverted from its duty to act as an independent arbiter of the constitution."[115]

Similar remarks were made in the case of *Christian Education South Africa v Minister of Education.*[116] In this case, the court held that

> "[i]t might well be that in the envisaged pluralistic society, members of large groups can more easily rely on the legislative process than can those belonging to smaller ones, so that the latter might be specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening."[117]

In countries with supreme and justiciable constitutions, the question of legitimacy of judicial review seems to be an intractable problem which continues to plague judges and constitutional theorists alike. In the US, for example, the Supreme Court (as the South African Constitutional Court did in *Makwanyane*), has also interpreted that Constitution against public sentiment. In *Roe v Wade*[118] the court interpreted the Constitution "broadly" and ruled that statutes prohibiting abortion, particularly during the first three months of pregnancy, were unconstitutional and it therefore allowed abortion during that period. The court

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112 The High Court of Parliament Act was intended to have power to invalidate the Appellate Division's decisions. The AD found however, that the High Court of Parliament created by the High Court of Parliament Act was not the court of law, but in fact, Parliament in another name. Consequently the AD unanimously declared that Act invalid.
113 *S v Makwanyane* para 216 per Langa J.
114 Para 185 per Didcott J.
115 Para 89.
116 2000 4 SA 757 (CC).
117 Para 25.
118 410 113 (1973).

found that the conception of privacy was broad enough to encompass the woman's right to terminate her pregnancy. This judgment drew public criticism; critics of the judgment considered it to be the work of the "liberal wing" of the court.[119]

The power of unelected judges to declare laws enacted by a democratically elected, and therefore accountable legislative assemblies, unconstitutional and consequently null and void, raises fundamental questions about the relation between democracy and rights, and between popular sovereignty and constitutionalism. The question whether constitutional review is essentially an undemocratic and therefore counter-majoritarian institution, and whether it can be reconciled with the sovereignty of the people, has been the subject of debate as observed. The dividing line between legitimate exercises of constitutional review and judicial usurpation of legislative authority features in virtually every constitutional judgment,[120] particularly where the constitution is silent about whether the court is entitled to review legislation or not. It is therefore imperative that the constitution defines the role of the courts. The constitutional system should identify the role of the courts in relation to the functions of other branches of government and the rights of citizens. The courts should monitor adherence to the distributed authority between different levels of government and compliance with other constitutional imperatives.

In both centralised and decentralised systems of judicial review, constitutional adjudication is different to adjudication of disputes between two private parties. The outcome of constitutional adjudication may be the invalidation of a statute which will have implications for the whole state system and all its citizens and not only for the litigants. The Federal Constitutional Court of Germany is in a unique constitutional position in that it is empowered by the constitution to recommend and demand that the legislature legislate on that relevant aspects and the legislature often responds obligingly. The legitimacy of a German Constitutional Court order may not be questioned, since the Federal Constitutional Court judges, as with other central bodies are, as pointed out above, elected by the Legislative Assembly.[121] The Federal Constitutional Court therefore, is a democratically legitimate institution.

In South Africa, the Constitutional Court has already had ample cause to address the problem of the legitimacy of its judgments where public opinion and the will of the parliamentary majority had to be countered in the interests of applying the provisions of the constitution.[122] In *Makwanyane* the court addressed the likelihood that public opinion may favour the retention of capital punishment in the following *dictum*:

> "I am . . . prepared to assume . . . that the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the constitution allows the sentence."[123]

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119 See Koopmans *Courts and Political Institutions* 55.
120 Botha 2000 *THRHR* 562.
121 *Ibid.*
122 *S v Makwanyane* para 88.
123 *S v Makwanyane* para 87.

The court therefore held that public opinion may have some relevance to the enquiry, but in that it in itself is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. It further held that if public opinion were to be decisive there would be no need for constitutional adjudication since the protection of rights could then be left to parliament which has a mandate from the public, and is answerable to the public for the way public mandates are exercised. However, the court pointed out that such approach would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution.[124] The court concluded therefore, that by the same token the issue of the constitutionality of capital punishment could not be referred to a referendum, in which a majority view would prevail over the wishes of any minority:

> "The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected."[125]

The *Makwanyane* case has however provoked different reactions from different quarters. Carpenter,[126] for example, finds it

> "paradoxical, that the Constitutional Court could find on the one hand, that the Constitution is the 'mirror of the nation's soul' and that the values articulated in the Constitution had to be identified and applied, and on the other that public opinion played no part in the interpretive process."[127]

Carpenter then wonders whether "there [should] not, logically, be some correlation between the nation's soul and the nation's views about a particular matter?"[128] It would seem, it is submitted; the court's reasoning in this regard was that the court only entertains public opinion after such opinion has been reflected in the Constitution. This means that the Constitution must first be changed to reflect such public opinion. In that regard, the court's reasoning was in accordance with the requirement of the Constitution that when interpreting the constitution, the court must promote the spirit, purport and objects of the bill of rights.

It may, however, be noted that it is imperative for courts also to also take cognisance of public opinion as this may be a true reflection of the changing values of the community on a particular aspect which requires that the constitution should be interpreted and re-interpreted. This would mean that earlier decisions should be overruled, if changing values warrant such overruling. The courts should not be seen to be overtaken by socio-political events or changes in the community.

The role of the court in the application of community values to mould the law was addressed in a symposium held in Australia in August 1994.[129] The

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124 Para 88.
125 *S v Makwanyan* para 88 per Chaskalson P.
126 Carpenter "Public opinion, the judiciary and legitimacy" 1996 *SAPL* 110.
127 Carpenter 1996 *SAPL* 115.
128 *Ibid*.
129 Braithwaite "Symposium on community values in law" 1995 *Sydney LR* 351.

symposium arose from the idea that the court, in particular the appellate division of the high court, should be sensitive and responsive to community values in exercising its responsibility "to keep the law in good repair," that is relevant to contemporary Australia. It was the spirit of the symposium that judges should take an active role in observing and implementing the changing values in the community. However, in the case of *Dietrich v R*,[130] Brennan J seems to suggest otherwise:

> "Legislatures have disappointed the theorists and the courts have been left with a substantial part of the responsibility for keeping the law in a serviceable state, a function which calls for consideration of the contemporary values of the community . . . The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community . . . The responsibility for keeping the common law,[131] consonant with contemporary values does not mean that the courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to those values. Although the courts have a broad charter, there are limits imposed by the constitutional distribution of powers among the three branches of government."

Braithwaite holds that this view is open to challenge and points to the way in which both English and American courts took a stance ahead of public opinion in abolishing, for example, slavery. He further criticises American courts for "engaging in an unprincipled surrender to public opinion" in 1976 after the death penalty had effectively been abolished in *Furman v Georgia*.[132] Referring to capital punishment, Braithwaite says that the courts can "reject majoritarian community attitudes in favour of capital punishment by arguing from consensual community values, such as respect for human life, to the conclusions that capital punishment is an overreaching of state power". This is what the Constitutional Court did in the *Makwanyane* case when it declared the death penalty unconstitutional.

4 THE INEVITABLE TENSION BETWEEN DEMOCRACY AND JUDICIAL ACTIVISM

Democracy is an elastic term, the meaning of which is open to political manipulation and contestation. It is generally accepted that it "means that people decide for themselves, by political procedures, the conditions of social life in which they have an interest."[133] The ideal of democracy therefore includes the requirement that citizens can only recognise laws to be legitimate products of their own free will if those decisions have been reached on the basis of popular participation and deliberation. Popular sovereignty dictates that citizens are only able to view themselves as free if they recognise enacted laws, as laws they have given to themselves, rather than as laws imposed on them by the judiciary. According to this view, if the moral principles contained in the constitution are interpreted by an independent, "unaccountable" judiciary, the principle of

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130 1992 109 ALR 385 at 402-403 as cited by Braithwaite 1995 *Sydney LR* 351.

131 In the South African context, s 39(2) of the Constitution must be considered in this regard.

132 408 US 238 (1972).

133 Lenta 2004 *SAJHR* 1 and 4-5.

popular sovereignty is seen to have been compromised.[134] However, Plasket[135] asserts that

> "[i]n democratic states that adhere to the Rule of Law[136] there is always a tension between the judiciary, on the one hand, and the legislature and the executive, on the other.[137] It arises because the judiciary is empowered, to a greater or lesser extent, to decide on the legality of the conduct of the other two branches of government: indeed, if the Rule of Law is to mean anything, the executive and the legislature must accept judges peering over their shoulders."[138]

Lenta opines that the weakening of popular sovereignty that judicial review signifies may have negative consequences both for politics and for the way that judges carry out their interpretative tasks.[139] Judges, according to Lenta, should interpret constitutional principles in accordance with what Dworkin terms a "moral reading of the constitution," or thickening principles with political theory.[140] However, in pluralistic societies people disagree about the content of morality. As Dworkin observes "political morality is inherently uncertain and controversial" and "different people hold different views about moral issues."[141] People, hence, disagree about the substantive content of constitutional rights, and about what they entail in practical terms. In the absence of agreement about the correct interpretation of rights, majoritarian democrats have been concerned that constitutional interpretation is nothing other than the illegitimate ascendancy of the judge's interpretation over interpretations favoured by the majority or their representatives.[142] This contention cannot be supported. The constitution is a skeleton, drawn by the majority and it empowers the court to provide flesh to it by interpretation. The ascendancy of the judge's interpretation is consequently not illegitimate, since it is mandated by parliament which represents the majority.

In a constitutional state the judiciary is, as observed, earmarked to play "a political role" in protecting *inter alia*, minority interests through judicial review. However, the judicialisation of politics may require a more nuanced political role. The protection of minority interests cannot antagonise majoritarian interests unduly without undermining such minority interests. A court entrusted with the challenging task of adjudication is therefore faced with the dilemma of either giving content to such cryptic and vague rules, concepts and values, or of conceiving as not binding, the very core of the constitution.[143] This second alternative is hardly tenable as it implies a renunciation by judges whose very function is the protection of rights.[144] The degree of influence the courts may have on

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134 Lenta 2004 *SAJHR* 28.
135 Plasket "Enforcing judgments against the state" 2003 *Speculum Juris* 1.
136 According to English and Stapleton *The Human Rights Handbook* (1997) 12 the rule of law requires government in accordance with laws that are just and fair and laws which apply to people equally. The rule of law excludes government decrees disguised as law.
137 Plasket 2003 *Speculum Juris* 1 citing Baxter *Administrative Law* (1984) 320-321.
138 Plasket 2003 *Speculum Juris* 1.
139 Lenta 2004 *SAJHR* 29.
140 Lenta 2004 *SAJHR* 6.
141 Dworkin *Law's Empire* (1986) 78.
142 Lenta 2004 *SAJHR* 7.
143 Cappelletti *The Judicial Process in Comparative Perspective* (1989) 30.
144 *Ibid.*

policy is dependent on the reaction of those actors in the political process entrusted with the execution of court decisions. Effect will be given to decisions, so long as there is a sufficiently broad *consensus* on political norms and the judicial review dealt with relatively minor issues.[145] Commenting on the above debate, Davis[146] said:

> "Most South Africans hope that the collapse of apartheid will herald the commencement of democracy . . . The question arises however as to the meaning of democracy within the context of the South African political lexicon . . . Majoritarian democrats contend that disputed political issues are decided through a political process in which the majority dominates. Within this conception a judicial system which is empowered to test the validity of legislation approved by the majority in terms of substantive constitutional values is viewed as profoundly anti-democratic. It presents the politics of an unelected and unaccountable judicial elite immune from the wishes of the majority."

The judicialisation of politics undoubtedly requires political accommodation of the interests of both the majority and the minority alike, whatever the letter or the spirit of the Constitution may say. This is the dilemma that the Judicial Service Commission and the judges face. It should however be remembered that the judicialisation of politics is, in most cases, one of the key ingredients in pacts that facilitate independence or new dispensations under majoritarian rule.[147] To what lengths the courts will be able to go on thwarting legislative and executive will on major policy issues or ignoring public opinion, like in *Makwanyane* before sparking off a constitutional crisis remains unknown territory as yet. Continuance of harmony will therefore depend largely on the political wisdom of both the courts and the executive.

Acceptance of judicial review will therefore be facilitated where there is trust and mutual support between the various branches of government. In a constitutional state such trust is not facilitated by a rigid bill of rights and a constitution which isolates the judiciary from the other two branches of government[148] by giving the judiciary too much power. A lack of trust may, in the end, lead to the breakdown of the constitutional order. It will then be ironic that the judicialisation of politics which facilitated the establishment of a constitutional order might then undermine the continuance of such order.

Under South Africa's new dispensation, politics has also been constitutionally judicialised.[149] In 1993 the apartheid regime crumbled and a "Government of

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145 Steytler "The judicialisation of Namibian politics" 1993 *SAJHR* 476 491.

146 Davis 1994 *SAJHR* 103.

147 In this regard, see the discussion of the South African Multi-Party Negotiation Process in Basson *South Africa's Interim Constitution: Text and Notes* xxi-xxiii.

148 Steytler 1993 *SAJHR* 499.

149 Section 165 of the Constitution, for example, provides as follows:
"(2) The courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
. . .
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."
Section 172 further provides that:
"(1) When deciding a constitutional matter within its power a court-

continued on next page

National Unity" was put in place. A democratic election followed and the African National Congress (hereafter "ANC") won in a free and fair election. Since the 1994 election, the ANC has been wining election after election, with increasing majorities in parliament. In 2005, "(i)n its traditional January 8 birthday declaration, the ruling ANC party accused the judiciary of having a collective mind-set that was not in line with the 'vision and aspirations of the millions who engaged in the struggle to liberate our country from white minority domination."[150] In a bold-typed heading, the *Sunday Times* reported: "Party warns white judges their mind-set is out of kilter with the masses." The paper further stated that "the ANC yesterday (the 8th January 2005) attacked the country's white judges warning of a 'popular antagonism' towards the judiciary and the courts if they did not change their mind-set."[151]

A political attack on the judiciary is common in many countries. In all constitutional states, where judicial review is sanctioned by the constitution, judges are consistently under attack as a result of the view that they usurp legislative authority. The Israeli courts however have asserted that since the views of the public are often driven by a sense of revenge, the courts should not allow themselves to be diverted from the principles of the law by the expectations of the public.[152]

Critics of judicial review argue that judicial review runs counter to majoritarian principle and that there is inconsistency between judicial review and parliamentary democracy. They contend that in a democratic society, governmental decisions should be made by, or directly on behalf of the current majority, and not by someone independent of the majority will, such as a judge with long tenure and with no constituency.[153] They further contend that because legislatures are directly elected and are thus thought to be at least the best available agents of public will, this provides a democratic justification for the supremacy of these bodies over non-elected agencies such as judges. Consequently it is argued that legislatures should legislate, and only legislate; courts should adjudicate and only adjudicate,[154] and because law-making is a political activity, it should therefore be done by elected officials, operating under a norm of accountability to their constituents.[155] However since the focus of judicial policy-making is protection human rights, this sentiment has not deterred the courts from protecting individual and minority rights. Moreover, since constitutional texts are essentially indeterminate,[156] the courts have been able to use such

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(a) must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including-
(i) an order limiting the retrospective effect of the declaration of invalidity, and
(ii) an order suspending the declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect."

150 *Sunday Times* (09-01-2005) 1.
151 *Ibid.*
152 Netanyahu J in *Avidan v State of Israel* 1992 46 (i) PD 677; *Tartur v State of Israel* 1991 45 (v) PD 573.
153 Strayer *The Canadian Constitution and the Courts* (1988) 51.
154 Kennedy *Critique of Adjudication* (1997) 27.
155 *Ibid.*
156 Braithwaite 1995 *Sydney LR* 365.

indeterminacy in interpretation, to protect fundamental human rights. So where the power of review is in fact conferred upon the courts, judges should have not only the power, but also the duty to intervene when the majority unduly infringes on human rights.

A bill of rights employs general terms such as "equal protection", "freedom of speech", "the right to speedy trial", "cruel and inhuman punishment". These terms lack further definition in the constitution. This is so because during drafting, the drafters of constitutions cannot foresee all the situations in the indefinite future to which they might be applied. It would, in any case, be unwise to restrict their use by too much precision. As a result, the courts have to attribute some meaning, which is consistent with the protection of fundamental human rights to these very general words in particular situations. Even in countries such as the US, where the bill of rights expresses many of the guaranteed rights and freedoms in fairly absolute terms, the courts have nevertheless had to find some rationale for balancing such interest against the interests of others which may seem equally valid. They have done so without any specific constitutional mandate.[157] Therefore, while it is improper for a court of law to pronounce on the wisdom of the policy choices which a government makes judicial review is rarely non-political and non-controversial. It is but a comfort for a ruling party to be told that a judgment clogging its political actions is not criticising the wisdom of its policy decisions.[158]

5 SYNTHESIS AND CONCLUSIONS

The article has examined the paradox of the principles of democracy and constitutionalism on the one hand, and popular or majoritarian democracy and judicial review, on the other. It has been observed, first, that the ideal of democracy includes the principle that citizens should readily recognise and accept the laws or decisions as legitimate if those laws or decisions have been reached on the basis of popular participation and deliberation. Fundamental to the principle of democracy and democratic decision-making, therefore, is the principle of majority rule. In a democratic society, governmental decisions should be made by or on behalf of the current majority, and not, so the argument goes, by the minority group or someone independent of the will of the majority, such as a judge with no constituency. In its simplest form therefore, democracy requires only that the will of the majority prevails even if its implementation tramples on the rights of individuals and minorities.

Second, constitutionalism, on the contrary, requires that the power of the majority (governmental powers) should derive from a written constitution and that its powers be limited to those set out in the constitution. This means that governmental power is constrained by the constitution and the government governs only according to the terms, conditions and purposes of the constitution.

Third, it has been observed that the paradox in the theoretical and practical application of constitutionalism and democracy seems to have been resolved by the introduction of the principle of constitutional democracy. Constitutional

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157 See the discussion of the case of *Marbury v Madison.*

158 Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 71.

democracy results from a dual stipulation that governmental power should be constrained by fundamental rights enshrined in the constitution and that sovereignty should nevertheless reside with the majority of the people. Majority rule is therefore accepted as one of the major elements but not the sole determining factor for democracy. In a constitutional state, democracy also encompasses limitation of the majoritarian power. Democracy therefore does not only refer to rule of the majority, but it refers to rule of the majority within certain predetermined and prearranged channels and procedures. Constitutional dispensation is always intent upon the refinement and improvement of social compromise and inhibits abuse of power by the majority. The principle of constitutional democracy therefore requires that the minority be protected and be given an important role in the balancing of power.

Finally, that in a constitutional state the judiciary is earmarked to play a non-partisan political role through judicial review. In South Africa, for example, the Constitutional Court was mandated by the Multi-Party Negotiating Forum to certify whether the final Constitution complied with the provisions of the 34 constitutional principles agreed to during negotiation and entrenched in the interim Constitution.[159] The function of defining these irreconcilable principles and protection of majority power and minority rights and freedom was therefore placed in a non-political institution – the judiciary. This task of reconciling democracy and constitutionalism cannot, as pointed out earlier, be accomplished once and for all; the freedom of the majority to govern and the freedom of the individual not to be governed remain forever in conflict. The resolution of the dilemma must be achieved anew in every case and is therefore a never ending search for a correct balance.

Where the power of review is conferred by the constitution, judges not only have the power but also the duty to intervene when the majority infringes unduly on individual or minority rights. Protection of rights by the judiciary through judicial review is therefore not undemocratic but instead, it enhances democracy. Where the constitution does not explicitly confer reviewing power, the court has nevertheless, on occasions, asserted its authority to do so. The case of *Marbury* is a monumental example in this regard. This case has however elicited fierce debate on the question of the legitimate function of the judiciary in relation to the legislature. However, it should be noted that the US Constitution, unlike the South African Constitution, did not make specific provision for judicial testing of legislation. The testing right claimed in *Marbury* was eventually accepted to be implied in the US Constitution.

The counter-majoritarianism therefore changes the role and function of the judiciary, as this involves the restrictions of certain manifestations of the will of the majority. This restriction tends to trigger and to precipitate political and constitutional tension. The Indian case of *Golak Nath*[160] is a typical example. It is therefore apparent that courts are sometimes eager to enforce the rule of law even to the extent of countering majoritarian will. Justification for the institution

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159 Schedule 4 of the Constitution of the Republic of South Africa Act 200 of 1993 (the so-called "interim Constitution") contained these 34 constitutional principles which bound the Constitutional Assembly in the drafting of the new constitution. The constitutional principles served as pillars for the new dispensation.

160 *Golak Nath* 1643. This case is discussed above in part 3.

of judicial review within the context of a democratic society turns on the argument that majority rule is not in itself democratic, since if a majority intrudes on political rights or excludes minority opposition groups, it violates constitutional democratic norms.[161]

In South Africa, the new constitutional dispensation has introduced constitutional democracy which departs radically from the old order of parliamentary sovereignty. Majoritarian democracy does not take cognisance of the interests or rights of minorities or individuals. The protection thereof by courts; through judicial review of parliamentary enactments in systems of parliamentary sovereignty is an anomaly, and therefore impermissible. On the contrary, constitutional democracy encapsulates guarantees of minority and individual interests, and empowers the courts to review not only executive (as is the case in a majoritarian democratic setup) but legislative enactments as well.

161 Davis *Democracy and Deliberation* (1999) 12.

Nowhere to Hide – Big Brother is Watching You: Non-communicative Personal Cellphone Information and the Right to Privacy

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"It's impossible to move, to live, to operate at any level without leaving traces, bits, seemingly meaningless fragments of personal information."

William Gibson

1 INTRODUCTION

By utilising the latest cellphone technology, non-communicative personal information such as the number that is dialled, the time the call is made, the movement and location of both the caller and the recipient of a call, can be obtained. This information is not ordinarily available to the police and it usually requires prior judicial authorisation to access this information. The problem is that this information is accessible to the cellphone companies, their employees and criminals who want to know the location and movement of other citizens in order to commit crime. The Protection of Personal Information Bill[1] suggests new methods of collection and/or dissemination of any personal information and the Bill aims to protect individual's right to data privacy and personal information. Whether an individual has a right to privacy in his or her movement and location is not addressed by the Bill. This Bill must, however still be passed by Parliament.

Information about a person's location and movement can play a crucial role in solving crime. The use thereof in crime investigation should be encouraged, provided that the proper legal authorisation is obtained. The central question is whether the nature and extent of non-communicative information and details obtained from cellphone records, such as the location and movement of users, are worthy of protection by the right to privacy.

The right to privacy enjoys both common law and constitutional protection.[2] Neethling defines privacy as follows:

> "[p]rivacy is an individual condition of life of separation from publicity. This condition of life embraces all those personal facts which the person concerned has

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* BA LLB LLM.

1 The Protection of Personal Information Bill [B9-2009] was tabled in Parliament on 25-08-2009. The text of this bill is available at http://www.pmg.org.za/bill/20090825-protection-personal-information-bill-b9-2009. (accessed 14-04-2010).

2 Section 14 of the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").

> determined to be excluded from the knowledge of outsiders and in respect of which he has a will that they be kept private." [3]

This definition has been accepted by both the Appellate Division[4] (as it then was) and the Constitutional Court[5] and it constitutes the basis of the discussion of the right to privacy in this article.

The right to privacy includes the right to have control over personal information and the right to be able to conduct personal affairs relatively free from unwanted intrusions.[6] This right has been interpreted to include telecommunications and the contents thereof which the state will only be able to access with prior judicial authorisation.[7] One would thus assume that the same rule would apply also to the content of communications via cellphone. But cellphone technology has spawned an industry-wide practice of cellphone companies recording and storing non-communicative information about users and usage. Personal information, such as the number dialled, the time and duration of the call, the location of both the caller and the recipient, are routinely recorded in respect of each call.[8] There is always the possibility that this stored information can be accessed and conveyed to others at a later stage, with or without the user's consent. This information is not ordinarily available to the police and they do not have unlimited and unrestricted access to it. However, the police would be able to obtain access with prior judicial authorisation in the form of a *subpoena* issued by a court.[9] In addition, cellphone companies themselves, their employees, computer hackers and possibly even criminals may be in a position to access this information. The potential for abuse is enormous.

The key issue with regard to cellphones is whether the keeping and use of this non-communicative information by cellphone companies amount to intrusions on an individual's right to privacy. Or stated differently, does the right to privacy protect the non-communicative personal information obtained from cellphone

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3 Neethling, Potgieter and Visser *Law of Delict* 4 ed (2001) 355; Neethling, *Die Reg op Privaatheid* (LLD-thesis, UNISA, 1976) 287.

4 *National Media Ltd v Jooste* 1996 3 SA 262 (A) 271.

5 *Bernstein v Bester NO* 1996 2 SA 751 (CC) para 68.

6 Neethling *Persoonlikheidsreg* (1998) 39; *National Media Ltd v Jooste* 271–272. This right allows a person to control what others know about him or her. It includes the right to walk naked in homes, to enjoy alcohol in the privacy of a home, to read whatever books or magazines one chooses to and to decide what others should know or should not know about one. It also includes the right to make certain personal choices regarding sexual relations.

7 Section 40 of the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002 (hereafter "RICA").

8 Cellphone records can indicate precisely where a user was on a specific day. The precise geographical area from where the call was made and the location where the recipient was can be ascertained. This is determined from the records by verifying the location of the tower that was used in making the call, the time of the call, the duration of the call and by determining which tower received the call. All this information is obtainable from the printouts of cellphone records from cellphone companies. If required, an expert will be able to plot all the details on a map to indicate with precision where a user was when a call was made. A user who uses a cellphone on a specific day and makes a number of calls whilst moving around can have the movements plotted on a map. Hamman *The Right to Privacy and the Challenge of Modern Cell Phone Technology* (LLM-thesis, UWC, 2004) 287.

9 *Subpoenas* are usually issued in terms of s 205 of the Criminal Procedure Act 51 of 1977. Accessing information by relying on a *subpoena* would seem to be a justifiable limitation of the right to privacy in terms of s 36 of the Constitution.

records? Cellphone technology has been and definitely will be utilised by law enforcement agencies in order to combat crime.[10] The challenge is to protect citizens' privacy in this process.

2 PRIVACY UNDER THE COMMON LAW

Before the entrenchment of the right to privacy in the Constitution it was recognised by the common law as an important right warranting protection.[11] At common law the following are regarded as breaching the right to privacy: entry into a private residence, the reading of private documents, the disclosure of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful intrusion, and the disclosure of private facts in breach of a relationship of confidentiality.[12] The common law right to privacy has also been deemed to be violated where a person's photograph was published as part of an advertisement without the consent of the person;[13] where a doctor informed third parties that his patient was HIV-positive;[14] where private premises were "bugged"[15] and where a woman was watched while undressing.[16] The examples are all closely related to what should be regarded as private and confidential aspects of a person's autobiographical details.

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10 In *S v Petersen* (C) case no SS 95/98 unreported advanced cellphone technology was utilised by the prosecution. This case was flagged as the first in South Africa to make use of such technology. The detailed billing records were obtained from cellphone companies and the information obtained from the cellphone records assisted the court in reaching a verdict. The court found that the state had proved, with extracts from the cellphone records, that 12 calls had been made from one specific cellphone to another during a period of 52 minutes between 01:20 and 2:12. It was also found that the calls were made according to the route that was mapped out by using the cellphone records. Cellphone records indicated precisely the area where calls were made from and the location of the recipient. An expert was able to plot all the detail on a map to indicate with precision where the user was when calls were made. Without the cellphone records used in this case there was no direct evidence against the accused as there were no eyewitnesses. The irrefutable evidence of the mapped cellphone records destroyed the alibis ventured by the two accused. Other information obtained from *The Sunday Times* 26-09-1999 www.suntimes.co.za/1999/09/26/insight/in01.html and see also www.mnet.co.za/CarteBlanche/Display/Display.asp?Id=1637**.** Similarly, detectives in the matter against Jonathan Moodley following the abduction and killing of Leigh Mathews used cellphone records to identify the perpetrator. *Subpoenas* were issued to the various cellphone companies to provide a database of all phone calls made from near the spot where Leigh Mathews had been murdered. The accused had made a mistake by phoning his girlfriend from near the bloody spot where the murder had taken place. The cellphone records indicated that he made one call on his phone within one minute after the ransom demand call was made on Matthews' phone to her father: *The Sunday Times* 31-07-2005 1 and 3.

11 De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) 268. The common law recognises the right to privacy as an independent personality right The courts consider this to be part of the concept of a person's "dignitas". An *iniuria* occurs when there is an unlawful intrusion on someone's personal privacy (a breach of a person's privacy or an unlawful disclosure of private facts about a person).

12 Mentioned by Ackermann J in *Bernstein* para 69.

13 *O'Keefe v Argus Printing and Publishing Co Ltd* 1954 3 S A 244 (C).

14 *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A).

15 *S v A* 1971 2 SA 293 (T).

16 *R v Holiday* 1927 CPD 395.

There is no indication that the common law principles will also apply to non-communicative personal information which is obtained from cellphone records. The common law does not provide an answer to the question whether personal information such as the location and movement of cell phone users should receive protection by the right to privacy. The shadowing of a person, however, was regarded as an infringement of that right.[17]

3 THE CONSTITUTIONAL RIGHT TO PRIVACY

3 1 Section 14

Section 14 of the Constitution reads as follows:

> "Everyone has the right to privacy, which shall include the right not to have
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized; or
> (d) the privacy of their communications infringed."

The section consists of two parts.[18] The first part guarantees a general right to privacy and the second part protects against specific infringements of privacy. A right of privacy in relation to information in possession of a third party (eg. a cellphone company's holding information about an individual's movement and location) would probably fall under the first part. As a fundamental right it can be limited in accordance with the limitation clause; that is by a law of general application.[19]

An assessment of an invasion of privacy in terms of the Constitution differs from a common law assessment. The common law operates in terms of a single enquiry; it must be determined that the invasion is unlawful and that there are no grounds of justification present.[20] Ackermann J in *Bernstein* held that the Constitutional Court should guard against applying the common law principles to interpret fundamental rights.[21] In terms of the Constitution the assessment does not involve a single enquiry, but a two-stage analysis:

1. The party who seeks to exclude certain evidence should first establish the scope of the right to determine whether certain conduct has infringed that right. An individual will have to prove that he or she has a subjective expectation of privacy and that society has recognised that expectation as being reasonable.
2. If an infringement occurred or there has been an invasion of the right to privacy, it must be determined whether it was a legitimate limitation to allow the information to be admissible as evidence.[22]

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17 *Epstein v Epstein* 1906 TH 87.
18 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 267.
19 Neethling, Potgieter and Visser *Law of Delict* 19.
20 De Waal, Currie, Erasmus *The Bill of Rights Handbook* 269.
21 *Bernstein* para 71.
22 *Bernstein* para 90.

The limitation of the right to privacy is a separate inquiry. If an infringement of a right has taken place, it must be determined whether such infringement was justifiable in terms of the Constitution.[23] If the infringement was not justifiable, the aggrieved party must have certain remedies against those who infringed the right.

The case law relating to the right to privacy that have come before the Constitutional Court can be classified into two broad categories, namely those concerning inner core privacy and those cases concerning business privacy.

3 2 Inner core or inner sanctum privacy

The inner core or inner sanctum of the privacy of an individual is the most sacred private area of a person's life. The strongest protection will be afforded to that which constitutes the "inner core" of privacy or that which takes place in the "inner sanctum" of an individual. The "inner core" of privacy was referred to in *Case v Minister of Safety and Security*[24] as that which is done in the privacy of an individual's home and what type of erotic material is kept in the privacy of a home. A person's family life, sexual relationships, sexual preferences and home environment form part of this inner core which will be protected by the right to privacy.[25] But as a person moves into communal relations and activities, such as business and social interaction, the scope of protected personal space shrinks accordingly.[26] The right to privacy, thus, will be reduced the further the individual moves away from this inner core.

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23 Section 36(1) of the Constitution provides:
"The rights in the bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
(a) the nature of the right
(b) the importance 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".

24 *Case v Minister of Safety and Security* 1996 3 SA 617 (CC).

25 In this matter it was stated that it is nobody's business what is done in the privacy of one's home. Part of this inner core is the right to make decisions concerning sexual relationships. The offence of possession of obscene photographic matter, in contravention of s 2(1) of the Indecent or Obscene Photographic Materials Act 37 of 1967 was declared to be inconsistent with the Constitution and invalid. The court held that the offence infringed the right to privacy of individuals and that there was no justification for this infringement. Didcott J held (para 91) "what erotic material I may choose to keep within the privacy of my home, and only for personal use there, is nobody's business, but mine. It certainly is not the business of society or the state. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which section 13 of the Interim Constitution … guarantees that I shall enjoy." This "the right to be left alone" was considered in the *National Coalition for Gay and Lesbian Equality v the Minster of Justice* 1999 1 SA 6 (CC). In this matter the court held that what an individual decides regarding his or her family life, sexual preference or sexual relationships is personal and decisions relating thereto, are of concern only to the person.

26 *Bernstein* para 67.

3 3 Business privacy

The privacy in the business of an individual relates to that which takes place in the business life of an individual. In *Hyundai*[27] the Constitutional Court qualified the "inner core" principle in relation to business privacy. In this matter search warrants were authorised which allowed the respondents to conduct a search and seizure at the place of business of certain individuals. Numerous documents, records and data were seized. The court, per Langa DP held that persons continued to retain a right to privacy in the social capacities in which they acted:

> "The right [to privacy], however, does not relate solely to the individual within his or her intimate space. Ackermann J did not state in the above passage that when we move beyond this established 'intimate core', we no longer retain a right to privacy in the social capacities in which we act. Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the State unless certain conditions are satisfied. Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such decision will be respected as reasonable the right to privacy will come into play."[28]

Even if there is a move away from the inner core, protection will still be afforded to an individual. The more public the undertaking, and the more closely it is regulated, the more attenuated the right to privacy would be and the less likely any possible invasion.[29] Although privacy rights can exist in a business, the more public the manner in which a business is being regulated, the possibility of an invasion of privacy will be reduced. The right to privacy will also be extended to personal space at places of employment and business. In *Mistry*[30] it was held that the entering, searching and seizing in terms of the Medicines and Related Substances Control Act[31] was an unjustifiable breach of the right to privacy.

3 4 Information and communications

It has been established that the right to privacy protects the content of telephone conversations. In *Protea Technology v Wainer*[32] it was held that where an employee makes and receives calls that have nothing to do with his or her employer's business, a legitimate expectation of privacy exists in respect of the content of such calls.

False and misleading information furnished by the police to obtain a direction to tap cellphones in *S v Naidoo*[33] resulted in the direction being declared invalid and a finding that the monitoring of the cellphone conversations amounted to an unjustifiable violation of the right to privacy. In *S v Nkabinde*[34] the monitored conversations between an accused and his legal representative were also held to be an invasion of the right to privacy of the accused. These cases, however, only relate to the content of telecommunications and they do not address the issue whether the protection of privacy will extend to non-communicative information

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27 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors Pty Ltd: in re Hyundai Motor Distributors Pty Ltd v Smit NO* 2000 10 BCLR 1079 (CC).
28 *Hyundai* para 16.
29 *Hyundai* para 27.
30 *Mistry v Interim Medical and Dental Council of South Africa* 1998 4 SA 1127 (CC).
31 Act 101 of 1965.
32 *Protea Technology v Wainer* 1997 9 BCLR 1225 (W).
33 *S v Naidoo* 1998 1 BCLR 46 (D).
34 *S v Nkabinde* 1998 8 BCLR 996 (N).

such as the movement and location of persons obtained from cellphone records. Divulging of private medical information without consent was regarded as an infringement of the right to privacy in *NM v Smith*.[35]

From the above it is apparent that no authority exists in South African law that the right to privacy protects non-communicative personal information, such as the movement and location of cellphone users.

It is submitted that privacy about a person's location and movement is not part of their "inner core". In *Simons v P4 Radio*[36] a matter heard by the broadcasting tribunal, a presenter of the respondent radio station conveyed a listener's cell-phone number to other listeners, inviting them to call the said person and engage him in debate on an issue. The presenter did not obtain the listener's permission to convey the number to the public. It was held that this amounted to an invasion of the listener's right to privacy, which was protected by the broadcasting code and also by s 14 of the Constitution. It was held that the listener had not said anything on air which necessitated the serious invasion of his privacy. The tribunal held that it was hard to imagine a set of facts (short of an emergency) which would allow divulging of a cellphone number without the permission of the person involved.[37] Such conduct was regarded as a very serious invasion of privacy.

The Regulation of Interception of Communications and Provision of Communication-Related Information Act (hereafter "RICA")[38] also gives protection to communications in that it provides that a court order must be obtained to get access to the content of conversations.[39] RICA was enacted to regulate the interception of certain communications and replaced previous legislation dealing with this.[40] This Act also places more responsibilities on cellphone owners and cellphone companies in an attempt to eradicate the theft of, and trade in, stolen cellphones. It aims to achieve this goal by compiling a database of the identity of all cellphone users. Once the database has been compiled and there is a record of the identity of most of the users. This means that the movements and location of almost every cellphone user will be traceable. It will also be possible to locate a person using a cellphone within a range of a few metres.

Although, subject to certain exceptions, it is an offence to provide real-time or archived information to any person other than the customer,[41] RICA does not expressly include the right to privacy to protect information regarding the

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35 *NM v Smith* 2007 5 SA 250 (CC).

36 *Simons v P4 Radio* 2003 JOL 10745 (BCCSA).

37 *Simons* para 11.

38 RICA commenced on 30-09-2005 with the exception of s 40 and s 62. Section 40 and s 62(6) commenced on 30-11-2005. Section 62(1)-(5) came into operation on 01-07-2009. The Department of Justice has since yielded to requests from mobile operators to extend the deadline for the registration of sim cards to 30-06-2011: Jones "Consumers, operators get RICA reprieve" *Mail and Guardian* http://www.mg.co.za/article/2010-11-04-consumers-operators-get-rica-reprieve (accessed 15-11-2010).

39 Section 16. An application for an interception direction must be made to a designated judge.

40 RICA repealed the Interception and Monitoring Prohibition Act 127 of 1992.

41 Section 50(1) and 50(2).

non-communicative information (movement and location) of cellphone users. In fact, RICA stipulates that more information regarding cellphone users should be kept in databases by cellphone companies. The fact that the details of movement and location of users can be ascertained with reference to the records presents the possibility that rights of individuals will be infringed, without them even realising that these details can be accessed. Moreover, RICA has the result that even more information in respect of cellphone users will be in possession of third parties.

3 5 The Protection of Personal Information Bill

If passed by parliament, the Protection of Personal Information Bill will give effect to the constitutional right to privacy of personal information. This Bill aims to protect individual's right to data privacy and protection of personal information. The purpose of the Bill is to give effect to the constitutional right to privacy, to regulate the manner in which personal information may be processed, to provide for persons with rights and remedies to protect personal information from processing not in compliance with the bill and to establish an information protection regulator to ensure respect for and promote, enforce and protect the rights protected by the Bill.

Personal information relating to race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental status, health, well-being, disability, religion, conscience, belief, culture, language and birth of the person will be protected.[42] Other types of information are also protected.[43] The Bill also contains reference to "special personal information" which is information concerning a child who is subject to parental control in terms of the law; or a data subject's religious or philosophical beliefs, race or ethnic origin, trade union membership, political opinions, health, sexual life, or criminal behaviour.

The processing of personal information and any activity or operation involving personal information, whether automated or not, will also be regulated.[44] This will include personal information stored in databases; address books; payroll systems or manual filing systems; information sent via email; in word processing programmes; exchanged in contracts with suppliers and recorded on CCTV and in telephone records. The processing of personal information must comply with

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42 Clause 1 of the Bill provides a definition of "personal information".

43 *Ibid*. Information relating to the education, the medical, financial, criminal or employment history of the person, any identifying number, symbol, email address, physical address, telephone number or other particular assignment to the person; the blood type or any other biometric information of the person; the personal opinions, views or preferences of the person; correspondence sent by the person that is implicitly or explicitly of a private confidential nature or further correspondence that would reveal the contents of the original correspondence; the views or opinions of another individual about the person; and the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.

44 It includes the collection, recording, organisation, storage, updating or modification, retrieval, consultation, use, dissemination by means of transmission, distributing or making available in any other form, merging, linking, as well as blocking, erasure or destruction of information.

certain requirements, which are referred to as eight "information protection principles" in the Bill.[45]

The regulator may authorise the processing of information that is in breach of the Bill in certain circumstances such as where public interest in the processing of the personal information substantially outweighs any resultant interference with the data subject's right to privacy.

The Bill further addresses issues pertaining to the processing of personal information for purpose of direct marketing.[46] Within one year from the date that the Bill comes into force, companies must ensure that their processing of personal information complies with the legislation and they are to notify the regulator. The minister may extend this one year grace periods to a maximum of three years.

If passed by Parliament, the Bill will undoubtedly impact on how companies and other institutions manage the processing of any personal information of their employees and customers. The cost of compliance for companies and other institutions will certainly be substantial. The Bill, however, does not address the right to privacy in relation to non-communicative cellphone information.

Since the Constitution prescribes that international law must be considered when a court, tribunal or forum interprets the Bill of Rights, and that regard may also be had to foreign law,[47] a study of these sources may provide some assistance regarding the right to privacy (in respect of movement and location) of cellphone users, as well as the proper regulation of access to such information held by third parties.

4 INTERNATIONAL LAW

International law will be referred to in order to ascertain how privacy has been defined, and what the extent and scope of the realm of privacy are.

4 1 International instruments

A number of international instruments dealing with privacy and privacy in personal data evolved over a long period. The fact that vast quantities of information can be transmitted within seconds between countries necessitated a consideration to establish privacy protection guidelines in relation to personal data.

The privacy benchmark at international level can be found in art 12 of the 1948 Universal Declaration of Human Rights (hereafter "UDHR") which states:

> "No one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interferences or attacks."

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45 The principles contained in clauses 7 to 25 of the Bill deals with accountability, processing limitation, purpose specification, further processing limitation, information quality, openness, security safeguards, data participation subject.

46 Information for the purpose of direct marketing by means of automatic calling machines, facsimile machines, short message service (sms) or electronic mail is prohibited unless the data subject has given consent to the processing.

47 Section 39 (1) of the Constitution.

Numerous other international human rights instruments contain provisions in almost the same language, which specifically recognise the right to privacy. Article 17 of the 1966 International Covenant on Civil and Political Rights (hereafter "ICCPR")[48] is worded similarly to art 12 of the UDHR. The United Nations Human Rights Committee commented that art 17 of the ICCPR should be given a broad interpretation to include "the place where a person resides or carries out his usual occupation".[49] Article 14 of the 1990 United Nations Convention on Migrant Workers[50] contains privacy provisions similar to those in the UDHR and the ICCPR. In similar vein, the privacy rights of a child are protected in art 16 of the United Nations Convention on Protection of the Child.[51] This provision stipulates that the privacy rights a child may only be limited lawfully domestic laws and that such limitation may not be arbitrary. The interference with the privacy rights must be reasonable in the circumstances. If legislation is enacted which allows interference, it must specify in detail the precise circumstances in which such interference will be permitted.[52] The United Nations Guidelines Concerning Computerised Personal Data Files[53] are intended to encourage United Nations member states without data protection legislation in place to take steps to enact legislation based on the Guidelines as well as international organisations to process personal data in a responsible, fair and privacy-friendly manner. The compilation and keeping of data-recorded information must be accurate and only for a specific purpose. People should have the right to know what information about them is stored.

4 2 Regional instruments

4 2 1 The Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms created the European Commission of Human Rights and the European Court of Human Rights to oversee the enforcement of the rights stipulated in art 8, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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48 Article 17 provides: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks."

49 Steytler *Constitutional Criminal Procedure* (1998) 79.

50 Article 14 provides: "No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interferences with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference."

51 This article reads: "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks."

52 Steytler *Constitutional Criminal Procedure* 80.

53 Adopted by the General Assembly of the United Nations on 14-12-1990.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

4 2 2 Decisions of the European Court of Human Rights

The European Court of Human Rights regards art 8 as reflecting a general right to privacy.[54] In *Klass v Germany*[55] the court held that telephone conversations are included in the notions of "private life" and "correspondence".[56] This protection was extended in *Kruslin v France*[57] to protect not only the subscriber to a telephone service, but any user of a telephone. In *Malone v United Kingdom*[58] it was held that telephone tapping is a violation of the privacy rights guaranteed under art 8. As a result of this metering, information about the details of the numbers dialled on a particular phone, as well as the time and duration of calls, could be ascertained.[59] The release of that type of information to the police was not permissible without the consent of the subscriber. Information regarding the telephone numbers dialled from a specific telephone was an integral element of telephone communications; it was regarded as private and important enough to be protected as falling within the notions of "private life" and "correspondence" under art 8. In *Niemitz v Germany* a broad interpretation was given to private life and the home. It was held that the office of a lawyer fell within the protected sphere of privacy.[60]

Information conveyed to a third party, although private, will not automatically receive protection under art 8. In *MS v Sweden*[61] it was held that it would depend on the manner in which the information was conveyed to the third party. If the information had been disclosed earlier to another public authority and, therefore, to a wider circle of public servants, the disclosure of the information could be justified. This will be the case even if the information conveyed was of a confidential nature. Although there had been an interference with the applicant's right to respect for private life under art 8(1), the interference was justified under art 8(2). Although the medical records contained personal information that was indeed of a very personal and sensitive nature, it had been conveyed earlier to a wide circle of public servants that had access to the information. It thus seems that the manner in which information is conveyed to a third party, and the number of people who will have access to the information, play an important part in the right to receive protection for the information.

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54 Steytler *Constitutional Criminal Procedure* 80.
55 *Klass v Germany* (06-09-1978) Series A No 28.
56 Para 41.
57 *Kruslin v France* (24-04-1990) Series A No 176-a.
58 *Malone v United Kingdom* (02-08-1984) Series A No 82.
59 *Malone v United Kingdom* para 83.
60 *Niemits v Germany* (16-12-1992) Series A No 251-B.
61 *MS v Sweden* (27-08-1997) Case No 74/1996/693/885.

4 2 3 American Convention of Human Rights

Article 11 of the American Convention on Human Rights[62] sets out the right to privacy in terms similar to the UDHR. It is interesting to note that the African Charter on Human and Peoples' Rights[63]does not make any reference to privacy rights.

4 2 4 Instruments dealing with data protection

Over the past 20 years technology has developed at an alarming pace and resulted in the automatic processing, collection and storage of personal information of individuals. A need arose to have regulations to safeguard the rights of individuals. Various regional instruments[64] contain principles that are very similar to the United Nations Guidelines Concerning Computerised Personal Data Files. It is apparent that a general right to privacy exists, but the international instruments do not indicate that the right to privacy protects non-communicative personal information, such as, the movement and location of cellphone users.

5 COMPARATIVE JURISDICTIONS

5 1 The United States of America

The jurisprudence of the United States of America has been influential in South Africa and elsewhere. Although the word "privacy" is not mentioned in the Fourth Amendment or anywhere else in the American Constitution, the Fourteenth Amendment has been interpreted to include a general right to privacy; a right to be let alone with respect to fundamental decisions concerning the individual's person.[65] Protection was given to adults to engage in private conduct in the exercise of their liberty under the due process clause of this Amendment.[66]

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62 Article 11 reads: "1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attack."

63 Adopted by the 18th Assembly of the Heads of State and Government of the Organisation of African Unity in Nairobi on 27-06-1981.

64 Examples of these include the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (hereafter "CoE Convention") of the Council of Europe; the Organisation for Economic Cooperation and Development Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (hereafter "OECD Guidelines") and the European Union Directive on the Protection of Individuals with regard to the processing of Personal Data and the Free Movement of Such Data (hereafter "EU Directive").

65 *Griswold v Connecticut* 381 US 479 (1965). Where it was held that a law forbidding the use and distribution of contraceptives violated the right of "marital privacy". *Roe v Wade* 416 US 113 (1973). The substantive right of privacy inherent in the due process clause was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy".

66 Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is Gormley's[67] opinion that scholars in America have been unable to agree upon any one-size-fits-all definition of privacy and the author is of the view that privacy in fact consists of five distinct species.[68]

It is submitted that non-communicative information obtained from cell phone records probably falls under the Fourth Amendment, which deals with search and seizure and which reads:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment requires that there should be a warrant before a search and seizure will be justified. A development also took place that there should be "a reasonable expectation of privacy" before a search is regarded as being unreasonable, and that it must be established that a reasonable expectation of privacy exists in the information before prior authorisation in the form of a warrant is required. At first the physical invasion of property was required to warrant protection under the Fourth Amendment. Violations of the Fourth Amendment only took place where there was a physical trespass on property, or seizure of material goods; government agents could employ dictaphones and microphones to listen to conversations as long as a defendant's property or person was not touched.[69] However, in 1961 the court changed its approach in *Silverman v United States.*[70] It disallowed the use of a "spike mike", driven into the wall of a row house which tapped into the heating duct and allowed officers to monitor conversations within the defendant's entire house. The court still

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67 Gormley "One Hundred Years of Privacy" 1992 *Wisconsin LR* 1335.

68 Gormley para 1434 describes these as follows:

"1. The Privacy of Warren and Brandeis (tort privacy): is the right to be let alone with respect to the acquisition and dissemination of information concerning the person, particularly through unauthorized publication, photography or other media.
2. Fourth Amendment Privacy: (relating to warrantless governmental searches and seizures), the right to be let alone, with respect to governmental searches and seizures which invade a sphere of individual solitude deemed reasonable by society.
3. First Amendment Privacy: the right to be let alone, when an individual's freedom of speech threatens to disrupt another citizen's liberty of thought and repose.
4. Fundamental-Decision Privacy: the right to be let alone, with respect to fundamental (often unanticipated) decisions concerning the individual's own person, which are explicitly reserved to the citizen (rather than ceded to the government) by the terms of the social contract. (Fourteenth Amendment Privacy.)
5. State Constitutional Privacy: the right to be let alone, with respect to a variety of private and governmental intrusions generally often overlapping with species number one through number four above, yet often extending greater protections to the citizen by virtue of independent state constitutional provisions."

69 *Olmstead v United States* 277 US 438 (1928). The court held that where no physical invasion of the defendant's premises occurred, there would not be protection under the Fourth Amendment. Wiretapping thus was not covered by the Amendment because the government had not invaded the defendant's premises physically. In *Goldman v United States* 316 US129 (1942) it was found that a detector placed against the wall of an adjoining room did not qualify as a search and seizure. During this period the notion was reinforced that violations of the Fourth Amendment only took place where there was a physical trespass on property or seizure of material goods.

70 *Silverman v United States* 365 US 505 (1961).

required some physical invasion of the premises and found that it was constituted in this case by the contact with the heating duct.

Katz v United States[71] initiated the development of a reasonable expectation of privacy. Charles Katz was arrested by federal authorities in Los Angeles, after an electronic listening device attached to the outside of a telephone booth was used to record his conversations concerning his bookmaking activities in Boston and Miami. The court found that this mode of gathering evidence did not comply with the Fourth Amendment, even though the physical property of the defendant had not been violated. Justice Stewart's opinion was that the Fourth Amendment "protects people, not places".[72] In dealing with the privacy concept under the Fourth Amendment, he went on to say that "what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected".[73] Justice Harlan, in his concurring judgment, initiated the notion of "reasonable expectation of privacy", which is now regarded as the standard for search and seizure.[74] It is a two-requirement test, which was confirmed in *Kyllo vs. United States*[75] in the following manner:

> "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable … a Fourth Amendment search does not occur – even in the explicit projection of a house – unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society [is] willing to recognize that expectation as reasonable."

First there must be a reasonable expectation of privacy in the mind of the person whose right will be/was infringed. Secondly, in addition to the individual manifesting a subjective expectation in the object of the search, society must be willing to recognise that expectation as reasonable. The second requirement thus brings an objective element into the test.

5 1 1 Information revealing certain details

Does American law grant an individual a right of privacy in non-communicative information revealing details such as location and movement? In *Smith v Maryland*[76] the Supreme Court held that an individual targeted in a pen registering[77]

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71 *Katz v United States* 389 US 347, 353 (1967).
72 *Katz* 351.
73 *Ibid*.
74 *Katz* 360–361. This two-requirement test of "reasonable expectation of privacy" was adopted soon afterwards the majority of the court in *Terry v Ohio* 392 US 1, 9 (1968). The test requires a consideration of (a) whether the individual had an "actual" expectation of privacy and (b) whether the expectation was "one that society was prepared to recognize as 'reasonable'".
75 *Kyllo v United States* 533 US 27 (2001) 190 F 3d 1041. In this matter it was held that no subjective expectation of privacy existed. The amount of heat emerging from the home of the appellant was not concealed. The imager did not expose intimate details of his life. On appeal it was held that where the government uses a (sense-enhancing) device which is not in general public use, the exposure of details of the home that would previously have been unknown without physical intrusion amounts to a search and which is presumptively unreasonable without a warrant.
76 *Smith v Maryland* 442 US 735 (1979).
77 The "pen register" is a device that records the date, time, and length of calls, information that is usually gathered already by phone companies for billing purposes by a communications service provider.

does not have a reasonable expectation of privacy in the telephone numbers dialled from his home. An individual was assumed to know that in dialling a number, certain numerical information (date, time, and length of the call) was recorded by the communications service provider for billing purposes. Because the user voluntarily conveyed this information to the phone company, the installation and use of a pen register was not a search and no warrant was required. It seems that if there is an element of voluntariness present, the expectation of privacy is diminished. The fact that the details were voluntarily conveyed to the phone company is regarded as a waiver of the reasonable expectation of privacy in this information.[78]

If information is revealed to a third party, there also seems to be no expectation of privacy in such information. The bank records of an individual were subpoenaed in *United States v Miller.*[79] It was held that a restrictive meaning should be ascribed to "reasonable expectation of privacy" in this case where a bank depositor claimed that the government had to satisfy Fourth Amendment standards in order to obtain his financial records from his bank. The court held that a depositor had no expectation of privacy in financial information voluntarily conveyed to the bank and because the information was exposed to its employees in the ordinary course of business. The court found that an individual assumes the risk, in revealing his affairs to another, that the latter may then also reveal this information.

An exclusion of the reasonable expectation of privacy seems to have developed in the *Smith* and *Miller* cases. It is submitted that the United States Supreme Court will in all probability not afford protection to non-communicative cellphone information.

5 2 Canada

The jurisprudence developed under the Canadian Charter of Rights and Freedoms (hereafter "the Charter") has been most influential in South African courts.[80] There is no explicit right to privacy in either Canada's Constitution or in the Charter. However, in interpreting s 8 of the Charter which grants the right to be secure against unreasonable search or seizure, Canadian courts have recognised an individual's right to a reasonable expectation of privacy.[81]

Privacy at the federal level is protected by two Acts, namely the 1982 Privacy Act and the 2001 Personal Information and Electronic Documents Act (hereafter "PIPEDA"). The Privacy Act regulates the collection, use and disclosure of personal information held by federal public agencies and grants individuals a right of access to personal information held by those agencies, subject to certain exceptions including an exemption for court records. PIPEDA is applicable to private sector organisations that process personal information "in the course of a commercial activity", and also applicable to federally regulated employers with respect to their employees. It does not apply to information collected for personal, journalistic, artistic, literary or non-commercial purposes.

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78 See also *MS v Sweden*.
79 *United States v Miller* 425 US 435 (1976).
80 Steytler *Constitutional Criminal Procedure* 13.
81 *Hunter v Southam* [1994] 2 SCR 145.

The right to privacy also protects people from unreasonable searches or seizures. Evidence obtained as a result such a search or seizure will be excluded if it is found that the admission of the improperly obtained evidence would bring the administration of justice into disrepute.[82] There will be certain situations when individuals will feel that information about them should not be revealed.[83]

5 2 1 The two-stage test

Canada has also developed a notion of "reasonable expectation of privacy". In *Hunter v Southam*[84] the Supreme Court ruled that the guarantee provided in s 8 of the Charter is applicable only where individuals have a reasonable expectation of privacy. The purpose of s 8 was to protect individuals from unjustified state intrusions. In *British Columbia Securities Commission v Branch*[85] the court, referring to *Hunter*, stated that the context within which the violation takes place must be considered since it is the context which determines the expectation of privacy. In *R v McKinley*[86] it was held that individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents. There should be a standard to determine what is reasonable in a given context. This standard must be flexible if it is to be realistic and meaningful. The test in Canada is therefore a two-stage test. First, an individual must manifest an expectation of privacy in the item/information. Secondly, an objective review to examine whether the expectation was indeed reasonable will determine if the intrusion was justified or not. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances.[87]

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82 The Charter guarantees certain rights. Section 24 reads:
"(1) Anyone whose rights or freedoms, as guaranteed by this chapter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy, as the court considers appropriate and just in the circumstances.
(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this charter, the evidence shall be excluded if it is established that having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice in disrepute."

83 *R v Dyement* [1988] 2 SCR 417 the court held: "In modern society the retention of information about oneself is extremely important and that we may for one reason or another, wish to be compelled to reveal such information, but there will be situations when we will feel that we are not compelled and that information about us should not be revealed to others."

84 *Hunter v Southam* 145.

85 *British Columbia Securities Commission v Branch* (1995) 97 CCC (3d) 565 (SCC).

86 *R v McKinley* [1990] 1 SCR 627 645.

87 *R v Edwards* [1996] 1 SCR 128. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to (a) the presence at the time of the search; (b) the possession of the property or place searched; (c) the ownership of the property or place; (d) historical use of the property or item; (e) the ability to regulate access, including the right to admit or exclude others from the place; (f) the existence of a subjective expectation of privacy and (g) the objective reasonableness of the expectation.

In *Thompson Newspaper Ltd v Canada*[88] the court held that both taking of documents and compelling someone to hand documents over infringe the right to privacy and that the conduct will be regarded as a seizure in terms of s 8.

5 2 2 R v Plant

The case of *Plant*[89] is critical for our enquiry. In this matter the court held that the right to privacy should be confined to a biographical core of personal information which may reveal intimate details of an individual's lifestyle and personal choices.[90]

On 09-03-1990 the Calgary police received an anonymous tip that marijuana was being grown at a certain dwelling. Without obtaining prior judicial authorisation, they used a terminal linked to the utilities commission's computer to check the electrical consumption at the dwelling. The reading showed that, over a period of six months, the consumption was four times higher than the average of two other residences with which it was compared. This information was used to obtain a search warrant. One of the questions the court had to decide was whether the information obtained from the computer records of the utilities commission revealed intimate details of the lifestyle and personal choices of the accused? If it was found that the accused had a reasonable expectation of privacy in this information, the police would have needed to obtain a warrant to access it. The court held that to answer the questions various factors had to be considered, and that in considering the factors a balancing of interests must take place. On the one hand, the individual's dignity, integrity and autonomy must be protected and, on the other hand, the interest of effective law enforcement must be considered. There was disagreement as to how this should be resolved and the court's judgment was not unanimous. The majority of the court[91] considered the following factors:

(i) The nature of the information

The court held that the information seized must be of a "personal and confidential" nature in that it reveals intimate details of the lifestyle and personal choices of the individual. The computer record only revealed how much electricity was consumed; an inference could not be drawn from the electricity consumption that an individual had made certain personal and private decisions.[92]

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88 *Thompson Newspaper Ltd, v Canada* (1990) 67 DLR (4th) 161 (SCC).

89 *R v Plant* [1993] 3 SCR 281. Confirmed in *R v Tessling*, [2004] 3 S.C.R. 432, 2004 SCC 67

90 "Although the information about the distribution of the heat was not visible to the naked eye, the FLIR heat profile *did not expose any intimate details of the accused's lifestyle or part of his core biographical data.*" My emphasis. It only showed that some of the activities in the house generated heat.

91 The majority judgment in which Lamer CJ, La Forest, Gonthier, Cory and Iacobucci JJ concurred, was delivered by Sophinka J.

92 In the court of first instance, it was held that the information was created in the context of a commercial transaction. The information was collected in order for the electricity company to furnish the user with an electricity account. That is different to the privacy expected with regard to confidential information in attorney/client and patient/doctor relationships. The information belonged to the electricity supplier and not to the individual. It had been created for billing purposes, for the company's use and not for the customer's use. Thus in the court *a quo*, the use of the information also determined the nature thereof and had an influence on whether it should be protected or not.

(ii) The relationship between the party releasing the information and the party claiming its confidentiality

The court held that the nature of the relationship between the appellant and the utilities commission could not be characterised as a relationship of confidence. The records were prepared as part of an ongoing commercial relationship and there was no evidence that the utilities commission was contractually bound to keep the records confidential. The court, however, qualified the above statement by stating that it was not suggesting that records prepared in a commercial context can never be subject to privacy protection in terms of s 8. If it were found that commercial records contained material which meets the "personal and confidential" standard, the commercial nature of the relationship would not prevent protection by the right to privacy. The court further held that it generally was possible for an individual to inquire about the electricity consumption at a particular address and that the information was subject to inspection by members of the public at large. It was the policy of the utilities commission to permit police access to the computer bank through a computer password held by them. No policy to the contrary was in place at the time.

(iii) The place where, and manner in which, the information was obtained

The court found that the place where and manner in which the information was retrieved also indicated that the appellant had no reasonable expectation of privacy. The police were able to obtain the information online in terms of an agreement with the utilities commission. There was no intrusion into private residences, nor did state agents invading personal computer records which were confidentially maintained by private citizens. It was held that the fact that the police used a password might have suggested an element of privacy, but it could also have suggested that it was intended merely to ensure that the information was available to the police online. It was stated that, in any event, the search was not conducted in an intrusive or high-handed manner.

(iv) The seriousness of the crime being investigated

The court held that the seriousness of the offence resulted in the requirements of the law enforcement agency outweighing the privacy claimed by the appellant. The court further held that although participation in illicit trading of marijuana might not be as serious as trade in other narcotics, such as cocaine, it remained an offence which was taken very seriously by law enforcement agencies. The majority, therefore, held that a consideration of all these factors did not warrant the conclusion that the appellant had a reasonable expectation of privacy in relation to the computerised electricity outweighing the state's interest in enforcing the laws relating to narcotics offences. Although the court stated that the information did not reveal intimate details of the lifestyle and personal choices of the individual, it found that the conclusion might differ if there were a contractual obligation towards the consumer to keep information confidential.

The minority judgment of Mclachlin J stipulated that the question that had to be decided was whether the individual has a reasonable expectation that the information in possession of the utilities commission would be kept in confidence and restricted to the purpose for which it had been given? The judge held that although electricity consumption records were close to the line, the evidence disclosed a sufficient expectation of privacy to require the police to obtain a warrant before accessing the information. The information should not have been

divulged to strangers without proper legal authorisation. The following reasons were furnished for the finding:

(i) Records not available to public

There was no evidence that the records were available to the public. The police only obtained access by reason of a special arrangement with the utilities commission. The details of electricity consumption revealed much about the individual's lifestyle. The details indicated how many people resided in the dwelling and what sort of activities probably took place there. The consumption records told a story about what happened inside a private dwelling, the most private of places.

(ii) Records disclosed personal information

In considering the fact a reasonable person would in all probability conclude that the records would only be used for the purposes for which they had been made, namely, the delivery and billing of electricity. The reason that the police wanted access to the records was precisely that they wanted to learn about the appellant's personal lifestyle and specifically the fact that he was growing marijuana. Although the electricity records are not as revealing as many other records, these records disclosed important personal information.

(iii) Records disclosed a reasonable expectation of privacy

The point that should have been considered was not whether the relationship between the individual and the utilities commission was one of confidence, but whether the particular records disclosed a reasonable expectation of confidence. The judge also disagreed with the majority finding that the records were generally available to the public. Only the police had access to the information. The police had to use a special computer to gain access to the information which access had been granted to them in confidence. This aspect was regarded as a very important factor. If it had been found that the records were open to the public, the minority might have agreed with the majority that the appellant had no reasonable expectation of privacy in the records.

(iv) Computers should be regarded as private

Mclachlin J also disagreed with the majority view that the police did not have to intrude into places ordinarily considered private, such as a house or hotel room, to gain access to the information. Mclachlin J found that computers might, and should, be regarded as being private, especially if they contain information which is subject to legal protection and in which the individual has a reasonable expectation of privacy. Computers can contain a wealth of personal information. Such information, depending on its character, may be as private as any found in a dwelling house or hotel room.

(v) Test should be expectation of privacy

Regarding the seriousness of the offence, reservations were expressed about using a case-by-case approach to determine whether a warrant to obtain information was required or not. It was held that the test should remain whether the individual has an expectation of privacy in the information. If that test is met, a search without a warrant will constitute a violation even if the suspected offence is a serious one.

It is submitted that the views of the minority judgment should be preferred in evaluating the reasonable expectation of privacy in information held by the

utilities commission. The details of electricity consumption revealed much about the individual's lifestyle and that the police required access to in the information because they wished to learn more about the appellant's lifestyle.

5 2 3 Privacy in movement and location

Does any Canadian authority exist for the view that a person can have a reasonable expectation of privacy in movement and location? In his dissenting judgment in *R v Wise*[93] La Forest J stipulated that such an expectation could exist in respect of information that reveals the movement of an individual. He held that the installation of a tracking device in the appellant's car constituted an unlawful trespass and violated the privacy rights under s 8 of the Charter. The use of the device that monitored the movements of the individual also violated s 8. The judge held that an individual has a reasonable expectation of privacy, not only in his communications, but also in respect of his movements even when travelling on a public road. It was held that if an individual is in a vehicle and on a public road, his privacy rights are also protected. A distinction was drawn between the risk individuals run by having their activities monitored by others and the risk that exists when the police monitor the movements of individuals. It was held that a person's daily moves, whilst travelling, could be observed and even monitored by others. However, that was not the same as the risk if agents of the state, in the absence of prior authorisation, were to track every move made by an individual. In the latter instance the person who was observed was not subjected to another individual's casual glance, look or observation, but to observation by a state authority which tracked every move. It was found that it is constitutionally unacceptable that the state should justify the unauthorised surveillance of individuals on the mere fact that other individuals can observe a person. The degree to which a person took measures to shield his activities from the scrutiny of other persons should not be decisive in deciding whether that person had a reasonable expectation of privacy in respect of his movements. Thus, whether a person tried to conceal his movements or was hiding is not indicative of his reasonable expectation of privacy. The surreptitious electronic tracking of a person's movements was held to be a grave threat to his privacy thus requiring prior judicial authorisation. It was held that this would call for an objective showing of a reasonable and probable cause that should generally be required of those seeking to employ electronic devices in the pursuit of individuals. It is submitted that this approach is correct and that it will prevent the unauthorised collection of personal information.

It seems that a prisoner does not have a reasonable expectation of privacy in his movements. In *R v Dorfer*[94] details about the time when, and place where, the appellant would receive treatment were furnished to the police. The court held that in prison the whereabouts of an offender at any given time is information that is not expected to be confidential and is knowledge as to a prisoner's whereabouts was important for the proper functioning of a criminal justice system. It

93 *R v Wise* [1992] 1 SCR 527. The majority decision did not consider the right to privacy of movement or whereabouts at all, nor did it discuss the existence of a reasonable expectation of privacy in movement or location.

94 *R v Dorfer* (1996) 104 CC (3d) 528 (BCCA).

thus seems that a prisoner cannot rely on the fact that he has a reasonable expectation of privacy regarding his movements. One then could draw the inference that persons in police custody, arrested persons, or those who are lawfully detained, also will not have a right to privacy in their movements.

In *Dagg* v *Canada*[95] the court held that a person could have a reasonable expectation of privacy in information relating to his arrival and departure from a certain location. A request was filed with the department of finance for copies of logs containing the names, identification numbers and signatures of employees entering and leaving their workplace on weekends. These logs were kept by security personnel for safety and security reasons, but not for verifying overtime claims. The relevant logs were disclosed, but the employee's names, identification numbers and signatures were deleted, on the basis that this information disclosed personal information and was thus exempted from disclosure. The appellant sought a review of the Minister's decision and filed a complaint with the information commissioner, arguing that the deleted information should be disclosed by virtue of exceptions to the protection of personal information in terms of the Privacy Act of 1982.[96] The Federal Court (Trial Division), on a review of the minister's decision, found the information not to be personal, but the Federal Court of Appeal reversed this decision on appeal.

The appeal against the decision of the Federal Court of Appeal was upheld, and the Supreme Court of Canada held that the Minister should reconsider his decision. The dissenting judgment, delivered by La Forest J, found that the purpose of the Privacy Act was to protect the privacy of individuals with respect to personal information about themselves held by a government institution, and to provide individuals access to that information. He stated that the employees of the respondent had a reasonable expectation that the information in the sign-in logs would not be revealed to the general public. La Forest J stated that the information requested revealed the following personal details: the times during which employees attended their workplace on weekends over a period of one month. A reasonable person would not expect strangers to have access to detailed, systematic knowledge of their location during non-working hours, even if that location was his or her place of employment. The judge further found that the information obtained from the sign-in logs kept by the security personnel at the workplace revealed intimate details of the lifestyle and personal choices of an individual. If information revealed personal details, in which a reasonable expectation of privacy existed, it should not be released without the individual's consent or prior judicial authorisation. Once an individual has established a reasonable expectation of privacy in certain information, the inquiry must then proceed to determine whether the search (divulging of information) was conducted in the proper manner.[97] To determine whether the search was properly done will depend upon whether it was necessary to obtain prior judicial authorisation.

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95 *Dagg v Canada (Minister of Finance)* [1997] 2 SCR 403.
96 Privacy Act Canada 1983.
97 *R v Edwards* 126; *Hunter v Southam* 145.

5 2 4 Prior judicial authorisation

The purpose of prior judicial authorisation was defined in *Hunter v Southam*: [98]

> "The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner."

It was further stated that it was preferable to have a system of prior authorisation to prevent unjustified searches, rather than having a system of subsequent validation. Reasonable and probable grounds, established under oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitute the minimum standard for authority for search and seizure, consistent with s 8.[99]

The majority of the court in *Plant* held that the search must be brought within the parameters of s 8 to require prior judicial authorisation. It was held that accessing the information from the electricity records did not involve an intrusion into places ordinarily considered private, and that the information was not of a personal and confidential nature. The manner and place of search indicated a minimal intrusion, and the seriousness of the offence outweighed the privacy interest claimed by the appellant. The appellant did not have a reasonable expectation of privacy in relation to the computerised records which outweighed the interest of the state in enforcing the laws relating to narcotic offences; and, therefore it was not necessary to obtain prior judicial authorisation. However, in *R v Wise*, La Forest J stated that the surreptitious electronic tracking of one's movements is a grave threat to individual privacy, which required prior judicial authorisation. Prior judicial authorisation called for an objective indication of reasonable and probable cause, which generally should be required of those seeking to employ electronic devices in the pursuit of individuals.

Canada goes further than the United States in protecting information. It is submitted that the views of the majority and the minority of the court in *Plant* can be used in an argument that non-communicative cellphone information reveals details of the personal and private decisions of users. Similarly, the decision in *Dagg* confirms that movement and location can receive constitutional protection.

6 CONCLUSION

Based on the information gleaned from the comparative evaluation of Canadian, American and European jurisdictions an attempt is made to establish a framework which can be utilised in South Africa.

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98 *Hunter v Southam* 145.
99 *Hunter v Southam* 145.

6 1 The nature of non-communicative cellphone information

Whether protection will be afforded to certain information will depend on the nature of the information. According to Steytler,[100] the question that needs to be answered is: "[s]hould it (the information) be worthy of protection?" The right to privacy should be confined to a biographical core of personal information which may reveal intimate details of an individual's lifestyle and personal choices; that is information which is of a "personal and confidential" nature.

The following information can be extracted from the records of cellphone users: the time that a call was made; the duration of the call; the precise geographical area of the person making the call (the caller); and the precise geographical area of the person to whom the call was made (the recipient). If the details of a number of calls made by a user during a specific period are monitored, the movement of the individual can be tracked for that specific period.

It is submitted that the abovementioned information is personal and reveals intimate details about the decisions and personal choices of an individual. By looking at this non-communicative information certain inferences can be drawn regarding an individual's personal decisions and choices. On the face of it the information does not reveal anything about, for example, the political opinion or sexual preference of an individual. However, inferences relating to such personal opinions can be drawn by considering the locations (such as a bar, shebeen, sports arena, club, church and any other place of entertainment or worship) that are frequented by the individual. Much more is revealed than dialled telephone numbers.[101] The non-communicative information also goes further than the mere furnishing of a cellphone number without a user's consent.[102] This type of information is referred to in the Protection of Personal Information Bill as special personal information.[103] Although the Bill does not specifically state that a person has a right to information privacy in his or her movement and location, it is argued that it is indeed this type of information that can be ascertained by looking at this non-communicative cellphone information. It further is submitted that if the criteria identified in *Plant*'s case are applied to non-communicative cellphone information, the information will be regarded as being personal and revealing of the personal choices and decisions of an individual. Determining where and when someone visited a certain dwelling/establishment may indicate the political, religious or sexual orientation and preferences of that person. Indeed, when one look at cellphone records, inferences can be drawn that an individual made certain personal and private decisions. The non-communicative information was not created in the context of a commercial transaction. The numbers dialled, and the information recording the duration of calls, are collected in order for the cellphone companies to furnish users with an account. However, it is not necessary to include details of location and movement in

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100 Steytler *Constitutional Criminal Procedure* 104.

101 See for example *Malone v United Kingdom*.

102 See for example *Simons v P4 Radio*.

103 The Bill also contains reference to "special personal information" which is information concerning a child who is subject to parental control in terms of the law; or a data subject's religious or philosophical beliefs, race or ethnic origin, trade union membership, political opinions, health, sexual life, or criminal behaviour.

accounts to clients. These details are captured only incidentally because of the manner in which various cellphones communicate via cellphone towers.

Information about the movement and location of cellphone users is not the exclusive property of cellphone companies. Further, only cellphone subscribers who enter into cellphone contracts receive accounts; prepaid cellphone users do not. It, therefore, cannot be said that the non-communicative information forms part of the commercial records of cellphone companies.[104]

The nature of the relationship between the cellphone user and the cellphone company can be characterised as a relationship of confidence. The records of the duration of calls and of numbers dialled are kept as part of an ongoing commercial relationship. Cellphone companies are obliged to keep the records of their contract subscribers (not prepaid customers) confidential. It is generally not possible for an individual to inquire about the cellphone accounts or records of other users, and the information is not subject to inspection by members of the public at large.

The retrieval of information by law enforcement officials also indicates that cellphone users have a reasonable expectation of privacy in respect of the cellphone records. The police are only able to obtain the information only by virtue of prior judicial authorisation, which is achieved in South Africa by the issuing of a subpoena in terms of s 205 of the Criminal Procedure Act.[105] An individual does have a reasonable expectation that the information in possession of the cellphone companies will be kept in confidence and restricted to the purposes for which it is obtained.

6 1 1 Is the information conveyed voluntarily?

It has been held in the US that if information about an individual is conveyed voluntarily there is no reasonable expectation of privacy therein.[106] It is submitted that the information regarding the movement and location of cellphone users is not conveyed voluntarily to the cellphone companies. It is debatable whether all users are aware that they are transmitting these details. It is a contentious issue that cellphone companies have access to this type of non-communicative information, but for present purposes it is accepted that the information has been validly obtained. For cellphone information to be regarded as being voluntarily conveyed, the individual cellphone user must be aware that these details are recorded.

In determining whether or not information regarding the location and movement of cellphone users should fall within the ambit of privacy protection, it is useful to use the criteria of the two-tier approach. It is submitted that cellphone users do have a reasonable expectation of privacy in their movement and location. This satisfies the first leg of the requirement; that is the subjective expectation. The objective element in this inquiry will be satisfied in that society will be willing to regard this expectation as being reasonable.[107] While it can be

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104 *United States v Miller*.
105 Act 51 of 1977.
106 *Smith v Maryland.*
107 The two-requirement test referred to in *Katz v United States* 353 and *Kyllo v United States*. See part 5 1 above.

accepted that prisoners,[108] persons in police custody, arrested persons, or those who are lawfully detained, have a limited expectation of privacy in their movements, the same cannot be said of cellphone users. They do have a right to privacy in their movement[109] and location.[110] If a person has a reasonable expectation of privacy in his or her arrival at, and departure from, a certain location even if it is their place of employment, then the movement of arrival at, and departure from, a location ascertained from cellphone records should also be protected. In addition, information about the location of cellphone users should not be divulged without their consent or without obtaining prior judicial authorisation.

6 2 How should this intrusion of the right to privacy be regulated?

The content of an individual's telecommunications is private and confidential. The state will be able to access it only with prior judicial authorisation.[111] If it is accepted that a right to privacy exists in non-communicative information, the question that needs to be addressed is how interference with that right should be regulated?

International law prescribes that there should not be any unlawful interference with the privacy of individuals. Interferences are allowed only if they are not arbitrary or unlawful in terms of domestic laws, which must specify in detail the precise circumstances in which such interferences will be permitted.[112]

In the *Petersen* case the police obtained authorisation to access the cellphone records. But could they have obtained the information if there were not enough evidence to obtain a s 205 warrant? For instance, if the police have established an individual's time of death at a particular place, could they trawl through cellphone records of persons who may have been there at that time to establish a suspicion? Could they look at the records of everyone at the scene of the crime to enable them to round up suspects? At what stage should police be allowed to have access to this type of information which can assist in them in the prevention and solving of crime?

There should be no objection to the obtaining and the publication of the information if the cellphone user has consented to the divulging thereof. In the absence of prior obtained consent from the user, it is submitted that the police will always require a s 205 warrant. A s 205 warrant can only be obtained if certain conditions are met. The police should have at least a suspicion before prior judicial authorisation in the form of a *subpoena* is granted; they should not be allowed to access the records in order to form a suspicion. This is not the purpose of prior judicial authorisation.[113] It is preferable to have a system of

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108 *R v Dorfer*.
109 *R v Wise*.
110 *Dagg v Canada (Minster of Finance)*.
111 Section 40 RICA.
112 Steytler *Constitutional Criminal Procedure* 80.
113 The purpose of prior judicial authorisation was defined in *Hunter v Southam.* This definition can be summarised as follows: to provide an opportunity for the conflicting interests of the state and the individual to be assessed. An individual's right to privacy will be breached only if an appropriate standard has been met and where the interests of the state are superior. The assessment of the evidence must be done in an entirely neutral and impartial manner.

prior authorisation to prevent unjustified searches than to have a system of subsequent validation.[114] If prior judicial authorisation is required, certain evidence must be available or certain requirements should be complied with, as was stipulated in *Hunter v Southam.* The court held that such authorisation could be granted only on reasonable and probable grounds, established under oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search.

The issue in *Plant* can be distinguished from the issue regarding cellphone information. In that case it was stated that the appellant could not be said to have a reasonable expectation of privacy in relation to the computerised electricity consumption records which outweighed the interests of the state in enforcing the laws relating to narcotic offences. It was therefore not necessary to obtain prior judicial authorisation. It is submitted that if the principles adopted in *Plant* are applied to cellphone information it will be found that a reasonable expectation of privacy exists in respect of non-communicative cellphone information. Therefore, to obtain details, such as, the location and movement of users, which are indicative of their personal choices and lifestyle would necessitate prior judicial authorisation.

6 3 Application of principle

If access to information in the possession of third parties is not regulated properly by legislation, the privacy of users will be at risk. Information obtained from a customer's personal bank records reflecting withdrawal dates, the times and locations of transactions at ATM machines, as well as details of credit card purchases, provide details of an individual's whereabouts and movements. Technology advances at an alarming pace and in future third parties could be in possession of, and have access to, information containing biometric features (such as fingerprints, palm prints, voice and eye scan DNA features).[115] If all information in the possession of third parties is not regulated properly, it effectively will remove an individual's right to determine what information about them others should know. The Protection of Personal Information Bill represents an important attempt at protecting privacy.

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114 *R v Wise*.
115 Van Tonder "Biometrics Identifiers and Privacy" August 2003 *De Rebus* 19.

The Quantification of "Labour of Love": Reflections on the Constitutionality of the Discretion of a Court to Redistribute Capital Assets in terms of Section 7(3)–(6) of the South African Divorce Act

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1 INTRODUCTION

In essence there are two matrimonial property regimes in South Africa; marriages in, and out of community of property. Marriage in community of property is characterised by the joint nature of ownership of assets by the spouses. If the marriage is out of community on the other hand, both spouses retain their separate estates.[1] The Matrimonial Property Act[2] which came into effect on 01-11-1984 caused major alterations to both dispensations. The marital power was abolished in respect of marriages in community of property. In addition to the existing system which excluded community of property and profit and loss, the Act introduced the accrual system as another type of marriage out of community of property. Prospective spouses electing to marry out of property can therefore now marry with or without the accrual system. In terms of s 2 of the Act all marriages out of community of property will incorporate the accrual system, unless the parties expressly exclude it in their antenuptial contract.

The inherent danger in a marriage out of community without the accrual system is that one of the spouses may be adversely affected by the dissolution of the marriage. If the spouse has been economically inactive during the marriage, but nevertheless made a substantial direct or indirect contribution towards the growth of the other spouse's estate, she would have no claim to any of the assets belonging to the other spouse.[3] The introduction of the accrual system endeavoured to reduce the occurrence of this unfair situation as far as possible.[4]

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1 See *inter alia* Robinson, Human, Boshoff and Smith *Introduction to South African Family Law* (2008) 132.

2 Act 88 of 1984.

3 For the sake of convenience the party adversely affected by the dispensation will be referred to as the wife.

4 It has generally been said that marriage in community of property effected economic equality but juridical inequality while marriage out of community of property resulted in juridical equality but economical inequality.

Because of the requirements of legality, the accrual system could not be made applicable retrospectively to marriages out of community of property that were concluded before 01-11-1984. To mitigate the predicament of spouses married under the old dispensation, the legislature inserted subsecs 7(3) to 7(6) into the Divorce Act[5] through the enactment of s 36 of the Matrimonial Property Act.[6]

Section 7(3) grants the court a discretionary power to order that the assets of the spouses must be equitably distributed to alleviate unfairness towards one of the spouses in divorce proceedings. In *Beaumont v Beaumont*[7] the court explained that the aim of this reform was to counter the unfairness

> "[w]hich could flow from the failure of the law to recognize a right of a spouse upon divorce to claim an adjustment of a disparity between the respective assets of the spouses which is incommensurate with their respective contributions during the subsistence of the marriage to the maintenance or increase of the estate of the one or the other."[8]

Prima facie the application of s 7(3) appears to be uncomplicated and relatively straightforward – the court is endowed with a discretionary power to order a redistribution of capital assets. However, the courts have grappled with this issue almost right from the start. In this contribution, the interrelated aspects of the nature of the contribution by the wife, the relationship between redistribution of assets and maintenance, and the quantification of her claim will be considered. No attention will, however, be paid to the abuse of trusts to frustrate the claim of the wife.[9]

2 THE REDISTRIBUTION DISCRETION OF THE COURT

2 1 The provisions of section 7(3)-(6)

A court granting a decree of divorce in respect of a marriage out of community of property entered into before the commencement of the Matrimonial Property Act may, on application by one of the parties to the marriage and in the absence

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5 Act 70 of 1979.

6 Act 88 of 1984. Wives previously relied on the application of artificial measures to benefit from the estates of their husbands. It was sometimes alleged that a tacit partnership had actually existed between the parties. In *Mühlmann v Mühlmann* 1984 3 SA 102 (A) the court pointed to the difficulties flowing from such artificial measures. In *Mühlmann* the appeal court rejected the view of the court *a quo* that the conduct relied upon to establish the existence of a partnership must be consistent with no other reasonable interpretation. The appeal court stated that the inquiry was simply whether it was more probable than not that a tacit agreement had been reached. However, it confirmed the general approach set out by the court *a quo* that in a situation involving a matrimonial relationship, the court must be careful to ensure that there is indeed an *animus contrahendi* of the parties and that the conduct from which a contract is sought to be inferred is not that which reflects what is ordinarily to be expected of a wife in a given situation (123H-124C).

7 1987 1 SA 967 (A).

8 987H-I.

9 See in this respect *Jordaan v Jordaan* 2001 3 SA 288 (C), *Van Zummeren v Van Zummeren* 1997 1 All SA 91 (E), and *Badenhorst v Badenhorst* 2005 2 SA 253 (C). In essence the approach of the court is that assets of a trust created by the husband during the subsistence of the marriage where the trust was in effect merely his *alter ego*, as well as the manner in which this trust had been administered in the past may be taken into account for purposes of determining the scope of the redistribution order.

of any agreement between them regarding the division of their assets, order that such assets or such part of such assets of the other party as the court may deem just be transferred to the applicant.[10] A court will only grant such an order if it is satisfied that it is equitable and just, by reason of the fact that the party in whose favour the order is granted *contributed directly or indirectly* to the *maintenance or increase* of the estate of the other party during the marriage either by the *rendering of services or the saving of expenses which otherwise have been incurred, or in any other manner.*[11] In the determination of the assets or part of the assets to be transferred to the applicant spouse (wife), the court shall, apart from any direct or indirect contribution made by that party to the increase or maintenance of the estate of the other also take into account:

- the existing means and obligations of the parties;
- any donation made by any party to the other during the subsistence of the marriage or which is owing and enforceable in terms of the antenuptial contract between the spouses;
- any order for forfeiture of benefits that the court may grant; and
- any other factor which, in the opinion of the court, should be taken into account.[12]

A court granting an order for redistribution of capital assets may, on application by the party against whom the order is granted, direct that the satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of installments and the delivery or transfer of specified assets, as the court may deem just.[13]

The intention of the legislature with this piece of legislation was to endow the court with a discretionary power to order a redistribution of assets. However, it is trite that such redistribution may differ radically from the terms and conditions of the antenuptial contract of the parties – the aim at all times being to redress the unfair financial imbalance flowing from the very nature of the marriage being out of community of property as set out above.[14] The subsections of s 7 enjoin the court to apply justice and equity in the exercise of its wide discretion in coming to the assistance of the wife, being the party who invariably suffers from the iniquitous and unfair financial consequences of the antenuptial contract. However, before the court will exercise its discretion in favour of the wife, it must be satisfied that she contributed to the increase or maintenance of the husband's estate during the existence of the marriage.

2 2 The discretion of the court – an overview of the development of the debate

It appears that aspects giving rise to the uncertainty in respect of the redistribution discretion of the court relate in particular to the nature as well as the quantification of the wife's contribution.[15]

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10 Section 7(3).
11 Section 7(4).
12 Section 7(5).
13 Section 7(6).
14 See part 1 above.
15 Although it would currently appear uncertain whether or not a wife's contribution has to entail more than her common law obligation, this has not always been the case. In the past

continued on next page

The first salvo was fired in the *a quo* decision of *Beaumont v Beaumont*[16] where the court made the following observation in respect of the wife's contribution:

> "She made innumerable contributions to the growth of the plaintiff's estate. She gave him her wages; she rendered services in his business and his home . . . She contributed directly, indirectly, continuously and capably, to the maintenance and increase of his estate. That contribution was very substantial indeed. The plaintiff had a secretary and general assistant in his business, a mistress, a housemaid, a cook, a seamstress, a scullery maid, a laundress, a nanny, a governess, a general domestic worker and a messenger who had worked for well over 10 hours per day, seven days per week, 52 weeks per year."[17]

The court set the tone for future development by making it clear that it would be an inapposite analogy for the purposes of redistribution to consider the nature of the wife's contribution in the same light as assessing partnership shares or a labour contract.[18] It found that the plain meaning of the words in s 7(4) is so wide that they can embrace the performance of the wife or her ordinary duties of "looking after the home" and "caring for the family".[19] The court then turned to the English Matrimonial Causes Act, 1973, for guidance. It pointed out that in terms of the English statutory provisions the same factors are to be taken into account in determining both maintenance and redistribution whereas in South African law there is a distinct difference between the criteria to be considered for purposes of maintenance and redistribution respectively. The court indicated that it would be loathe to follow the principle that "one-third of the combined resources of the parties is as good and rational starting point as any other" without further ado.[20] However, even though the court is obliged to assess maintenance and redistribution of assets separately,[21] and even though different sets of criteria are prescribed for each of these two exercises, they are nevertheless interrelated:

> "If, therefore, a particular case calls for both a redistribution of assets plus an order for maintenance, it would not be so inappropriate to take as a starting point in maintenance cum redistribution cases the traditional one-third that our courts have used as a starting point in maintenance matters. The historical, equitable and practical reasons for the latter approach are common to our and English practice."[22]

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the courts have made it clear that something more than this was required. Already in 1911, in *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 the Appellate Division, in interpreting the common law duties of husband and wife, stated that: "[I]t seems to me that every wife is bound to supervise or assist, according to circumstances, in the care and upbringing of the children of the marriage. Indeed the law regards her as primarily in charge of the household affairs (Voet 23.2.46). This is a legal duty which she owes not merely to the children, but to her husband, who is entitled to demand her assistance in bearing a burden which the law has placed on them both."

16 1985 4 SA 171 (W).

17 177E-F. It may be noted that the court took a dim view of the husband's testimony that she was chasing a broom up and down the corridor and spending the afternoons lying down: 176J.

18 179D-G.

19 179F-H.

20 180A.

21 See *Kritzinger v Kritzinger* 1989 1 SA 67 (A) 77H-I where the then Appellate Division rejected a so-called globular approach in terms of which the marriage is treated as if it were in community of property.

22 *Beaumont* 180C-D. Our emphasis.

Sonnekus[23] disagrees with this exposition of s 7(3). He argues that only *juridically relevant* contributions should be taken into account. Such contributions are those over and above the normal *ex lege* performance obligations of marriage. Consequently, it is not all contributions that will be taken into account for purposes of redistribution but only those *not associated with her normal obligations as wife.* Viewed from this perspective, and given the social status of the spouses and their lifestyle, the wife who works for her husband in his business and fulfils her household chores will have a claim in terms of s 7(3). However, according to Sonnekus, one cannot accept that the legislature intended an automatic right to share if s 7(3) applies to the marriage.[24] As will be explained *infra* the then Appellate Division in *Beaumont* rejected Sonnekus' argument, stating as it did, that a court should start with a clean slate.

In *Van Gysen v Van Gysen*[25] the court adopted a rather different approach towards the quantification aspect, explaining that s 7(3) endows the court with an unfettered discretion which should not be limited by the application of a starting point such as the so-called one-third rule. It nevertheless accepted the exposition set out in *Beaumont* in regard of considerations to be taken into account.

It is suggested that the court in *Van Gysen* misdirected itself on a material aspect. After finding that the wife did all the domestic work herself, it concluded that she, "[l]ike plaintiff, contributed services which saved expenses *for their common good*".[26] It is not clear whether the court considered this exposition to be synonymous with the provisions of s 7(4).[27]

On appeal the then Appellate Division in *Beaumont*[28] adopted the views expressed in *Van Gysen*. The court pointed out that s 7(4) contains two conjoined jurisdictional preconditions to the exercise of the court's discretion. The first one is a contribution by a spouse to the estate of the other. This requirement involves a purely factual finding. The second requirement is that the court must be satisfied that it is equitable and just to make a redistribution order. This requirement involves the exercise of a purely discretionary judgment in equity. In this respect the court concludes that once the factual requirements are satisfied, the determination of whether or not to make a redistribution order is left to the "wholly unfettered discretionary judgment of the court as to whether it would be equitable and just to do so".[29] In view of the fact that there is such an infinite variety of circumstances under which the redistribution discretion of the court stands to be applied, any attempt to lay down guidelines as to the manner in which the court's discretion is to be exercised would increase uncertainty rather than reduce it. Guidelines laid down by the courts may also result in a rigidity of approach that may displace the flexibility envisaged by the legislature. Therefore, the court explained, the flexibility in the application of s 7(3) ought not to be curtailed by placing judicial glosses on the subsection in the form of guidelines as to the

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23 Sonnekus "Egskeiding: die maatstawwe by die toepassing van die diskresie vir herverdeling van bates en vir onderhoud" 1987 *THRHR* 331 336.
24 Sonnekus 1987 *THRHR* 373-374.
25 1986 1 SA 56 (C).
26 61J-62A. Our emphasis.
27 Sonnekus 1987 *THRHR* 335.
28 1987 1 SA 967 (A).
29 988I-989A.

determination of what would be a just redistribution order.[30] In *Katz v Katz*[31] the then Appellate Division followed this approach when it found that the wife assisted her husband by rendering services in his home and that he relied on her implicitly to keep the home-fires burning in pursuit of his practice. She enabled him to live in great comfort. The court then concluded that there is no evidence which enables one to place a monetary value on such services. However, the court made it clear that the manner in which it is to arrive at what is just and equitable is not limited to what has been contributed, and that it is not a prerequisite that a monetary value be placed upon it. In fact, it is not necessary for the wife, the court held, to prove that her contribution entails more than a contribution to her own support.

In *Kritzinger* the court was faced with the question of whether career sacrifices constituted a contribution to the maintenance or increase of the plaintiff's estate as contemplated in s 7(4).[32] In this regard, the court was of the opinion that the contribution by one spouse to the estate of the other should not be measured exclusively in terms of, or even confined primarily to, money provided or property delivered or services rendered (as is required for a contribution to a partnership) as it may be made in "any other manner" than those mentioned in s 7(4).[33] In order to qualify in terms of s 7(4), however, a contribution has to lead to the saving of expenses which would otherwise be incurred.[34] One of the spouses cannot use s 7(3) merely to improve his or her economic status at the expense of the other spouse.[35] However, the court did find that even if a career sacrifice had been established, such sacrifice does not necessarily qualify as a contribution within the meaning of s 7(4).[36] It explained that:

> "[w]hat was clearly envisaged [by s 7(4)] was some positive act by means of which one spouse puts something into the maintenance or increase of the estate of the other spouse – by way of money or property, labour or skill. It does not envisage a mere refraining from a particular activity or course of conduct."[37]

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30 990-991D. In rejecting the decision of the court *a quo*, the Supreme Court of Appeal in essence followed the approach adopted in Van *Gysen v Van Gysen* 1986 1 SA 56 (C) and *MacGregor v MacGregor* 1986 3 SA 644 (C). See, however, *Kritzinger v Kritzinger* where the court makes it clear that even though the decision in *Beaumont* on appeal was that, in the words of subsec (4) "one searches in vain for any suggestion of a qualification of the nature of the contribution required", mere non-earning does not constitute a contribution as intended by the legislature:
"The words used are certainly of wide meaning but that does not make them of unlimited meaning . . . The legislation is dealing with the financial position of the parties and, *prima facie*, therefore with contributions of a financial nature. . . . [A]s the legislation is dealing with the financial position of the parties, what was clearly envisaged was some positive act by means of which one spouse puts something into the maintenance or increase of the estate of the other spouse – whether by way of money or property, labour or skill. It does not envisage a mere refraining from a particular activity or course of conduct"(87G-88B).

31 1989 3 SA 1 (A).

32 See Jordaan "Redistribution of assets – S 7(3)-(6) of the Divorce Act 70 of 1979" 1988 *Codicillus* 71.

33 Jordaan 1988 *Codicillus* 71.

34 *Kritzinger* 87I-88D.

35 86F-G.

36 Clark and van Heerden "Asset redistribution on divorce – the exercise of judicial discretion" 1989 *SALJ* 243 245.

37 *Kritzinger* 88C-D.

In the 1989 case of *Kretschmer v Kretschmer*[38] the court stated that minor contributions by the wife to the household, such as cooking and transporting children to school, did not qualify as contributions in terms of s 7(4). It was further decided that the mere fact that a spouse performed a duty that could have been performed by a third party for compensation does not mean that such spouse has made a juridically relevant contribution.[39]

After the trilogy of the *Beaumont, Kritzinger* and *Katz* decisions of the then Appellate Division it was settled that courts had an unfettered discretion in ordering the redistribution of assets in terms of s 7(3). However, in 2003 the high court in *Childs v Childs*[40] seemed to have placed a judicial gloss on the court's discretionary power. Following the line of argument of the judgment of the House of Lords in *White v White*,[41] the court stated that there is no place for discrimination between husband and wife in their respective roles. If, in their different spheres, husband and wife contributed equally to the family it does not matter in principle which of them earned the money and built up the assets. There is no bias in favour of the money-earner and against the homemaker and child carer:

> "A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the Judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the Judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, *a Judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so*."[42]

The English court in *White* continued that if a husband and wife by their joint effort over many years (his directly in his business and hers indirectly at home) have built up a valuable business, why should the wife be confined to the court's assessment of her reasonable requirements and her husband left with a much larger share?[43] In *Childs* the court found no reason to depart from equality and it followed the English approach. In essence, this decision takes 50% instead of one-third as a starting point, and in that way deviates from the line of approach of the then Appellate Division.

The Supreme Court of Appeal again reiterated its position in *Bezuidenhout v Bezuidenhout*[44] and made it clear that the application of English law as set out in *White* has no place in South Africa. It held that it was out of step with the prescripts of s 7(4) to accept that the combined assets of the parties should be divided equally as a general point of departure and that this principle should be

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38 1989 1 SA 566 (W).
39 See Blackbeard "Herverdeling van bates ingevolge a 7(3)-(5) van die Wet op Egskeiding 70 van 1979" 1989 *Codicillus* 105 106; Dillon "Divorce – proprietary rights and redistribution order – reprehensible conduct" 1989 *De Rebus* 353 354; Sonnekus "Herverdelingsdiskresie by egskeiding – die wiele draai na klem op bydrae" 2005 *THRHR* 671 673.
40 2003 3 SA 138 (C).
41 *White v White* [2000] 2 WLR 1571.
42 *Childs* 140H-I. Our emphasis.
43 See *Childs* 141A-B.
44 2005 2 SA 187 (SCA).

departed from only and to the extent that there is good reason to do so.[45] The court furthermore pointed out that it is also not acceptable to South African law to ask, as is sometimes done by English courts, "[w]hat more could the wife have done to justify an award of 50%?" Should the answer then be that she has done her utmost and could not have done more, the English courts accept as a matter of course that there is no justification for deviating from the equality principle.[46] The court warned that English cases emanate from the application of statutory provisions that are different from those applicable in South Africa. English courts are afforded an even wider discretion than that provided for in s 7(3) of the South African Act. For example, a contribution by the claimant to the estate of the other spouse is not a jurisdictional prerequisite for redistribution in England as it is in terms of s 7(3). English courts consequently do not need to consider the nature and extent of the claimant's contribution to the estate of the other spouse at all whereas it is a pre-eminent consideration in terms of s 7(3). Acceptance of equal distribution as a starting point is therefore in direct conflict with the previous decisions of the then Appellate Division. The exposition in *Beaumont* was again accepted as correct:

> "I do not see any real difficulty in starting with a clean slate, then filling in the void by looking at all the relevant facts and working through all the relevant considerations, and finally exercising a discretion as to what would be just, completely unfettered by any starting point."[47]

The court further mentioned that even though practitioners may prefer guidelines or formulae that may assist in settlement, the problem remains that there exists such an infinite variety of circumstances under which s 7(3) may be applied that the court cannot afford to trade the wide discretion of s 7(3) for formulae albeit in the guise of guidelines or starting points.[48]

Sonnekus commented on the decision of the Supreme Court of Appeal in *Bezuidenhout.*[49] Taking as point of departure that marriage out of community of property constitutes a watertight separation of the estates of the spouses, the emphasis should rather fall on the real contribution the wife has made to the growth or maintenance of the estate of the husband. It is only when such contribution has been established that a court may order a fair and just redistribution. It would therefore be patently wrong to start off with a 50:50 point of departure on the supposed basis that it would be fair. To argue simply that it would be just to start off from a position of equality is simply too vague to serve legal certainty.[50] Sonnekus therefore strongly supports the argument that a court should have an

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45 195I.

46 195I-196A.

47 *Beaumont* 998F-G accepted with approval by the Supreme Court of Appeal in *Bezuidenthout v Bezuidenhout* 2005 2 SA 187 (SCA) 197C.

48 *Bezuidenhout* 197D-E. The court also dealt at length with the argument that it would be in conflict with the prescripts of the anti-discrimination provisions of the Constitution. *In casu* the court found, however, that it had no bearing on the facts of the case as the wife never assumed the traditional role of housewife.

49 Sonnekus "Herverdelingsdiskresie by egskeiding – die wiele draai na klem op bydrae" 2005 *THRHR* 671

50 Sonnekus 2005 *THRHR* 671. See also *Kretschmer v Kretschmer* 1989 1 SA 566 (W) 579I-580A where the court explained the position as follows: "[I]t would require particular facts to dictate equities which justify a literal equal sharing in all accruals. No other fixed pro-

continued on next page

unfettered discretion.[51] He finds further support for his argument in the decision of *Beira v Beira*[52] where it was held that s 7(3)

> "[w]as enacted to redress a deficiency, namely to enable both spouses to enjoy their rightful shares in the accumulated wealth residing in the one which their joint endeavours during the subsistence of the marriage had brought them. There is a clear indication to this effect in my opinion in the fact *that only when the wife has proved that she has made a contribution of the kind recognised in ss (4), does she become entitled to a redistribution order.*"[53]

It is clear, according to Sonnekus, that the legislature never intended for an automatic right for the wife to share in the husband's estate. He reiterates his previous viewpoint that her contribution must indeed be one sounding in money and that it must be over and above the fulfillment of her household chores. Mere fulfillment of her household duties as mother and housewife is not automatically synonymous with a relevant patrimonial contribution to the estate of the other spouse.[54] As will be seen *infra,* the Supreme Court of Appeal again rejected Sonnekus's views in *Buttner v Buttner*.[55]

In *Badenhorst v Badenhorst*[56] the Cape High Court again had an opportunity to reflect on the nature of the contribution. It appeared to have followed the "clean slate" approach of *Beaumont* but then added that it "must try and balance the scales as far as possible so that the parties are almost on equal par".[57] In coming to this conclusion, the court relied on the English case of *H-J v H-J*[58] where the court held that it would find it repugnant as a judicial exercise to have to draw up a married table in which fund gradations of contributions give rise to an imaginary increased or decreased share in the financial spoils of marriage and that it was sufficient to record that both the husband and wife had made their full and equal contribution in their respective roles:

> "The family has been financially successful and the job of raising any children . . . has also been successful. The role of the husband has been predominant in the financial success and . . . the role of the mother and wife predominant in keeping house and raising the children. Any further distinction is, in my judgment, impossible to draw on the evidence."[59]

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portion is fitting unless the equities attached to the particular contributions justify it. Neither is it a free discretion in the name of general fairness, because the content of what a party 'contributed' and the circumstances surrounding that are dominant."

51 He also quotes from the decision in *White v White* where the court said that "[f]eatures which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder." Sonnekus's view is also in line with a previous decision of then Appellate Division in *Kritizinger* where the court held that "[t]here is no warrant whatsoever for saying that it is fair or appropriate to divide the joint net assets of the parties equally, regardless of their known and unequal contributions" (77F-G).

52 1990 3 SA 802 (W).

53 807E-F. Our emphasis.

54 Sonnekus 2005 *THRHR* 672-673.

55 2006 3 SA 23 (SCA).

56 It is noted that the judgment in *Badenhorst* was handed down on 15-06-2004 whereas the judgment in *Bezuidenhout* was handed down on 23-09-2005. It therefore cannot be concluded that *Badenhorst* is in conflict with the Supreme Court of Appeal in *Bezuidenhout.*

57 *Badenhorst* 263A.

58 [2002] 1 FLR 415.

59 See *Badenhorst* 261E-G.

It is therefore clear that even though the court in *Badenhorst* acknowledged that it needed to start off with a clean slate, it implicitly took as its point of departure the equality of contributions. In view of the *stare decisis* rule that prevails in South Africa, this deviation from the ruling of the Supreme Court of Appeal is difficult to comprehend.

In *Buttner v Buttner* the Supreme Court of Appeal found that the husband and wife had always pooled their incomes and had always regarded the assets acquired through their joint efforts as being joint assets. Even though the husband was the family's principal breadwinner and had made a far greater contribution to the assets acquired by the parties, there was nothing to indicate that either the husband or the wife regarded the wife's contributions as housewife and mother as being less valuable than those made by the husband.[60] Under these circumstances, the court found, that fairness demands that, on divorce, effect be given to the principle of equal sharing which the spouses had consciously applied throughout their married life. The court therefore seems to deviate from its previous decisions in *Beaumont* and *Kritzinger* and to accept that it may be appropriate in particular circumstances to start off with a starting point of equal sharing. In fact, the order of the court included that the husband pay over to the wife a specific amount to effect an equal distribution of assets.[61]

The misconduct of the wife is a factor which complicates the question whether the court should grant a redistribution order, as well as the quantification thereof. In *Buttner* it concerned the adultery of the wife with another man. The court accepted that it is well established that a court may take a party's misconduct into consideration when considering a redistribution order. It warned, however, that a conservative approach in assessing misconduct as a relevant factor should be adopted. Following the approach of English law the court accepted that it will

> "[l]ook at the whole of the picture, including the conduct [of the parties] . . . which may or may not have contributed to the breakdown of the marriage or which in some other way makes it inequitable to ignore the conduct of each of the parties."[62]

In casu the court found it unnecessary to make a detailed comparative analysis of the parties' conduct in order to determine their respective degrees of blameworthiness stating that misconduct of one or both of the parties must only be allowed to influence the outcome of a case where to disregard it would be unjust.[63]

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60 *Buttner* 35C-F.

61 36B and 42B. The court relied to a substantial degree on the decision in *Kirkland v Kirkland* 2006 6 SA 144 (C). The court concluded that it did not understand the decisions of the Supreme Court of Appeal to reject the principle of equality as such, but rather that the principle did not fit the facts of the particular case. *In casu* three main considerations stood out for the court, namely that the husband had made the major financial contributions, an intention on the part of both parties that the assets belonged to both of them, and the principle as applied to the facts of the case.

62 *Buttner* 37E-F. The court referred to *Kyte v Kyte* [1987] 3 All ER 1041 (CA) 1048H-J.

63 *Buttner* 37G.

2 3 The current position with regard to the court's discretion

From the above discussion it is evident that the courts are not unanimous in their approach to exercising their discretion. In general it may be concluded, though, that:

1. An infinite variety of factors may be taken into account. This simply means that *all factors* that may be relevant for a particular case may be considered. This may even include misconduct on the part of a spouse. In fact, it is not even necessary for a wife to prove that her contribution entails more than a contribution to her own support.
2. The so-called one-third starting point, as set in out *Beaumont* by the court *a quo*, was immediately rejected by the then Appellate Division insisting that court must, due to an "infinite variety of factors", start with a clean slate. A clear move away from the clean slate starting point followed. However, the position currently is that *in appropriate circumstances* an equal division may be applied as a starting point. This conclusion clearly implies that the discretion of the court is not unfettered as was explained in *Beaumont* on appeal, but in effect that a court must find that it will be contrary to justice not to make an equal distribution.

3 EVALUATION OF THE CURRENT POSITION

The line of argument of the courts in respect of s 7(3) tends to blur the clear distinction between the patrimonial consequences of marriage in and out of community of property. To accept a 50:50 division as a starting point (even in "appropriate circumstances") is not only out of step with the specific wording of the provisions of s 7(4) but is also untenable with the initial views of the court that an infinite variety of factors may be taken into account. In fact, this is the very reason why the then Appellate Division rejected the so-called one-third starting point of *Beaumont* in the court *a quo*. It is respectfully submitted that the reasoning of the court in *Kirkland v Kirkland*[64] concluding that the Supreme Court of Appeal in *Bezuidenhout* did not reject the principle of equality, is simply not tenable. The decision in *Buttner* to a substantial degree relied on *Kirkland.* It is consequently suggested that the courts in *Buttner* and *Kirkland* misdirected themselves.

It is not denied that the application of constitutional values and norms necessitated the extensive interpretation of s 7(4) in *Childs, Kirkland, Buttner* and *Badenhorst*. However, it is equally clear that this interpretation is out of step with the initial intention of legislature to alleviate the harsh consequences of marriage out of community of marriage out of community of property concluded before 01-11-1984. It is respectfully submitted that it has never been the intention to negate the difference between marriage in and out community of property as far as patrimonial consequences are concerned.

The extensive interpretation of s 7(4) creates further serious uncertainty. For instance, it is difficult to comprehend how it can be possible to start off with a 50:50 division as a point of departure if the court must first, in terms of the subsection, exercise its discretion to establish whether the particular

64 2006 6 SA 144 (C).

requirements are met. In fact, the position is even further distorted by the proviso in *Buttner* that a 50:50 division may be effected "in appropriate circumstances". Does this mean that the court's discretion must now be aimed at establishing whether a deviation of a 50:50 formula is justified, or must the court decide whether the requirements of s 7(4) are met?

It is suggested that the extensive interpretation of s 7(4) necessitates an amendment to this provision to allow the court a discretion to make an order subject to a 50:50 starting point – the divide between the intention of the legislature and the interpretation of the court has become unbridgeable. It goes without saying that this approach will further deviate from the clear common law distinction between marriages in and out of community of property. Such result is of necessity due to constitutional requirements.

4 EVALUATION OF THE CONSTITUTIONALITY OF THE CURRENT POSITION

The exposition set out above has attracted the attention of authors and raises serious considerations, particularly with regard to the constitutionality of the court's discretion in terms of s 7(3).

4 1 Role of the Constitution in matters pertaining to section 7(3)

The Bill of Rights[65] as enshrined in the Constitution of the Republic of South Africa, 1996[66] enjoys both indirect and direct application in South African law. In instances of indirect application, the Bill of Rights establishes a set of values that must be respected whenever legislation and common law are interpreted, developed or applied.[67] In other words, indirect application requires that the law be interpreted in such a manner as to be consistent, rather than inconsistent, with the Bill of Rights. In instances of direct application, on the other hand, the Bill of Rights applies as directly applicable law, thus overriding legislation and common law that are inconsistent with it.[68]

As for the issue of whether or not the Bill of Rights is applicable to family (and specifically matrimonial property) law, one can turn to *Van der Merwe v Road Accident Fund.*[69] *In casu* the court rejected the argument of the Road Accident Fund that marriage and its proprietary consequences are matters of choice that are exempt from the provisions of the Bill of Rights with the result that a spouse who has chosen to marry in community of property be kept to the immutable consequences of her choice. The court found that this argument amounted to a waiver defence, implying an undertaking by married people not to attack the legal validity of the laws that regulate their marriage.[70] This defence is not good in law as the constitutional validity of legislation does not derive from the personal preference of a person affected by a law, but rather the objective validity of a law stemming from the Constitution itself. The constitutional

65 Chapter 2 of the Constitution of the Republic of South Africa, 1996.
66 Hereafter referred to as "the Constitution".
67 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 56.
68 Currie and De Waal *The Bill of Rights Handbook* 5 ed (2006) 32.
69 2006 4 SA 230 (CC).
70 Para 59.

obligation of a court to test the objective consistency of a law against the Constitution does not depend on, and cannot be frustrated by, the conduct of litigants or holders of the specific rights.[71] *Van der Merwe* serves as a clear example of the willingness of the Constitutional Court to superimpose the values of the Constitution on something as personal as the patrimonial consequences that spouses wish to pertain to their marriage.[72]

The recent judgment of the Constitutional Court in *Gumede v President of the Republic of South Africa,*[73] illustrates the direct application of the Bill of Rights to matrimonial property law. This case concerned a claim of unfair discrimination on the grounds of gender and race in relation to marriage under customary law as codified in the province of KwaZulu-Natal.[74] The court was approached in terms of s 167(5) of the Constitution for the confirmation of an order of the high court declaring certain sections of the Recognition of Customary Marriages Act,[75] certain sections of the KwaZulu Act on the Code of Zulu Law[76] and certain sections of the Natal Code of Zulu Law[77] which regulate the proprietary consequences of customary marriages constitutionally invalid.[78] The Recognition Act provides that a customary marriage concluded after its commencement on 15-11-2000 is ordinarily a marriage in community of property, unless community of property is excluded by antenuptial contract.[79] Marriages concluded before this date, however, are governed by customary law;[80] the customary law of KwaZulu-Natal providing that the husband is the family head and owner of all family property, which he may use at his discretion.[81] The Constitutional Court confirmed the order of the high court, on the basis that the provisions relating to the matrimonial property regime in question unfairly discriminated against the applicant on the basis of gender.[82]

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71 Para 61.

72 It is clear, however, that the court's reasoning that the wife could not waive her constitutional right to attack the validity of laws pertaining to her marriage tends to obscure the difference between the patrimonial consequences of marriages in and out of community of property. It is trite that in the case of marriage in community of property all assets become common assets by operation of law, while the matrimonial property dispensation in the case of marriage out of community of property is set out in the antenuptial contract between the parties. *Prima facie* it would appear that the court's exposition is correct. Unfortunately the court did not consider the impact of its decision on commercial dealings where it is normally of particular importance for creditors to know whether parties are married in or out of community of property. In this respect reference may be made to the position of creditor's security in the event of the insolvency of the joint estate. It is clear that situations not contemplated by the Constitutional Court will definitely be raised on the basis of *Van der Merwe* and one may be justified to think that the distinction between marriages in and out community of property may become less visible in the near future.

73 *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC).

74 *Gumede* 154H.

75 Act 120 of 1988, hereafter "the Recognition Act".

76 Act 16 of 1985.

77 Proc R115 of 1987.

78 *Gumede* 155A-156A. See 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 *SAPL* 206 207.

79 157H-158A and 165A.

80 158 B.

81 158 C.

82 173H.

As such, the Bill of Rights can apply to s 7(3) of the Matrimonial Property Act both indirectly (with regard to the court's interpretation of s 7(3)) and directly (with regard to the constitutionality of s 7(3) itself).[83]

4 2 The constitutionality of the court's interpretation of section 7(3)

Section 39(2) of the Constitution places a duty on every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. Statutory interpretation (including the interpretation of the court's redistribution discretion) must therefore positively promote the Bill of Rights. Upon evaluation of the courts' interpretation of s 7(3) in the light of the Constitution, certain aspects, including the nature of the contribution and the role of common law and the equality clause[84] in interpretation, appear to be worthy of discussion.

The first issue to come to the fore is the nature of the contribution which must have been made by the party claiming a s 7(3) redistribution. Section 7(4) of the Matrimonial Property Act defines the nature of the contribution which must have been made for an order to be granted in terms of s 7(3): the party in whose favour the order is granted must have contributed directly or indirectly to the maintenance or increase of the estate of the other party during the marriage, either by the rendering of services or the saving of expenses which otherwise would have been incurred or by contributing in any other manner. Once such contribution has been proved, the court can make a s 7(3) award which it deems just and equitable. As has become evident from the above discussion,[85] the court's interpretation of what constitutes a juridically relevant contribution has been far from consistent.

Although it would currently appear uncertain whether or not a wife's contribution has to entail more than a contribution to her own support, this has not always been the case. In the past the courts have made it clear that something more than this is required.

Already in 1911, in *Union Government (Minister of Railways and Harbours) v Warneke*[86] the then Appellate Division, in interpreting the common law duties of husband and wife, stated that:

> "[I]t seems to me that every wife is bound to supervise or assist, according to circumstances, in the care and upbringing of the children of the marriage. Indeed the law regards her as primarily in charge of the household affairs (Voet 23.2.46). This is a legal duty which she owes not merely to the children, but to her husband, who is entitled to demand her assistance in bearing a burden which the law has placed on them both."[87]

It is true that the interpretation of s 7(3) reflects an exercise in the interpretation of a statute, but it is also trite that legislation altering or repealing common law must do so explicitly. Section 7(3) evidently does not do so, with the result that common law rules still prevail and must be considered. Against this background,

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83 For purposes of this contribution, only the former, namely the constitutionality of the courts' interpretation of s 7(3) is considered.
84 Section 9 of the Constitution .
85 See part 2 above.
86 1911 AD 657.
87 669.

the correct interpretation of s 7(3) and applicable common law must be found. In the first s 7(3)-case decided (the *Beaumont* case), the court made it clear that it would be impossible to consider a redistribution of assets before a real contribution to the growth or maintenance of the other spouse's estate has been proven.[88] According to Sonnekus, this means that only juridically relevant contributions, over and above the contributions required by common law, can be considered.[89] The court, however, found that the plain meaning of the words in s 7(4) is so wide that they can embrace the performance of the wife or her ordinary duties of "looking after the home" and "caring for the family".[90]

In *Kritzinger*, on the other hand, the court was faced with the question of whether career sacrifices constituted a contribution to the maintenance or increase of the plaintiff's estate as contemplated in s 7(4).[91] In this regard, the court was of the opinion that the contribution by one spouse to the estate of the other should not be measured in terms exclusively of, or even confined primarily to, money provided or property delivered or services rendered (as is required for a contribution to a partnership), as it may be made in "any other manner" than those mentioned in s 7(4).[92] In order to qualify in terms of s 7(4) a contribution has to lead to the saving of expenses which would otherwise have had to be incurred.[93] One of the spouses cannot use s 7(3) merely to improve his or her economic status at the expense of the other spouse.[94] The court did however find that, even if a career sacrifice had been established, such sacrifice did not necessarily qualify as a contribution within the meaning of s 7(4),[95] stating that:

> "[w]hat was clearly envisaged [by s 7(4)] was some positive act by means of which one spouse puts something into the maintenance or increase of the estate of the other spouse – by way of money or property, labour or skill. It does not envisage a mere refraining from a particular activity or course of conduct."[96]

In the 1989 case of *Kretschmer* the court stated that minor contributions by the wife to the household, such as cooking and transporting children to school, did not qualify as contributions in terms of s 7(4). It was further decided that the mere fact that a spouse performed a duty that could have been performed by a third party for compensation, does not mean that such spouse has made a juridically relevant contribution.[97] As recently as 2005, in *Bezuidenhout*, the Supreme Court of Appeal has held that while the traditional role of the wife as housewife should not be ignored (as this would be in conflict with the anti-discrimination provisions in s 9 of the Constitution), such traditional role will not necessarily be a consideration in every case relating to s 7(3).[98] According to s 9(1), the basic premise of this right is that "everyone is equal before the law and has the right to

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88 Sonnekus 1987 *THRHR* 335.
89 Sonnekus 1987 *THRHR* 336.
90 *Beaumont* 997F-H.
91 See Jordaan 1988 *Codicillus* 71.
92 *Ibid*.
93 *Kritzinger* 87I-88D.
94 86F-G.
95 *Kretschmer* 579I-580A. See Clark and van Heerden 1989 *SALJ* 245.
96 *Kritzinger* 88C-D.
97 See Blackbeard 1989 *Codicillus* 106; Dillon 1989 *De Rebus* 354 and Sonnekus 2005 *THRHR* 673.
98 See Schultze "Marriage" 2005 *De Rebus* 36.

equal protection and benefit of the law". Section 9(3) provides that neither the state nor any person may discriminate unfairly, either directly or indirectly, against anyone on a number of listed grounds,[99] including gender[100] and marital status. Discrimination on a listed ground is presumed to be unfair unless it is established that the discrimination is, in fact, fair.[101] The fact that the Bill of Rights is, at the very least indirectly applicable to the interpretation of legislation, makes it clear that s 7(3) must be interpreted so as not to be in conflict with s 9 of the Constitution.

While the s 7(4) contribution required to qualify for a s 7(3) redistribution has been inconsistently interpreted to mean a financial contribution over and above what is traditionally required by a spouse,[102] the reality (not only in South Africa) is that the gendered division of labour means that women are primarily responsible for the routine household tasks.[103] Research shows that, even in households where there has previously been a more equal division of household labour, spouses take on traditional gendered labour roles with the birth of children. Even in households where women are employed outside of the home, they continue to bear the major responsibility for household and child-care work in addition to their wage labour. The gendered division of labour means that men benefit from the tasks which their wives perform. Their earning power increases because they do not expend time and energy on all the tasks which are needed to replenish their labour power, while women's earning power is negatively affected by the additional household tasks which they have to perform.[104] Wives also often contribute directly to their husbands' work[105] while generally structuring their own careers to accommodate the needs of children and the careers of their husbands by working part-time, interrupting their careers to care for young children, limiting their occupational mobility, refusing to work overtime and even choosing careers which will be compatible with family life.[106] In other words, because of their work in the home, women's career possibilities often suffer, while those of their husbands are enhanced. The low value placed on women's traditional labour is reflected in the wage market where women take

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99 The grounds listed in s 9(3) are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

100 While sex is also a listed ground, the focus of this article is on gender. For an explanation on the difference between the two concepts see Heaton "Striving for substantive gender equality in family law: selected issues" 2005 *SAJHR* 547.

101 Section 9(5).

102 See *Sonnekus* 1987 *THRHR* 336 and *Kretchmer* 579I-580A. See, on the other hand, *Kritzinger* in which the Appellate Division firmly rejected this approach.

103 Women tend to produce food and clothing for consumption by the household, nurture husbands and children, keep up family ties and care for elderly and ill family members. It is women who bear children and take primary responsibility for their physical, emotional and social welfare. See Bonthuys "Labours of love: child custody and the division of matrimonial property at divorce" 2001 *THRHR* 192 193-194.

104 Bonthuys 2001 *THRHR* 194-195. See also Heaton 2005 *SAJHR* 550.

105 Such contribution is most commonly made by helping in their husbands' businesses, providing emotional support, creating comfortable environments for men to rest or work in, maintaining kin and friendship networks and entertaining their friends and business associates. See Bonthuys 2001 *THRHR* 195.

106 *Ibid.*

part-time or lower-paid positions in order to accommodate domestic responsibilities.[107] Even in *Kritzinger*, where the roles were reversed, the sacrifice of the husband's career opportunities was dismissed in a way which does not look promising for women who make career sacrifices in the interests of husbands and children.[108] Regarding the wife's contributions as homemaker as inconsequential can also be seen as infringing s 10 of the Constitution, that is the right to have one's dignity respected and protected.[109]

Measured against ss 9 and 10 of the Constitution, the approach of Sonnekus (*viz.* that it could not have been the intention of the legislature to reward the wife for all her activities)[110] no longer appears to be applicable to the South African context. The idea that the intention espoused by the wording of s 7(3) was merely to remedy the wrong that was created by marriage out of community of property (and not to effectively negate the difference between the patrimonial consequences of marriage in and out of community of property or to compensate a wife who merely fulfilled chores flowing from her obligation to love and care for her husband) can without a doubt be seen as an infringement of these constitutional sections.

The current interpretation of s 7(4) is that:

1. "an infinite variety of factors" are to be taken into account;
2. a court should not include the wife's contribution flowing from her obligation to love and care for her husband – such contributions simply not being refundable since they hardly ever contribute to the growth or maintenance of her husband's estate; and
3. a distinction needs to be made between contributions flowing from her duty to support her husband and those over and above "that may be expected of a wife in her position,"

In the light of ss 9 and 10 of the Constitution this interpretation is a cause for concern. The approach set out above requires that the wife should not be compensated for fulfilling her common law obligations, but only for "over and above" juridically relevant contributions. According to the wording of ss 7(3) and (4): has her contribution caused the estate of the husband to grow or to maintain its value and is it fair and just to make a redistribution? Although this is the approach which is promoted by Sonnekus, it does appear to infringe on the wife's rights to equality and dignity.

With regard to the court's interpretation of the wife's contribution in the light of the anti-discrimination provisions of the Constitution, the English Law position could be noted, in particular of *White v White,* where the court stated that:

> "If a husband and wife by their joint effort over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the Court's assessment of her

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107 Bonthuys 2001 *THRHR* 196 and Heaton 2005 *SAJHR* 550-551.

108 Bonthuys 2001*THRHR* 200. See also Heaton 2005 *SAJHR* 559-560.

109 Costa describes this mentality of placing no value on the wife's contribution as "demeaning, offensive and sexist". See Costa "He loves me not – and what was it worth?" 2005 *De Rebus* 19.

110 Including those flowing from the *agapé* and *philia.*

> reasonable requirements, and her husband left with a much larger share? Or, to put the question differently, in such a case where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband?"[111]

and

> "In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife in their respective roles. . . . If in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the homemaker and the child carer."[112]

3 3 The constitutionality of the limitation of the application of section 7(3) to marriages concluded before 01-11-1984

Since the Bill of Rights applies to all law, it will always be directly applicable to legislation.[113] Section 2 of the Constitution entrenches it as the supreme law of the Republic and provides that any law or conduct inconsistent with it is invalid. Along with all other legislation, s 7(3) of the Matrimonial Property Act is thus subject to the Constitution and, should it be found to be inconsistent with any provision of the Bill of Rights, will be invalid to the extent of the inconsistency.

As mentioned from the outset of this contribution, s 7(3) is only applicable to marriages concluded out of community of property (without the accrual system or any other form of sharing of profit and loss) before 01-11-1984. The reason for this limitation is that s 7(3) was from its inception intended to be a transitional measure.[114] Persons that married out of community of property after this date are automatically married with the accrual system, unless such system is expressly excluded from their matrimonial property regime in their antenuptial contract.[115] According to Sonnekus, this limitation to marriages concluded before 01-11-1984 indicates that it was not the intention of the legislature to make the court's redistribution discretion available to a party to a marriage that happens to find himself or herself in an unfavourable financial position as a result of the fact that he or she concluded a marriage without community or property or accrual.[116]

Costa describes s 7(3) as "an enlightened piece of social legislation introduced with retrospective effect to alleviate the iniquitous and unfair consequences of the antenuptial contract on termination of the marriage by divorce".[117] The mischief which s 7(3) was designed to remedy is the "inequality which could flow from the failure of the law to recognise a right of a spouse upon divorce to claim an adjustment of a disparity between the respective assets of the spouses which is incommensurate with their respective contributions during the subsistence of the marriage to the maintenance or increase of the estate of the one or the other".[118] In other words, s 7(3) was introduced to redress the financial imbalance generally suffered by the wife on termination of the marriage by

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111 *White v White* 1578H.
112 1571.
113 Section 8(1) of the Constitution. See Currie and De Waal *The Bill of Rights Handbook* 64.
114 Sonnekus "Herverdelingsdiskresie by egskeiding, 'n deugsame vrou en *pact sunt servanda*" 2003 *SALJ* 761.
115 See s 2 of the Matrimonial Property Act 88 of 1984.
116 Sonnekus 2003 *SALJ* 762.
117 Costa 2005 *De Rebus* 17.
118 *Beaumont* 987I.

divorce.[119] For this reason, the court is not only required to consider the s 7(4) contribution, but also justice and equity in the exercise of its judicial discretion in coming to the assistance of the financially disadvantaged spouse.[120] As stated by the court in *Beaumont*, it is only fair that a person that has spent so much energy to the advantage of the growth of the estate of the other spouse has a claim to the division of such growth.[121]

It could thus be argued that the limitation to the application of s 7(3) to marriages concluded before 01-11-1984 is in conflict with s 9 of the Constitution as it discriminates on the listed grounds of marital status (between parties married before and parties married after the coming into operation of the Matrimonial Property Act) and gender (because s 7(3) cases, with a few exceptions, in the past have and in the future will involve the wife as the economically-disadvantaged party).[122] It could even be argued that it is in conflict with s 34 of the Constitution, which grants everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, by only allowing a certain category of spouse access to the courts in a s 7(3) case. In order to remedy this unconstitutionality, it can be argued that s 7(3) should be extended to marriages concluded after 01-11-1984.

While it is true that marriages concluded after this date are automatically subject to the accrual system unless it is expressly excluded, and while it is true that parties to a marriage may change the patrimonial consequences of such marriage at any time, the law should take notice of the South African situation.[123] The reality in South Africa is one of widespread illiteracy, unfamiliarity with the law, the inability to understand and foresee the effect of the applicable legal norms, lack of access to legal advice and the courts and the possibility of an unequal socio-economic relationship between parties.[124] Modification of the matrimonial property regime involves a joint application to the high court by both spouses. While spouses are happily married, they will not be too concerned with their matrimonial property regime – it is only when they are considering divorce will this become an issue. At this stage, however, it is generally one of the spouses that will want to change from complete separation of goods to the accrual system because the other party will suffer financial prejudice as a result of such a variation.[125] Can it be said to be just that a party to a marriage, after possibly decades of service to the other spouse, be left without a remedy (apart from a claim for maintenance) upon termination of such marriage simply because of a clause

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119 Costa 2005 *De Rebus* 17.

120 *Ibid*.

121 Sonnekus 1987 *THRHR* 332.

122 See Costa 2005 *De Rebus* 17: "Thus, of necessity, section 7(3) cases apply to a different era. It was an era prior to the introduction of our new Constitution and prior to the socio-economic emancipation of women. It was an era in which women were subjected to gender discrimination both in the home environment and the workplace and in which the homemaker was subjected to domestic enshacklement, disempowerment and financial bondage. We have come a long way, but we must guard against complacency because unfortunately gender prejudice is still rife".

123 See Neels "Substantiewe geregtigheid, herverdeling en begunstiging in die internasionale familiereg" 2001 *SALJ* 692 694 and Bonthuys 2001 *THRHR* 211.

124 Neels 2001 *SALJ* 694 and Bonthuys 2001 *THRHR* 211.

125 Sinclair 1981 *SALJ* 479.

excluding the accrual system in an antenuptial contract?[126] It can therefore be argued that a judge should have a discretion to apply redistribution to situations in which parties excluded the accrual system on the grounds of the duration of the marriage and/or the contribution by one spouse to the estate of the other.[127]

The argument that parties had the option of marriage with the accrual system as a reason for exclusion of the application of s 7(3) to later marriages is also flawed. Section 7(3) does not grant the court a free judicial discretion to create a system of accrual that the parties themselves did not create[128] or to redistribute the spouses' assets in a way that seems fair.[129] In *Beira v Beira*, Leveson J expressly stated that it was not the aim of the legislature for a s 7(3) redistribution order to put the parties in equal financial positions. Fairness is not *per se* half-half.[130] The content of what a party contributed is of importance – the mere fact that one party is rich does not authorise the other party to claim additional amounts.[131] Modern marriage is, according to Sonnekus, a type of aleatory contract – the parties to the marriage stand the chance of losing. Section 7(3) should not allow either of the parties to a marriage to use the redistribution discretion of the court as a type of insurance against damages.[132] An unequal result is one of the risks of the chosen matrimonial property regime.[133] As is set out clearly in s 7(4) and in the court's interpretation thereof, a redistribution order in terms of s 7(3) will not be made unless the court is convinced that the claimant in fact contributed to the growth or maintenance of the other spouse's estate during the marriage. A spouse does not qualify as having made a contribution as a matter of course, by virtue of having been married.[134] The accrual system and a s 7(3) distribution order, thus, do not have the same result.

Section 7(3) constitutes an exception to the contractual principle of *pacta sunt servanda* (agreements are to be observed). As such, it should be interpreted and applied restrictively – it is, after all, a deviation from the parties' contractually chosen matrimonial property regime, whether such marriage was concluded before or after 01-11-1984.[135] It is therefore advised that, should s 7(3) judicial discretion be extended to marriages entered into after the commencement of the Matrimonial Property Act, the court only apply this section when it is satisfied that exceptional circumstances which justify a redistribution order exist.[136]

The final issue which deserves attention in relation to the constitutionality of the limitation of the application of s 7(3) is that of spousal maintenance. Section 7(2) of the Divorce Act permits the court to order one spouse to support the other

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126 According to Neels 2001 *SALJ* 694 this cannot be seen as fair.
127 See Clark and van Heerden 1989 *SALJ* 247and Neels 2001 *SALJ* 694-695.
128 *Bezuidenhout* 197A and *Kretschmer* 354. See also Costa 2005 *De Rebus* 18; Dillon 1989 *De Rebus* 354; Sonnekus 2005 *THRHR* 671 and Sonnekus 2003 *SALJ* 762.
129 *Beira v Beira* 1990 3 SA 802 (W) 806A-807G. See also Sonnekus 2005 *THRHR* 672.
130 Sonnekus 2003 *SALJ* 769.
131 Blackbeard 1989 *Codicillus* 105; Sonnekus "Kwantifisering van huweliksopofferings op appèl" 1989 *SALJ* 250 253 and Sonnekus 2003 *SALJ* 763 and 767.
132 Sonnekus 1989 *SALJ* 257.
133 Sonnekus 2003 *SALJ* 763.
134 Sonnekus 2005 *THRHR* 672 and Sonnekus 2003 *SALJ* 763.
135 Heaton 2005 *SAJHR* 555 and 558 and Sonnekus 2003 *SALJ* 763.
136 See Clark and Van Heerden 1989 *SALJ* 247.

after divorce by granting the court a judicial discretion to make an order which it finds just for the payment of maintenance for a limited period of time or until the death or remarriage (whichever occurs first) of the party concerned.[137] In this regard, a distinction can be made between permanent and rehabilitative maintenance. Permanent maintenance is maintenance which is paid periodically until death or remarriage. Such maintenance is generally ordered in respect of long marriages where the wife has devoted herself to her role as homemaker. The court takes note of the wife's age and lack of experience in the labour market and, as such, finds that it cannot expect her to seek employment.[138] Rehabilitative maintenance, on the other hand, is maintenance aimed at the "clean break" principle. According to this principle, a "clean break" between parties is considered desirable – the parties should ultimately be placed in a position in which they are no longer dependant on one another. The financial obligations of spouses to each other should end on divorce, or as soon as possible after thereafter.[139] This is effected by way of a property or adjustment or a capital transfer, which is preferred to an award of maintenance.[140] When maintenance is awarded, it takes the form of rehabilitative maintenance. Rehabilitative maintenance thus involves the awarding of maintenance, either for a limited period of time, or in an amount that is reduces over time until it disappears completely when the wife is expected to once again become self-sufficient.[141]

In making an order for maintenance in terms of s 7(2), the court is enjoined to have regard to, *inter alia,* an order in terms of s 7(3). A maintenance order thus only comes into play after a s 7(3) redistribution order has been made – maintenance will be awarded if the redistribution order is insufficient to provide for the reasonable maintenance needs of a spouse.[142] A court may even achieve a clean break between the parties by making a large redistribution order which altogether does away with the need to award maintenance to the applicant.[143] In *Childs v Childs*[144] a maintenance order was not granted because of the fact that the claimant was going to receive a large sum in terms of the redistribution order.

It can thus be argued that a s 7(3) order serves two distinct purposes. It may be used not only to compensate a spouse for past contributions rendered to the maintenance or increase of the other spouse's estate but also to provide for the applicant spouse's maintenance needs.[145] The Appellate Division in *Beaumont v Beaumont* found that the two provisions are interrelated and that the view that should be taken from the outset is that of how justice could best be achieved between the parties in the light of possible orders under s 7(2) or s 7(3), or both.

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137 See Costa "Section 7(2) of the Divorce Act – how much elasticity?" 2006 *De Rebus* 28; Sinclair "Financial provision on divorce – need, compensation or entitlement?" 1981 *SALJ* 469 470.

138 Costa 2006 *De Rebus* 30.

139 Heaton and Schoeman "Foreign marriages and section 7(3) of the Divorce Act 70 of 1979" 2000 *THRHR* 141 149.

140 Sinclair 1981 *SALJ* 475.

141 As was awarded in *Koverjee v Koverjee* 2006 6 SA 127 (C). See Schultze 2007 *De Rebus* 34.

142 Costa 2005 *De Rebus* 19.

143 Heaton and Schoeman 2000 *THRHR* 149.

144 *Childs* 146H-I.

145 Heaton and Schoeman 2000 *THRHR* 147.

In cases where s 7(3) is not applicable, if the court were to make a substantial maintenance award because the spouse who is entitled to maintenance has no or very little property, it could be argued that the court is actually redistributing the other spouse's property in part.[146] The implication of this is that, when s 7(3) is not applicable to a marriage (concluded after 01-11-1984), the court could in effect, order a redistribution of property by way of periodical amounts in favour of any divorcing spouse, provided that he or she is in need of maintenance.[147] Such an indirect redistribution by way of periodic payments thus frustrates the clean break principle. How are spouses ever to be financially independent of one another while these periodic maintenance (or in effect redistribution) payments are being made? As has been noted by the English Law Commission:[148]

> "the award of periodical payments very frequently gives rise to difficulties of enforcement and tends to prolong what has proved an unhappy situation between the parties and to exacerbate their hostile feelings. A lump sum, on the other hand, avoids the difficulty of attempting to recover at intervals relatively small periodical payments. . . . Furthermore, it enables the parties to start afresh. . . ."

For the sake of the clean break principle, extension of s 7(3) to marriages concluded after 01-11-1984 is also advisable.

5 CONCLUSION

While both the nature and the quantification of the contribution of the spouse claiming a s 7(3) redistribution order have been subject to interpretation by the courts and various authors, sight should not be lost of the Bill of Rights, particularly the rights to equality[149] and dignity[150] in such interpretation. A literal interpretation of s 7(3) and (4) could previously have sufficed, but it in the light of the introduction of the Constitution as the supreme law of the Republic of South Africa,[151] cognisance now has to be taken of the applicable fundamental rights in the interpretation of any legislation, including that of the redistribution discretion of the court in making a s 7(3) order. When exercising its s 7(3) discretion, a court should now find itself constitutionally obliged to consider various additional factors, including a wife's contribution as a housewife in its consideration of a redistribution order.

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146 Heaton and Schoeman 2000 *THRHR* 149.
147 *Ibid*.
148 Law Commission No 25 (1969) para 9, quoted in Sinclair 1981 *SALJ* 480.
149 Section 9.
150 Section 10.
151 Section 2.

The South African Nonprofit Sector: Legal and Policy Environment

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1 INTRODUCTION

The nonprofit organisation, often the structural form of civil society activity, has come to assume a strategic position within national and international development spheres. Nonprofit organisations are by no means homogenous. These organisations cover a wide spectrum of entities and activities, ranging from the community-based self-help association through to the city-based professional association and the large grant-making foundations. The common denominator of these organisations, however, is that they are not established for the primary purpose of making profit, and where profit is made, it is channelled back into the work of the organisation.

Nonprofit organisations are found in every sector of the economy, but their "not-for-profit" status is often anomalous with the institutions and organisations found in other sectors. Such organisations often find a home in legal terms and in academic study in the class of organisations increasingly described as forming part of the "nonprofit sector". Sometimes directly, but more often, indirectly, the law constructs the operating environment for the nonprofit sector, and the work of these nonprofit associations of civil society can be facilitated or hampered by the applicable law.

Several key points at which nonprofit organisations interact with formal mechanisms of the law have been identified by scholars of the nonprofit sector. These include the conferment of legal personality on the nonprofit entity, the introduction of donor-friendly provisions in the tax law and the general posture of the law towards people's freedom and inclination to associate, also described as "permissible purposes of association".[1] It needs to be mentioned that a fourth point has to do with human resources employed in nonprofit organisations and the dynamics created by this growing class of employment relationships.

The impact of law on the operating environment of the nonprofit sector in South Africa has been described in terms of its capacity to prescribe "who has the right to assert leadership, organise people and allocate resources".[2]

> "It needs to be considered what legislation can do positively to assist the non-profit sector. It should establish easy registration procedures, create accessible

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1 Salamon and Toepler "The Influence of the Legal Environment on the Development of the Nonprofit Sector" Johns Hopkins University Institute for Policy Studies, Center for Civil Society Studies Working Paper Series No 17 2000 2.

2 Marais "Annual Review: the voluntary sector and development in South Africa"1997 *Development Update* 107.

> information about registration, give information to NPOs [nonprofit organisations] on benefits available and enable registration to be quick and efficient."[3]

This article examines the ways in which the law has created a more facilitating operating environment for the nonprofit sector in South Africa. It draws on literary and empirical sources to highlight the progression of the legal and policy regime governing nonprofit agencies from the apartheid era through the transition period to the present. These legal interventions are examined from three perspectives, namely, permissible purposes of association, registration and tax framework and employment law. In studying this subject, the focus is not on specific provisions of the law, but on the ways in which selected statutes have shaped and continue to influence the character and work of organisations in the nonprofit sector

The article also provides an empirical account of some developments that have had significant impact on the existence and operation of nonprofit organisations in South Africa. This is with a view to providing an insight into the ways in which the law has been put to good use to create a more conducive environment for the collective expression of civil society interests. Depending on the context, various terms are used interchangeably or correspondingly to describe aspects of the character and configuration of the nonprofit sector. These include "nonprofit agency", "nonprofit organisation", "nonprofit company", "public benefit organisation", "nonprofit sector", "nonprofits", "civil society", "non-governmental organisation", "third sector" and other such terms. It needs to be observed that not many literary resources on the South African nonprofit sector appear in law journals. This work therefore draws extensively on the publications of non-governmental organisations and social science scholars.

2 HISTORICAL CONTEXT OF THE CONTEMPORARY NONPROFIT SECTOR IN SOUTH AFRICA

2 1 The apartheid era

The apartheid era is generally perceived as one that was hostile to independent activities of civil society, particularly in non-white communities. For one, government appropriated to itself by means of law, broad powers of control over fundraising, as well as powers to investigate and halt nonprofit organisations perceived as opposing the government.[4] The Fundraising Act of 1978 was a key state instrument of control of nonprofit funding and fundraising. State discretion in granting fundraising permission by means of a fundraising number was more easily exercised in favour of applicants working in traditional welfare fields like early childhood education and services. For organisations perceived as political or in competition with government, this was particularly difficult.[5] Within such a repressive legal environment however, many organisations ignored these provisions in the conduct of their activities.[6]

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3 Dangor *et al The Nonprofit Sector in South Africa* (1997) 30.

4 Dangor "Government-Civil Society Partnership in Policy Development: the Case of the Nonprofit Organisations Act in South Africa" in *Government-NGO Partnerships: Some Emerging Lessons and Insights* (1999) 4; see also Fundraising Act 107 of 1978, s 2.

5 Dangor *et al The Nonprofit Sector in South Africa* 29-30.

6 Marais 1997 *Development Update* 107. See also Dangor *et al The Nonprofit Sector in South Africa* 30.

Furthermore, segregation laws spawned civil society reaction especially in non-white communities as much as it served to enforce apartheid policies. This was particularly evident in labour relations, where constant negotiation and tense engagement between employers and workers characterised the entire apartheid era. For instance, the 1956 amendment to the Industrial Conciliation Act 1924 served to prohibit the formation of mixed race trade unions. The pressure brought by this resulted in the expulsion of black unions from the Trade Union Council of South Africa (hereafter "TUCSA"). Formed in 1954, TUCSA began to admit black unions into its membership in 1962, thus giving it, for a short time, in the sixties, the status of a multi-racial union.[7] The systematic exclusion of black trade unions in general union bodies led to a rapid growth in unregistered black trade unions in the seventies.[8]

On the other hand, the white population enjoyed the freedom to form associations and exert pressure on the state through institutionalised channels.[9] Consequently, racially exclusive nonprofit organisations involved in service delivery, culture and sport in white communities enjoyed a fairly stable interdependent relationship with the state.[10]

During the apartheid era therefore, the potential of law in promoting and hindering development processes, sometimes simultaneously, was clearly demonstrated. This manifested in the negative use to which apartheid state policies and laws were put on the one hand, and in the resistance which their implementation generated on the other hand. Thus, while indigenous networks of civil society suffered under the severity of segregation laws, new forms of civil society activity, such as that found in the labour movement, grew tremendously.

2 2 The transition period

The transition period was a time for constructing the framework for the new South Africa, involving extensive consultations, negotiations, lobbying and dialogue between different interest groups, among which were the government, formerly exiled political groups and representatives of civil society. These transition processes exposed distinctions between opposition forces concerned primarily with the seizure of state power and forces that wished to remain rooted in civil society.[11]

During the transition period, several concerns relating to the work of the nonprofit sector emerged. Firstly, it still remained to be established whether the involvement of stakeholders in the transition process was a sign of lasting change to an inclusive policy process or merely the result or sign of compliance with specific transition requirements.[12] Secondly, it was obvious that the skills, structures and modes of interaction required for reconstruction were different from those required for political resistance with which South African civil society was much more familiar. The need for re-orientation to build the capacity

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7 Finnemore *Contemporary Labour Relations* (1999) 34-35.
8 *Ibid*.
9 Greenstein *et al The State of Civil Society in South Africa: Past Legacies, Present Realities and Future Prospects* (1998) 7.
10 Swilling and Russell *The Size and Scope of the Nonprofit Sector in South Africa* (2002) 4.
11 Greenstein *et al The State of Civil Society in South Africa* 6.
12 Greenstein *et al The State of Civil Society in South Africa* iv.

of civil society to cope with new roles was therefore a key concern of this period.[13]

A third feature of the transition period was the recruitment of key leaders of civil society into the ranks of the new government. While this trend significantly depleted the seasoned crop of human resources in the nonprofit sector, it reinforced the positive role of that sector as the "chief training grounds for state personnel".[14] Activist leadership and staffing had therefore to be replaced with career-oriented professionals recruited from the open market on salaries competing with business and public sector.[15] Fourthly, the dismantling of apartheid meant the loss of a vital rallying point for the nonprofit sector.[16]

Thus the transition period was characterised by fundamental changes in the South African political economy which had ripple effects on the nonprofit sector. These transitional processes introduced significant changes in the roles and capacities of civil society organisations. In responding to the imperative of transformation, these organisations had first to ensure their survival and relevance. Legal and policy reforms were therefore pursued, largely in response to the challenges of the post-apartheid funding climate. The next section of this work discusses aspects of these legal and policy reforms that have since emerged. This is done under three main heads, namely, permissible purposes of association, registration and tax framework, and employment law.

3 LEGAL DEVELOPMENTS IN THE NONPROFIT SECTOR

3 1 Permissible purposes

In the context of the history given above, the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution") provides an unqualified right to freedom of association.[17] This provision is further reinforced at the workplace by the Labour Relations Act of 1995,[18] which provides for freedom of association at the workplace as well as the right to fair labour practices. These provisions encompass the right to form and to join a trade union.[19]

Related to, and core to civil society activities, are the respective rights to freedom of expression and freedom of religion, belief and opinion.[20] This cluster of rights reflects the variety of themes around which people tend to organise, for purposes other than profit. The wide ambit which the constitutional provisions give to the principle of freedom of association reflects the spirit in which law is expected to govern the nonprofit sector, as expressed in the following statement:

> "[n]or should legislation curtail the activities of NPOs or constrain and hamper them on the assumption that they will violate the law. The law should operate

13 *Ibid*.
14 Marais 1997 *Development Update* 116.
15 Kraak "The South African voluntary sector in 2001: a great variety of morbid symptoms" 2001 *Development Update* 129.
16 Marais 1997 *Development Update* 120-121.
17 Section 18.
18 Act 66 of 1995 (hereafter "the LRA").
19 Sections 4 and 23(1) and (2) of the LRA.
20 Sections 15(1) and 16(1).

> punitively only after it has been broken or after the NPO has failed to account in accordance with the laid down procedures."[21]

3 2 Registration and tax framework

The difficulties associated with the decline in funding to the sector led nonprofit organisations to explore other avenues of raising and saving funds in the immediate post-apartheid period. Lobbying for tax reforms to encourage philanthropic giving was initiated at this time.[22] Partnerships between the sector and government for purposes of creating a facilitating legal framework for nonprofit organisations were also pursued.[23] An independent study of the nonprofit sector was commissioned in 1992 while a number of legal teams were constituted over a process that lasted several years. The focus of the legal team was the tax status of nonprofit organisations as well as incorporation and registration issues, fundraising, giving, and fundamental rights crucial to a vibrant and effective civil society.[24] The results of these efforts were the enactment of the Nonprofit Organisations Act in 1997, the amendment of the Income Tax Act of 1962, as well as the amendment of the Fundraising Act of 1978. The provisions of these laws operate jointly with others, such as the Companies Act,[25] to create the legal and policy environment for nonprofit sector organisations in South Africa. In this section, key legal provisions discussed are drawn from the Nonprofit Organisations Act, the Taxation Laws Amendment Act and the Companies Act of 2008.

3 2 1 The Nonprofit Organisations Act 1997

The Nonprofit Organisations Act[26] (hereafter the "NPO Act") was enacted to provide for an environment in which nonprofit organisations can flourish, to establish an administrative and regulatory framework for their work, as well as to repeal certain portions of the Fundraising Act of 1978.[27] The Act is made up of thirty sections, divided into five chapters broadly headed: "interpretation and objects of the Act", "creation of an enabling environment", "registration of nonprofit organisations", "regulations and general provisions". Registration under the NPO Act is voluntary, and an organisation is not precluded from operating on grounds of non-registration under the Act. The NPO Act defines "nonprofit organisation"[28] as

> "a trust, company or other association of persons established for a public purpose; and the income of and property of which are not distributable to its members or office-bearers except as reasonable compensations for services rendered".

The term "nonprofit organisation" was picked to describe formal associations of civil society in the Act because of its depoliticised content.[29] The term gained

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21 Dangor *et al The Non-Profit Sector in South Africa* 30.
22 Marais 1997 *Development Update* 107.
23 Dangor in *Government-Civil Society Partnership* 7-8.
24 Dangor in *Government-Civil Society Partnership* 5.
25 This includes the Companies Act 61 of 1973, soon to be replaced by the Companies Act 71 of 2008.
26 Act 71 of 1997.
27 See long title to the NPO Act.
28 Section 1(1).
29 Swilling and Russell *The Size and Scope of the Nonprofit Sector in South Africa* 6.

acceptance with policy makers and non-governmental partners in the wake of the unresolved complexities of distinguishing between different kinds of civil society organisations, most notably non-governmental organisations and community based organisations .[30]

The Act establishes a directorate for nonprofit organisations, the functions of which are broadly defined. These functions include supporting nonprofit organisations in the registration process and facilitating the development and implementation of multi-sectoral and multi-disciplinary programmes.[31]

The main effect of registration under the Act is that it confers the status of a body corporate on a nonprofit organisation.[32] While the Act specifically sets out the technical effects of registration, it does not provide specific benefits, but rather gives room for a future determination of benefits accruing to organisations registered under the Act.[33] The Act prescribes a simple registration procedure which includes submitting an application form together with a constitution containing certain specified provisions and any other information required by the director of nonprofit organisations. The director has the discretion to register an applicant organisation or to require that certain other provisions be complied with.[34] An applicant has a right of appeal to the arbitration tribunal established under the Act against a negative decision by the director.[35]

Further, the NPO Act accorded to organisations registered in terms of ss 4, 5 or 6 of the Fundraising Act the status of registered organisations under the NPO Act, subject to their complying with certain procedures. The Act also transferred to the director of nonprofit organisations, the functions of the director of fundraising in relation to organisations "transferring" their registration from the Fundraising Act to the NPO Act.[36]

Perhaps because it was the product of an extensive consultative and partnering process between civil society practitioners and government agencies such as the department of social development, the Act does not seem to have attracted much critique from the former. Moreover, since registration under the Act is voluntary, its provisions do not strictly speaking impose any mandatory burden on nonprofit organisations. On the contrary, registration under the Act confers on a nonprofit organisation eligibility for tax exemption.[37] The major critique of the Act, which came from a wide-ranging study of the South African nonprofit sector, is that it was articulated with very little empirical and quantitative knowledge about the nonprofit sector.[38] Further critique and dissatisfaction with the provisions of the NPO Act, emerged from the empirical studies conducted with nonprofit sector practitioners.[39]

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30 *Ibid*.
31 Section 5.
32 Section 16.
33 Section 11.
34 Section 13.
35 Section 14.
36 *Ibid*. See also s 34.
37 Income Tax Act 58 of 1962 as amended, s 30.
38 Swilling and Russell *The Size and Scope of the Nonprofit Sector in South Africa* 5.
39 See part 4 4 below.

It is important to note that the NPO Act did not change the ways in which a nonprofit organisation can come into existence. The three recognised ways of creating a nonprofit entity are the company limited by guarantee, under s 21 of the Companies Act of 1973, a registered trust created under the Trust Property Control Act of 1988 and an association of persons broadly endorsed by the constitutional guarantee on freedom of association.[40] However, the Companies Act of 2008 introduced certain amendments into the memorandum of incorporation of entities known as s 21 companies. This is discussed in part 3 2 3 of this article. In concluding this section, it is useful to refer to a pertinent observation made in relation to the process leading to the enactment of the NPO Act:[41]

> "[a]n important lesson has been that a democratically elected government is ultimately the key agent in concluding public policy change processes and that relevant government organizations and officials need to be brought on board early rather than later in public policy change processes initiated outside of government. Partnerships around these changes are, however, dependent on the level of agreement on values around the specific public policy issues."

3 2 2 Tax framework[42]

Previously, a nonprofit organisation could obtain tax exemption only if it could show that it was of an "ecclesiastic, charitable or educational" nature and of a "public character".[43] Obviously, such a narrow description worked to exclude many organisations, and educational institutions, for instance, were typically seen as only those which promote a definite course of study.[44] Even more discouraging to potential funders was the fact that tax deductibility for donations was restricted to a class of nonprofit organisations, specifically educational funds, universities or colleges.[45] A further disincentive to charitable giving flowed from the provision that attracted additional tax to donations exceeding a certain percentage of taxable income. This was 5% in the case of companies and 2% in any other case.[46]

The amendment to the Income Tax Act introduced in 2000 by the Taxation Laws Amendment Act[47] authorised the commissioner to approve public benefit organisations for tax exemption. Those who could benefit from the exemption

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40 Section 18 of the Constitution.

41 Dangor in *Government-Civil Society Partnership* 2.

42 On this see Honey *New Tax Laws for South African Nonprofit Organisations* (2000) Legal Resource Centre / Nonprofit Partnership Information Series No3, Wyngaard *et al* "The Income Tax Act and Sustainable Development: Do the Provisions of the Income Tax Act, As Amended, Promote Financial Sustainability in the Sector?" www.projectliteracy.org.za/tmpl/Documents/Penny%20and%20Ricardo.doc (accessed 25-03-2004). See also Wyngaard "Becoming a Public Benefit Organisation: Demystifying the NPO Tax Laws" www.cafonline.org/downloads/word7/sa_PublicBenefitOrganisation.doc (accessed 05-03-2004) and Wyngaard "Having Donor Deductable Status: Demystifying the NPO Tax Laws" www.cafonline.org/downloads/word7/sa_DonorDeductibleStatus.doc (accessed 05-03-2004).

43 Section 10(1)(f) and (1)(fA) of the Income Tax Act.

44 Dangor *et al The Nonprofit Sector in South Africa* 30.

45 Dangor *et al The Nonprofit Sector in South Africa* 31.

46 Section 18(A) of the Income Tax Act.

47 Act 30 of 2000.

include, among others, organisations that are registered under the NPO Act.[48] In broad terms, the Income Tax Act as amended defines the term "public benefit organisation" to include organisations of a public nature, which carry out public benefit activities within South Africa in a nonprofit manner.[49] There is however no specific definition for "public benefit activity". Rather, the term is described by reference to an activity which the minister's determines to be "of a philanthropic and benevolent nature, having regard to the needs, interests and well-being of the general public for the purposes of this section".[50]

It is important to note that "public benefit activity" is also defined to include the process of *providing funds* to a public benefit organisation approved under the Act.[51] Funds provision as envisaged in this section is not limited to organisations approved under the Act, but extends to associations carrying on one or more public benefit activities as well as certain bodies which apply at least 75% of their resources in furtherance of a public benefit activity.[52] This provision effectively takes care of the requirement for fundraising approval prescribed under the Fundraising Act of 1978.

Further tax benefit lobbying by South African civil society[53] more recently resulted in the removal of the provision requiring a public benefit organisation to register under the NPO Act before it could be recognised for purposes of tax exemption and other benefits. This was one of the outcomes of an amendment drive which saw the Revenue Laws Amendment Bill of 2006 passed in November 2006.[54] Another result of this amendment which came into effect in 2007, was the pegging of statutory tax rates for taxable trading activities of all public benefit organisations at 29%. Other amendments include the removal of restrictions on the capacity of public benefit organisations to make investments, as well as the extension of tax exemption to foreign legal entities in South Africa who qualify for tax exemption in their originating country.[55]

The NPO Act repealed chapters one and three of the Fundraising Act, which provided for funding approval to the extent of their application to fundraising organisations, branches of such organisations and any other organisation contemplated in chapter one of the Fundraising Act.[56]

The tax law amendments also expand the scope of donations eligible for tax deductibility to approved public benefit organisations and certain bodies

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48 Section 30(3)(g) of the Income Tax Act (as amended); s 35 of the Taxation Laws Amendment Act 2000 which introduced a new s 30 to the Income Tax Act.
49 Section 30(1) of the Income Tax Act as amended.
50 Section 30(1)(a) and (2)(a).
51 Section 30(1)(b)(i).
52 Section 30(b)(ii) and (iii).
53 The tax lobby involved a number of organisations including the Non profit Consortium and the Legal Resources Centre.
54 See Brewis and Wyngaard "Nonprofit organizations in South Africa: reaping the benefits of the income tax campaign" 2006 *The International Journal of Not-For-Profit Law* http://www.icnl.org/KNOWLEDGE/IJNL/vol9iss1/art_3.htm (accessed 05-12-2008).
55 *Ibid*. See also Brewis and Wyngaard "NGO Tax Campaign Yields Results" http://www.sangonet.org.za/portal/index.php?option=com_content&task=view&id=5800&Itemid=442 (accessed 05-12-2008).
56 Section 33 of the NPO Act.

established by law, carrying out public benefit activities within South Africa.[57] The amendment has the effect of bringing donations to certain funding agencies within this privilege if at least 75% of the funds qualifying for tax deductibility is distributed within a specified period of time.[58]

The success in securing further tax exemptions for a wider category of organisations is a demonstration of continuing positive legal intervention in nonprofit activity, more than ten years after the enactment of the NPO Act in 1997. This trend would no doubt be reinforced if its value in improving the delivery of nonprofit organisations can be shown. In an earlier study, the importance of establishing a framework for measuring the impact of tax exemptions on delivery by nonprofit organisations was demonstrated, leading to the recommendation for the setting up of a database on currently exempt organisations.[59]

Having discussed permissible purposes and the registration and tax framework for nonprofit organisations, the next section highlights certain regulatory provisions introduced by the Companies Act of 2008 to the operation of nonprofit organisations.

3 2 3 The Provisions of the Companies Act 2008

The Companies Act 2008 (hereafter "the CA") articulates more definitive provisions for nonprofit organisations than did its predecessor.[60] Specific provisions on nonprofit organisations are found in Schedule 1 of the CA. The provisions of this schedule set out operating principles with particular reference to the objects and policies of nonprofit organisations, their financial transactions, incorporators, members and directors.

On the face of it, these legal provisions derive from time-tested principles that have guided genuine nonprofit organisational activity over time. These include the core principles of application of organisational funds exclusively to the objects of the organisation and non-distribution of the organisation's income to its incorporators, members or directors except in certain strictly defined circumstances.[61]

The CA provides that incorporators of a nonprofit company are its first directors and its first members, if its memorandum of association provides for it to have members.[62] With regard to a pre-existing s 21 company, the CA provides that such a company must be deemed to have amended its memorandum of incorporation to expressly designate itself a nonprofit company, denoted by the abbreviation "NPC" at the end of its name.[63] The object of a nonprofit company must represent either a public benefit object or cultural, social, communal or group interests.[64]

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57 Section 18(A).
58 *Ibid*.
59 Kraak 2001 *Development Update* 142.
60 The Companies Act 71 of 2008 is billed to replace the Companies Act of 1973 in the later part of 2010. The Companies Act uses the term "nonprofit company" in its provisions on nonprofit organisations.
61 Section 1(2) and (3), section 5(3) and (4), Schedule 1 of the CA.
62 Section 3, Schedule 1 of the CA.
63 Section 4(1)(a), Schedule 5 and section 3(c)(v) Chapter 2 of the CA.
64 Section 1 (1) Schedule 1 of the CA.

Other provisions include those distinguishing the requirements for membership organisations from non-membership organisations. For example, if a nonprofit organisation has members, the memorandum of incorporation must set out the basis on which the members choose the directors of the organisation.[65] On the other hand, if a nonprofit organisation has no members, the memorandum of incorporation must set out the basis on which directors are to be appointed by its board or other persons.[66] No restriction amounting to unfair discrimination under the Constitution is to be imposed on members.[67] Furthermore, for-profit companies and juristic persons may hold membership in nonprofit organisations and the rules guiding membership must be set out in the memorandum of incorporation of the company.[68]

A nonprofit company is not permitted to merge with a for-profit company, but it may merge with another nonprofit company with the approval of its voting members in the same manner as applies to for-profit companies.[69] Upon dissolution or winding-up, the net assets of a nonprofit company are not to be distributed to its members or directors, but to other nonprofit organisations which have a similar object as the dissolved organisation.[70] This distribution is to be done as specified by the memorandum of incorporation, or as determined by its members or directors, or as laid down by the court in the last instance.[71]

The CA has been the subject of several informal criticisms, but it is not clear whether any of these criticisms affects its provisions on nonprofit companies. For instance, the CA has been criticised as having been "driven by foreigners who do not have sufficient knowledge of local conditions" and drafted by "legal people who have no business experience".[72] Further, the perception among some people in the business sector is that "there was insufficient consultation, submissions by local experts on the draft law were ignored and key sections are contradictory".[73]

On the face of it, the CA differs from NPO Act on several points. First, the CA specifically legislates on ethical and operational issues, while the NPO Act mainly deals with the administrative procedure for the registration of nonprofit organisations. Secondly, the former issues directives in a regulatory manner while the latter communicates guidelines in an enabling way. Thirdly, while the nonprofit status under the CA does not confer tax benefits, registration under the NPO Act is essential to securing tax exemption as a public benefit organisation under the Income Tax Act 1962 as amended.[74] Further, with regard to terminology, the CA uses the term "nonprofit company,", while the term "nonprofit organisation" is used by the NPO Act. It is not clear whether each term has a distinctive meaning or whether the two terms can be used interchangeably in

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65 Section 5(1)(a), Schedule 1 of the CA.
66 Section 5(2), Schedule 1 of the CA.
67 Section 4(2)(a), Schedule 1 of the CA.
68 Section 4(2)(c) and (e), Schedule 1 of the CA.
69 Section 2(1) and (2).
70 Section 1(4)(a) and (b)(i).
71 Section 1(4)(b)(ii), Schedule 1 of the CA.
72 Rawoot "Companies Act farce" 26-03-2010 *Mail and Guardian* 48.
73 *Ibid.*
74 See s 1(6) of the CA; see also s 30(3)(g) of the Income Tax Act amended by the Taxation Laws Amendment Act 2000.

relation to the category of organisations covered by the two statutes. The effect of the CA on the South African nonprofit sector will no doubt become clearer as the relevant organisations seek to comply with its provisions.

3 3 Employment law

This section briefly examines how employment in the nonprofit sector is affected by statutory developments in South African labour law. The immediate post-apartheid period was also a time of transformation of the legal framework for labour relations in South Africa to reflect constitutional provisions as well as International Labour Organisation standards.[75] Deliberations with social partners led to the enactment of the LRA in 1995, the Basic Conditions of Employment Act in 1997, Employment Equity Act in 1998 and the Skills Development Act in 1998. One of the major effects of the LRA, the principal labour Act passed at the time, was the creation of a single labour relations framework for all sectors, public and private, except for a few security establishments. [76]

The LRA seeks to advance economic development, social justice, labour peace and the democratisation of the workplace.[77] For this purpose, the LRA contains comprehensive provisions on employees' rights and obligations, collective bargaining, worker participation and dispute resolution. Since it is a statute of general application, the LRA applies as much to nonprofit sector employees as it does to workers employed in the business sector and in government. Consequently, organisations within the nonprofit sector are expected to comply with its provisions.

Unlike in many countries, a unique component of social policy in South Africa is job creation, given the high unemployment level in the country. In recognition of this, a study demonstrating the effectiveness of certain activities of nonprofit organisations featured employment generation as a positive indicator.[78] This has been identified alongside other indicators such as scale of impact and coverage, continuity and sustainability of intervention, cost effectiveness and accountability.[79] More information on employment in the nonprofit sector was generated by empirical studies, discussed in the next section of this article.

4 ORGANISATIONAL ENGAGEMENT WITH LAW AND POLICY IN THE NONPROFIT SECTOR[80]

The information in this section is drawn from empirical research involving interviews with managerial staff of six organisations based in Cape Town.[81]

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75 See s 1 of the LRA.

76 See s 2 of the LRA which excludes the National Defence Force, National Intelligence Services and the South African Secret Service.

77 Section 1 of the LRA.

78 See Motala and Husy "NGOs Do it Better: An Efficiency Analysis of NGOs in Development Delivery" 2001 *The Learning Curve: A Review of Government and Voluntary Sector Development Delivery from 1994* (*Development Update)* 71, 83, 94.

79 *Ibid*.

80 This section is based on doctoral research carried out between 2004 and 2006 at the University of Cape Town.

81 The organisations were the Institute of Democracy in South Africa (IDASA), the Western Cape Network on Violence against Women (WCNVAW), Institute of Justice and Reconciliation (IJR), Resources Aimed at the Prevention of Child Abuse and Neglect (RAP-

continued on next page

Responses addressed various dimensions of the experience of these organisations in trying to achieve compliance with administrative and other requirements of the law affecting the respective organisational missions.

4 1 Registration under the NPO Act

Of the six organisations whose representatives were interviewed, five were registered under the NPO Act. This is perceived as giving credibility with funders and in some ways, increasing the "bargaining strength" of recipient nonprofit organisations with their funding partners. For organisations who receive government funding and other resources channelled through government, it is usually a prerequisite to be registered with the directorate for nonprofit organisations under the NPO Act. Further, it confers eligibility for tax and levy exemptions as well as donor deductibility. The Act is perceived as fostering accountability and effectiveness within the nonprofit sector, with the requirement of an annual audit and filing of organisational reports, among other provisions. The NPO Act introduced a measure of desirable regulation into the sector and also confers a status on registered organisations that is generally perceived as empowering. Further, registration under the Act creates opportunities for grassroots organisations to gain exposure to new ways of doing things and also gain access to an expanded resource base. It is, however, challenging for small organisations and grassroots groups to comply with its provisions as it introduces additional costs and calls for administrative skills which small organisations often do not possess the capacity to handle.

4 2 Awareness and compliance with other legal provisions

Different kinds of law intersect with the work carried out by different types of nonprofit organisations. Apart from the NPO Act, other more general legal provisions of which there is a higher level of awareness include tax law and employment law.

The current tax law, principally the Income Tax Act of 1962 as amended, expands the scope for more nonprofit organisations to qualify for tax exemption and donor deductibility. The LRA and other employment laws were perceived as promoting organisational accountability to staff, as it affords them the same legal protection as workers in other sectors. Further, employment law provisions promote organisational commitment to transformation, which requires a deliberate effort on the part of the organisation. On a day-to-day basis, these statutes guide recruiting decisions and human resource management. It was, however, observed by one respondent that the tight protection provided by current South African employment law makes it difficult to terminate the services of errant staff.

Another statute identified as relevant to the work of nonprofit organisations is the Lotteries Act[82] which provides funding for community-based organisations. There were mixed feelings about the Promotion of Access to Information Act

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CAN), National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and the Legal Resources Centre (LRC), all in Cape Town. Visits were paid to these organisations between June 2004 and January 2006.

82 Section 26(3) of Act 57 of 1997.

(hereafter "PAIA").[83] While the rationale of transparency and openness for which the law was enacted, was acknowledged as important, it was felt that PAIA introduces a major burden especially on small organisations. In particular, it was felt that the PAIA requirement for the annual submission of a manual by each and every organisation was already covered by certain provisions of the NPO Act which require the submission of a constitution and periodic reports by registered organisations.[84] With regard to its application to the nonprofit sector, PAIA was perceived by some to be directed at "tracking down" nonprofit organisations that are not registered under the NPO Act. This, it is felt, could operate against the principle of associational life and voluntarism in civil society. Furthermore, nonprofit organisations working in services requiring confidentiality emphasise the importance of balancing the provisions of the PAIA with the need to protect their clients, as for example in cases of child abuse.

Another law identified as having a direct impact on NPOs is the Financial Intelligence Centre Act (hereafter "FICA").[85] FICA's requirement for documentary evidence of a physical address for bank clients' verification is considered challenging for informal grassroots associations which typically have a loose *modus operandi*, and usually operate from *ad hoc* or temporary locations. This makes it difficult for such organisations to open and maintain bank accounts. In turn, not operating a bank account limits the access of such organisations to funding.

4 3 Law and organisational mission

The role of the Constitution as the guiding authority for the promotion of socio-economic rights is clearly acknowledged among the organisations. It is also recognised that different laws combine to advance the advocacy roles of nonprofit organisations working in different areas. For example, organisations involved in service delivery to children, youth and families find laws on domestic violence, child protection and social security useful. In turn, these nonprofit organisations contribute to the development of these laws by their involvement in consultations leading to the drafting of the laws. They also lobby through the parliamentary process and make submissions on policy issues. Some of the organisations interviewed contributed to the content of the NPO Act, the Domestic Violence Act[86] and the Child Justice Act.[87]

Other legal frameworks such as contract and copyright laws are identified as incidental to the contractual activities of nonprofit organisations. These activities include the production of publications, supply of materials and outsourcing of certain specialised services.

4 4 Challenges of legal requirements on administration

Generally, more legal requirements in organisational processes translate to more administrative work which takes up time that would have been applied to the

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83 Act 2 of 2000.
84 Section 13 and 13(1) of the NPO Act.
85 Section 21 of Act 38 of 2001.
86 Act 116 of 1998.
87 Act 75 of 2008.

organisation's core mission. In the context of strict budget restrictions that obtain in most nonprofit organisations, this creates more work for staff as they often have to play several different roles on one salary. The situation is exacerbated by the unwillingness of funders to support administrative costs, thereby reducing administrative capacity.

It was further observed that the attempt to comply with the law also exposed a lack of capacity on the part of relevant government departments to deal with the processes involved. For instance, all applications for registration with the directorate for nonprofit organisations are processed in Pretoria, irrespective of where the organisation operates. This introduces long delays in the registration process. Further, organisations that maintain offices in other countries have the additional burden of complying with the laws of the foreign country.

It was however observed that while the different statutes impose bureaucratic requirements requiring more resources for compliance, the benefits outweigh the challenges of compliance. In small organisations however, lack of capacity in complying with and making use of legal provisions was a recurrent drawback.

4 5 Views on the nonprofit sector, law and development processes

First, there was an appreciation of law in its fundamental sense; as the expression of equality, indispensable to human activity, with the potential to ensure that economic development is made more humane. The potential and capacity of law in creating a facilitating environment for development processes was clearly acknowledged. This is seen, for example, in the fact that the law provides a regulatory framework for associations in the nonprofit sector to gain corporate personality.

Further, legal provisions may be used to promote inter-sectoral planning, budgeting and adequate resourcing, especially in response to the volume of service-delivery responsibilities delegated to nonprofit agencies by government. In relation to human resources, law was perceived as useful for transformation and for the development of staff and clients of nonprofit agencies.

With regard to service delivery organisations, legal provisions can be used to prescribe standardisation in training and to monitor the quality of services provided by these organisations. In the family service industry for instance, different kinds of skills are often required in respect of one matter. For example, the set of skills required for counselling a victim of domestic violence would be different from the skills required for preparing such a person as a witness in legal proceedings, and usually the same organisation is required to provide these distinct services. It therefore becomes imperative that legal benchmarks are established to guide the training of service providers in these areas, irrespective of the source of the organisation's funding.

It was also observed by one respondent that the guidelines and principles set out in the *King I* and *King II Reports on Corporate Governance* do not seem to have considered nonprofit entities adequately, if at all. Consequently, the management requirements and expectations created by those documents are difficult for nonprofit organisations to meet.[88]

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88 See *King I Report on Corporate Governance* 1994 and *King II Report on Corporate Governance* 2002 www.iodsa.co.za (accessed 24-01-2006).

4 6 Employment issues

All six organisations had comprehensive staff policy documents covering issues such as leave, recruitment, work schedule, organisational ethics and so on. In practice, these administrative provisions are supplemented by the provisions of employment law.

Apart from one organisation which had a designated personnel officer, staff issues were the responsibility of the administrative officer in the other organisations. The size of the workforce in all but one of the organisations was too small for the workers' forum provided for by the LRA, which requires a minimum of one hundred staff to constitute a workers' forum. However, periodic staff meetings were designed to serve the needs of staff.

Remuneration packages varied in the different organisations, depending on how well established each organisation was, and of course depending on its funding condition at any point in time.

4 7 Fundraising and limitations on grant funds

All organisations acknowledged that grants which are mostly from foreign sources, come with stringent limitations which do not accommodate discretionary expenditure. Moreover, budgets tend to be project-focused as funders are often unwilling to finance infrastructural development and overhead costs. Further, some grantors insist on yearly, as opposed to multi-year funding and reporting. However, the more established of the organisations seemed to enjoy a better deal as they determine their priorities and negotiate and renegotiate grant terms with funders. Overhead expenses provided in funding application budgets are usually limited to between 7% and 12% of project, but actual general overheads can rise to 28%. Usually, budget line items can only be changed with the donor's permission.

Further, funds from the United States are usually accompanied by stipulations precluding the application of such funds towards lobbying activities. This restricts the nature of advocacy that can be carried out by the recipient nonprofit organisation. Some organisations have found that by including fundraising as one of the objectives in the founding document of the organisation, approval of the founding document for purposes of registering the organisation effectively serves as approval for the fundraising objective. In order to cater for non-salary staff remuneration items such as bonuses and overtime, some of the organisations factor these into human resources costs in budgeting, while others build it into client costs.

4 8 Promoting organisational use of the law

Respondents emphasised the need to assist NPOs to build capacity in a process-oriented way, first by creating awareness about a particular law or legal provision and explaining how this will affect NPOs. Services can then be provided to NPOs to enable them comply with the law to ensure that the law will be effective when implemented.

Emerging from the interviews was the perception of law in a dual capacity of provisions to be *complied* with and provisions to be *utilised* in the work of nonprofit organisations. In respect of legal compliance, the fact that a law providing specifically for the registration of nonprofit organisations is now in operation enhances the credibility of registered organisations and makes it easier

for it to apply for donor funding. To reinforce this gain, the simplification of the procedure for a nonprofit organisation wishing to register as a company limited by guarantee was considered necessary. This is governed by s 21 of the Companies Act of 1973, dealing with incorporation of associations not for gain.

With regard to legal utility, there was an emphasis on the need to keep the law current as it is at the centre of most advocacy work carried out by nonprofit agencies as primary or secondary aspects of their mission. Even where nonprofit organisations are primarily set up for direct service delivery, they usually get involved in legislative advocacy at some point to create a facilitating legal environment for the achievement of their core mission.[89]

5 CONCLUSION

The paper has attempted to describe the legal and policy environment for the non-profit sector in its role as a key agent of development. In so doing, it started by recounting developments leading to the current legal framework for the non-profit sector, focusing on the creation of the NPO Act of 1997, which has been in operation for about thirteen years.

For South African civil society, the process of creating a new legal and policy framework for the non-profit sector was a lesson in government civil-society partnership. In particular, a lesson that emerged clearly from the campaign for the NPO Act was that the non-inclusion of government at the onset turned out to work against the process, as some organisations did not wish to participate in an exercise that seemed to be led by a particular organisation. It was felt that the presence of government earlier might have injected a neutral element, necessary for the progress of the initiative. As it turned out, this omission seemed instead to have prolonged the process. The feeling was captured by one of the leading actors in that process as follows:

> "The organisations leading the process did not sufficiently think through all possible strategies for engaging government. In fact our constructive relationship with government was as a result of government approaching us and indicating their willingness to participate and be partners in the enabling environment process . . . With the benefit of hindsight it would have been better for us to approach the Welfare Department early in 1994. This would have allowed us to recognise that there was a high level of commonality around values regarding the regulation of nonprofit organizations . . . This would have allowed government to lead the process of drafting legislation and bringing to the discussion organisations and people who may not have wanted to participate in a 'DRC led' initiative."[90]

This observation notwithstanding, the extensive consultative process yielded a more conducive legal framework for the work of organisations in the nonprofit sector in South Africa, and secured tax benefits for a larger category of

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89 This is also true of service delivery agencies elsewhere as shown by findings from a comparative study of direct service delivery and civic advocacy nonprofit organisations in the United States of America. See Okoye "Human Resource Policies in the Nonprofit Sector: A Comparison of Civic-Advocacy and Service Delivery Agencies in Baltimore" International Philanthropy Fellows research paper, Johns Hopkins University Institute for Policy Studies, Center for Civil Society Studies 2003.

90 Dangor in *Government-NGO Partnerships* 30.

organisations. In this sense, negative law provoked civil society reaction that produced positive law by which civil society is itself governed.

The paper also described in some detail, from empirical research, the ways in which nonprofit organisations engage with the law. Emerging from this was the consensus that a key positive aspect of legal provisions is that they provide a clear regulatory framework for the registration and work of nonprofit organisations, and by so doing, confer credibility on compliant organisations. On the other hand, the registration requirements of the NPO Act tend to have an exclusionary effect on smaller organisations which find it difficult to meet those requirements and so, are sometimes excluded from funding that could otherwise be available to them. This challenge has been taken up by specialised nonprofit entities which offer capacity-building support to such organisations.[91] Examples include the Nonprofit Consortium (previously known as the Nonprofit Partnership), [92] which holds workshops on a variety of relevant issues around registration and compliance with the Nonprofit Organisations Act and the Southern African NGO Network (SANGONeT) [93] which offers information and technology support to nonprofit organisations in South Africa.

Also emerging from empirical findings was the fact that the NPO Act indirectly introduced much needed regulation to the sector. This is because although registration under the Act is not compulsory, it has become a benchmark for funders in making grants to nonprofit organisations. Consequently, any organisation seeking funding from certain agencies will at least need to create a constitution in compliance with the requirements of the NPO Act. Such an organisation will also need to submit periodic reports. Still, more sector-specific guidelines are considered desirable to create for the nonprofit sector, a governance structure similar to that which the *Kings I, II and III Reports* create for the business sector.[94]

The recently released *King III Report* follows its predecessors in focusing on the business sector and was produced, not necessarily to include nonprofit organisations, but to respond to the new provisions of the Companies Act of 2008 in the context of contemporary international corporate governance practice.[95] It is submitted that the new Act does provide some governance for nonprofit organisations, but it still remains to be seen how far-reaching its provisions will prove to be in relation to the variety of organisations which make up the nonprofit sector.

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91 Nonprofit organisations offering these kinds of services are known as "infrastructure organisations". For more on this, see "Building the Organisational Infrastructure of Civil Society" Statement of the 14th Annual Johns Hopkins International Fellows in Philanthropy Conference, Istanbul, Turkey (01-07-2003 – 03-07-2003)1 note 1 http://www.jhu.edu/~philfellow/actionstatements/PDFs/Turkey.pdf (accessed 03-12-2008).

92 See http://www.npc.org.za/word/siyakha-july.doc (accessed 03-12-2008).

93 See http://www.sangonet.org.za/portal/index.php?option=com content&task=view&id=2065&Itemid=250 (accessed 03-12-2008).

94 See part 4 5, in which the *King I* and *II* reports are critiqued as not being suited to the needs of nonprofit organisations, having been more specifically tailored to the activities of the business sector. The *King III* report remains dedicated to the commercial business environment.

95 See http://www.iodsa.co.za/downloads/documents/King Code of Governance for SA 2009.pdf (accessed 26-03-2010).

Finally, the challenges faced by nonprofit agencies in the effort to comply with the NPO Act requirements could be a justification of the critique made by Swilling and Russell that the NPO Act was enacted without much empirical knowledge of the size and structure of the sector in South Africa.[96] If this is so, then directions for further research have already emerged.

96 Swilling and Russell *The Size and Scope of the Nonprofit Sector in South Africa* 5.

NOTES AND COMMENTS

PROTECTING CHILD WITNESSES AND VICTIMS FROM "UNDUE" STRESS AND SUFFERING IN CRIMINAL TRIALS: *S v MOKOENA*[1]

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1 INTRODUCTION

Children have a right to enjoy their childhood.[2] This right is increasingly being infringed upon as more and more children are deprived of the opportunity to grow up in a stable environment, free of fear, trauma and violence.[3] A child's best interest is of paramount importance in every matter concerning the child.[4] Most children are ill-equipped – developmentally, cognitively, and emotionally – to withstand the stress of testifying in criminal proceedings.[5] This vulnerability becomes more relevant when proceedings centre on the traumatic events and abuse in which children are the focal participants.[6] In an effort to safeguard the interests of children involved in legal processes, more specifically in criminal trials, statutory instruments have been enacted with the intention to protect child victims and witnesses.[7] Despite the presence of the purported statutory instruments alluded to above, the lack of protection for child witnesses still begs for judicial attention.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act (hereafter "the Amendment Act")[8] was introduced in recent times to provide protection to children from incidents of violence and pornography. An analysis

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1 *S v Mokoena, S v Phaswane* 2008 2 SACR 216 (T).
2 A child is deemed to be a person under the age of 18 years: s 28(3) of the Constitution of the Republic of South Africa 1996 (hereafter "the Constitution"). In terms of s 17 of the Children's Act 38 of 2008, a child, whether male or female, becomes a major upon reaching the age of 18 years.
3 See generally, Zedner "Victims" in Maguire, Morgan and Reiner (eds) *The Oxford Handbook of Criminology* (1997) 577-612.
4 Section 28(2). On a related note, see also Simon "Pre-recorded videotaped evidence of child witnesses" 2006 *South African Journal of Criminal Justice* 56 56-57.
5 Whitcomb "Legal intervention for child victims" 2003 *Journal of Traumatic Stress* 149-157.
6 *Ibid.*
7 Sections 170A(1), 153(3), 158 and 164(1) of the Criminal Procedure Act 51 of 1977.
8 Act 32 of 2007.

of the Amendment Act points towards a failure on the part of the legislature to give effect to children's constitutional rights that are clearly spelt out in s 28 of the Constitution. The matter of *S v Mokoena* highlights the fact that the ordinary procedures of the criminal justice system are inadequate to meet the needs and requirements of the child witness. In *Mokoena* the court raised several constitutional issues relating to the position of children involved in criminal trials and emphasised that the criminal justice system faces critical systematic challenges.[9] The issue of the presence of a support person during the trial to assist child victims was also canvassed by Bertelsmann J, whom we firmly believe missed an ideal opportunity to address the contentious issue of providing legal representation for child complainants in criminal matters adequately – an issue which could go a long in protecting the child in a courtroom environment.

2 FACTS

In *S v Mokoena* the high court was required to confirm the verdict and sentencing in two separate matters in which the accused were found guilty of rape by the regional court. In the first matter[10] the accused, Mr Mokoena, was found guilty of the rape of an 11 year old child, and in the second matter[11] the accused, Mr Phaswane, was found guilty of the rape of a 13 year old child. The court was not satisfied with the manner in which both cases were handled at different stages. Some of the concerns raised by the court were that the complainants were only examined by a medical practitioner several days after the alleged rape, the public was allowed into the court after the complainant had completed her testimony, the record did not indicate whether the complainant was accompanied to court by a parent or guardian, and that there was no consideration given as to whether the 13 year old complainant should be allowed to testify through an intermediary.

The high court decided to consolidate the two matters for the purpose of dealing with the constitutional issues. The court decided to deal with the constitutional issues before the issue of the correctness of the convictions could be addressed.[12] In a nutshell, the court considered the validity of several provisions of the Criminal Procedure Act (hereafter "the Act") as amended by the Amendment Act.

The key constitutional issues raised by the high court included first, the constitutionality of s 170A(1) of the Act which deals with the appointment of an intermediary to assist a child under 18 years during their testimony should it be discerned that such a child may be exposed to undue mental stress or suffering during criminal proceedings. The court further considered the constitutionality of s 170A(7) of the Act which requires the presiding officer to furnish reasons for the refusal of the appointment of an intermediary for a witness under the age of 14 years. Additionally, the constitutionality of s 153 of the Act which determines the circumstances under which the court can order that criminal proceedings shall not take place in open court was also considered. The other provisions that

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9 *Mokoena* 224.

10 The regional court sat at Bethal.

11 The regional court sat at Pretoria North.

12 In this case note, we confine our discussion to the constitutional propriety or otherwise of the impugned legislative provisions under discussion. We make no comments regarding the correctness of the convictions.

were scrutinised for constitutional compatibility were ss 158[13] and 164(1) of the Act[14].

3 FINDINGS OF THE HIGH COURT

3 1 Unconstitutionality of section 170A(1)

Section 170A(1) of the Act as amended by the Amendment Act reads as follows:

> "Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress and suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as intermediary in order to enable such witness to give his or her evidence through that intermediary."

The court declared s 170A(1) of the Act unconstitutional on the basis that it grants a discretion to the trial court to appoint or not to appoint an intermediary when a child is called to testify in criminal proceedings. The court emphasised that the appointment of an intermediary for child victims is indispensable in all criminal matters due to the mental anguish and trauma experienced by the child in a foreign environment (courtroom) and therefore there should be no discretion conferred on the court.[15] We agree with the court's finding on this point.

It was further held that the appointment of an intermediary would always be in the best interests of a child. The court noted that a child is exposed to as much stress and mental anguish as an adult in the daunting surroundings of a courtroom. To demand that the child victim be exposed to "undue" stress and suffering before the services of an intermediary may be considered is illogical.[16] The court was in no doubt that s 170A(1) was in direct conflict with s 28 of the Constitution.

3 2 Unconstitutionality of section 170A(7)

Section 170A(7) of the Act as amended by the Amendment Act reads as follows:

> "The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of child complainants below the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings."

The high court held that it would be irrational for any court to distinguish between children below 14 and those above 14 years since the levels of pain, trauma and mental anguish that they experience cannot be said to vary or diminish with age.[17] As Bertelsmann J pointed out, "it is not difficult to imagine a case where the interests of justice would not best be served by the appointment of an intermediary to a child victim of such tender age, nor is it easy to imagine grounds upon which such a request might be dismissed – always provided that an

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13 The relevant section allows the court to order that a vulnerable witness testify by way of an electronic device such as a video recording.

14 The section enables the court to hear the evidence of any person who does not understand the importance of the oath or a solemn affirmation without such person having to give a solemn undertaking, with the proviso that the court must still admonish such a person to speak the truth.

15 *Mokoena* 236.

16 *Ibid.*

17 *Mokoena* 238.

intermediary is available at all."[18] Section 170A(7) was held to be inconsistent with s 28(2) of the Constitution.

3 3 Unconstitutionality of section 153

Section 153(3), as amended by the Amendment Act reads as follows:

> "In criminal proceedings relating to a charge that the accused committed or attempted to commit-
>
> (a) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, towards or in connection with any other person;
>
> (b) any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, towards or in connection with any person; or
>
> (c) extortion or any statutory offence demanding from any other person some advantage which not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage, the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that the judgement shall be delivered and sentence shall be in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby."

Bertelsmann J expressly pointed out that the word "may" ought not to have been used in subsec (3), as it vests the court with discretion to decide whether proceedings shall be in open court.[19] It was held that in some cases a court might decide that the fact that the complainant is a minor may not in itself be a justification for the exclusion of the public from the proceedings.[20] It was further held that removing the word "may" will take away the discretion that a court has to refuse an application for proceedings not to be held in an open court where the minor or the parents or guardians of such a minor bring the said application.[21]

The court noted that subsec (4) dictates that in criminal proceedings involving a minor accused, the court "shall" sit *in camera*, but that subsec (5) vests the court with discretion to decide that proceedings should proceed *in camera* if a child witness is called to testify.[22] Bertelsmann J stressed that a child complainant or witness is exposed to as much stress as a child accused during court proceedings and there should be no distinction between the two when deciding whether the matter should be held *in camera*.[23] In the final analysis, the court found ss 153(3) and 153(5) of the Act to be unconstitutional.

3 4 Unconstitutionality of Section 158

Section 158(5) of the Act reads as follows:

> "The court shall provide reasons for refusing any application by the public prosecutor for the giving of evidence by a child complainant below the age of 14

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18 *Mokoena* 237.
19 *Mokoena* 241.
20 *Ibid*.
21 *Ibid*.
22 *Ibid.*
23 *Ibid*.

> years by means of closed circuit television or similar electronic media, immediately upon refusal and such reasons shall be entered into the record of the proceedings."

The court held that s 158(5) discriminates against children below the age of 14 years.[24] A 13 year old is subject to the same level of mental anguish, trauma and suffering as a 17 year old during a criminal trial.[25] Bertelsmann J found no reason why a court should not be obliged to consider the use of closed circuit television or electronic media for all children where such aids are available. The court therefore held s 158(5) to be unconstitutional.

3 5 Unconstitutionality of section 164(1)

Section 164(1) of the Act reads as follows:

> "Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, *in lieu* of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth."

The court held that s 164(1) of the Act implies that a child who displays difficulty in differentiating between truth and falsehood, is automatically incompetent to testify in court.[26] However, the section fails to take into account that a witness, due to tender age, may not be able to explain his or her understanding of abstract concepts such as truth and lies, but that the witness may still be able to illustrate his or her ordeal, even if it be with the assistance of devices such as puppets and dolls.[27] Bertelsmann J held that this section clearly conflicts with the best interests of the child standard and the Constitution which aims to create an atmosphere which is conducive to children testifying in a courtroom environment. It was held that s 164(1) is unconstitutional because it fails to protect the best interests of the child as entrenched in s 28(2) of the Constitution.

3 6 Protecting the child victim through the presence of a support person

Section 153(5) of the Act reads as follows:

> "Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorised by the court."

The court held that the provisions of s 153 of the Act are wide enough to accommodate the provision of a support person if requested, to assist the child during criminal proceedings.[28] The court narrowly interpreted the provision to include only persons who would play no part in the trial at all, except for those providing the necessary support and comfort to the child during the proceedings. However, due to the lack of evidence relating to the definitive role of such a person, the court was hesitant to go into detail regarding the issue in question. We submit that this could have been the very point at which the court could have

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24 *Mokoena* 243.
25 *Mokoena* 242.
26 *Mokoena* 244.
27 *Ibid.*
28 *Mokoena* 249.

intervened and extended the scope of a "support person" to include a legal representative of the child.

3 7 A view from the Constitutional Court

The Constitutional Court, in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*,[29] to which the judgment from *Mokoena* had been referred for confirmation, disagreed with the court *a quo's* finding that the abovementioned provisions were unconstitutional. The Constitutional Court found that the high court only had jurisdiction to deal with s 170A(1) of the Act.[30] The other provisions – ss 164(1), 170A(7), 153(3) and 158(5) were still in bill form and only the Constitutional Court could decide on the constitutional validity of the said provisions.[31]

On the constitutional validity of the abovementioned provisions, the Constitutional Court favoured a conservative approach, and it directed that courts must interpret legislation to conform with the Constitution rather than having the statute books rewritten. The court held that s 170A(1) is constitutionally valid as the discretion afforded to presiding officers is necessary in that it allows presiding officers to assess the needs and desires of each child which conforms with s 28(2) of the Constitution.[32] The court was also of the view that younger children may need more protection than older ones as vulnerability decreases with age. Hence it held that ss 158(5) and 170A(7) were not unconstitutional.[33] On the issue of differentiation in s 158(3) between a child accused and a child witness, the court held that the differentiation does not amount to unfair discrimination as the protection afforded to each child is rationally and proportionally related to the amount of time that each child spends in court. The Constitutional Court held that a reliance on the evidence of a child who cannot grasp the meaning of concepts such as truth and falsehood would undermine the accuser's right to a fair trial and concluded that s 164(1) was not unconstitutional.[34] Interestingly, despite the abovementioned provisions being held to pass constitutional muster, the Constitutional Court expressed the concern that there are judicial officers who have not acquired the skill of questioning children. This confirms our viewpoint that child victims are not adequately protected in the courtroom environment.

4 CRITICAL MATTERS ARISING FROM *MOKOENA*

4 1 Shortcomings of the South African criminal justice system

Section 28(2) of the Constitution clearly spells out that a child's best interests are of paramount importance in every matter concerning the child.[35] The high court in *Mokoena* stressed that a child is ill-equipped to deal with the adversarial environment of a courtroom and the court was of the view that exposing a child to foreign legal language and confrontational cross examination without proper assistance were not in the best interests of the child.[36] Bertelsmann J went on to

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29 2009 2 SACR 130 (CC).
30 Para 50.
31 *Ibid.*
32 Para 123.
33 Para 161.
34 Para 166.
35 It is submitted that if a child is not subjected to the trauma of the courtroom occasioned by the adversarial nature of our criminal procedures, this would be in the child's best interest.
36 *Mokoena* 232-233.

look at issues raised in the comparable case of *S v Stefaans*,[37] where Mitchell AJ noted that the testimony of a child in cases involving sexual offences exposed the child complainant to further trauma possibly as severe as the trauma caused by the crime itself.[38] *Mokoena*'s case recognises a legitimate concern on the part of most South African citizens that our criminal justice system does not give due recognition to the primacy of children's interests. Bertelsmann J stressed that children are ill-equipped to deal with confrontational and adversarial settings in which adults dictate the subject matter.[39] It was further held that the child is an alien in the courtroom since our legal system was designed for adults.[40] One cannot expect a child of tender age to make sense of legal jargon that has taken legal practitioners years to master. Bertelsmann J added that only a small portion of sexual assaults are reported to the authorities and fear of "secondary victimisation" by the victims plays a huge role in their reluctance to come forward.[41]

Mokoena's case underlines a deep-rooted apprehension among child law practitioners that key legislative instruments designed to protect children in the courtroom environment fail to give effect to children's constitutional rights as spelt out in the Constitution. As a way forward, Bertelsmann J declared that criminal trials involving child complainants be afforded special attention, especially at the investigative and prosecution phases.[42]

It was also suggested that children's constitutional rights as buttressed by support structures in the form of electronic devices and intermediaries during criminal trials, be respected.[43] The court went on to add that all court officials involved in the trial must have adequate expertise to deal with vulnerable child witnesses or complainants. Bertelsmann J appropriately implored the Minister of Justice, the National Commissioner of the South African Police Services and the Director of Public Prosecutions to address and eliminate the existing shortcomings in the criminal justice system.[44]

4 2 The *Mokoena* judgment in a broader perspective

Mokoena's case correctly points to a number of shortcomings in the present criminal justice system in relation to the protection of child victims. It clearly drives the point home that neither the courts nor their supporting institutions give due recognition to the primacy of children's interests.[45]

Bertelsmann J rightly suggests that the criminal justice system appears to be lagging behind other areas of law when it comes to protecting the rights of a

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37 1999 1 SACR 182 (C).
38 *Mokoena* 235.
39 *Mokoena* 232-233.
40 *Ibid.*
41 In the matter of *K v The Regional Court Magistrate NO* 1996 1 SACR 434 (E) it was held that in cases of sexual assault and rape, the fear of investigation and trial seriously impedes the combating of these crimes; and the witness experiences difficulties in comprehending the language of legal proceedings, understanding the role of the various participants and coping with confrontation and extensive cross examination.
42 *Mokoena* 247.
43 *Ibid.* On the desirability and possible efficacy of the use of electronic media in the form of video tapes, see generally Simon 2006 *South African Journal of Criminal Justice* 56-78.
44 *Ibid*.
45 *Mokoena* 239.

child in a courtroom environment. A recent case that illustrates his point is the matter of *Legal Aid Board v R.*[46] In this case, Wallis AJ held that in divorce matters where parties are contesting the issue concerning care of the minor child, substantial injustice to the child would result if the child were not afforded the assistance of a legal practitioner to ensure that the voice of the child is heard. The Children's Act[47] provides for legal representation of children in all matters brought before the Children's Court. In civil proceedings, the Constitution provides for children to be assigned a legal practitioner by the state.[48] It is only in criminal proceedings that a child complainant is prejudiced by the lack of protection provided to him or her in a court of law.[49]

Despite *Mokoena*'s case setting the tone for a possible overhaul of the criminal justice system in matters involving children, we firmly believe that the court missed an ideal opportunity to address the contentious issue of providing legal representation for child complainants in criminal matters adequately. If such representation were to be allowed it could go a long way in protecting the child in a courtroom environment.[50]

On a positive and perhaps heartening note, a landmark application for legal representation for minor complainants in criminal proceedings was filed in the recent matter of *S v McKenna.*[51] Interestingly, the application was not made by the state, but by the advocate instructed to watch over proceedings by the complainant's family. The basis for the application was to prevent an invasion of the child's constitutional rights to privacy and dignity.[52] The legal representative applied for permission to be allowed to object to any improper or irrelevant questions put to the complainant by the prosecution or the defence. Regrettably, the regional court dismissed the application on the basis that it did not have the jurisdiction to grant the relief sought by the applicant. It is interesting to speculate on what could have happened had the court ruled that it had jurisdiction and considered the application. One is tempted to ask the question whether the dismissal of the application was a lost opportunity or a disaster averted. Only time will tell.

The fact that the issue of legal representation keeps resurfacing, points to a need to consider the appointment of a legal practitioner as a support mechanism to a child complainant. Such a representative could ameliorate the shortcomings in our criminal justice system as outlined above. The high court in *Mokoena* did have the jurisdiction to deal with the matter, and it is disappointing that Bertelsmann J did not see the need to embark on such an "unchartered course".[53] Our courts may be hesitant to take the bold step in granting legal representation to child complainants on the basis that such an extension of the child's rights

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46 2009 2 SA 262 (D).
47 Act 38 of 2005.
48 Section 28(h) of the Constitution.
49 It is noteworthy to point out that s 35 of the Constitution deals with the rights of arrested, detailed and accused persons and affords them the right among others, to legal representation [(s 35 (2) (b)] but the list does not extend to child victims.
50 See our remarks with specific regard to s 53 (7) of the Constitution in part 3 6 above.
51 The case is unreported. The application was made in the Knysna Regional Court in October 2009.
52 As spelt out in ss 14 and 10 of the Constitution respectively.
53 *Mokoena* 249.

may infringe on the accused's right to a fair trial, more so his constitutional right to challenge evidence. We believe that granting legal representation to child complainants would not in any way infringe on the accused's right to a fair trial since this will not deny the accused his or her right to cross-examine the child witness. Even if it were deemed that an accused's right to a fair trial was being infringed on the basis that allowing representation will diminish the flow of the cross-examination, such a limitation would be reasonable and justifiable in an open and democratic society which views children as a vulnerable group in dire need of protection.[54]

Our law does provide for the use of support structures such as intermediaries and electronic devices outside the courtroom, and we see no reason why an additional support structure in the form of legal representation should not be allowed. Until the issue is revisited, our law in the form of s 153 of the Criminal Procedure Act does give the courts a discretion to allow a support person in the form of a family or friend to assist the child complainant during proceedings as pointed out by Bertelsmann J in *Mokoena*.[55] The use of a support person will no doubt ease some of the mental anguish and trauma experienced by the victim during the trial process.

5 DIRECTIVES FROM THE CONSTITUTIONAL COURT

Despite the Constitutional Court managing to interpret each of the provisions invalidated by the high court in such a way that they were not inconsistent with s 28(2) of the Constitution, it acknowledged that the courts have difficulty in interpreting and applying legislation correctly in the context of sexual offences in criminal proceedings.[56] The Constitutional Court reiterated some of the concerns raised in *Mokoena* about the administration of justice in the sphere of sexual offences. Ngcobo J on behalf of the majority had this to say: "[t]he record suggests a disturbing inconsistency between the promises that the laws make and the implementation of the laws."[57] He added that "[p]arliament has made laws to protect child complainants from undue stress or suffering that may result from testifying in court."[58] To this end, ss 170A(1) and 170A(3) promise child complainants protective measures such as the appointment of an intermediary and the creation of child-friendly courts.[59] The non-availability of these measures contemplated in the Criminal Procedure Act is not only a breach of the relevant provisions of the Act, but it is indeed a breach of the Constitution."[60]

The court went on to add that child complainants in sexual offence matters are some of the most vulnerable members of society. Even though they are not parties to the proceedings, they have constitutional rights and the right to have their best interests considered is of paramount importance.[61] The court went on

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54 Section 36 of the Constitution states that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

55 *Mokoena* 249.

56 *Director of Public Prosecutions* para 200.

57 Para 201.

58 Para 202.

59 *Ibid*.

60 *Ibid*.

61 Para 200.

to replace the supervisory order made by the high court with its own order, requesting the Director-General for the Department of Justice and Constitutional Development to furnish the following information:

> "(a) A list of regional courts indicating how many intermediaries each regional court requires to meet its needs and how many intermediaries each regional court has.
>
> (b) If the regional courts do not have the number of intermediaries required to meet their needs, the steps which are being taken to ensure that each regional court has the number of intermediaries necessary to meet its needs.
>
> (c) A list of regional courts indicating which of them have the following facilities contemplated in s 170A(3) of the CPA:
>
> (1) separate rooms from which children may testify;
>
> (2) closed circuit television facilities;
>
> (3) one-way mirrors
>
> (d) To the extent that there are regional courts that do not have all these facilities in (c) above, the steps which are being taken to provide these facilities to these regional courts."

Mokoena has at the very least caused the highest court of South Africa to acknowledge the failure of the criminal justice system to adequately protect children in sexual offence matters.

6 CONCLUSION AND WAY FORWARD

There is no doubt that the legislature has made an effort to introduce new laws to protect the rights and interests of the minor witness in a courtroom environment.[62] *Mokoena*'s case clearly illustrates the notion that these laws do not collectively safeguard the best interests of the child.

The Amendment Act was introduced specifically to afford complainants in sexual offences the most complete form of protection that the law can provide. However, the Amendment Act seems to overemphasise the punitive measures towards sexual offenders and underemphasise the protective measures towards complainants that many predicted would be the bastion of the Amendment Act. The Act remains silent on key issues such as legal representation for victims, protection of vulnerable witnesses and treatment of children in court. However, despite the aforementioned shortcomings, there are key sections in the Amendment Act that, if implemented correctly, could go a long way in improving the plight of the child victim.[63]

International trends demand that steps must be taken to protect the child in court, and key to achieving this is by mitigating the adversarial nature of the trial.[64]

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62 The Children's Act and Amendment Act are key legislative instruments introduced into the South African legal system to protect and safeguard the interests of children.

63 Sections 62-65 of the Amendment Act provides for a national policy framework that calls on all departments and institutions to move towards a coordinated and progressive approach that will improve the position for victims of sexual abuse. The National Policy Guidelines for Victim Empowerment is in place and a key objective is to empower victims by providing a friendly criminal justice system that reduces the negative impacts on victims.

64 Article 12(2) of the United Nations Convention on the Rights of the Child assures the child "the opportunity to be heard in any judicial or administrative proceedings affecting the

continued on next page

Countries such as Ireland have introduced legislation allowing for separate legal representation for complainants in applications where permission has been requested for evidence regarding their previous sexual history or character, to be led.[65] The criminal justice system in Ireland has shown a significant shift towards a deeper understanding of the position of victims of violence. Victimisation studies are carried out frequently and victim impact reports are now part and parcel of the criminal justice system.[66] The role of child victims has been strengthened with the introduction of electronic facilities and the abolition of corroborative evidence.[67] In Ireland, the trend is for statements to be taken down jointly by the *gardai*[68] and assessment personnel so as to reduce the number of times the child has to discuss abuse.

Ireland has taken a bold step in rectifying the deficiencies in her criminal justice system, and it is time that South Africa follows suit. The United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance.[69] Section 28(2) of the Constitution, declares that: "the child's best interests are of paramount importance in every matter concerning the child". However, as illustrated earlier some of the key legislative instruments protecting children in South Africa are inadequate and in conflict with the Constitution.

There may never be a "perfect" system to deal with children especially in sexual offences. However, the implementation of therapeutic support programs and counsel sessions, acquainting children with the court process and reducing multiple interviews of child victims will help minimise the trauma and stress that the child victim is exposed to during criminal proceedings.[70] By moving towards a system free of prejudices and bias, a system which safeguards the interests of the child victim at all material times, we can help children become empowered witnesses. The process has commenced – recent legislation in the form of the Children's Act, the Amendment Act, the Child Justice Act[71] and National Policy Guidelines for Victim Empowerment, may be viewed as a positive intervention in this regard. However, the key to determining and measuring any improvement in the present system will rest on the implementation of the above key legislative instruments.

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child, either directly or through an impartial representative or an appropriate body, in a manner consistent with the rules of national law". Article 4(2) of the African Children's Charter also echoes this view.

65 Section 34 of the Sex Offenders Act 2001.

66 O'Connell and Whelan "Crime victimization in Ireland" 1996 *Irish Criminal Law Journal* 112.

67 Section 13 and 28 of the Criminal Evidence Act 1993.

68 A person who exercises the functions of a police officer.

69 Article 25(2).

70 See also Jenkins "Reducing trauma for children involved in dependency and criminal court" 2008 *Child Law Practice* 1 5.

71 Act 75 of 2008.