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ARTICLES

NOTES & COMMENTS

The Judiciary as a Site of the Struggle for Political Power: a South African Perspective

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1 INTRODUCTION

Africa may have won the battle against colonialism, but the struggle towards constitutionalism and democracy is far from over.[1] While constitutionalism is about the locus and limits of power, democracy is about formal and substantive equality and respect for rights.[2] The relationship between the two concepts is one marked with contradictions and at times paradoxes. A political system can be constitutional without necessarily being democratic, but a true and sustainable democracy is impossible without constitutionalism.[3] Africa has embraced these paradoxes. It was Okoth-Ogendo who wrote about the African constitutional paradox of committing to the idea of the constitution, while at the same time rejecting the classical notion of constitutionalism.[4] Constitutionalism is firmly rooted in the doctrine of separation of powers and the subordination of the exercise of governmental power to legal rules.[5] One consistent failure of the post-independence African constitutions that Okoth-Ogendo laments has been their failure to regulate the exercise of power.[6]

Democracy has become a central requirement for international relations. Most countries are either striving towards this ideal, or would like to create the impression that they are striving towards it. In Africa, however, the strife towards democracy has manifested itself in most countries opting to have elections without necessarily having democracy.[7] Democracy requires a strict adherence to institutions and processes, and such an adherence is still a pipe dream in most

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1 Mangu "Challenges to Constitutionalism and Democratic Consolidation in Africa" 2005 *Politeia* 315–333.

2 Mangu 2005 *Politeia* 318–320.

3 Mangu 2005 *Politeia* 321.

4 Okoth-Ogendo "Constitutions without Constitutionalism: Reflections on an African Political Paradox" in Shivji (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 6.

5 See Mahao "The constitutional state in the developing world in the age of globalisation: from limited government to minimal democracy" 2008 *Law, Democracy and Development* 1–19.

6 Mahao 2008 *Law, Democracy and Development* 4.

7 Mangu "Constitutional democracy and constitutionalism in Africa" 2006 *Conflict Trends* 6.

African countries.[8] According to Mangu, the failure to adhere to institutions and procedures has manifested itself in, among others, the rebellion against elections which have been declared free and fair, the attempt by political leaders to amend constitutions to secure a third term in office, even where the constitutions under which they were elected allow only two terms, or the misguided notion that one does not organise an election to lose it.[9] Though a greater majority of African countries are still struggling to consolidate democracy and constitutionalism, Mangu writes that Benin, Botswana, Mali, Mauritius, Sao Tome and Principe, and South Africa provide a ray of hope for the consolidation of democracy.[10] However, even these countries that have managed to consolidate democracy and constitutionalism are still struggling to demarcate the contours of power within the doctrine of separation of powers between the executive, the judiciary and the legislature. Both the perceived and the actual role of the judiciary, within the matrix of the doctrine of separation of powers, has become a challenge over the years, even in developed democracies such as the United States of America. The challenge becomes more pronounced when the judiciary delivers judgments that are either contrary to government policies, or strikes down certain laws of the land as being unconstitutional. The judiciary trades on nothing but its reputation, legitimacy and respect from the public in general. An assertive judiciary often finds itself subjected to unwarranted attack by those who are, in fact, supposed to protect it. In the words of Diescho, "the relative, but not absolute, insulation of the judiciary means it is apart from politics but still part of political forces. Those forces operate to protect judges and, at times, to threaten them".[11]

As watchdogs of democracy and arbiters of disputes, it is inevitable that some of the disputes that come before the courts would not only be of a political nature but would have serious political ramifications.[12] Depending on the merits of the case, the courts have in some cases decided in favour of the executive while in others, they have decided against policies of the ruling party. The undefined contours of the separation of powers create a necessary tension within the doctrine of separation of powers, which makes for interesting observation. Though vulnerable to domination by those in power and interested stakeholders alike, the decisions of an assertive judiciary can have far-reaching political consequences for those in power.[13] Zimbabwe provides an extreme example of the response of the executive to judges who do not toe the government line.

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8 See Mangu 2006 *Conflict Trends* 5.

9 Mangu 2006 *Conflict Trends* 5–6.

10 Mangu 2005 *Politeia* 321–322.

11 Diescho "The Paradigm of an Independent Judiciary: Its History, Implications and Limitations in Africa" in Horn and Bösl (eds) *The Independence of the Judiciary in Namibia* (2008) 27.

12 By political ramifications, this article refers to decisions that impact on political questions like election results, the constitutionality of an attempt to amend the constitution so as to give a third term of office to the incumbent president, or when the courts are drawn into the political factions related to the succession race within political parties.

13 See VonDoepp "The problem of judicial control in Africa's neopatrimonial democracies: Malawi and Zambia" 2005 *Political Science Quarterly* 276–278 for a discussion of the role played by the courts in both countries to thwart efforts of those in power to extend their term of office.

Such judges were witch-hunted, purged from the bench and then replaced with judges who are more sympathetic to the ruling party.[14]

While the Zimbabwean situation may be too extreme, it is an almost impulsive reaction for almost every government to want to have a firm grip on the judiciary. As VonDoepp writes:

> "As much of the comparative judicial development points out, it is only under peculiar circumstances that governments develop interests in leaving intact the power of judiciaries. Given the power of courts to undermine the policy objectives and staying power of the government, most governments seek to rein judiciaries. Indeed, studies of judicial politics in emerging democracies indicate that elected officials have been eager and often effective in enfeebling judicial institutions to the point that they no longer represent such a threat."[15]

Institutionally, most states have constitutional and statutory requirements in place to ensure the independence of the judiciary.[16] Despite the existence of these mechanisms, influence, domination and undermining of the judiciary can manifest itself in small measures such as the thwarting of upward mobility of judges who do not tow the government line. Alternatively, the judiciary may be frustrated by the non-compliance with judgments of the courts,[17] calling judges names and vilifying them when they decide contrary to a particular interest group or constantly mobilising crowds outside the courts each time a matter of a particular interest group is presided upon. All of these scenarios have been a reality in South Africa. Compared to what happened in Zimbabwe, these may be insignificant, but cumulatively they do have the potential to constitute a threat to the independence of the judiciary.

In light of the foregoing background, this article seeks to discuss the role of the judiciary in a nascent democracy like South Africa. Historically, the apartheid minority white government used, among others, the courts to advance its racist ideology of apartheid. Freedom fighters also used the same courts to their advantage by making political statements that they would otherwise not have made, given the fact that most of them were banned. Thus, as Le Roux writes, the courts became sites of resistance.[18] Recently, the struggle for power within the dominant ruling African National Congress (hereafter "ANC") was waged among others in the courts. As the court proceedings unfolded against the then deputy-president of the ANC, Mr Jacob Zuma, his supporters voiced allegations of abuse of power against the then President of South Africa, Mr Thabo Mbeki. In the Zuma-Mbeki tussle for power, the courts became a site of the struggle for power within Africa's oldest liberation movement.[19]

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14 See Saller *The Judicial Institution in Zimbabwe* (2004) 42–47 and Saller "Zimbabwe" in Van De Vijver (ed) *The Judicial Institution in Southern Africa: A Comparative Study of Common Law Jurisdictions* (2006) 252–260.

15 VonDoepp 2005 *Political Science Quarterly* 276.

16 See Saller *The Judicial Institution in Zimbabwe* and Malleson and Russell (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (2006).

17 For non-compliance in South Africa, see De Vos "Between moral authority and formalism: *Nyati v Member of Executive Council for Department of Health*, *Gauteng*" 2009 *Constitutional Court Review* 409–427.

18 Le Roux "Conscience against the law: Mahatma Ghandi, Nelson Mandela and Bram Fischer as practising lawyers during the struggle" 2001 *Codicillus* 34.

19 See Davis and Le Roux *Precedents and Possibility: The (Ab)use of Law in South Africa* (2009) 191 who write that "Mr Zuma and his supporters have consistently argued that the

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To present a descriptive analysis of the use of the courts, this article will give a political background to the independence of the judiciary in South Africa. A constitutional framework for the doctrine of separation of powers, as entrenched in the Constitution of the Republic of South Africa,[20] will be presented. The article will then present a discussion of both the constitutional and statutory mechanisms in place for the appointment of judges, and the safeguard measures which are intended to guard against interference with the work of judges. In the final part, the article will discuss the much-contested topic of the transformation of the judiciary, and then conclude.

2 POLITICAL BACKGROUND TO THE INDEPENDENCE OF THE JUDICIARY IN SOUTH AFRICA

Historically, the South African judiciary was used as an institution that gave effect to oppressive laws enacted by the apartheid minority government. As a result, the judiciary suffered a legitimacy crisis and people lost confidence in it.[21] The might of the apartheid government manifested itself in, among others, the courts. It was in these courts that those opposed to apartheid and its policies were given harsh sentences, including death. As pointed out above, freedom fighters like Mandela used the same courts to discredit the oppressive laws of the apartheid regime. Writing in his autobiography about one of his numerous appearances in court, Nelson Mandela states that:

> "During the proceedings, the magistrate was diffident and uneasy, and would not look at me directly. The other attorneys also seemed embarrassed, and at that moment I had something of a revelation. These men were not only uncomfortable because I was a colleague brought low, but because I was an ordinary man being punished for his beliefs. In a way I had never quite comprehended before, I realised the role I could play in court and the possibilities before me as a defendant. I was the symbol of justice in the court of the oppressor, the representative of the great ideals of freedom, fairness and democracy in a society that dishonoured those virtues. I realised then and there that I could carry the fight even within the fortress of the enemy."[22]

Mandela and his co-accused used the courts to enhance their struggle. Legal niceties were abandoned in the interest of advancing the course of the struggle. The following is an example of the exchange that took place within the court of law:

> "–Accused number One, Nelson Mandela, how do you plead to the indictment served upon you?
>
> –The government should be in the dock, not me. I plead not guilty.
>
> –Accused number Two, Walter Sisulu, how do you plead?

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interference from ministers of state and political supporters of Mr Mbeki were behind attempts to prosecute Mr Zuma. In short, whatever the merits of the criminal charges on which we cannot express a view, the case was set up in the public discourse as a case of vicious factional party politics being fought out in the courts; political warfare had been replaced (or supplemented) by vigorous and expensive lawfare. The institutions of the legal system were new fronts in this battle."

20 The Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").

21 Hlophe "The role of the judges in a transformed South Africa – problems, challenges and prospects" 1995 *SALJ* 24.

22 Mandela *Long Walk to Freedom* (1995) 375–376.

> –It is the government which is guilty, not me . . .
> The judge intervened. 'I do not want any political speeches here. You may plead guilty or not. But nothing else.'
> Walter Sisulu went on as if the judge had not spoken."[23]

The trials of these freedom fighters were characterised by long detailed speeches that not only explained why they were on the "wrong side" of the law, but also advanced the course of the struggle by ensuring that they pointed out the evils of the apartheid system.[24] The most famous of these speeches was the one delivered by Nelson Mandela in his 1962 trial.[25]

Both inside and outside the courts, there were masses of people who came to support their leaders. The court precincts were turned into something like a political rally, albeit without speeches from the accused. As Mandela writes:

> "When I emerged from the courthouse to enter the sealed van, there was a crowd of hundreds of people cheering and shouting '*Amandla*!' followed by '*Ngawethu*!' a popular ANC call-and-response meaning 'Power!' and 'The power is ours!' People yelled and sang and pounded their fists on the side of the van as the vehicle crawled out of the courthouse exit." [26]

This was to be a regular occurrence at most of Mandela's court appearances.

For a long time, positivism held sway in South Africa. One of the central tenets of positivism is that judges could only interpret the law as it was intended by the legislature. A combination of parliamentary sovereignty and positivism did not leave much room for the judiciary to create law. The judiciary was only supposed to interpret the law. In interpreting a statute, the judiciary only had to establish the intention of the legislature, not to create the law.[27] With the exception of a few,[28] judges of the apartheid era confined their role to that of being interpreters of laws in support of the *status quo* as was required of them. Loyalty to the political system was rewarded. One such beneficiary was Justice LC Steyn. His rise to the highest judicial office in the land within a very short space of time could, according to Cameron, only be described as meteoric.[29] Some of those who opposed the system on the other hand did so at the cost of their upward mobility within the ranks of the legal profession. The life of Judge Oliver Schreiner bears testimony to this. On two occasions, contrary to the established practice of seniority, he was overlooked when the position of Chief Justice of the Republic became vacant.[30] He was a brilliant judge of whom Ellison Khan was to write that:

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23 Quoted in Bizos *Odyssey to Freedom* (2007) 220.
24 See also Le Roux 2001 *Codicillus* 21–35 for an account of the struggles of lawyers like Mahatma Ghandi, Nelson Mandela and Bram Fischer and how they used the courts strategically to advance their course.
25 For the full text of the speech, see Mandela *I am prepared to die* (1979) 1–48.
26 Mandela *Long Walk to Freedom* 376.
27 See Dugard "The judicial process, positivism and civil liberty" 1971 *SALJ* 182.
28 See Davis and Le Roux *Precedents and Possibility* 1–35 for a discussion of the early apartheid years and the role played by judges who held the human rights torch regardless of challenges of the time.
29 See Cameron "Legal chauvinism, executive-mindedness and justice – LC Steyn's impact on South African law" 1982 *SALJ* 38–75.
30 See Moseneke "Oliver Schreiner Memorial Lecture: separation of powers, democratic ethos and judicial function" 2008 *SAJHR* 343.

> "It has been said of RA Butler that he was the greatest Prime Minster Britain did not have. So it may be said of Oliver Deneys Schreiner that he was the greatest Chief Justice South Africa did not have."[31]

When the interim Constitution[32] was enacted South Africa became a constitutional democracy. There was therefore a clear shift away from parliamentary sovereignty to constitutional democracy. The South African Constitution, like most constitutions in a democratic world, is firmly rooted in the notion of the separation of powers, consisting of the judiciary, the legislature and the executive. Within this *trias politica*, the judiciary is the weakest and most vulnerable of the *troika*.[33] The legislature has the electorate whom they represent while the executive has both the political and the financial muscle in its favour. As the dicta of the Constitutional Court in *S v Mamabolo* states:

> "Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of states and, ultimately, as the watchdog over the constitution and the Bill of Rights."[34]

This implies that the judiciary executes its role in an independent manner and guards against any interference in its authority to do so. Though the Constitutional Court of South Africa handed decisions that are unfavourable to political branches, it has managed to maintain its legal legitimacy and institutional security.[35]

3 THE CONSTITUTIONAL FRAMEWORK FOR THE SEPARATION OF POWERS IN SOUTH AFRICA

South Africa has gone through three major constitutional moments. First, there was the Union Constitution of 1909,[36] which facilitated the formation of the Union Government of 1910. The Union Government was modelled on the Westminster system of government with two Houses of Parliament, the House of Assembly and the Senate. The executive not only formed part of the legislature but was also answerable to it, while the judiciary occupied an "independent" position. In the division of labour, parliament represented the white minority while the unrepresented black majority were governed by the executive.[37] Interesting to note about the independence of the judiciary was that the executive was responsible for the appointment of judges and there was no provision for a body like the Judicial Service Commission.[38] The process of appointing judges was not transparent as the whole process was shrouded in mystery.[39] As

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31 As quoted in Moseneke 2008 *SAJHR* 342.
32 Constitution of the Republic of South Africa Act 200 of 1993.
33 De Vries "Courts: the weakest link in the democratic system in South Africa: a power perspective" 2006 *Politeia* 41–56.
34 *S v Mamabolo* 2001 3 SA 409 (CC) 16.
35 Roux "Principles and pragmatism on the Constitutional Court of South Africa" 2009 *ICON* 106–138.
36 Constitution of the Republic of South Africa Act 1909.
37 De Waal, Currie and Erasmus (eds) *The Bill of Rights Handbook* 4 ed (2001) 3.
38 Langa "Symposium 'A delicate balance': the place of the judiciary in a constitutional democracy" 2006 *SAJHR* 3.
39 Moerane "The meaning of transformation of the judiciary in the new South African context" 2003 *SALJ* 712.

parliament was sovereign, there were no systems in place to constrain parliament and courts could only intervene if legislation was not passed in accordance with the law as laid down in the constitution. No law could be struck down on substantive grounds.[40] The 1909 *status quo* continued to be maintained in the 1961 Constitution when South Africa became a republic.[41]

A slight change to the form of government was introduced when the 1983-tricameral Constitution[42] was promulgated. Under the tricameral Constitution, the president ceased to be a member of parliament. The change, however, did not affect the link between the executive and the legislature. Notwithstanding the slight change, all three constitutions were, as De Waal *et al* noted, "in most respects, little different from ordinary Acts of parliament. They did not have supreme status and parliament was free to amend them by ordinary procedures."[43] Too much power was vested in parliament, which was at liberty to pass draconian laws[44] that could not be challenged on substantive grounds as long as they satisfied the constitutional processes and procedures. Vesting too much power in one institution is contrary to what the doctrine of separation of powers requires. In Montesquieu's words:

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because many apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[45]

The core of the doctrine of the separation of powers is to prevent tyranny and protect liberty.[46] A great breakthrough took place in 1994 when the interim Constitution came into force. On the separation of powers, Principle VI annexed to the interim Constitution provided that, "There shall be a separation of powers between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."[47] When the 1996 Constitution was drafted, it did not make an express mention of the doctrine of the separation of powers; however, the essence of what the document denotes was clearly captured. When the document came before the Constitutional Court for certification, the court stated that:

> "The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch over the terrain of another."[48]

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40 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 3.
41 Constitution of the Republic of South Africa Act 32 of 1961.
42 Act 110 of 1983.
43 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 3.
44 See the Population Registration Act 30 of 1950; the Group Areas Act 36 of 1966; the Reservation of Separate Amenities Act 49 of 1953; the Immorality Act 23 of 1957 and the Suppression of Communism Act 44 of 1950.
45 As quoted in O'Regan "Checks and balances reflections on the development of the doctrine of separation of powers under the South African constitution" 2005 *PER* 3.
46 O'Regan 2005 *PER* 4.
47 Schedule 4 to the Interim Constitution of the Republic of South Africa Act 200 of 1993.
48 *Ex Parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 109.

Different political contexts will of course call for different models of the application of this doctrine, and of course, the separation itself is not absolute.[49] There may indeed be instances where the powers of the different branches of the state may overlap. The relationship between the three arms can at times be intricate and complex.[50]

A second breakthrough in the new democratic era was the supremacy of the constitution in the democratic era.[51] The task of ensuring that the Constitution is protected and respected rests with the courts. For judges to be able to execute their task without fear, favour or prejudice,[52] the Constitution has ensured the independence of the judiciary. The Constitution enjoins it on organs of state, "to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts" through legislative and other means.[53] This then raises the age-old question: who watches the watchers?[54] To provide an answer to this question we now turn to the appointment of judges in South Africa and the measures in place to ensure their independence.

4 THE CONSTITUTIONAL AND STATUTORY FRAMEWORK FOR THE APPOINTMENT OF JUDGES IN SOUTH AFRICA

The Constitution outlines the court system[55] as consisting of the Constitutional Court,[56] the Supreme Court of Appeal,[57] the high courts,[58] the magistrate's courts or any other court established or recognised in terms of an Act of parliament. Currently there is a Bill before parliament that seeks to introduce the traditional courts' system.[59] The Constitution provides guidelines as to who may qualify for appointment as a judge, how they are to be appointed, for how long, and the circumstances under which they may be removed from office. Over and above

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49 *Ex Parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa* para 108, where the court stated that: "There is however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch upon another, there is no separation that is absolute. While in the USA, France and the Netherlands members of the executive may not continue to be members of the legislature, this is not a requirement of the German system of separation of powers."

50 O'Regan 2005 *PER* 12–30.

51 Section 1 of the Constitution of the Republic of South Africa, 1996.

52 See section 165(2) of the Constitution.

53 Section 165(4) of the Constitution.

54 See Diescho in Horn and Bösl (eds) *The Independence of the Judiciary in Namibia* 36.

55 Section 166(a)–(e).

56 With its seat in Braamfontein.

57 With its seat in Bloemfontein.

58 South Africa has nine provinces: Limpopo, Gauteng, North West, Mpumalanga, Kwazulu-Natal, Western Cape, Eastern Cape, Gauteng, and the Free State. Not all provinces have high courts though. The high courts are in Cape Town, Eastern Cape, Free State, Gauteng and Kwazulu-Natal.

59 The Traditional Courts Bill [B15-2008] published in *Government Gazette* 30902 (27-03-2008). The Bill seeks to affirm the recognition of the traditional justice system and its values, based on restorative justice and reconciliation by providing for structures that will deal with matters connected therewith. See Ntlama and Ndima "The significance of South Africa's Traditional Court's Bill to the challenge of promoting African traditional justice systems" 2009 *International Journal of African Renaissance Studies – Multi-, Inter-and Transdisciplinarity* 6–30.

being appropriately qualified, the person to be appointed as a judge must be a South African who is a fit and proper person.[60] This article will only limit itself to judges of the Constitutional Court, which is the highest court in constitutional matters.[61] From its inception, the Constitutional Court was thrust into the centre of politics when it had to certify the final Constitution of the Republic, a document negotiated by all political parties.[62]

While the President has the final say in appointing judges, the initial selection and short listing is done by the Judicial Service Commission (hereafter "JSC"), which is a constitutionally created body.[63] In assessing the independence of the JSC, regard should also be had to the dominance of the ANC as a political party.[64] The idea of the JSC is to have an independent body that will look for candidates who are suitable for the job and not just party loyalists. However, in a country where the ruling party commands an overwhelming majority, the involvement of the JSC may in this regard not be a safe enough guarantee, especially where matters are decided on by voting. Van Zyl argues that as it is, the JSC is politically loaded, as only three members are judges, four are practising lawyers, one an academic lawyer, and the rest are political appointees.[65] The JSC consists of twenty-three permanent members who are either nominated or appointed from the different ranks of the legal fraternity in the country. These consist of the Chief Justice who presides; the President of the Supreme Court of Appeal; the Minister of Justice; one Judge President; two advocates; two attorneys; one university law professor; six members of the National Assembly, of which at least three must be members of opposition parties and four delegates from the National Council of Provinces; as well as four persons designated by the President. In addition to the twenty-three, the Judge President and Premier, or their delegates, join the Commission in respect of the appointment of judges to the high court in their province.

The JSC calls for nominations and interviews are done in public.[66] The JSC then moves to the second phase of the deliberations of the suitability of the candidates, which is done in private. The JSC prepares a list with three names more than the number of appointments to be made and submits them to the

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60 Section 174(1) of the Constitution.

61 Currently there is a proposal to have the Constitutional Court as the apex court in all matters as per the Constitution Seventeenth Amendment Bill [B6-2011] published in *Government Gazette* 33216 (21-05-2010). The Bill seeks to *inter alia* define the Chief Justice as the head of the judiciary and provide that the Constitutional Court is the highest court in all matters.

62 Roux "Legitimating transformation: political resource allocation in the South African Constitutional Court" 2003 *Democratization* 94.

63 Section 178(1)(a)–(k) sets out the composition of the Judicial Service Commission. Matters incidental to the JSC are regulated in terms of the Judicial Service Commission Act 9 of 1994.

64 For a discussion of the dominant party democracy, see Choudhry "'He has a mandate': The South African Constitutional Court and the African National Congress in a dominant party democracy" 2009 *Constitutional Review* 1–86.

65 Van Zyl "The judiciary as bastion of the legal order in challenging times" 2009 *PER* 10. See also Roux 2003 *Democratization* 94 who writes that, "Given that South Africa is a one-party dominant state, this might be a reason for doubting the independence of the court."

66 Members of the public can access the transcripts of the JSC interviews of the judges currently serving on the Constitutional Court under each member's profile, available on: http://www.constitutionalcourt.org.za/site/judges/currentjudges.htm (accessed 02-10-2010).

President. If the President does not make an appointment from the list furnished, he must provide the JSC with reasons, in which case the JSC will supplement the list and again submit it to the President.[67] All judges, even those acting, take an oath before the commencement of their duties that they will be faithful to the Republic of South Africa, that they "will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law".[68] The oath is taken before the Chief Justice or any judge designated by the Chief Justice.[69]

The Constitution has further put in place mechanisms to ensure that there is less interference in the work of judges, for instance their salaries, allowances and benefits may not be reduced.[70] To remove a judge from office is a laborious process.[71] A judge may only be removed in cases where he or she suffers from incapacity, gross incompetence, or is found guilty of gross misconduct. Other than that, the National Assembly may call for a removal of a judge by a resolution supported by a vote of at least two-thirds majority.[72] Judges of the Constitutional Court must serve for a non-renewable term.[73] South Africa has not yet had to invoke any of the provisions for the removal of a judge from office. Judges of the Constitutional Court are the only ones who serve for a limited term, other judges of the Supreme Court of Appeal or high courts do not have such a limit. The reason for this, according to Judge Ngoepe, is mainly to ensure that the court has new minds on issues, particularly because one cannot appeal against the decisions of the court.[74] If judges were to be appointed for life, Ngoepe argues, that would translate into the same minds having the same views for a very long time.[75]

As pointed out above, the President has the last word as to who to appoint as a judge and who to leave out. One name that has relentlessly knocked at the doors of the Constitutional Court for a while, is that of Judge Edwin Cameron. He was appointed to the bench in 1995 by the first black President of the Republic, Mr Nelson Mandela, to be a high court judge and has on three occasions applied to move to the Constitutional Court without success.[76] He had acted on the Constitutional Court bench before and had been a judge of the Supreme Court of Appeal for eight years. As an openly gay judge, and one of the first high-profile

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67 Section 178(4)(a)–(c).
68 Section 178(8) requires that judicial officers take an oath in accordance with Schedule 2 of the Constitution.
69 Schedule 2(6)(1) of the Constitution.
70 Section 176(3) of the Constitution.
71 Section 177(1)–(3) sets out circumstances under which a judge may be removed from office.
72 Section 177(1)(b) of the Constitution.
73 Section 176(1) of the Constitution. See also section 3(a) of the Judges Remuneration and Conditions of Employment Act 47 of 2001.
74 Ngoepe "Choosing new custodians of our Constitution" (20-08-2009) *Sunday Times* 11.
75 *Ibid*.
76 Barron "You be the Judge – at long last" (11-01-2009) *Sunday Times* available at http://www.aegis.com/news/suntimes/2009/ST090102.html (accessed 02-10-2010). Another human rights advocate who was also overlooked on several occasions and is still not a judge, is Geoff Budlender.

people in the Republic to declare that he was living with HIV, legally astute and highly regarded in the legal fraternity and beyond, he kept on trying.[77] He had been a firm critic of President Thabo Mbeki's government on HIV.[78] It was only during the brief tenure of former President Kgalema Motlanthe that Judge Cameron was eventually appointed to the Constitutional Court on 31 December 2008.

5 TRANSFORMATION OF THE JUDICIARY IN SOUTH AFRICA

The South African Constitution stands in a league of its own for its insistence on transformation.[79] Since the early 1990s, transformation has been high on the agenda of the new constitutional state. This being the case, it is important to note that transformation can also mean a number of different things to different people.[80] Institutionally, transformation refers to the structure, function and composition of the courts.[81] This would, among others, refer to obvious features such as questions of race, gender and disability. In this regard, the task of the JSC in its shortlisting of candidates is to embark on an aggressive campaign to ensure that questions of race, gender and disability are addressed. Critics argue that this kind of transformation has deprived the country of experienced white males, like Geoff Budlender who was overlooked on several occasions.[82] A second component of institutional transformation is accessibility of courts, and this speaks to both access to buildings and to court proceedings by litigants.[83] The most contested aspect of transformation relates to transformation of the mindset or attitudes of those who sit on the bench. This relates to the attitudes of judges and how they see their role especially with regard to the constitutional imperatives of the country.[84] Transformation of this sort calls on judges to be more than defenders of the prevailing *status quo* as was the case in the era of apartheid. Theirs is a duty to enforce principles of a constitutional order.[85]

Transformation of the mindset of judges goes along with the question of accountability. This means that in performance of their duties judges must see themselves as accountable to society as a whole. They should therefore not consider themselves immune to criticism relating to the manner in which they perform their judicial function.[86] Since the dawn of the democratic dispensation,

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77 His work was celebrated at the University of the Witwatersrand on 10-10-2008. The symposium was simply titled: "Judges and the World: A Symposium in celebration of the Work of Edwin Cameron". The proceedings were published in 2008 *SAJHR*.

78 According to studies, about 300 000 died of HIV/AIDS due to the HIV/AIDS policies of the government under the leadership of former President Thabo Mbeki and according to Judge Edwin Cameron, these figures are "conservative". See Barron (11-01-2009) *Sunday Times*.

79 Budlender "Transforming the judiciary: the politics of the judiciary in a democratic South Africa" 2005 *SALJ* 715.

80 Pieterse "What do we mean when we talk about transformative constitutionalism?" 2005 *SAPR/PL* 155–163.

81 Chaskalson "Preface" 2008 *SAJHR* ix.

82 See Wesson and Du Plessis "Fifteen years on: central issues relating to the transformation of the South African judiciary" 2008 *SAJHR* 200.

83 Moerane 2003 *SALJ* 715–718.

84 Chaskalson 2008 *SAJHR* ix–x.

85 See Wesson and Du Plessis 2008 *SAJHR* 200.

86 Moerane 2003 *SALJ* 711.

the judiciary has made strides in some areas of transformation, especially on issues of race and to some degree on gender representation. Nevertheless, the ruling party seems to be dissatisfied with the pace of transformation of the judiciary.

In January 2005, almost ten years into the democratic dispensation, the ANC issued the following statement in relation to transformation of the judiciary:

> "We face the continuing and important challenge to work for the transformation of the judiciary . . . We are also confronted by the similarly important challenge to transform the collective mindset of the judiciary to bring it into consonance with the vision and aspirations of the millions who engaged in the struggle to liberate our country from white minority domination. The reality can no longer be avoided that many within our judiciary do not see themselves as being part of these masses, accountable to them, and inspired by their hopes, dreams and value systems."[87]

This statement is important not only for the questions it raises about the collective mindset of the judiciary, but also about the political context within which it was said. President Thabo Mbeki was at the beginning of his second term and therefore, constitutionally his last term as the president of the Republic. The rest of what transpired can be better explained through the Schabir Shaik corruption trial.[88] This case had very interesting elements to it. Firstly, Judge Hilary Squires was called from retirement to preside over the matter. Secondly, though everything in the charge sheet of Mr Shaik pointed to Mr Jacob Zuma, the two were not prosecuted together. Mr Zuma had not been prosecuted. This was so because on 23 August 2003 the then Director of National Public Prosecutions, Mr Bulelani Nqcuka,[89] announced at a press conference that his directorate planned to prosecute Mr Shaik and some business entities, and that Mr Zuma would not be prosecuted. Mr Shaik was a close friend of Mr Jacob Zuma while they were in exile and later became his financial advisor when Zuma was the Deputy President of the Republic. According to the evidence led in court, between October 1995 and September 2002, Mr Shaik had made numerous payments, either personally, or through the business entities he controlled, to or on behalf of Zuma. In a trial that was politically charged, Mr Shaik was found guilty and was sentenced to fifteen years in jail. Mr Shaik has since been released on medical parole.

The third interesting point to note is not what came from the judgment itself, but what came from the media about what the judge was quoted as having said. The media coined a phrase that they attributed to Justice Squires. He was reported to have said that there existed "a generally corrupt relationship" between Shaik and Zuma.[90] It later turned out that the phrase did not appear anywhere in the original judgment. What was even more problematic was that the Supreme Court of Appeals judges had also used the phrase, as if it had

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87 As quoted by Gordon and Bruce "Transformation and the Independence of the Judiciary in South Africa" *CSVR* Paper 32. Available at: http://www.csvr.org.za/docs/transition/3.pdf (accessed 02-10-2010).

88 *S v Shaik* 2007 1 SACR 142 (D).

89 His wife, Mrs Phumzile Mlambo-Nqcuka, was to later replace Mr Jacob Zuma as the Deputy President of the Republic of South Africa.

90 For a detailed discussion of this, see Davis, Marcus and Klaaren "The Administration of Justice" 2006 *Annual Survey of SA Law* 841.

appeared in the original judgement. The General Secretary of the Congress of South African Trade Unions (hereafter "COSATU"), a political alliance partner of the ruling party, blasted the judges, calling for their heads. His claim was simply that:

> "Instead of going through Squires' judgement line by line, the Supreme Court merely parroted newspaper editorials. The five of them clearly must go. If they can do this in such a high profile case, imagine what they do to ordinary, poor people."[91]

For Zuma himself the judgment was purely political. Zuma had been a political activist and in the 1960s he was sentenced to ten years imprisonment on Robben Island. Commenting on the *Shaik* judgment he said:

> "In 1963, I was sentenced to 10 years in prison by Justice Steyn. It was a political trial . . . I listened to Judge Squires and there was nothing different to what I heard 42 years ago in terms of the political judgement."[92]

The judgment indeed had political ramifications on Zuma's political career. He was relieved from office as the Deputy President of the Republic by President Thabo Mbeki on 14 June 2005 in a speech delivered at a joint sitting of parliament. Among others, Mbeki had this to say:

> "Among others, and relevant to the reason why I requested this joint sitting, the executive must discharge its responsibilities within the rule of law, which includes respect for the integrity and the independence of the judiciary and presumption of innocence of any person, pending findings of the courts. Similarly, we have to respect decisions of our parliament."[93]

As the Deputy President of the Republic and of the African National Congress, Zuma was in line as Mbeki's heir apparent. On 20 June 2005, the new National Director of Public Prosecutions, Mr Vusi Pikoli, announced that the state intended to prosecute Mr Zuma. Zuma's dismissal from office and the legal battles that ensued were to mark the beginning of the end of his political career, at least so it appeared.

The ANC statement on the transformation of the judiciary above was made halfway through the Shaik trial. The cracks within the ruling party were no longer a party secret but were open for all to see. The succession battle was on. The South African Communist Party, COSATU and some members within the ruling party had lost confidence in Mbeki's leadership and were convinced that the charges against Zuma were nothing but abuse of power and of legal processes. These groups had made public their support for Zuma as their preferred candidate as Mbeki's successor as the president of the ANC and the republic. The succession battle and allegations of the use and abuse of the law ushered the ANC into what Davis and Le Roux call "lawfare". The characteristic feature of "lawfare" is when politics plays itself out not in the streets but in the courts.[94]

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91 As quoted in Davis, Marcus and Klaaren 2006 *Annual Survey of SA Law* 844.

92 See Anonymous "Zuma questions Squires's judgment – report" http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1119007263533B252 (accessed 02-10-2010).

93 For the full text of the speech, see http://www.dfa.gov.za/docs/speeches/2005/mbek0614.htm (accessed 02-10-2010).

94 See Davis and Le Roux *Precedents and Possibility* 185.

The charging of Zuma marked the beginning of his protracted legal battles.[95] In both the rape trial[96] and the other cases that followed, Zuma's court hearings were sites of political struggle. His court hearings drew thousands of supporters and sympathisers. Inside and outside the courtroom there were accusations of political conspiracies and abuse of political power directed at the government of Mbeki. Accusations were that the charges against Zuma were merely designed to thwart his rise to the presidency of the Republic. As the 52nd ANC elective conference was approaching, Mbeki had made it known that he was intending to stand for the third term as the president of the party. Had he won the elections, he would have been the president of the ruling party for three consecutive terms, as the ANC constitution is silent on the number of terms the president can serve. This was not to be, as he lost to Zuma.

Shortly after the Polokwane conference, the spotlight shifted from Zuma to Mbeki. This shift was occasioned by a judgment that was delivered in one of the Zuma matters.[97] Judge Nicholson had made some remarks that confirmed Zuma's long held view that there was political meddling in the legal processes. Like Zuma, who was relieved from office based on insinuations made by a judge in a case where he was not the accused, Mbeki too was recalled following remarks by Judge Nicholson in a case in which he too was not an accused or party to the proceedings. The National Director of Prosecutions, joined by Mbeki, appealed the judgment. Judge Harms was emphatic in stating, among others, that:

> "However, it must be understood that this aspect of the judgment is not about the guilt or otherwise of Mr Zuma or whether the decision to prosecute him was justified. It is even less about who should be the president of the ANC; whether the decision of the ANC to ask Mbeki to resign was warranted; or who should be the ANC's candidate for President in 2009. More particularly, this aspect of the judgment is not about whether there was political meddling in the decision-making process. It is about whether the findings relating to political meddling were appropriate or could be justified on the papers."[98]

The SCA may have steered clear from party politics but it is no understatement to say that a greater part of the battle for the top office in the land unfolded not in the statehouse or the party headquarters, but mainly in the courts. "Lawfare"' became part of the strategic posturing for the position and in the process the

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95 *Zuma v National Director of Public Prosecutions* 2008 2 SACR 421 (CC); *Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions* 2009 1 SA 1 (CC) and *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA).

96 See *S v Zuma* 2006 7 BCLR 790 (W). Mr Jacob Zuma was charged and acquitted of rape. Throughout his court appearances, scores of people came to give him support. Outside the same court building non-governmental organisations (NGOs), opposed to women abuse, also gathered with placards in support of the complainant. For comment on the case see Moloi "The case of *S v Zuma*: implications of allowing evidence of sexual history in rape trials" 2006 *SA Crime Quarterly* 25–29.

97 *National Director of Public Prosecutions v Zuma* 2009 ZASCA 1, see also Le Roux "Section 39(2) and shadows of history over the post-apartheid constitution" [Discussion of *Zuma v National Director of Public Prosecutions* 2009 1 All SA 54 (N) and *National Director of Public Prosecutions v Zuma* 2009 ZASCA 1] 2009 *Stellenbosch Law Review* 31–49.

98 *National Director of Public Prosecutions v Zuma* 2009 ZASCA para 14.

court became a site of the struggle for political power. The latter, coupled with the proposal to make the Chief Justice the head of the judiciary and the Constitutional Court the apex court in all matters, has among others, heightened civil society's interest in both the processes and the candidates vying for the apex position in the judiciary.

It was in 2008, at the height of Zuma's legal travails that the Deputy Chief Justice Dikgang Moseneke, made a statement which, according to some analysts, was to mark the ceiling of his career. On his sixtieth birthday, Moseneke was reported to have said:

> "I chose this job very carefully, I have another 10 to 12 years on the bench, and I want to use my energy to help create an equal society. It's not what the ANC wants or what the delegates want; it is about what is good for our people."[99]

Earlier, when the Chief Justice Arthur Chaskalson retired, his then Deputy Chief Justice Pius Langa, was appointed as his successor. The succession plan was seamless. When Chief Justice Pius Langa retired, the President overlooked Moseneke and appointed Justice Ngcobo, a long-serving Constitutional Court judge who had only two more years left to serve on the bench. As the two years were to expire on 14 August 2011, the President by way of a letter requested the Chief Justice to stay in office for five years.[100] This request was done in accordance with the provisions of the Judges' Remuneration and Conditions of Employment Act.[101] Section 8(a) of which provides that:

> "A Chief Justice who becomes eligible for discharge from active service in terms of section 3(1)(a) or 4(1) or (2), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years."

By way of a letter, the Chief Justice accepted the request, pointing out that he has carefully considered the reasons for the request and the period suggested by the President. He further indicated that he has decided to accede to the request to continue to lead the judicial branch of government during the critical time of the transformation of the judicial system in South Africa.[102] On 3 June 2011, the President affected the extension of the term of office of the Chief Justice, and then communicated his decision to the JSC and to leaders of the political parties represented in the National Assembly. A Constitutional Court application was brought by a number of organisations[103] that asked, first for direct access to the court, and secondly for the court to declare the provision under which the Chief Justice's term of office was extended to be declared unconstitutional. The court found s 8(a) of the Judges' Remuneration and Conditions of Employment Act to

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99 Makhanya "Do the right thing and pick the obvious candidate for chief justice" (07-08-2011) *Sunday Times* 4.

100 A copy of the letter appears in the *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) para 7.

101 Act 47 of 2001.

102 A copy of the letter appears in the *JASA* para 9.

103 Justice Alliance of South Africa (JASA), Freedom Under Law (FUL), Centre for Applied Legal Studies (CALS) and the Council for the Advancement of the South African Constitution (CASAC).

be inconsistent with the Constitution and therefore invalid. Of importance for our discussion is that the court noted that:

> "The power to extend the term of a Constitutional Court judge goes to the core of the tenure of judicial office, judicial independence and the separation of powers. The term or extension of the office of the highest judicial officer is a matter of great moment in our constitutional democracy."[104]

The court was weary to ensure that the independence of the Chief Justice, and by extension the judiciary, remains intact and free from perceptions of interference from the executive.[105]

Shortly before the Constitutional Court ruling in the *JASA* matter, Chief Justice Ngcobo withdrew his acceptance and once again the position of the Chief Justice became vacant. The Deputy Chief Justice Dikgang Moseneke was once again overlooked as the President nominated another Constitutional Court Judge, namely, Mogoeng Mogoeng. The events which followed the nomination of Justice Mogoeng Mogoeng were unprecedented in the history of the appointment of the Chief Justice in South Africa. First, the President's nominee was put on a back foot.[106] Secondly, the JSC voted by majority not to have another nominee other than the one of the President, effectively a one-horse race was on. The process came to a conclusion on 8 September 2011 when the President appointed Justice Mogoeng Mogoeng as the Chief Justice of the Republic of South Africa.

6 CONCLUSION

As the final arbiter in disputes, the courts will not avoid getting involved in disputes of a political nature. Elements of bias, whether imagined or real, will always arise, but the judiciary has a task to ensure that the courts continue to command moral authority. The first step towards maintaining legitimacy and commanding authority is for the courts to be independent and execute their mandate without fear, favour or prejudice. Part of the independence of the judiciary, however, is dependent on external forces over which the courts have no power. As the article has pointed out, the apartheid judiciary failed to do this and the failure was mainly due to the fact that there were no institutional mechanisms to ensure the independence of the judiciary. This lack of independence manifested itself, among others, in the way the courts were used to advance the ideology of the white minority apartheid rule. The freedom fighters of the time responded to the might of the apartheid rule by using the same courts to advance their struggle. In the early years of the post-apartheid era, the courts have managed to keep and maintain their independence, and were afforded space to do that. However, during the last few years we have witnessed a heightened tension, directly related to the succession battle within the majority ruling party. The succession battle to the highest seat in the country turned the judiciary into a battleground for political struggle. Only time will tell how the political struggle will impact the role of the judiciary, its independence and its legitimacy.

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104 *JASA* para 65.
105 See *JASA* para 68.
106 See Ngalwa "Judging the judge" (21-08-2011) *Sunday Times Review Section* 1.

International Dimensions of the Rules of Impartiality and Judicial Independence: Exploring the Structural Impartiality Paradigm

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1 INTRODUCTION

The relationship between African states and the international system is shrouded by a cloud of mistrust, predicated on the former's reluctance to go the full measure in surrendering their sovereignty, especially in circumstances where international mandates may have the potential of unsettling the balance of power in internal politics.[1] In recent times, however, the mistrust has bubbled to the surface, creating a rather unpleasant environment for enforcing international norms. The spat between the African states and the International Criminal Court in their collective refusal to endorse the indictment of President Al-Bashir of Sudan;[2] the vote by Kenya's parliament to pull the country out of the Rome Treaty for the International Criminal Court following the court's decision to authorise an investigation into the possible commission of international crimes during the post-election violence of 2008;[3] and the refusal of the Ivorian strong-man, Laurent Gbagbo, to honour the UN's request to step down after continuing

1 See in general Clapham *Africa and the International System: The Politics of State Survival* (1996). A poignant example here would be Zimbabwe, where Mugabe's foreign policy is framed around the regime's mistrust of the international system. See Coleman *International Organisation and Peace Enforcement: The Politics of International Legitimacy* (2007), 172. See also Cooper *et al* "Yielding sovereignty to international institutions: bringing systems structure back in" 2008 *Int'l Studies Rev* 501.

2 See Du Plessis *The International Criminal Court that Africa Wants* (2010) 14–15. See also Sagan "African criminals/African victims: the institutionalised production of cultural narratives in international criminal law" 2010 *J Int'l Studies* 3.

3 See *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in Kenya* ICC-01/09 http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf (accessed 20-11-2010). See also Rugene "Parliament Pulls Kenya out of ICC treaty" *Daily Nation* 2010 1; BBC "Kenya MPs vote to leave ICC over Poll Violence Claims" 1 Jan, 2010 http://www.bbc.co.uk/news/world-africa-12066667 (accessed 10-01-2011); Mutua "Bid to pull Kenya out of ICC an act in futility" 2010 *Sunday Nation* http://www.nation.co.ke/oped/Opinion/Bid%20to%20pull%20Kenya%20out%20of%20ICC%20an%20act%20in%20futility%20/-/440808/1082038/-/bh6tel/-/index.html (accessed 02-01-2011); Ochieng "We must reject bid to Pull Kenya out of the ICC" 2011 *Sunday Nation* http://www.nation.co.ke/oped/Opinion/Why%20we%20must%20reject%20bid%20to%20pull%20Kenya%20out%20of%20the%20ICC%20/-/440808/1082036/-/view/printVersion/-/59hucuz/-/index.html (accessed 02-01-2011).

in power in a flawed election,[4] are examples of how fast the relationship seems to be deteriorating. Yet, it is true that Africa needs the international system just as much as the system needs it. The question, therefore, is what makes the international system, especially its dispute resolution organs, so unpalatable to Africans as to engender such mistrust? Undoubtedly, there are many factors which could explain the unease between African states and the international system. The one most often cited is the intrusive character of international norms themselves and the lack of comparable standards within domestic systems.[5] So the argument is made that the insularity of African domestic systems to international standards rests on their undemocratic and authoritarian tendencies willed through moribund legislative arrangements.[6] This argument, and others of the same pedigree, which fashion the dichotomy between domestic and international practice to be the reason for Africa's intolerance of international regimes, command an overbearing presence in mainstream discourses.[7] Thus, little room is left for consideration of factors, not necessarily energised by Africa's bad image, but which, nonetheless, contribute significantly to the weakening of multilateral support for international adjudicatory processes.

This article explores a dimension critical to the unravelling of the diminishing faith in international adjudication which is centred on the internal mechanisms or workings and posture of the dispute resolution organs of the international system. It suggests that one reason why international processes may be found unpalatable by states is because they are often perceived as lacking legitimacy, and their outcomes are perceived to be tainted with bias. This dimension galvanises the notions of judicial independence and impartiality, which ordinarily have greater resonance in domestic judicial practice, towards finding indicators of the probable disconnect between political aspirations of African nations and the operational quality of international adjudicatory organs. Obviously, this approach raises the question of whether international bodies should be held to the same standards of performance as domestic tribunals. Some could argue that since international and domestic adjudication processes differ in some profound

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4 UN Radio "UN Chief Urges Laurent Gbagbo to Step down in Ivory Coast" 2010 http://www.unmultimedia.org/radio/english/detail/109390.html (accessed 17-12-2010). See also Cocks "Ivory Coast President has Limited Time to Step down with Impunity" 2011 *Washington Post* http://www.washingtonpost.com/wp-dyn/content/article/2011/01/01/AR 2011010100676.html (accessed 02-01-2011); "Cote d'Ivoire: AU Picks Kenya PM to Lead Ivorian Mediation Efforts" 2010 *Afrique en Ligne* http://www.afriquejet.com/news/africa-news/cote-d'ivoire:-au-picks-kenya-pm-to-lead-ivorian-mediation-effort-2010122965585.html (accessed 02-01-2011).

5 Generally, international treaties can only be enforced by domestic courts if they have been incorporated into domestic law. See the discussions on limitations of international law in Govidec "The relationship of international law and national law in Africa" 1998 *Afr J Int'l & Comp L* 244; Tshosa "Giving effect to the treaties in domestic law of Botswana: modern judicial practice" 1997 *Lesotho L. J.* 205. See also Nsereko "Implementing the ICC Statute within Southern African Region (SADC)" in Kress and Lattanzi (eds) *The Rome Statute and the Domestic legal Orders* (2000) 169.

6 See for example Moyo "Policy Dialogue, Improved Governance and New Partnership: Experiences form Southern Africa" in Kifle *et al* (eds) *A New Partnership for African Development: Issues and Parameters* (1997) 61.

7 See for example Thompson "Democracy and peace: putting the cart before the horse?" 1996 *Int'l Org* 141.

ways, it may be unscientific to draw parallels in the manner in which the two conform to the objective standards of impartiality and independence. However, the two notions have long been held to describe the nature of responsibility that adjudicatory organs – be they international or domestic – must assume when purporting to deliver justice. Therefore they have ideological ramifications beyond the narrow confines of a domestic legal system. Moreover, from a utility perspective, those having a stake in international dispute resolution systems are entitled to the benefits of independence and impartiality to the same extent as individuals or other legal persons would have in domestic processes.

Be that as it may, this article proposes to use the impartiality and independence paradigm to map out aspects of international adjudication that significantly threaten coherency in the international system. This paradigm, it is argued, provides a better framework for isolating the special qualities that make the findings of international adjudicatory bodies legitimate and thus demanding compliance. It should be noted that this perspective or its analytical scheme is not new. The notions of impartiality and independence have long been a staple of international discourses, either in relation to standard setting for domestic adjudication, or as a benchmark for the performance of judges serving in permanent international courts.[8] Similarly, their effect on adjudication has also been acknowledged by many scholars. Guzman, for example, has argued that states are unlikely to comply with judgments of international tribunals if there is bias, thus affirming the primacy of "impartiality" in international adjudication.[9] According to Posner and Yoo, international lawyers have imported the notion of independence from the domestic arena to the international sphere to explain legitimacy of decisions made by international organs.[10] Helfer and Slaughter surmise the "effectiveness" of European supranational adjudication to be dependent on factors such as composition of tribunal, quality of legal reasoning, expertise of judges, and neutrality, which are the same factors that indicate "independence" of an adjudicatory organ.[11] What is new is the interpretation of the principles that canvass perspectives relevant to the emerging character of Africa's relationship with the international system. For example, the article suggests that the notion of structural impartiality that takes into account geopolitical imbalance could better define the scope and meaning of independence and impartiality than the constitutional definitions of the term that inhere in domestic law. This article is not conclusive, but rather exploratory in nature. Its main agenda is to stimulate thought on how best international adjudicatory institutions could be constituted and operationalised, bearing in mind the principles of impartiality and independence, so that they can achieve maximum support from the poorer nations of the south.

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8 See for example Rosenne *The Law and Practice of the International Court 1920–2005* (2006) 1079–1080.

9 Guzman "The cost of credibility: explaining resistance to intestate dispute resolution mechanisms" 2002 *J Leg Studies* 303 326. See also Ginsberg and McAdam "Adjudicating in anarchy: an expensive theory of international dispute resolution" 2004 *William & Mary L Rev* 1229.

10 Posner and Yoo "Judicial independence in international tribunals" 2005 *Cal L Rev* 1 12.

11 See in general Helfer and Slaughter "Toward a theory of effective supranational adjudication" 1997 *Yale LJ* 282.

2 INDEPENDENCE AND IMPARTIALITY: MEANING AND SCOPE

The twin principles of judicial independence and impartiality resonate with just about everything positive in international law. They represent what liberalists might consider to be the clearest symbols of values that a judicial organ in a democratic society must strive to embrace – equal treatment, freedom, tolerance of opposing views and absence of prejudice and bias.[12] Yet, not a single treaty, or regime of international law define these principles.[13] This may be understandable, given that international norms are expected to set general standards and not deal with particularity of rule application. Moreover, the international organs to which the attributes of impartiality and independence apply, such as the International Court of Justice and the International Criminal Court, are expected to establish their own standards, but within the confines of the enabling treaty. But these apart, the idea that international adjudication should manifest standards that are universally acceptable and which, as compared to the domestic processes, indicate a higher sense of infallibility, creates a level of expectation in their discharge of functions. Thus, their assertion of independence and claim to impartiality must be apparent, both in the procedures that they employ and in the outcomes that they produce.[14] But how can these pursuits be guaranteed in the absence of an overarching international statutory regime?

Before responding to this question, a discussion of two broad concerns is warranted. First, international adjudication has expanded considerably since the latter part of the last century.[15] Apart from creating multiple forums for litigating disputes at the international level, the expansion has significantly diminished the gap between domestic and international processes, especially in areas such as criminal responsibility. These developments have created opportunities for widening the scope of principles of independence and impartiality in international adjudication. Secondly, international practice presents a rather fractionalised judicial landscape where nuanced interpretative approaches are best suited.[16] So whereas an overarching regime may provide a more consistent base for defining the scope of these principles, its benefit may be limited. This view is not entirely arbitrary considering that even within domestic law the constitutional text alone may not be enough to render an accurate understanding of the meaning and scope of these principles. In the United States, for example, it has been

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12 Kang "John Locke's political plan or there is no such thing as judicial impartiality (and it is a good thing too)" 2004 *Vermont L Rev* 7.

13 Watts "Enhancing the effectiveness of procedures of international dispute settlement" 2001 *Max Planck Yearbook of UN Law* 21.

14 See Mackenzie and Sands "International courts and tribunals and the independence of an international judge" 2003 *Harv Int'l LJ* 271 272.

15 There are more than 50 international institutions that handle disputes, which include courts, tribunals and quasi-judicial bodies. See Alford "The proliferation of international courts and tribunals: international adjudication in ascendance" 2000 *Am Soc'y Int'l Proc* 160 161. See also Romano "The proliferation of international judicial bodies: the pieces of the puzzle" 1998–1999 *NYU J Int'l L & Pol* 709; Oellers-Frahm "Multiplication of international courts and tribunals and conflicting jurisdiction-problem and possible solution" 2001 *Max Planck Yearbook of UN Law* 67.

16 For fragmentation of international law, see Report of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the ILC, 58th sess 01-05-2006 – 09-06-2006, 03-07-2006 – 11-08-2006, UN Doc. A/CN.4/L. 682 (13-04-2006).

are made according to law and that there is political insularity.[22] He defines independence as:

> •The existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behaviour, enact neutral justice, and determine significant constitutional and legal values.Ž[23]

Major J described it as follows:

> •The historical rationale for independence was to ensure that judges, as the arbiters of disputes, are at complete liberty to decide individual cases on their merits without interference . . . The integrity of judicial decision making depends on an adjudicative process that is untainted by outside pressures. This gives rise to the individual dimension of judicial independence, that is, the need to ensure that a particular judge is free to decide upon a case without influence from others.Ž[24]

The idea of judicial immunity from pressures that are extralegal in nature has constitutional implications. It emanates from the long established view that the judiciary should be accountable to the •sovereign willŽ (the people) rather than a branch of government and that is why it is relevant to democratic practice and the rule of law. In fact, one scholar has observed that independence •advances democracy by ensuring that the majority•s long term constitutive values are represented in the heat of the moment.Ž[25] Indeed, most modern constitutions treat it as a necessary ingredient in the exercise of judicial authority. The Ugandan Constitution in s 128(1) provides that •in the exercise of judicial power, the courts shall be independent and shall not be subjected to the control or direction of any person or authorityŽ.[26] Similarly, s 165(2) of the South African Constitution states that the •courts are independent and subject only to the Constitution and the lawŽ.[27] This constitutional imperative of judicial independence operates to safeguard rights to fair trial, but may very well go beyond the tenets of the Bill of Rights. It could be conceptualised as the cornerstone for judicial review of legislation and executive conduct. Thus, the scope of judicial independence has a wider reach than just the limitations that it places on the executive control. It also encapsulates the •status or relationship to others . . . that rests on objective conditions and guaranteesŽ.[28] The relationships envisaged here, as the Canadian Supreme Court observed, are individual as well as institutional:

> •the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and the legislative branches of governmentŽ.[29]

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22 Larkin •Judicial independence and democratization: theoretical and conceptual analysisŽ 1996 Am J Comp L 605.

23 Larkin 1996 Am J Comp L 611.

24 Ell v Alberta 2003 227 DLR 217 (SCC) 228 para 21. Influence or pressure need not come from the executive, the legislature or other judges. It could emanate from one of the officers of the court, such as counsel. See for example Bothma v White 2004 3 SA 184 (T).

25 See Croley •The majoritarian difficulty: elective judiciaries and the rule of lawŽ 1995 Chi L Rev 689 767.

26 See also section 103(1) of the Constitution of Malawi and article 160 of the Constitution of Kenya (2010).

27 For a general discussion of the judicial independence in South Africa, see Van de Vijver (ed) The Judicial Institution in Southern Africa (2006). See the cases of Van Rooyen v De Kock 2003 2 SA 317 (T) and De Kock v Van Rooyen 2005 1 SA 1 (SCA).

28 Valente v The Queen (1985) 24 DLR (4th) 161 (SCC).

29 Ibid.

From the foregoing discussion, two facets of judicial independence could be discerned. The first is the institutional facet. This relates to the structural safeguards, which ensure that judicial organs are not unduly interfered with. These would include the administrative controls, proper and transparent methods of appointing judicial officers (judges), reasonable financial autonomy and even exclusive jurisdictional competence over all issues of judicial nature. The second facet relates to individual independence of the judge – what Wynn and Mazur refer to as the "neutralizing distance between the judge and the legal dispute".[30] This facet canvasses issues such as adequate remuneration; security of tenure (so that a judge cannot be arbitrarily removed from office);[31] political insularity; fear of reprisals on decisions they make while performing their judicial functions; and, of course, impartiality.

2 1 1 International dimension

The independence of international tribunals should ideally measure to these standards, except for their differences from domestic ones. In the first place, domestic courts are unified and hierarchical. Secondly, they function within a caucus of governmental organs headed by a powerful executive. This is important because through the executive all their decisions are speedily enforced. International tribunals, on the other hand, are non-hierarchical and lack any formal enforcement mechanism. Posner and Yoo describe them as "an interstitial legal system that lacks a hierarchy, an enforcement mechanism and a legislative instrument that allows for centralized change".[32] These differences have implications for their independence. For example, international tribunals have no means of compelling states to comply with their rulings. Much of what happens after decisions are rendered often depends on the goodwill of states. Thus, politics plays a huge role in dispute resolution.

But this apart, the character of the international system supports the creation of adjudicative bodies that are so diverse. As already mentioned, the international system is really a jack of all trades; there are bodies that deal with trade issues,[33]

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30 Wynn and Mazur "Judicial diversity: where independence and accountability meet" 2004 *Albany Law Review* 775 778.

31 See for example the Nigerian case of *Anya v Attorney General of Nigeria* 1984 5 NCLR 225 FCA in which the Federal Court of Appeal held that it was improper for the national assembly to seek removal of a judge.

32 Posner and Yoo 2005 *Cal L Rev* 13.

33 There is a wide variety of international bodies that deal with trade disputes. For disputes arising out of World Trade Organisation (WTO) regime, the main organ is the Dispute Settlement Body (DSB) that operates under the Dispute Settlement Understanding (DSU). For a detailed discussion see Vermulst and Driessen "An overview of the WTO dispute settlement process and its relationship with Uruguay Round Agreements" 1995 *Journal of World Trade* 131; Palmeter and Mavroidis *Dispute Settlement in the World Trade Organization: Practice and Procedure* (1999); Shaffer *Defending Interests: Public–Private Partnerships in WTO Litigation* (2003). Apart from the WTO there are several forums for arbitrating international trade disputes. The International Centre for Settlement for Investment Disputes (ICSID) deals with investment disputes among states. See Chung "Lopsided International Investment Law regime and its effect on Future of Investor-State Arbitration" 2006–2007 *Va. J. Int'l. L.* 953; Delaume "ICSID Arbitration proceedings: practical aspects" 1984–1985 *Pace L Rev* 563. There are also the various arbitral panels set under the United Nations Commission on International Trade Law (UNCITRAL) model rules which undertake arbitration in many jurisdictions. See Kolowska "The revised

continued on next page

peace and security,[34] maritime disputes,[35] human rights violations[36] and even environmental issues. Added to these, are the regional bodies that mimic the functions of the international system.[37] In this mix there are organs that Posner and Yoo describe as "dependent" and those that are "independent".[38] Independent tribunals are those that are "institutionally separated from state parties", in the sense that they were described in the preceding section.[39] "Dependent" ones, on the other hand, are usually temporary, and member states wield complete authority over their constitution and *modus operandi*. According to this classification, most international arbitration panels are dependent, while courts, such as the ICC and the ICJ, are independent. This classification merely portrays the differences among international organs based on their relationship with the states; it has little to do with the expectation that the international tribunals will conform to the general principles of impartiality and independence as discussed here, when going about their work. Moreover, it is my argument that it is precisely because of these differences that "independence" must acquire a nuanced meaning, rather than the straightjacket formulation couched in terms that suit a standing domestic tribunal.

UNCITRAL Arbitration Rules seen through the prism of electronic disclosure" 2011 *J of Int'l Arb* 51; Binder "International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions" 2010; Holtzmann *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1994); Thompson "The UNICITRAL Arbitration Rules" 1976 *Harv Int'l LJ* 141.

34 The role of the International Court of Justice (ICJ) is prominent in this regard, but complementary to the UN Security Council. See in general Amr *The Role of the International Court of Justice as Principal Judicial Organ of the United Nations* (2003); Akande "The role of the International Court of Justice in the maintenance of international peace" 1996 *Afr J Int'l & Comp L* 592.

35 For example, the Law of Sea Tribunal and the Commission on Continental Shelf. See Gautier "The International Tribunal of the Law of the Sea: activities in 2009" 2010 *Chinese J Int'l L* 783.

36 The Human Rights Committee, which is a treaty body established by the Optional Protocol to the ICCPR, [GA Res 2200 A(XX 1) 21 UN GAOR Supp No 16 qt 59, UN Doc. A/6316 (1966) 999 UNTS 302 (23-03-1976)] is noteworthy. See Gandhi *The Human Rights Committee and the Right of the Individual* (1998). Other bodies have equally reinforced the human protection by determining disputes that have human rights implications. For example, the ICC deals with crimes that are also violations of human rights. See Sluiter "International criminal proceedings and protection of human rights" 2000 *New Eng L Rev* 935; Mayerfeld "Who shall judge? The United States, International Criminal Court and the global enforcement of human rights" 2003 *Hum Rts Q* 93; Zappalà *Human Rights in International Criminal Proceedings* (2003). See also Mutua "Looking past the Human Rights Committee: an argument for the demarginalizing enforcement" 1998 *Buff Hum Rts L Rev* 211.

37 For example, Regional Courts (the European Court of Justice, the Pan African Court); regional human rights courts (the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights, the European Human Rights Court); regional economic courts (Court of Justice of the Common Market for Eastern and Southern Africa, the SADC Tribunal, Court of Justice of the Economic Community of West African States). A full account of all regional tribunals and courts can be found on the NYU Project on International Courts and Tribunals webpage http://www.pict-pcti.org/index.html (accessed 27-02-2011).

38 See for example Posner and Yoo 2005 *Cal L Rev* 12–13.

39 Posner and Yoo 2005 *Cal L Rev* 7.

Be that as it may, issues that affect independence of international bodies arise in a much wider scope, and may envelope what could, in strict normative terms, be considered extrajudicial. Invariably, they hinge on state relations and international political power play. For example, Kenya's on-going protest against ICC does not come close to meeting any of the material factors that would indicate lack of independence or impartiality in a parochial sense. In any event, none of those named as possible suspects have even been officially indicted by the ICC.[40] Obviously, if there were to be a trial and material evidence of possible bias or lack of independence were available, then arts 40, 41 and 42 of the ICC treaty would come into operation. Already, an attempt by one of the suspects to disqualify the prosecutor has been rejected, which indicates the remoteness of such possibility.[41] However, the government's complaint seems to hinge on some broad suspicion of ICC's challenge to its sovereignty.[42] Absurd as it may seem, some quarters in government believe that the ICC is being used to realign the political landscape in favour of some groups.[43] While one may not be overly concerned about the validity of this claim, the opposition to the international process indicates a real possibility that the government might not cooperate with the ICC in its pursuit of the suspects.[44] This is reminiscent of the Sudan experience where African states have simply refused to assist in the arrest of President Omar Al-Bashir.[45] This trend does not augur well for the future of international law and most certainly for the ICC.

2 2 Impartiality

2 2 1 Meaning

Impartiality of a tribunal is paramount to its performance of adjudicatory functions.[46] The rule of impartiality is entrenched in constitutional practice of many

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40 See Outa "Why Kenya's ICC Deferral petition is likely to Fail" 2011 *East African Standard* http://www.standardmedia.co.ke/InsidePage.php?id=2000029779&catid=15&a=1) (accessed 22-02- 2011).

41 See Ombati "Journalist's Application to bar O'Campo dismissed" 2011 *East African Standard* http://www.standardmedia.co.ke/InsidePage.php?id=2000029833&catid=4&a=) (accessed 23-02-2011).

42 See Onyiego "Kenya's Politicians Look to withdraw from ICC as suspects named" 2010 *VOA News.Com* http://www.voanews.com/english/news/africa/Kenyas-Politicians-Look-to-Withdraw-from-ICC-as-Suspects-Named--111998579.html) (accessed 02-01-2011).

43 See "ICC has Kenyan Politicians on the Run" in *Africa Confidential* 7 Jan. 2011 http://www.africa-confidential.com/article-preview/id/3796/ICC has Kenyan politicians on the run (accessed 17-10-2011).

44 See for example Mutua "High Stakes Game as Date with ICC Draws Near" 2011 *Daily Nation* http://www.nation.co.ke/oped/Opinion/High+stakes+game+as+date+with+ICC+draws+near+/-/440808/1115316/-/rlwlh3/-/index.html) (accessed 27-02-2011).

45 See "African Union Backs Sudan's Bashir" *Mail and Guardian* (01-12-2010) http://www.mg.co.za/article/2010-12-01-african-union-backs-sudans-bashir. (accessed 15-12-2010). The statement was issued in Tripoli, Libya.

46 See in general Leader "Impartiality, Bias and the Judiciary" in Hunt (ed) *Reading Dworkin Critically* (1992) 241. English law is replete with examples of how the principle has been applied. See *R v Bow Street Magistrate: Ex Parte Pinochet (No2)* (2000) 1 AC 119; *Dimes v Grand Junction Canal Properties* (1852) 10 ER 301; *Locabail (UK) Ltd v Bayfdield Properties Ltd* (2000) QB 451; (2000) 1 All ER 65. For an in depth discussion of the *Pinochet* decision, see Byers "The law and politics of the Pinochet case" (1999) 10 *Duke J of Comp & Int'l L* 415.

countries. In the US, for example, the right to an impartial judge is entrenched in the Due Process Clause of the Fourteenth Amendment to the Constitution.[47] In South Africa, the right to a fair, independent and impartial trial is guaranteed in the Constitution and has become a standard procedural requirement in all administrative actions.[48] The dictates of the principles of *justitia naturale* and *nemo judex causa sua*, the observance of which eliminates the possibility of impartiality, have a firm foundation in international human rights law as well. The Human Rights Committee in *Arvo O Karttunen v Finland*[49] has held that impartiality "implies that judges must not harbour preconceptions about the matter put before them, and that they must act in ways that promote the interests of one of the parties".

Simply stated, the rule of impartiality is that no one should be a judge in their own case, or in a case of which the outcome may be in their interest. Thus, a judge is expected to recuse herself when a matter in which she has interest comes before her. In the complexity of modern proceedings, however, the interplay of many factors may give rise to the scope of arbitrariness beyond the mere interest that a judge may have in the outcome of the case. One example may be the unequal treatment of parties through a judge's interference during proceedings. The problem may not be the inequality of treatment itself, especially if it is done pursuant to some objective morality (law). What the rule is concerned with is the disadvantage arising from external or pre-existing factors that impinge on the judge's state of mind. In the Canadian case of *Valente v Queen*[50] which is frequently cited, Justice Le Dain observed that impartiality referred "to the state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case".[51] Thus, impartiality refers not only to the judge's relationship with the parties, but also, to his or her relationship with subject matter issues in the case. This creates a two-pronged approach to impartiality that may have relevance in our examination of international law in the latter parts of this article. It should be noted, however, that impartiality of a judge may still be impermissible outside of her relationship with the parties or with the subject matter.

Let me begin with the judge's relationship with the parties. If a judge has a personal relationship with a party, in the form of shared business interests or if the party is a relative, then she has no business sitting in a trial involving that party. The danger here is that there is a likelihood of bias. Thus, impartiality is linked to actual or apparent bias. Bias has to do with tendencies to view situations and meaning from a viewpoint that favours one party above others. In *Ex Parte Pinochet (2)*,[52] for example, the House of Lords considered the fact that one of the judges was a director of an organisation which shared interest with

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47 See US Constitution Amendment XIV. See also *Tumey v Ohio* 1927 273 US 510, 522–523, 531.

48 See Constitution of the Republic of South Africa, ss 34 and 165(2). See also *President of the Republic of South Africa v South African Rugby Football Union* 1999 7 BCLR 725 (CC) (the recusal application); Devenish "Disqualifying bias: the second principle of natural justice – the rule against partiality or bias *nemo judex in propria causa*" 2000 *TSAR* 397; Hoexter *Administrative Law in South Africa* (2007) 404.

49 Views adopted on 23-10-1992 in UN Doc. GAOR A/48/40 (Vol. II) 120 para 7.2

50 *Valente v The Queen* (1985) 24 DLR (4th) 161 (SCC).

51 *Ibid.*

52 *R v Bow Street Magistrate: Ex Parte Pinochet (No2)* (2000) 1 AC 119.

one of the parties in the promotion of a cause, to be sufficient interest warranting that judge's disqualification. But how can the court satisfy itself that bias has occurred or is likely to occur? There seems to be harmony across many jurisdictions that appearance of bias is important and that the appropriate test should be an objective one, that of a "reasonable man".[53] In the United Kingdom, the courts have moved from the real "likelihood or danger of bias" test in *R v Gough*,[54] to the reasonable man test.[55] The same position obtains in South Africa. In *President of RSA v South African Rugby Football Union*,[56] the court thus summarises the test:

> "The question is whether a reasonable objective and informed person would on the current facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear in adjudicating the case, that is, a mind open to persuasion, by the evidence and the submission of counsel."[57]

Similarly, in the United States, impartiality may be found where "a reasonable man cognisant of the relevant circumstances surrounding a judge's failure to recuse himself, would harbour legitimate doubts about the judge's impartiality".[58] This test has also been applied by international tribunals.[59]

What kinds of preconceptions in the mind of a judge would be impermissible? Obviously, there are many issues in society today that divide people. Sexual orientation, abortion, ethnicity, minority rights and even national origin, are just but a few of such issues. As regards the relationship with issues, circumstances may arise in which the parties feel that because of the judge's attachment to the subject matter, she may be biased against their cause. Also, people hold very strong opinions and may not be afraid to express them, no matter the circumstances they find themselves in. It may be unreasonable to expect that judges will be immune from holding personal opinion on these matters. Evidently, the line between acceptable beliefs and forbidden personal considerations or idiosyncrasies, is hard to delineate. However, it seems that an opinion or belief may be impermissible if it is the kind that would raise reasonable doubt on the judge's

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53 A reasonable man is defined in *RDS v The Queen* 1997 Can Sup Ct. (judgment delivered on 27-09-1997), as an "informed person, with knowledge of all the relevant circumstances, including the tradition of integrity and impartiality that forms part of the background and appraised also the fact that impartiality is one of the duties that judges swear to hold".

54 *R v Gough* 1993 AC 646 661.

55 See the long line of decisions such as *Director General of Fair Trading v Proprietary Association of Great Britain* 2000 EWCA Civ 350; *Magil v Weeks* 2001 UKHL 67.

56 *South African Rugby Football Union* 1999 7 BCLR 725 (CC).

57 Para 48. See also the subsequent decision of *Van Rooyen v The State* 2002 5 SA 246 (CC). Chaskalson J modified the test to "contextualised objective test" (273).

58 *US v Bremers* 195 F 3d 221, 226 (5th Cir 1999). Disqualification is governed by 28 U.S. Code Section 455 (2000), which provides that a judge shall disqualify himself "in any proceedings in which his *impartiality might reasonably be questioned*" (my emphasis).

59 In *Prosecutor v Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case No SCSL-2004-15AR15, A.Ch. 13-03-2004, the presiding judge observed that the question would be "whether an independent bystander so to speak, or the reasonable man . . . will have a legitimate reason to fear that the judge) lacks impartiality". In *Prosecutor v Furundžja*, Case No IT-95-17/1-A, A Ch. 21-07-2000 para 189, the judges held that "there is a general rule that a judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively give rise to an appearance of bias".

ability to be impartial. By the same token, a judge's race, ethnicity, religion, or sexual orientation is not sufficient to infer bias. Take for example the application which was made in the United States Federal Court asking for Judge Leon Higginbotham to remove himself from a racial discrimination case on the basis that he was black.[60] In refusing to step down, the judge made the following remark: "Black lawyers have litigated in federal courts almost exclusively before white judges, yet they have not urged that white judges should be disqualified as on matters of race relations".[61]

2 2 2 International dimension

In considering the impartiality in international adjudication, the question which we could ponder is that posed by Professor Franck in 1968: "Can any man or any group of men administer justice impartially in an ideologically and culturally divided world?"[62] There are over a dozen international tribunals that function almost in the same way as domestic courts; they render binding decisions and adjudicate on disputes on a plethora of circumstances. In permanent tribunals such as the ICJ, states may insist that a judge of their choice is appointed to hear the dispute in which it has interests.[63] In these circumstances, can an international judge be relied upon to give an impartial decision?

Given, as has been shown, that impartiality relates to the judge's personal relations with the parties and the subject matter, an assumption could be made that a judge may feel the pressure to favour his country. Posner and De Figueredo who conducted a study of bias among judges on the ICJ reached the following conclusion:

> "We . . . have not shown that judges consciously or unconsciously vote in a manner that promotes the strategic interests of their home states; it is possible that the judges vote in a manner that reflects their own psychological or philosophical biases . . . We do not have enough data to reject this possibility."[64]

The pressure to favour one country may emanate from a judge's cultural background; the fact that they may be familiar with their domestic legal culture and hence prefer it to any other. Secondly, there may be incentives for a judge to act as representative of their country, although not formally appointed. This may arise because of the pressure to secure their career after their term at the court elapses, or simply as a result of national bias. Thirdly, impartiality may arise from personal policy preferences, or matters in which the judge is known to harbour strong preferences. There is a propensity to downplay the actual effect of these factors on international adjudication. Since international organs generally operate under a cloud of moral infallibility, scholars are more disposed towards acknowledging their impartial character.

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60 *Pennsylvania v Local Union 542, International Union of Operating Engineers 1974* 388 F. Supp. 155, 156–157 (E. D. Pa 1974).

61 *Pennsylvania v Local Union 542, International Union of Operating Engineers* 177. See also *Liteky v United States* 1994 510 US 540 (The fact that a judge has an opinion developed from a source outside of the judicial proceedings is not necessary or a sufficient condition for him to recuse himself).

62 See Franck "Some psychological factors in international third-party decision-making" 1967 *Stan L Rev* 1217.

63 See for example ICJ Statute art 31; European Convention on Human Rights art 27(2).

64 Posner and De Figueredo "Is the International Court of Justice biased?" 2005 *J Leg Studies* 599 603.

2 2 3 Response to allegations of bias

There is no shortage of norms that guarantee impartiality in domestic as well as international judicial practice. These norms have been adopted by individual international tribunals, either in their constitutive instruments or in the rules of procedure. A few examples may illustrate how these norms occur in both international courts and supranational tribunals. The ICJ Statute in art 17(2) provides that "no member may participate in the decision of any case in which he has previously taken part as an agent, counsel, or advocate for one of the parties, or as a member of national or international court, or of a commission of enquiry or in any capacity". Under the procedural rules of the Special Court of Sierra Leone "a judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any personal association which might affect his impartiality".[65]

It is noteworthy that international bodies have shown marked resistance to allegations of partiality on their part. In *Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory*,[66] the ICJ rejected the request by Israel to disqualify Judge Nabil Elaraby on the grounds that he had prior engagement with the issues at hand as an Egyptian diplomat. Even the fact that the judge had openly criticised Israel's position on the Palestinian question published in a local Egyptian newspaper was not able to persuade the ICJ to find a likelihood of bias.[67] In the *Prosecutor v Furundžja*, the ICTY Appeals Chamber rejected the allegation that a judge's previous involvement with the UN and her work on rape in former Yugoslavia could give an appearance of bias for which she should be disqualified. The application for disqualification of Judge Mumba had been brought under rule 15A of the ICTY Rules of Procedure and Evidence.[68] The Appeal Chamber observed that, "there is a general rule that a judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively give rise to an appearance of bias".[69] Thus, in their opinion, since the work that had been undertaken by the judge was in her official capacity, it was in no way a reflection of what her personal views were.

The above notwithstanding, empirical studies of some of these institutions provide something to work with. For example, with regard to the European Court

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65 Rule 15A SCSL Rules of Procedure.

66 See *Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Reports 3.

67 See Shany and Horovitz "Judicial Independence in The Hague and Freetown: a tale of two cities" 2008 *Leiden J Int'l L* 113.

68 Under this rule, "A judge may not sit on a trial or appeal in any case in which the judge has a personal interest or concerning which a judge has or has had any association which might affect his or her impartiality." This rule is similar to that in ICTR and Sierra Leone Special Tribunal as well. Interestingly, however, the Sierra Leone Special Tribunal in *Prosecutor v Sesay* [Decision on Defence Motion Seeking Disqualification of justice Robertson from the Appeals Chamber, Case No SCSL-2004-15-AR15, A. Ch. 13-03-2004], found that a reasonable person reading a book written by the judge (entitled *Crimes Against Humanity – The Struggle for Global Justice*, published in 2002), in which he castigated those who committed atrocities during the war and called for their punishment, could apprehend bias and therefore ordered for the judge's disqualification.

69 *Prosecutor v Furundžja* Case No IT-95-17/1-A, A. Ch. 21-07-2000.

of Human Rights, a study by Erik Voeten suggests that there is no evidence that the judges in this court are biased in favour of their own cultures, or that they are motivated by geopolitical issues.[70] However, the study found that most judges are "policy seekers" who are more likely to rule against their own countries when violations of human rights occur.[71] This study is not representative of all international institutions and therefore I cannot draw a generalised conclusion from it. But it does suggest that impartiality is a factor that may positively or negatively influence international processes. In my view, therefore, the issue of impartiality of judges in international tribunals cannot be canvassed outside the structural factors that drive international processes. As I have already mentioned, and shall illustrate further when I discuss the individual institutions, the context (geopolitical or otherwise) in which international adjudication occurs is an important factor, perhaps so important as to be of greater influence in international decision making than the partiality of individual judges.

2 3 International standards

It may be worthwhile to examine, albeit briefly, how international regimes affirm the domestic rules of impartiality and independence that I have discussed here. This is because domestic judicial practice as underwritten by modern constitutionalism, aspire to conform to international normative standards. Moreover, the building blocks and constituent portions of their constitutions reflect, or bear consonance to, the same ideals of humanity that have propelled normative development at the international level. Notions such as freedom, responsible government, security, economic well-being, equality, non-discrimination and justice have firm foundations in international law. No wonder international frameworks that seek to preserve judicial independence and impartiality are constructed along the same lines as human rights instruments. Indeed, there is general consensus that judicial independence is key to human rights protection in any constitutional order.[72] According to Macovei, the effective protection of human rights can only be attained when the excesses of the executive and the legislative branch of government are held in check by an impartial judiciary.[73] This consensus arises from a long history of an established nexus between rights guarantee and adjudicatory fairness emboldened in the key human rights conventions, such as will be discussed hereunder. Therefore, it is worthwhile to explore the international dimensions and the nomenclature of elements of judicial independence and impartiality that exist at the international level to find a basis for evaluating domestic judicial practice, if not just to establish a more universal understanding of the terms themselves.

2 3 1 International human rights instruments

International human rights instruments have been the most definitive in setting international standards for judicial independence and impartiality. But their

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70 See Voeten "The Impartiality of international judges: Evidence from the European Court of Human Rights" 2008 *Am Pol Sci Rev* 417.

71 Voeten 2008 *Am Pol Sci Rev* 431.

72 Ackerman "Constitutional protection of human rights: judicial review" 1989 *Col Hum Rts L Rev* 59–71.

73 Macovei "Protection of Human Rights by the Judiciary in Romania" in Gibney and Frankowski (eds), *Judicial Protection of Human Rights: Myth or Reality* (1999).

impact has been most explicit in the rules applicable in the domain of criminal litigation. This is probably because the criminal process is susceptible to misuse by despots, keen to curtail liberty of their political opponents and to frustrate the enjoyment of individual rights and freedoms by their subjects. Nonetheless, the notion of procedural fairness and the concomitant due process requirements attract a number of guarantees within the range of instruments that protect civil and political rights. What these instruments have done is to reduce these notions and the obligations they create into a rights regime. Thus, the Universal Declaration of Human Rights[74] provides that "everyone is entitled in full equity to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".[75] From this provision alone, three aspects of the imperatives of procedural fair hearing may be distilled: the idea of equality before the law, the presumption of innocence, and the right to fair and public hearing by a competent court. These ideas, which form the basis of due process guarantees, have found emphatic expression in Bills of Rights sections of all modern constitutions.

The spirit of art 10 has been carried through all the major human rights instruments enacted since 1948. For example, the International Covenant on Civil and Political Rights in art 14(1) provides that "all persons shall be equal before courts and tribunals". It also provides that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent and impartial tribunal established by law". In addition, these rights have been consistently affirmed by international and regional jurisprudence. In *Gonzalez del Rio v Peru*,[76] the Human Rights Committee held that "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception". In this case, the breach of the fair trial requirement in art 14(1) was deemed to have occurred because of the prolonged delay of a criminal process on account of political considerations. The Committee has further affirmed that even in conditions of emergency, "only a court of law can try and convict a person of a criminal offence".[77] Other international instruments that contain fair hearing provisions include the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment;[78] the International Convention on the Elimination of All Forms of Racial Discrimination; International humanitarian law, codified in the four Geneva Conventions and two Additional Protocols, which are only applicable in times of conflict; and Convention on the Rights of the Child.[79]

2 3 2 Regional instruments

On the regional front, one could mention the African Charter on Human and Peoples' Rights,[80] which provide that "every individual has the right to have his

74 GA Res 217A, UN Doc. A/810 (1948).
75 Article 10.
76 Communication No. 263/1987 in UN Doc. GAOR, A/48/40 (Vol II), para 5.2.
77 General Comment no 29 para 16.
78 Dec 10 1984, GA Res 39/46, UN GAOR 39 Sess. Supp No 51 UN Doc. A/39/51 (1984), reported in ILM 1027, Arts 12–15.
79 Arts 37 and 40.
80 Also known as the Banjul Charter, adopted on 27-06-1981, OAU Doc. CAB/LEG/67/3 rev 5, 21 ILM 58 (1982). See also Mutua "The Banjul Charter: The Case for an African

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cause heard".[81] This right comprises the right to be presumed innocent until proved guilty by a competent court or tribunal and the right "to be tried within a reasonable time by an impartial court or tribunal". Through a series of recommendations, the Commission has established that the rights contained in art 7 should be considered "non derogable" because they provide "minimum protection for citizens".[82] Earlier in 1991, the Commission had held that a tribunal composed of appointees of the executive that purported to try and convict persons, could not meet the impartiality threshold of article 7. In *Constitutional Rights Project v Nigeria*,[83] the Nigerian Robbery and Firearms Tribunal established under the Firearms Special Provisions Decree had sentenced the complainants to death. The tribunal was composed of three members: a judge, a military officer and a police officer, all appointed by the executive in accordance with the Decree. The Commission held that "the selection of serving military officers, with little or no knowledge of law as members of the tribunal" was in violation of art 7 and also contravened principle 10 of the Basic Principles on the Independence of the Judiciary. The Charter has a further provision in art 26 which enjoins states to guarantee the "independence of the courts".

Other regional human rights systems, such as the European and the American systems, have similar guarantees in their constitutive instruments. For example, the European Convention on Human Rights guarantees the right to fair hearing in art 6(1). It provides that "everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal established by law". Generally speaking, the fair hearing guarantees under this Convention are relatively expansive. For example, they go beyond procedural fairness to encompass the rights of access to courts.[84] But what has made the convention remarkable is the interpretation that the Court of Human Rights has given to its provisions. Like the African and the European Conventions, the American Human Rights Convention, in art 8 guarantees the right:

> "to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature".

2 3 3 International Principles and Guidelines

2 3 3 1 UN Basic Principles on the Independence of the Judiciary[85]

Although lacking binding force, these principles set standards for achieving judicial independence which the international community has shown ready willingness to abide by. They provide a useful benchmark in assessing the independence

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Cultural Fingerprint" in An-Naim (ed) *Cultural Transformation and Human Rights in Africa* (2002) 79.

81 Article 7(1).

82 See for example *ACHPR Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* Communication No. 218/98.

83 Communication No. 60/91.

84 See for example *Golder v UK* 1975 A 18; 1 EHRR 524.

85 United Nations High Commissioner for Human Rights, *Basic Principles on the Independence of the Judiciary* (1985) adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26-08-1985 – 06-09-1985 and endorsed by General Assembly resolution 40/32 of 29-11-1985 and 40/146 of 13-12-1985.

of the judiciary in international contexts, and are held as a model of encouragement for judicial systems everywhere in the world. The provisions are wide ranging and cover the following subjects: independence of the judiciary; freedom of expression and association; qualifications, selection and training of judges; conditions of service and tenure; professional secrecy and immunity; and discipline, suspension and removal. According to the Principles on the Independence of the Judiciary, "it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary".[86] Moreover, "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".[87] States are also enjoined to take specific measures guaranteeing the independence of the judiciary, hence protecting judges from any form of political influence in their decision making.[88] The principles also contain guidelines for the selection, training, discipline, removal, and mechanisms of handling complaints.

In 1989, ECOSOC adopted the Procedure for Effective Implementation of the Basic Principles on the Independence of the Judiciary.[89] These procedures contain guidelines on how states can incorporate the UN Basic Principles into their justice system, publicise and make it available to all members of the judiciary, and how UN institutions could assist member states in reviewing and strengthening judicial independence. The UN General Assembly has subsequently adopted the Guidelines on the Role of Prosecutors[90] and the Basic Principles on the Role of Lawyers[91] to compliment the Basic Principles. These documents have aligned the requirements of independence and impartiality contained in the Basic Principles with functions of the prosecutors and lawyers, so as to complete the picture of international standards in this regard. In addition, regional organisations and professional bodies have also promulgated their own sets of standards specific to their regions or constituencies.[92]

2 3 3 2 UN Special Rapporteur on Independence of Judges and Lawyers

In 1994, the UN High Commissioner for Human Rights appointed a Special Rapporteur (hereafter "SR") on the Independence of Judges and Lawyers.[93]

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86 Principle 1.
87 Principles 1 and 2.
88 Human Rights Committee, General Comment no 32 on article 14, 23-08-2007 para 19.
89 ECOSOC Resolution 1989/60.
90 UNGA Resolution 45/166 of 18-12-1990, originally adopted by the 8th UN Congress on the Prevention of Crime and Treatment of Offenders in Havana, Cuba, August/September 1985. See Report A/CONF. 144/28.
91 UNGA Resolution 45/166 of 18-12-1990 117.
92 See for example *Draft Principles on the Independence of the Judiciary* (Syracuse Principles) 1981; *Draft Principles on the Independence of the Legal Profession* (Noto Principles) 1982; *The Rule of Law and Human Rights* (Declaration of Delhi, Law of Lagos, Resolution of Rio Declaration of Bangkok); *Union International des Avocats are you referring to a case or the organisation?*: *The International Charter of Legal Defence Rights*; International Bar Association: *Minimum Standards of Judicial Independence* 1982; *International Convention for the Preservation of Defence Rights* 1987; and *Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region*, adopted by the Sixth Conference of Chief Justices of Asia and the Pacific on 19-08-1995.
93 Resolution 1994/41 of the Commission on Human Rights (UNHCR).

Departing from its practice of establishing special rapporteurs to monitor human rights protection, the Commissioner for the first time evoked a thematic procedure in seeking to fulfil its mandate. The office of the SR was to be held for three years.[94] The task was, *inter alia*, to "identify and record not only attacks on the independence of the judiciary, lawyers and court officials, but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they are requested by the state concerned" and also "to identify ways and means to improve the judicial system and make concrete recommendations thereon".[95] In June 2008, the mandate was enlarged to include the identification and making of concrete recommendations on ways and means to improve judicial systems, to apply gender perspectives to cooperate with other relevant UN bodies and report regularly to HRC and UNGA. The SR can investigate information that comes to his attention, and is entitled to address individual cases upon complaints received. In the report of activities for 2004, the then SR noted that he had made 104 urgent appeals, wrote 34 letters of allegations of interference with judicial independence and 15 press releases to 53 governments.[96] In recent times, the SR had made visits to Ecuador (following reports of unconstitutional dismissal of judges), Kyrgyzstan (on invitation of government) and Tajikistan.[97] The first visit to Africa was in December 2010 when the current SR, Ms Gabriela Knaul, visited Mozambique.[98] The restricted role of the rapporteurs has not prevented them from making their voices heard whenever there is threat to the independence of judiciary. For example, when the Senegalese authorities transferred judges to lesser positions so as to frustrate the trial of Hissène Habré, indicted on war crime charges, the SR joined his counterpart, the Special Rapporteur on Torture, to issue a joint statement condemning the action of the Senegalese government.[99] The SR has also been active in trying to enhance capacities of poorer states to improve their systems of the administration of justice. In the 2007 report, the then SR, Leandro Despouy, urged the UN to support transitional countries in this endeavour.[100] As a result, the UN General Assembly adopted a resolution, called Human Rights in the Administration of Justice,[101] in which it invited state parties to access technical assistance provided by UN programmes in order that they may strengthen their national capacities in the administration of justice.

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94 The first SR was Param Cumaraswamy (Malaysia) whose term ended in 2003. He was succeeded by Leandro Despouy, whose term expired in June 2008. In the same year, the mandate of the Special Rapporteur was extended for a further term of three years (Res.8/6, 2008). The current Special Rapporteur is Ms Gabriela Knaul, a former judge from Brazil.

95 Human Rights Council Res 8/6, 28th Meeting 18-06-2008.

96 See E/CN.4/2005/60, discussed in *UN Juridical Yearbook*, 2005. The report highlighted the main concern over how counter-terrorism measures were affecting the right to fair trial by independent and impartial courts of law.

97 *Ibid*.

98 See "UN Expert on independence of judges and lawyers visit Mozambique" *Club Mozambique Lda* http://www.clubofmozambique.com/solutions1/sectionnews.php?secao=mozambique&id=20334&tipo=one (accessed 06-01-2011).

99 See Brody "The prosecution of Hissène Habré: an African Pinochet" 2000–2001 *New England Law Review* 321 332. See also Seck "Affaire Hissène Habré: le New York Times dénonce un déni de justice" 2000 *Le Matin* 3.

100 See A/62/207, discussed generally in *UN Juridical Yearbook 2007* (2009) 209.

101 UNGA Res 62/158 of 18-12-2007.

2 3 3 3 The Bangalore Principles on Judicial Conduct[102]

Concerned that corruption in the judiciary was increasing, the Centre for Independence of Judges and Lawyers and Transparency International convened a workshop in Geneva in 2000, to discuss strategies for strengthening judicial independence and eliminating corruption. The workshop resulted in the creation of the Judicial Group for Strengthening of Judicial Integrity. This group met in Bangalore, India, in 2001 and endorsed a Draft Code of Judicial Conduct. The code was adopted by the Round Table meeting of Chief Justices held at Peace Palace, The Hague, Netherlands in November 2002, and formally by ECOSOC in April 2006.[103] The Code establishes standards of universal judicial conduct. It sets out six values considered to be most important in the discharge of judicial functions. These are: independence, impartiality, integrity, propriety, equality, competence and diligence. The principles are not binding but are rapidly influencing judicial practices around the globe. Among the countries that have already established legislation for monitoring conduct and integrity of judges is South Africa.

2 3 3 4 The Burgh House Principles

These principles, which relate to judicial independence and impartiality in international practice, were promulgated by the International Law Commission in 2004. Like the other principles mentioned above they are not binding.[104] Worth noting is Principle 9(2) which allows for the disqualification of a judge for "any other form of association" which may compromise independence or impartiality. But the principles cover several other aspects of independence and impartiality of international judges, such as implications for independence and impartiality on nomination, election, appointment and tenure of international judges; compatibility of extrajudicial activities with judicial functions; and past links of a judge to a case before the court, to a party, or to an issue before the court.

3 INDEPENDENCE AND THE TEST OF EFFECTIVENESS

At the beginning, I posited the argument that international adjudicatory organs are likely to achieve greater support from African states and therefore become more effective in their mission if they are independent and impartial. In the foregoing sections I have analysed, albeit briefly, what the two principles entail in terms of their meaning and scope. It is apparent that if we adhere to the template and articulate the meaning of these principles within the procedural confines of an adjudicatory process, then the entire argument being made here might not make sense. That is why the proposition advanced here is based on the assumption that independence and impartiality, in the international context, should acquire a much wider meaning than can be discerned from conventional

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102 See http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf. The commentary to the principles was prepared in 2007. See http://www.coe.int/t/dghl/cooperation/ccje/textes/BangalorePrinciplesComment.PDF) (accessed 15-12- 2010).

103 ECOSOC Res 2006/23 of 27-07-2006. See also Res 2007/22 on Strengthening Basic Principles of Judicial Conduct.

104 See The Burgh House Principles on the Independence of the International Judiciary http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf) (accessed 27-02-2011). See a discussion of the principles in Sands *et al*, "The Burgh House Principles on the Independence of the International Judiciary" 2005 *Law & Prac Int'l Cts & Tribunals* 247.

normative constructions that have been discussed already. When independence of an international body is constructed on a much wider plane, the fictional aspects of international cooperation that often reside in the political domain, and which impact on the effectiveness of international bodies, may then be canvassed.[105] Isolating these aspects may engender more than just analysing the subjective content of the notion of sovereignty, but also, seeking an understanding of the principles of independence and impartiality in a way that is sensitive to the evolving nature of a state's relationship with international organs.

3 1 The test of effectiveness

Given the assumption outlined above, can effectiveness as a test, give us a glimpse of that level of independence which we seek to ascribe to international adjudication? To answer this question, we must first unravel what the meaning of effectiveness could be in this context. Authors differ on the precise meaning of the term. Young and Levy take a simplistic view of legal effectiveness by equating it with compliance.[106] Posner and Yoo list three attributes: the compliance rate, usage and "the overall success of the treaty establishing the treaty".[107] Helfer and Slaughter define effectiveness of the tribunal to be "the ability to compel a party to a dispute to defend against a plaintiff's complaint and to comply with the resulting judgement".[108] Both sets of scholars admit that their postulations are problematic.[109] States do not necessarily resort to adjudication because the tribunals are effective. They do so because either settlement is impossible, or because there are other incentives which may be extralegal, such as political payoffs. Guzman argues that a state's decision to use a tribunal may be "a strategic choice" completely unrelated to the tribunal's perceived effectiveness.[110] In his view therefore, the net measure for effectiveness is the ability of the tribunal to "enhance compliance with associated substantive obligation".[111] He also adds caution to this view:

> "A tribunal's ability to encourage compliance with underlying legal rules is not a simple binary measure. A tribunal that provides some incentive to states but fails to prevent violations will be more effective than that one which fails to provide any compliance incentives to parties. Effectiveness, then, is inevitably a relative measure."[112]

Presumably therefore, the measure of effectiveness of an international tribunal should correspond to the purpose for which it was set up. According to Martinez, most international tribunals have the primary duty of providing an institutional framework for international cooperation, promoting compliance with international law and reinforcing human rights and the rules consistent with the

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105 The extensive obligation placed upon states to cooperate with the ICC, notwithstanding, the court still has to devise subtler means of securing state assistance.

106 See Young and Levy "The Effectiveness of International Environmental Regimes" 1999 in Young (ed) *Effectiveness of International Environmental Regimes: Causal Connection and Behavioural Mechanisms* 1–32.

107 Posner and Yoo 2005 *Cal L Rev* 28–29.

108 Helfer and Slaughter 1997 *Yale LJ* 283.

109 Helfer and Slaughter 1997 *Yale LJ* 391; Posner and Yoo 2005 *Cal L Rev* 29.

110 Guzman "International tribunals: a rational choice analysis" 2008 *U Pa L Rev* 172 188.

111 *Ibid.*

112 Guzman 2008 *U Pa L Rev* 189.

achievement of democratic ideals.[113] These functions indicate that international tribunals have a role in promoting an ordered international system. Thus, they "cannot behave as if the general state of the law in the international community . . . is none of their concern; to act on that blinkered view is to wield power divorced from responsibility".[114] Although this statement was made in response to the need for judges to pay attention to precedent, it has implication for the argument being advanced here. A narrow focus by international tribunals, engendered by parochial approaches to rules of procedural fairness that do not take into account the general status of law, geopolitical balance, cooperative measures and flexible interpretive mechanisms may decrease, rather than increase, their effectiveness.

3 2 Compliance

Respect and observance of judicial decisions is an integral part of any adjudicatory regime.[115] The function of the adjudicatory tribunal will become irrelevant if the sanctions that it imposes are incapable of being enforced. In international adjudicatory processes where jurisdiction is not compulsory, states have an option to accede to jurisdiction and thereby undertake to abide by its decisions. In principle, states could withhold such undertaking and thereby nullify the tribunal's authority to hear dispute or make a determination. But even in cases where states accede to jurisdiction, the enforcement of the decision largely depends on the goodwill of the state itself. Coercive mechanisms of enforcement of orders of tribunals such as those in the domestic legal systems do not necessarily exist. Apart from the European Union where member states are required to "take measures required for the implementation of the judgement", and where ECJ is empowered to impose penalties for non-compliance with its judgement, most supranational organs do not enjoy such powers.[116] What we have in most treaties are states simply undertaking to comply with judgements, such as in the American Convention on Human Rights, but without any tangible measures being imposed for non-compliance.

But there is one factor here that I wish to highlight, which resonates with my idea of the level of independence in international adjudication. This is the fact that international adjudicatory institutions have a very close link with the international system, and thus enforcement may sometimes depend on how the system is persuaded. For example, the enforcement of the ICJ decisions could, in

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113 Martinez "Towards an international judicial system" 2003 *Stan L Rev* 429 463.

114 *Prosecutor v Semanza* ICTR-97-20-A, Decision Para 25 (ICTR App. Ch. 31-05-2000) (opinion of Judge Shahabuddeen).

115 This is affirmed by principle 4 of the UN Basic Principles which provides: "*There shall not be any inappropriate or unwarranted interference with judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law*" (my emphasis). Poulson has defined compliance as consisting of "acceptance" and "performance" in "good faith". See Poulson "Compliance with final judgements of International Court of Justice since 1987" 2004 *EJIL* 434. See also Chayes and Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 17–22.

116 See Treaty Establishing the European Economic Community 25-03-1957 art 171 (1957) 298 UNTS 4.

some instances, depend on how the UN Security Council responds to the issue in dispute. Article 94(2) of the Charter enjoins states to perform obligations incumbent upon them under the "judgment rendered by the Court". And if they fail to do so, "the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement". This means that states who have accepted jurisdiction run the risk of facing the full wrath of the international community, including possible coercive action, if they fail to perform obligations imposed by the judgement of the ICJ.[117] Secondly, the apparent nexus between judicial function and political action in resolving disputes indicates a much wider breadth for construing independence in international adjudication. Thus, you cannot surmise independence of international adjudicatory institutions without having recourse to the political spectrum in which their functions are carried. But whipping up political support for international decision is a tricky enterprise. Some authors have lauded the so-called second-look approach, adopted by some tribunals to be a way of building legitimacy within political circles.[118] This approach allows tribunals to direct potentially explosive legal conflicts arising out of certain law or decrees, to the political offices for reconsideration before the final verdict is reached.[119] In the same vein, the principle of complementarity could operate as a cognisable opportunity for agreement between international prosecutors and the state, thus allowing the states to reconsider their options to prosecute before an international indictment is issued. Other hybrid forms of the second-look principle could be seen in the "margin of appreciation" doctrine that is so well articulated by the European Court.

Undoubtedly, the behaviour of states, especially African states, indicate that perspectives on international justice do not quite depart from the underlying political considerations that have supported their creation in the first place. The normative pattern and methods of operation of these institutions should follow this path. It is proposed therefore that the preferable theoretical framework for discerning the province of impartiality of international tribunals should be the structural impartiality paradigm.

4 STRUCTURAL IMPARTIALITY AND LIMITATIONS IN INTERNATIONAL PRACTICE

What does structural impartiality mean? For the purposes of the discussion in this article, structural impartiality should be understood as the sum of all factors accruing from the relationship and stature of states in the international system that impinge on adjudication of international disputes. In essence, structural impartiality recognises the role of states as key players in fashioning the international

117 See Llamzon "Jurisdiction and compliance in recent decisions of the International Court of Justice" 2008 *EJIL* 815.

118 See for example Martinez 2003 *Stan L Rev* 519.

119 The example cited here is that of the WTO appellate body's decision in the *Shrimp-Turtle case*. The WTO organ, despite its disposition to the rule against the US ban on harvesting of shrimps that had contravened agreed trade rules, allowed the US a period of one year to reconsider its position. See WTO Appellate Body Report on US – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/RW 22-10-2001 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm. (17-12-2010).

normative agenda. Falk characterises it as the "reality of a world of sovereignty in which the primacy of states is critical to the effectiveness of law".[120] He further argues that this reality is explicit in the manner in which state power is utilised in advancing ideas of law, or its interpretation, and which often reflects "geopolitics and power".[121] Construed in these terms, structural impartiality challenges the perch that individual impartiality enjoys in the construction of what may, or may not be, permissible in the conduct of a judge or an adjudicator sitting in an international tribunal. Instead it widens the scope of impartiality to include considerations that may be extrajudicial, but which impinges on the conduct and outcome of international adjudicatory processes. Thus, "structural impartiality" infers that cultural diversity, racial balance and equitable distribution must be taken into account in the management and operation of international institutions. There are several issues that may be critical to the achievement of structural impartiality and we cannot possibly discuss all of them here. However, the main concerns that do raise questions about Africa's engagement with the international system, and thus indicate the shortfall in the current independent and impartiality paradigm, are outlined below. It may be useful to caution that although the suggestion here may suffer from operational ambiguities, they nonetheless indicate an alternative view/approach to internationalisation that recognises the participation of all countries.

4 1 Geopolitical Bias

Most of the international institutions that are the subject of this enquiry were created during the 1940s. This was at the height of US hegemony in the western world and the institutions were designed to boost the power of the US and its allies around the globe.[122] At this time, Africa was not a participant in the international system. Its territory and peoples had been partitioned and shared out as property to the group of "civilised" European nations.[123] The partition, done in 1834, was to be endorsed by the League of Nations, and later by the UN Charter under the ambiguous trustee arrangements.[124] And the arbitrary boundaries that were established, which have been the cause of great misery, have been normatively sustained in the latest wave of internationalism through the doctrines such as *uti possidetis*. To view the establishment of international institutions as beneficial to Africans may be counterintuitive to the prevailing mistrust

120 Falk *et al* "The Independence and Impartiality of International Judges" in *Proceedings of the Annual Meeting (American Society of International law)* (1989) 508 516.

121 *Ibid*.

122 See Drezner "New world order" 2007 *Foreign Affairs* 34.

123 See Mutua "Why redraw the map of Africa: moral and legal enquiry" 1995 *Mich J Int'l L* 1113.

124 See *International Status of South West Africa* (1950) ICJ 128 (advisory opinion of July 11); Voting Procedures and Questions Relating to Reports and Petitions Concerning the Territory of South West Africa 1955 ICJ 67 (advisory opinion of June 7); Admissibility of Hearings of Petitioners by the Committee on South West Africa 1956 ICJ 23 (advisory opinion of June 1); *South West Africa Cases* (*Ethiopia v South Africa; Liberia v South Africa*) 1962 ICJ 319 (judgment on preliminary objections of December 21); *South West Africa Cases* (*Ethiopia v South Africa; Liberia v South Africa*) (second Phase) 1966 ICJ 6 (judgment of July 18); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 1970, 1971 ICJ 6 (advisory opinion of January 26).

between the two. With African states joining the UN and becoming a major force in international decision making, the stability of the international system began to falter. The unrepresentative nature of the UN Security Council, skewed economic policies imposed by the Bretton Woods institutions, the irrelevance of pacts such as G-8, and the impartiality in world trading systems are some of the factors that have fuelled frustrations with the international system as it stands. As the mass of hitherto unrepresented constituencies (states) contest the impartiality of the international political order, the stability of the system is threatened. What is evident is that for the system to maintain its political legitimacy a lot of things need to change. More particularly, its institutions must change. The turmoil caused by the recent global financial crisis indicates just how urgent the change must come.[125] In a 2007 address to the Chicago Council on Global Affairs, the US President Barack Obama while talking about the future participation of the US in international institutions such as the UN, International Monetary Fund and World Bank, observed that reform was "urgently needed if they (international institutions) are to keep pace with the fast moving threats we face".[126] Unfortunately, the recent efforts towards this goal have not been objectively driven. They are still buoyed by self interest. For example the "responsible stakeholder" rhetoric emanating from the US that urges emerging economies such as China and India to join her in strengthening the international system is a self-interest project aimed at sustaining their geopolitical dominance.[127]

The reason why the current geopolitical order has failed is because of its susceptibility to geopolitical manipulation.[128] This has resulted in impartiality in the operation of most institutions of the international system, including adjudicatory institutions. According to Falk, there is a very strong and important nexus between "impartiality and geopolitics", and this has in part inhibited a fully fledged support for international justice systems. In 1961 (during the formative stages of most African states), Professor Anand observed that the main reason why the ICJ could not acquire compulsory jurisdiction was because of "lack of confidence in the impartiality of its judgements".[129] Conversely, the prospect of impartiality is also frightening to those who might not have their way in the international processes. This makes the powerful wary of supporting adjudicatory processes that may be completely independent of the influence or ideological partisanship of the international system. Indeed, some sceptics have argued that the more inclusive international system would be a threat to the progress that the international community has made in democratisation, human rights, trade liberalisation and even international criminal system. For example, according to Castaňeda, the ascension of states such as South Africa and Brazil into the

125 See for example Altman "Globalisation retreat: further geopolitical consequences of the financial crisis" 2009 *Foreign Affairs* 2.

126 Cited in Brooks and Wohlforth "Reshaping the world order: how Washington should reform international institutions" 2009 *Foreign Affairs* 49 50.

127 Drezner 2007 *Foreign Affairs* 41.

128 A number of studies have acknowledged this fact. See for example Mendlovits (ed) *On the Creation of a Just World Order* (1975); Walker *One World Many Worlds* (1988); Falk *Humane Governance: Towards a New Global Politics* (1995).

129 Anand *Compulsory Jurisdiction of the International Court of Justice* (1961) 101–102.

"sanctum of world's leading institutions" could undermine the principles and practice of these institutions.[130]

4 2 Paucity of resources

Lack of resources eliminates the chances of most African states to participate in adjudicatory forums of the international system, either as litigants, or as judges and arbitrators. Access to an adjudicatory tribunal is an important component of that tribunal's independence and impartiality attributes. A dispute in the WTO dispute settlement process that goes to the appellate stage may cost roughly US $500 000.[131] Lawyers who act on behalf of states in the same process are known to charge an hourly rate of about US $600.[132] Added to the fact that African states cannot build the necessary expertise in some areas, their voice is muted even in disputes where they have a stake.

4 3 Legitimacy

International adjudicatory bodies must have legitimacy to be able to function and also render "acceptable" and "observable" decisions.[133] One source of legitimacy for these institutions, which is perhaps crucial to the understanding of the structural impartiality paradigm, is based on their representative function. International adjudicatory organs are representative of the international community's interests. To fulfil their roles, they must engage with issues affecting their constituencies, including those whose participation are hampered by skewed economic and political relations. The representative role is best served, not only when its decisions are seen to be impartial, but also when it responds to the issues affecting the community of states and their citizens. Two issues could be canvassed here to give an example of the weaknesses in these organs' representative role. These are diversity and unrepresentative geographical location of most of these institutions. Invariably, lack of diversity diminishes the ability of these institutions to respond to the disaffected life stories of the majority of the world's poor who live on the fringes of international politics. A court or adjudicatory organ that shuns diversity is unlikely to give decisions that are representative of people's wishes, and thus command acceptability. This is because diverse backgrounds enrich jurisprudential discourse. Posner concedes that "different judges, each with his own idea of the community's need, will weigh consequences differently".[134] Thus he argues for diversity in the judiciary because "a diverse judiciary is more representative and its decisions will therefore command greater acceptance in a diverse society than would be decisions of a mandarin court".[135] Moreover, according to Falk, structural impartiality exists "when the

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130 Castaňeda "Reshuffling the geopolitical order" 2010 *Los Angeles Times* http://articles.latimes.com/2010/aug/26/opinion/la-oe-castaneda-world-20100826) (accessed 15-12-2010).

131 See Mosoti "Africa in the first decade of WTO dispute settlement" 2006 *J Int'l Econ L* 427 429.

132 See Kessie and Addo "African Countries and the WTO Negotiations on the dispute Settlement Understanding" http://ictsd.org/downloads/2008/05/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understanding.pdf) (accessed 27-02-2011).

133 Meron "Judicial independence and impartiality in international criminal tribunals" 2005 *AJIL* 359 359–360.

134 Posner *Law Pragmatism and Democracy* (2003) 73.

135 Posner *Law Pragmatism and Democracy* 120.

judiciary as a whole is comprised of judges from diverse backgrounds and viewpoints".[136] Unfortunately, there is still racial and gender imbalance in the staffing of international adjudicatory institutions, and the appointment processes are still heavily slanted in favour of powerful nations because of their political and economic stature.

Paradoxically, these inadequacies are almost never discussed because our understanding of impartiality often precludes us from thinking outside the box. We find ourselves entangled with the appeal of political correctness in constructing a meaning to impartiality which circumscribes representativeness in the composition of the bench. Yet we cannot deny that gendered and racial views have an impact on judicial processes and their outcomes. Furthermore, experiences that shape our views on all matters, including the essence of law, are inextricably bound to national cultures and social structures. In emphasising the importance of diversity for a world court, Edward Gordon wrote: "The variety of origin of judges is certainly the great strength of this court. It is a major contributory factor to confidence that all states may feel in the balanced nature of the court's decision and the broad spectrum of legal opinion they represent."[137]

5 CONCLUSION

Respecting other reasons why African states are uncomfortable with international institutions, this article points to independence and impartiality as an aspect worthy of consideration. It makes no claim on the extent to which the two principles could override any other factors central to state relations, but suggests that their application at the international level raise some compelling questions that scholarship on international adjudication should begin to explore. Thus, the notion of "structural impartiality" is presented as a possible starting point for this exploratory journey.

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136 Ifill "Judging judges: racial diversity, impartiality and representation in state trial courts" 1997–1998 *Boston College Law Review* 95 99. See also Howe "Juror neutrality or an impartiality array? A structural theory of the imperial jury mandate" 1995 *Notre Dame Law Review* 1173.

137 See Gordon "Observations on independence and impartiality of members of the International Court of Justice" 1986 *Conn J Int'l L* 397 402.

Academic Freedom and Institutional Autonomy: Some Reflections on the *Magna Charta Universitatum*

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"First they had me fired. Then they banned my articles and books. They cut off my phone and e-mail. When I heard they were coming to arrest me I fled."[1]

1 BACKGROUND

It is common cause that academic freedom and institutional autonomy are conditions precedent to the successful prosecution of the mission of institutions of higher learning: pursuit of knowledge for knowledge's sake. These essential values can be best realised when these institutions are "morally and intellectually independent of all political or religious authority and economic power".[2] And yet these claims cannot be asserted in splendid isolation. Universities must be relevant and responsive to the needs of the communities they serve. They must be accountable to their stakeholders, broadly defined to include the state, students and surrounding communities. Furthermore, while "every single university has a local and unique profile, a very specific environment and a particular mission",[3] it is also generally accepted that in almost every country, universities are facing formidable challenges as a result of inexorable changes in the landscape of higher education. In this clamour to "adapt or perish", the very *raison d'être* of universities can no longer be taken for granted.

In an article of this nature and scope it is not possible or even advisable to traverse all the issues implicated by these questions. In the premises, this article is concerned with the author's own reflections on the values enshrined in the *Magna Charta Universitatum*, Bologna, Italy, 18–20 September 2008, the oldest

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1 Quinn "Academic Freedom and the Individual" pamphlet circulated under the name of Scholars at Risk, New York University, XX Anniversary of the *Magna Charta Universitatum*, Bologna, Italy (18-09-2008 – 20-09-2008).

2 Jarab "Academic Freedom and University Autonomy" in *Report of the Rapporteur* Parliamentary Assembly of the Council of Europe Report Doc 10943 (02-06-2006).

3 Daxner "Foreword" in Jónasson (ed) *Inventing Tomorrow's University – Who is to Take the Lead*? (2008).

university in Western Europe or *Alma Mater Studiorum*.[4] The article assesses the relevance of these values to the South African higher education landscape as universities strive for relevance and fitness for purpose. The organising principle herein is, that while the values articulated in the *Magna Charta Universitatum* may be taken for granted in the liberal democracies of Western Europe and North America, there is a lot that we in the developing south can learn from that inspirational document and its enduring principles.[5] The article concludes by recommending the establishment of a regional framework in the SADC region as a springboard from which issues germane to academic freedom and institutional autonomy, accountability and social responsibility could be elucidated and kept in the public domain.

2 INTRODUCTION

Academic freedom and institutional autonomy are generally conceived as being central to the "traditional" mission of universities as places "where knowledge is generated, stored, transformed, taught, converted into truth or ideology, where inter-generational relations are also being re-adjusted, either a true philosophical dream or a nightmare".[6]

The twin principles of academic freedom (at individual level) and institutional autonomy (at collective level) are central to the role of universities in "rolling back the frontiers of knowledge, exploring the unknown to bring it to human consciousness",[7] and to the "moral and intellectual independence of research and teaching, openness to dialogue, tolerance, free exchange of ideas and information.[8]

Luigi Berlinguer, has rightly observed that:

> "there can be no higher education, no research and no teaching without academic freedom and institutional autonomy. Today we cannot even have democracy without these two prerequisites. In the knowledge economy, development would be seriously undermined without them. On many occasions we have seen that when freedom and autonomy have come under attack – in various forms, brutal or more subtle – even economic prosperity has ground to a halt, leading to social and economic stagnation".[9]

In similar vein, Ebrima Sall and Andre Mangu, in a seminal article have cogently observed that:

> "the freedom of academic institutions, scholars and students to pursue their research, teaching and learning, and to publish without undue control or restraint

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4 www.magna-charta.org (accessed 19/9/2009). See also Tűrk "The Purpose of Academic Freedom Today" in *Proceedings of the Conference of the Magna Charta Observatory 18–20 September 2008* (2009) 30.

5 Recently, my own university, North-West University, Mafikeng Campus, featured in the news for the wrong reasons regarding its decision to honour a former political leader and to invite such a leader to deliver a lecture during its 30 year anniversary celebrations, September–October 2010, hence the need for vigilance in the face of threats from within and without.

6 Daxner in Jónasson (ed) *Inventing Tomorrow's University* 8.

7 Jarab in *Report of the Rapporteur* 10.

8 Singh "Making Academic Freedom and Institutional Autonomy Real in Boundary Conditions: Some Issues from African Higher Education" in *Proceedings of the Conference of the Magna Charta Observatory 18–20 September 2008* (2009) 89.

9 Berlinguer "European views on the Political Future of Universities" (paper presented to the Magna Charta Yearly Event on the theme of "Political Approaches to University Identity" Bologna, Italy (14-09-2006)) 1.1.

> from the institutions that employ them, from forces in civil society, from donors, or from other academics of a different gender, age, or ideological leaning is a prerequisite for quality higher education and research".[10]

Danilo Türk has underlined the importance of these principles in these words: "there is no better guarantee of university's creativity, innovation and, ultimately of its role as an agent of social economic and technical development".[11]

The case for academic freedom and institutional autonomy has been well articulated in a number of regional instruments. In the African context, the Kampala Declaration on Intellectual Freedom and Social Responsibility 1990 boldly asserts that:

> "Every African intellectual has the right to pursue intellectual activity, including teaching, research and dissemination of research results, without let or hindrance subject only to universally recognized principles of scientific inquiry and ethical and professional standards."[12]

According to the Network for Education and Academic Rights, the Kampala Declaration "was the first attempt by academics and students in Africa to establish the benchmarks for academic freedom and institutional autonomy".[13] It is important to note that the Kampala Declaration was principally concerned with the relationship between universities and the state at a particularly difficult time in the history of the African continent, including endemic phenomena which the Network has aptly identified such as "the arbitrary closure of universities, the invasion and occupation of campuses by the paramilitary police or the army, censorship, and restrictions on freedom of association".[14]

In similar vein, the Dar-es-Salaam Declaration on Academic Freedom and Social Responsibility of Academics stated that:

> "[A]ll members of the academic community have the right to fulfil their functions of teaching, researching, writing, learning, exchanging and disseminating information and providing services without fear of interference or repression from the State or any other public authority."[15]

Articles 15 to 25 of that Declaration further elaborate on the rights and freedoms, *inter alia*, as follows:

- respect for the civil, political, social, economic and cultural rights of members of the academic community as enshrined in UN Covenants on human rights:

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10 Sall and Mangu "The quest for academic freedom today" 2005 *Journal of Higher Education in Africa* 1.

11 Türk in *Proceedings of the Conference of the Magna Charta Observatory* 31.

12 The Kampala Declaration on Intellectual Freedom and Social Responsibility (1990) http/www/.umn.edu/humanrts/africa/KAMDOK.htm (accessed 25-03-2009) art 6. The Declaration also provided for security of tenure for individual academic staff, and on the right to autonomy and democratic self-governance for higher education institutions. See arts 1–18 of the Declaration.

13 Network for Education and Academic Rights *The State of Academic Freedom in Sub-Saharan Africa* (2003) (hereafter "NEAR *Report*"). See also www.nearinternational.org (accessed on 25-03-2009).

14 NEAR *Report* 3. See also Sall and Mangu 3–14; Ogunlana "Autonomy and Academic Freedom in Africa" in *Proceedings of the Conference of the Magna Charta Observatory 18–20 September 2008* (2009) 199–201.

15 That Declaration was adopted by delegates from six academic institutions at the end of an inaugural workshop held at Silversands Hotel, Dar-es-Salaam, Tanzania (19-04-1990) art 14 https://www1.umn.edu/humanrts/africa/DARDOK.htm (accessed on 25-03-2009).

in particular freedom of thought, enquiry, conscience, expression, assembly and association, as well as the right to liberty, security and bodily integrity;

- freedom of movement;
- equal access to the academic community by all members of society without hindrance, including the right to become part of the academia as students, researchers, teachers, workers or administrators, on the basis of ability;
- the right of teaching and researching members of staff and students, to initiate, participate in and determine academic programmes of their institutions;
- the right of researchers to carry out research without hindrance, including the right not to be denied information or permission to do, or hindered in any way from doing research;
- the right of teachers to teach without any interference;
- the rights of academics to demand and receive explanation from organs, officials, and administrators of their institutions on their performance as it affected academics;
- the freedom to maintain contact with their counterparts in other parts of the world as well as the freedom to pursue the development of their education capacities;
- the freedom of students to study, including the right to choose the field of study, as well as the right of students, individually and collectively, to express and disseminate opinions on any national or international question; and
- guaranteeing the participation of students in their governing bodies.

I referred to these extensively in order to map out the amplitude or outward boundaries of academic freedom, who the beneficiaries are (staff, students, researchers) and the reasons for guaranteeing these rights and freedoms. It is submitted that although these rights and freedoms were articulated in 1990 in a specific context of structural adjustments programmes demanded by international financial institutions with their concomitant cuts on budgetary allocations to social causes and an increasingly authoritarian state, which increasingly and frequently encroached on academic freedom and the freedom to pursue truth and knowledge, the ethos and values articulated in that Declaration are almost timeless and transcend boundaries of space and time.[16]

Away from the African continent the Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education,[17] elucidated the case for academic freedom in these words:

> "[A]cademic freedom is an essential precondition for those education, research, administrative, and service functions with which universities and other institutions of higher education are entrusted. All members of the academic community have the right to fulfil their functions without discrimination of any kind and without fear of interference or repression from the State or any other source."[18]

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16 See in particular the Preamble to the Declaration for the material conditions under which the declaration was adopted.

17 Adopted by the 68th General Assembly of the World University Service (WUS), 10-09-1988 at Lima, Peru.

18 Lima Declaration. See in particular art 3 of the Declaration. It is also instructive to note here that the 1997 UNESCO Recommendation concerning the Status of Higher Education,

continued on next page

The Declaration went on to provide in art 4, *inter alia*, that:

> "Every member of the academic community shall enjoy, in particular, freedom of thought, conscience, religion, expression, assembly, and association, as well as the right to liberty and security of person and liberty of movement."

It is evident from the authorities delineated above that the case for academic freedom and institutional autonomy is almost unanswerable. It is therefore not the purpose of this article to rehash all the complex and complicated issues associated with these concepts. Indeed, I shall show in the next section, there is no universally accepted approach to what is meant by "academic freedom" and "institutional autonomy". Associated questions include: Freedom from whom? Who are the alleged or perceived violators or "enemies" of academic freedom? Is it the State? Or are the violators the private funders of research? What does academic freedom entitle bearers thereof to?

It is also important to have a sense of perspective, informed by the material conditions in any given country. Universities all over the world operate in complex, materially different local circumstances. In our peculiar circumstances, Adam Habib has made the salient point that:

> "Clearly the debate in contemporary South Africa is not the same as that under *apartheid*. Neither is it the same as in some parts of the continent and the world where academics are regularly harassed, maimed, jailed and even killed. In these cases, the repressive apparatus of the state violates academics' freedom. Contemporary South Africa is not confronted with such a threat."[19]

This article embodies the author's reflections on the contribution of the *Magna Charta Universitatum* 1988 and of the Bologna Process,[20] articulating the concept of Europe "as single intellectual space" and establishing a Europe-wide area of academic mobility,[21] in the evolution of fundamental values and principles of university institutions globally, in particular principles essential for the good governance and self understanding of the universities in future.[22] In the context of South Africa, these reflections are animated and informed by the challenges of transformation of the higher education landscape with its concomitant demands of accountability and social responsibility.[23]

It is my principal argument that these basic values, developed for universities in Western Europe at the end of the last century, have universal appeal and are

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Teaching Personnel also stated that "the right to education, teaching and research can only be fully enjoyed in an atmosphere of academic freedom and autonomy for institutions of higher education, including the right of academics to self-governance, collegiality and security of tenure" (quoted in NEAR *Report* 4).

19 Habib "The Practice of Academic Freedom in South Africa" paper presented to the Council on Higher Education *Regional Forum on Government Involvement in Higher Education, Institutional Autonomy and Academic Freedom* (2006) 1.

20 Bologna Process 1999 and 2001 http://www.ond.vlaanderen.be/Logeronderwijs/bologna/about/ (accessed 17-04-2009).

21 *Ibid*. See also Türk, in *Proceedings of the Conference of the Magna Charta Observatory* 33 with respect to freedom of movement of people, goods, services, capital and the freedom of movement of knowledge.

22 Jónasson *Inventing Tomorrow's University* 58–64.

23 Higher Education White Paper (1997) published in *GG* 18207 (15-08-1997). The White Paper calls for the transformation of higher education to re-dress past inequalities, to serve a new social order, to meet pressing national needs and to respond to new realities and opportunities (3–7).

germane to our own peculiar circumstances even as we strive for greater relevance, self-awareness and fitness for purpose. However, before I do so, it is useful to elucidate, at the conceptual and contextual levels, the major strands of thought on the meanings of academic freedom and institutional autonomy. Thereafter the article will delineate the main principles articulated by the *Magna Charta Universitatum*. Finally, the article suggests possible lessons in the context of the South African higher education architecture thereby contributing to the ongoing debate about these values.

3 ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY: A CONCEPTUAL CONSPECTUS

It is axiomatic that there are no universally accepted definitions of the concepts of academic freedom and institutional autonomy. Indeed, Marla Singh has correctly observed, with reference to the *Magna Charta Universitatum*, that the conceptual and contextual challenges "hinge around the difficulty of devising a consensual, universal and timeless definition that is relevant to different interest groups in different and changing circumstances".[24]

Notwithstanding Singh's views, a number of useful approaches can be gleaned from the rich literature on these concepts, with each definition bringing out a particular aspect, which all add up to giving the reader a very broad conspectus and useful points of reference.

3 1 Four freedoms or the T B Davie model

An appropriate starting point would be to approach the idea of academic freedom in terms of the "four freedoms" articulated by Justice Frankfurter of the United States Supreme Court in the case of *Sweezy v New Hampshire*.[25] The learned judge referred to academic freedom as the four freedoms of a university – to determine for itself on academic grounds alone, *who may teach, what may be taught, how it shall be taught, and who may be admitted to study*[26] (my emphasis).

The case of *Sweezy* was an interesting one, involving an investigation conducted by the Attorney-General of New Hampshire, acting on behalf of the state legislature under a broad resolution, directing him to determine whether there were "subversive persons" in the state. Subversive persons were made ineligible for employment by the state government.

The appellant (*Sweezy*) answered most of the questions asked of him but he refused to answer questions, *inter alia*, relating to the contents of a lecture he had delivered at the State University of Hampshire. For the sake of completeness, the relevant questions are reproduced below:

> "What was the subject of your lecture?"
>
> "Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954 that socialism was inevitable in this country?"

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24 Singh in *Proceedings of the Conference of the Magna Charta Observatory* 90.

25 *Sweezy v New Hampshire* 354 U.S. 234 (1957).

26 *Sweezy v New Hampshire* 263 per Justice Frankfurter, quoting with approval from a statement of a conference of senior scholars from the Universities of Cape Town and Witswatersrand, including advocates Centlivres and Richard Feetham as chancellors of these universities.

> "Did you advocate Marxism at that time?"
>
> "Did you express the opinion, or did you make the statement at that time that socialism was inevitable in America?"
>
> "Did you in this last lecture on March 22, or in any of the former lectures, espouse the theory of dialectical materialism?"[27]

Sweezy refused to answer these questions on the grounds, *inter alia*, that they violated his rights under the First Amendment to the USA Constitution (protecting freedom of political expression and association) and the Due Process Clause of the Fourteenth Amendment.

The trial court adjudged him guilty of contempt of court, a judgment affirmed by the New Hampshire Supreme Court, holding that the need for the legislature to be informed on so elemental a subject as the self-preservation of government outweighed the deprivation of constitutional rights pursuant to that process.[28]

Writing for the majority of the Supreme Court, Chief Justice Warren, joined by Justices Black, Douglas and Brennan, held that the appellant's rights under the Fourteenth Amendment were violated, especially "the petitioner's liberties in the area of academic freedom and political expression – areas in which government should be extremely reticent to tread".[29]

The Supreme Court made a very important observation that is pertinent to the main thrust of this paper, to wit.

> "the essentiality of freedom in the community of American Universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight-jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die."[30]

Justice Frankfurter, joined by Justice Harlan made the very important observation that:

> "Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology, and related areas of scholarship are merely departmentalized dealings, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities.[31]
>
> For society's good – if understanding be an essential need of society inquiries into these problems, speculations about them, stimulation in others of reflection upon

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27 *Sweezy v New Hampshire* 244 and 261.
28 *Sweezy v New Hampshire* 251.
29 *Sweezy v New Hampshire* 250.
30 *Ibid.*
31 *Sweezy v New Hampshire* 261.

> them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's wellbeing, except for reasons that are exigent and obviously compelling."[32]

I have quoted extensively from these illuminating passages if only to answer the central thesis of this article, namely academic freedom and institutional autonomy from whom and to what end?

3 2 Treaty stipulations

The Dar-es-Salaam Declaration of 1990 defined academic freedom in very expansive terms to mean "the freedom of members of the academic community, individually or collectively, in the pursuit, development, and transmission of knowledge, through research, study, discussion, documentation, production, creation, teaching, lecturing and writing".[33]

This definition also identifies the beneficiaries of academic freedom as well as the role of academic freedom in the search for knowledge.

Under the Council of Europe, Jón Torfi Jónasson has conceived of academic freedom as:

> "the freedom to preserve, seek and transmit knowledge in a manner uncompromised by non-academic considerations, that is, regardless of interests other than those that relate directly to understanding and truth".[34]

It is respectfully submitted that Jónasson was referring to an "ideal" situation. In the developing countries of Africa, Asia and Latin America, the material conditions and the political contexts do shape the outward boundaries of academic freedom. As Ogunlana has percipiently observed, "universities cannot be autonomous and enjoy academic freedom when the system itself is not free".[35] In the special circumstances of African universities, Ogunlana points to a litany of ills:

> "The leadership of the universities is not free from the influence of the political authority. The governments appoint rectors irrespective of their managerial competence;
>
> The direct influence of the government in decision-making has stultified the growth of African universities, resulting in poor outcomes and a low level of productivity; and
>
> Classrooms are inadequate, dormitories are overcrowded, libraries insufficiently stocked, and laboratories ill-equipped."[36]

4 ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY IN THE SOUTH AFRICAN CONTEXT

4 1 The classical approach in perspective

Since this article is about what South African universities in particular and those in the SADC region in general can learn from the *Magna Charta Universitatum*,

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32 *Sweezy v New Hampshire* 262.
33 See the definitions clause para 53.
34 Jónasson *Inventing Tomorrow's University* 27.
35 Ogunlana in *Proceedings of the Conference of the Magna Charta Observatory* 200.
36 Ogunlana in *Proceedings of the Conference of the Magna Charta Observatory* 200–201.

it is imperative to discuss academic freedom and institutional autonomy in the historical context of South Africa, bearing in mind the different perspectives during the apartheid era on one hand and in the post-apartheid era on the other.

It is incontrovertible that apartheid was the very antithesis of basic human rights and fundamental freedoms on a universal basis. Paradoxically it has been observed that as far back as the 1950s and 1960s, the notion of academic freedom had already acquired a "specialised meaning" in the English-speaking universities (the so-called "open liberal universities") namely the "right of universities to take in students or to appoint staff without regard to race rights that were denied to them under apartheid".[37] In this respect, the Network for Education and Academic Rights quotes the South African historian and American University President, CW de Kiewiet, in terms of "the right of scholarship to the pursuit of knowledge in an environment in which the emancipating powers of knowledge are the least subject to arbitrary restraints – academics must not be subject to fear or ostracism".[38] A classical statement of this so-called liberal approach was enunciated thus:

> "[W]e desire at all times (a) to be permitted to appoint our staff on the grounds of their fitness by scholarship and experience for research and teaching for which they are needed, (b) that the staff duly appointed shall teach the truth as they see it and not as it be deemed by others for the purposes of sectional, political, religious, or ideological dogmas or beliefs, (c) that the methods of teaching shall not be subject to interference aimed at achieving standardization at the expense of originality or orthodoxy at the cost of independence, and, lastly, (d) that our lecture theatres and laboratories shall be open to all who, seeking higher knowledge, can show that they are intellectually capable of benefitting by admission to our teaching and are morally worthy of entry into the close intimacy of the brotherhood which constitutes the wholeness of a university."[39]

In sharp contrast, Afrikaans-speaking universities espoused the notion of a "*volksuniversiteit*" in which "true university autonomy and academic freedom" could only exist when universities "were closely connected to particular population groups or peoples".[40]

The HEIAAF Task Team[41] noted that between the two approaches adumbrated above, "there was no conceptual unanimity on academic freedom" pointing out that "for historically black universities and technikons, who were subject to central control, traditions of academic freedom could hardly develop".[42]

Du Toit makes a useful distinction between what he calls the "libertarian" and "revisionist" conceptions of academic freedom. In the first approach, academic

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37 NEAR *Report* 2.

38 NEAR *Report* 2.

39 *Report of the Task Team Appointed by the Council on Higher Education to investigate South African Government's Involvement in, and Regulation of Higher Education, Institutional Freedom and Academic Freedom* "Overview of Recent and Current Debates in South African Higher Education" (2005) 3.

40 *Report of the Task Team* (2005) 2. See also Hall "Academic Freedom and the University: Fifty Years of Debate" (2006) 1–2 (paper presented to the Council on Higher Education, Regional Forum on Governmental Involvement in Higher Education, Institutional Autonomy and Academic Freedom, Cape Town); Du Toit "Some Comments on Academic Freedom and the University: Fifty Years of Debate" (2006) 1–2; Du Toit "Letter to Martin Hall" and the non-paginated paragraphs on the letter that follow.

41 *Report of the Task Team* (2005).

42 *Report of the Task Team* (2005) 3–4.

freedom is conceived in terms of "scholarly freedom" or the "negative freedom of individual scholars, including students – to teach, learn, research and publish without externally imposed restraints". In the second approach, academic freedom is seen as "academic rule" or "the positive freedom of groups of academics to exert their authority over academic affairs in university governance, e.g. – through such collegial forms of academic governance as Faculty Boards, Senates and their Committees".[43]

Du Toit refers to what he calls a "core or constituent" view of academic freedom in different contexts "in which academic freedom and institutional autonomy are related but distinct concepts". Under this approach the crucial questions then must be:

> "what practical implications are for relations between universities and the state and, in particular, what decoupling of these concepts means for compass and limits of the state's legitimate interest in the internal affairs of the university, in the interest of the public good".[44]

According to him, the crucial question "must be whether the state's 'legitimate interest' can justify, not just 'state steering' but actual 'state interference' in the internal affairs of the university".[45] In his view, the answer must be that "while institutional autonomy cannot be an absolute value, academic freedom itself may not be compromised. In other words, while there can be legitimate state interference in the internal affairs of universities, provided that this does not compromise academic freedom, there cannot be any notion of legitimate state interference with academic freedom itself."[46] In the final analysis, Du Toit argues that currently, threats to academic freedom in South Africa are not just external but as much and more so internal.[47] In this respect Du Toit is supported by Adam Habib, who gives an example of Xolela Mangcu who left the Human Sciences Research Council as a result of pressure from internal sources or "institutional bureaucrats" as he calls them.[48]

In similar vein, the Freedom of Information Institute has bemoaned the taking of disciplinary action against the University of KwaZulu-Natal's academics, pointing out that:

> "academics should be afforded the space to espouse unpopular views on general matters or even in relation to university administration, without threats of disciplinary action; that academics should be encouraged to play a public intellectual role, not punished for it"

and that:

> "for the professoriate in universities, freedom of expression is a precondition for their activities, as the right to receive and impart information is their bread and butter. That professors – who are generally considered to be at the apex of

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43 *Report of the Independent Task Team on Higher Education, Institutional Autonomy and Academic Freedom* (2008) 33–33.

44 Du Toit "Some Comments" 1.

45 Du Toit "Some Comments" 1.

46 Du Toit "Some Comments" 1–2. Du Toit "Letter to Martin Hall". *Cf* Hall 2–3.

47 Du Toit "Letter to Martin Hall" 3–4 where he observes that "No university would simply allow any and all would be 'lecturers' to set themselves up arbitrarily to teach on subjects of their own choice in the name of academic freedom." *Cf* Hall 1–3.

48 Habib "The Practice of Academic Freedom in South Africa" 1.

> knowledge production cannot enjoy freedom of expression, should be of concern to everyone, not just academics."[49]

It is evident from the foregoing authorities that threats to academic freedom may indeed emanate from internal as well as external forces.

4 2 Academic freedom redefined

In 1994, South Africa became a constitutional democracy with a Bill of Rights enshrining the basic human rights and fundamental freedoms of the people. In the context of this article, it is trite that academic freedom was included in the Bill of Rights, but as a species of the fundamental freedoms of thought and expression.[50] However, it was not until 1997, with the promulgation of the White Paper enunciating government's resolve to transform higher education that the promise of the Constitution began to take shape. The transition to a new constitutional dispensation of necessity required that "existing practices, institutions and values are viewed anew and rethought in terms of their fitness for the new era".[51] In this milieu, academic freedom was encapsulated in principle 1.23 to imply "the absence of outside interference, censure or obstacles in the pursuit and practice of academic work. It is a precondition for critical, experimental and creative thought and therefore for the advancement of intellectual inquiry and knowledge".[52]

Apart from recapping the rationale for safeguarding academic freedom, this principle took us back to the "traditional" approach under which the threats to academic freedom were viewed as being exogenous to the institutions themselves. However, the debate was taken further with the translation of the White Paper's promises in the Higher Education Act.[53] In the Preamble to the Act, the following commitments are discernible, *inter alia*:

- Respect and encourage democracy, academic freedom, freedom of speech and expression, creativity, scholarship and research; and
- Promote the full realisation of the potential of every student and employee, tolerance of ideas and appreciation of diversity.

The Preamble went on to re-state that "it was desirable to enjoy freedom and autonomy in their relationship with the State within the context of public accountability and the national need for advanced skills and scientific knowledge". For the first time the concepts of accountability and social responsibility of universities emerge. In other words:

> "government would delegate to the institutional level authority over inputs and resource use, while demanding accountability for outputs. The State would drive

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49 Freedom of Expression Institute "FXI distressed by disciplinary action against two UKZN Professors" 2. See http://www.fxl.or.za/content/view/204/SI accessed 26-02-2010.

50 Section 16(1) of the Constitution reads as follows: "Everyone has the right to freedom of expression, which includes:
(a) Freedom of the press and other media;
(b) Freedom to receive or impart information or ideas;
(c) Freedom of artistic creativity; and
(d) Academic freedom and freedom of scientific research."

51 White Paper para 1.1.

52 White Paper para 1.23.

53 Act 101 of 1997.

> the transformation of higher education using designated levers in particular, '*steering mechanisms*' in the areas of planning, funding and quality, while respecting academic freedom, being transparent, and avoiding the micro-management of institutions".[54]

Despite these elaborate and commendable undertakings, tensions emerged from the actual implementation of the White Paper's policy objectives. These challenges have been succinctly captured in a Commissioned Report to the Council of Higher Education Task Team, on government involvement in, and regulation of, higher education, institutional autonomy and academic freedom.[55] The Task Team itself was appointed in 2005 to interrogate the nature of regulation of South African higher education by government. The Task Team's Report, makes it very clear that the investigation was prompted by "concerns and claims that government steering of higher education risked becoming interference".[56]

In carrying out its mandate, the Task Team came up with a renewed approach to academic freedom by way of:

> "seeking to counter potential and actual external and internal threats to the academy – State repression, and/or interference, over-control by government bureaucracies and institutional hierarchies, commercial and functional impingements on academic work, and unreformed institutional cultures".[57]

The Task Team adopted a very broad definition of academic freedom as "residing in a particular configuration of three elements associated with the academy, that need to be exercised, supported and protected by the state and society and at sectoral, institutional and academic levels of governance", namely:

- constitutional deliberative democracy or participation by state authority, citizens and academics on issues and choices in society;
- the scholarly freedom of individual academics and students; and
- collegial and accountable participation by groups of academics in the governance of academic affairs at the university level.[58]

The Task Team went on to articulate the requirements that a renewed approach to academic freedom had to fulfil:

- "It must facilitate the production of present and future social goods in a fashion that is congruent with the imperatives of the Constitution;
- It must articulate the relationship between academic freedom, intellectual responsibility and social accountability, as consistent with the constitutional framework;
- It must move beyond the TB Davie approach which was self-selective in making no mention, for example, of research, or of the freedom of students to learn;
- It must protect the freedom of expression of academics – and naturally also of students – from undue sanction by their own institutions: there is a risk that any institution enjoying an unfettered right to decide who shall learn and teach (in the name of institutional autonomy), will exploit a collateral 'right' to decide that people espousing unpopular views – in general, or in the view of the university administration – should be disciplined; and

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54 *Report of the Task Team* (2005) 7.
55 *Report of the Task Team* (2005) 8–10.
56 *Report of the Task Team* (2008) vii.
57 *Report of the Task Team* (2008) viii.
58 *Report of the Task Team* (2008) viii.

- It must account for the relative freedoms and vulnerabilities of different groups within the academy."[59]

The Task Team went on to make salient observations with regard to the sources of threats to academic freedom in the South African context, namely: legacy of state repression from the apartheid era; government and regulatory agencies exercising controls and power in the system of higher education; university administrators leaning towards corporatism, including the intrusion of market forces; unreformed institutional cultures including racism and xenophobia; individual, senior academics who impose on the junior colleagues' research and teaching agenda, including violations of freedom on grounds of gender, age and ideological leanings.[60]

It is not within the remit of this article to rehash all the views advanced by the Task Team, save to note that the reconceptualisation of academic freedom, as captured in the preceding paragraphs, resonates with developments inspired by the *Magna Charta Universitatum* in which academic freedom is balanced with accountability and social responsibility, including the duty on individual academics to speak out on issues affecting societies in which universities find themselves.[61]

In concluding this part of the discussion, it is necessary to remember the collective aspects of academic freedom as captured in these words:

> "At the core of the right to academic freedom is the right of the individual to do research, to publish and to disseminate learning through teaching, without government interference. The right to academic freedom vests in individual academics and not the university. In fact, a university's decision-making bodies, such as its Council or Senate, may be as prone to infringing academic freedom as organs of State. In practical terms, however, academic freedom would be a hollow ideal without institutions such as universities. If the State could prescribe to universities that no research critical of the government may be funded by the university or that no researchers critical of the government may be appointed, academic freedom would be left stranded."[62]

The next part concerns the principle of institutional autonomy.

4 3 Institutional autonomy as a prerequisite to effective self governance

As in the case of academic freedom, there is no universal timeless approach to what is meant by institutional autonomy. Some authors like Marla Singh have questioned whether "institutional autonomy is the institutional expression of academic freedom and whether institutional autonomy guarantees academic freedom".[63] Some have argued that institutional autonomy is quite "distinct from academic freedom".[64] These authors call for the "decoupling" of academic freedom from institutional autonomy.

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59 *Report of the Task Team* (2008) 29 where the Report quotes the views of different authors, see notes 97 and 100.

60 *Report of the Task Team* (2008) 29–30.

61 Jónasson *Inventing Tomorrow's University* 62–63.

62 Currie and De Waal *The Bill of Rights Handbook* 5 ed (2005) 370.

63 Singh in *Proceedings of the Conference of the Magna Charta Observatory* 91.

64 *Report of the Task Team* (2008) 35–40. Du Toit (2006) points out that "A clear articulation and understanding of academic freedom as distinct from institutional autonomy is a prerequisite for the effective defence of the former." (2).

The Dar-es-Salaam Declaration, 1990 defined institutional autonomy as "the independence of institutions of higher education and organizations, associations and groups within these institutions from the State and any other public authority including a political party but not including organization of civil society".[65]

Much close to home, it is obvious that the Constitution is silent on this issue. However, the 1997 White Paper on Higher Education conceived of the concept as follows:

> "Institutional autonomy refers to a high degree of self-regulation and administrative independence with respect to student admissions, curriculum, methods of teaching and assessment, research, establishment of academic regulations and the internal management of resources generated from private and public sources. Such autonomy is a condition of effective self-government."[66]

The same White Paper makes it very clear that government has no intention of interfering in the management of the internal affairs of institutions.

> "The Ministry has no responsibility or wish to micro-manage institutions. Nor is it desirable for the Ministry to be too prescriptive in the regulatory framework it establishes. It is only in extreme circumstances that the Minister of Education, as the responsible representative of the elected government of the country, would consider intervening in order to assist to restore good order and legitimate governance and management in institutions."[67]

The Higher Education Act made it very clear in the preamble, cited earlier, that institutional autonomy was desirable. Institutional autonomy is provided for mainly through councils which are accountable for governing their institutions "in order to satisfy both the institutional interest and the public interest". The Act sought to strike a delicate balance between autonomy and accountability; spelt out in detail the roles and functions of institutions responsible for internal self-governance such as university councils, senates, principals and faculties; and institutional fora.[68] However, it is important to note that the Act also gave the Minister power to intervene in the affairs of institutions through the appointment of independent assessors, and, in extreme cases, to appoint an administrator who would combine the functions of university council and chief executive.[69] It is

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65 Dar-es-Salaam Declaration vi of the definitions clause. The Declaration makes it clear that institutions of higher education shall be independent of the state or any public authority in conducting their affairs and setting up their academic teaching, research and other related programmes. The State is under an obligation not to interfere with the autonomy of institutions of higher education: para 30.

66 White Paper para 124.

67 White Paper para 3.3.3. The White Paper circumscribes the circumstances under which the ministerial intervention will be permissible as follows: "Consistent with the Minister's responsibility to ensure accountability for the use of public resources and having regard to the reputation of the higher education system, the Higher Education Act will confer a legal right upon the minister to seek an independent assessment and advice on the condition of a higher education institution when serious circumstances arise in an institution or institutions which warrant investigation in terms of the procedures prescribed by the Act." (See ch 6 of the Act). See further s 6 of the Higher Education Amendment Act 55 of 1999 providing for a new s 41A to the principal Act, authorising the appointment of administrators for troubled institutions.

68 See ch 4 (ss 26–38) on the governance of public higher education institutions.

69 See ch 6 (ss 43–47). See in particular section 45 detailing circumstances where under it would be competent for the Minister to appoint an independent Assessor. See also *Report of the Task Team* (2005) 8–10 and 18–24, quoting Minister Pandor: "We cannot stand by and watch institutions collapse" *Sunday Independent* (21-10-2004) 47.

common cause that South Africa is a constitutional democracy and in terms of the ordinary prescripts of administrative law such broad discretionary powers are to be exercised very sparingly and judiciously. State practice over the last several years confirms this view.[70]

4 3 Substantive autonomy

The Council on Higher Education's Task Team has advocated for "a context-specific approach", anchored on "substantive autonomy" as more suitable to the context of higher education in South Africa. Under this approach, institutions of higher learning should be governed in such a manner as to ensure that "such institutions serve social and public purposes – rather than functional and/or instrumental, political, institutional, or market goals. Institutional autonomy is also exercised in such a manner as to support scholarship, academic freedom and other constitutive values of the academy, which are integral to higher education's social role and accountability".[71]

The Team has gone on to identify four elements of substantive autonomy and, for the sake of completeness, I reproduce them here. Substantive autonomy:

- "Is necessarily linked to an institutional defence of academic freedom as exercised by scholars, students and academic colleagues;
- Is necessarily linked to the substantive goals of society, and not only to functional institutional goals, or to political or market goals;
- Recognizes that threats to academic freedom may originate from within higher education institutions, as well as from outside them, and that autonomy is substantive only to the extent that it is proof against both; and
- Recognizes mutual and correlative rights and duties, including distinctive accountabilities, on the part of the academy, institutional leadership, government and society, to ensure that higher education is governed for public good."[72]

The ideals of public good "and a public responsibility" have come to mean that institutional autonomy must be balanced with public accountability of universities. The White Paper,[73] spells out the implications of the principle of accountability, namely that universities are accountable for how they spend public funds entrusted to them. This is in line with corporatist notions of "value for money" and "returns on public investment". Secondly, even if they do not receive public money, which is not the norm in South Africa, universities should be answerable

70 The author is only aware of the cases of the University of Fort Hare and Limpopo where assessors had been appointed. The DUT has the dubious distinction of having its council dissolved by the Minister. The parent Act has been amended by Act 55 of 1999, to allow for the appointment of administrators for troubled institutions to perform governance and management functions for a prescribed period and in extreme cases to allow the administrator to take over the authority of the council or the management of the institutions for a period not exceeding two years. In 2011 administrators were appointed for TUT and WSU.

71 *Report of the Task Team* (2008) x.

72 *Report of the Task Team* (2008) 72. See also, *Report of the Task Team* (2005) 7–26 for more detailed discussions.

73 White Paper para 1.25.

to the broader society.[74] Universities should also be answerable to students as "clients" or "customers" and private sponsors.[75]

5 THE *MAGNA CHARTA UNIVERSITATUM*

The *Magna Charta Universitatum* is a document that was signed by 388 rectors and heads of universities from all over Europe and beyond.[76] This document enshrines four fundamental principles entrenching academic freedom and institutional autonomy as a guide for good governance and self-understanding of universities in the future.[77] These principles are as follows:

5 1 Retention of moral and intellectual autonomy

The university is an autonomous institution at the heart of societies, differently organised because of geography and historical heritage; it produces, examines, appraises and hands down culture by research and teaching. To meet the needs of the world around it, its research and teaching must be morally and intellectually independent of all political authority and economic power.[78]

This principle aims to prevent distortion of knowledge as knowledge is a powerful instrument of a multitude of interests which are likely to restrain, sway or even control its accumulation. It also enshrines the principle of institutional autonomy.[79]

5 2 Inseparability of research and teaching

Teaching and research in universities must be inseparable if their tuition is not to lag behind changing needs, the demands of society, and advances in scientific knowledge.

This principle emphasises the interrelatedness or interconnectedness of missions, so as to ensure a close and dynamic connection between teaching and research so that science can best be served in an environment that serves both researchers and students.[80]

Jónasson observes that the question of the relationship between the university's role for advancing knowledge versus its educational role, between accumulating (or perhaps preserving) information and knowledge versus transmitting it, was first raised by Wilhelm von Humboldt, the Prussian Minister of Education in the 19th century. He "argued both cogently and forcefully that a university with

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74 *Cf* De Boer-Buquicchio "Universities between Autonomy and Accountability: the, Search for a Balance and its Guarantees" (paper presented to the Magna Charta Yearly Event, Bologna, Italy (14-09-2006 – 15-09-2006)) 1–2; Bergan "Public Responsibility and Institutional Autonomy Where is the Balance?" (paper presented at the XX Anniversary of the *Magna Charta Universitatum* Bologna, Italy (18-09-2008 – 20-09-2008)) 1–8.

75 See also Collier, "The changing universities and (legal) academic career: re-thinking the relationship between women, men and the private life of the law school" 2002 *Legal Studies* 1 16.

76 The *Magna Charta Universitatum* was signed on 18 September 1988, the 900th anniversary of the University of Bologna, in the historic city of Bologna, Italy.

77 See also http:www.3.unibo.it/ar1/charta/charta12.htm.access 14-07-2008. It is not the same thing as the *Magna Charta* of 1215 between King John and the Barons of England.

78 Jónasson *Inventing Tomorrow's University* 59.

79 Jónasson *Inventing Tomorrow's University* 61.

80 *Ibid*.

teaching and research intertwined was definitely to be preferred over research institutions, academies of science on the one hand, or teaching institutions on the other".[81] Humboldt was writing in the twilight of the 19th century but at the heart of his ideal was that "universities were first and foremost educational institutions, combining research and teaching and enjoying considerable independence for their own administration, with researchers choosing what to investigate and teach, the students what to learn and where".[82]

5 3 Ensure freedom in research and training

Freedom in research and training is the fundamental principle of university life; governments and universities, each as far as in them lies, must ensure respect for this fundamental requirement. To preserve freedom in research and teaching, the instruments appropriate to realise that freedom must be made available to all members of the university community. [83]

According to Jónasson, this principle has two components: ethical and pragmatic. "The ethical component relates to the principle of autonomy – by underlining the need for freedom from any political, ideological, normative or methodological constraints in conducting research." He goes on to argue that "if academic freedom refers to independence from all restraining forces that may pervert in any way the accumulation, preservation or transmission of knowledge, it also implies some liberty of choice as far as the content and methods allowing for the best study of a particular field".[84] The pragmatic side underscores the fact:

> "that scientific breakthroughs were usually unexpected, so it was necessary to give the scientist or the teacher a free hand to develop his/her professional interests.[85] Finally he observes that this principle has a wider connotation relating to the obligations and responsibilities of the academics within and outside their institutions. It requires a strong element of self-control by setting up those rules that govern academic matters in the university as far as content, methods and in particular standards of research and training are concerned".[86]

He concludes by making the salient point that:

> "by virtue of their expertise and special position, academics have both the licence and obligation to express a considered opinion on all issues that relate to their field of expertise. This means exercising a critical part, well informed, constructive and relatively free from those special interests most people are affected by".[87]

In his view, this aspect of academic freedom also "entails that academics, because of their professional standing and capacity for critical thinking, have also the obligation to take up issues that they know to be ignored by others, due to various pressures".[88]

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81 Jónasson *Inventing Tomorrow's University* 23.
82 Jónasson *Inventing Tomorrow's University* 23–24.
83 Jónasson *Inventing Tomorrow's University* 60–61.
84 *Ibid.*
85 *Ibid.*
86 *Ibid.*
87 Jónasson *Inventing Tomorrow's University* 62.
88 Jónasson *Inventing Tomorrow's University* 63 where the author posits that these principles call upon academics to be a strong voice in national debates; they should not be preoccupied with perceptions (political correctness, career aspirations, survival strategies and currying favours) with those in power.

In the context of higher education in South Africa, it is common cause that institutions of higher learning must be responsive to the imperatives of socio-economic transformation and so be accountable to society. This view may be akin to the notion of substantive autonomy favoured by the Council of Higher Education's Task Team under which the right to self-government in accordance with academic values is tempered with "co-existing rights, duties and obligations – on the part of the academy, institutional leadership, government and society – to ensure that higher education is governed to the public good".[89]

5 4 Universities as trustees of the European humanist tradition

This principle teaches that a university is the trustee of the European humanist tradition, its constant case is to attain universal knowledge in order to fulfil its vocation; it transcends geographical and political frontiers and affirms the vital need for different cultures to know and influence each other.[90]

Under this principle, universities, particularly in Europe, regard the mutual exchange of information and documentation, and frequent joint projects for the advancement of learning, as essential to the steady progress of development.[91]

The *Magna Charta Universitatum* requires universities to be the guardians and proponents of such a liberal and humanistic tradition. Universities should not be ivory towers; rather they should be concerned with human and social problems and should prepare students to become active citizens in a complex society that is undergoing continual changes.[92]

Although this principle was rooted within the peculiar histories of European universities, it is submitted that it is very relevant to our own particular circumstances as we seek to produce well-rounded graduates, with a broad and liberal education, with generic competencies in all students. We should be able to defend the "usefulness of the so-called useless disciplines" in situations where non-market-friendly programmes are under siege, particularly in the humanities and the liberal arts.

It is now instructive to refer to the institutional framework within which the ideals proclaimed in the *Magna Charta* are being implemented and constantly renewed in order to give member universities a real capacity to question, propose and innovate in the development and transfer of knowledge and their quest for truth.

6 INSTITUTIONAL FRAMEWORK DEFENDING BASIC PRINCIPLES OF UNIVERSITY INSTITUTIONS: THE OBSERVATORY

When the rectors and vice-chancellors append their signatures to the *Magna Charta Universitatum*, they solemnly pledge their allegiance to and undertake, in an unequivocal manner and on the basis of shared values, to safeguard at a global level, in a period of rapid change, the fundamental freedoms and underlying

89 *Report of the Task Team* (2008) 36–38.
90 Jónasson *Inventing Tomorrow's University* 63–64.
91 *Ibid.*
92 Jónasson *Inventing Tomorrow's University* 63.

principles of university institutions at global level.[93] With the growth in signatories to well over six hundred universities in Europe (East and West), North America and Latin America, so has been the demand for monitoring, enhancing and advising on the status of academic freedom and institutional autonomy. To that end, the European Association of Universities and the University of Bologna jointly created the *Magna Charta* Observatory in September 2001.

The work of the Observatory can be summarised thus:

- The Observatory monitors the status of institutional autonomy and academic freedom in all parts of Europe and beyond. It is not a membership organisation, but acts on behalf of signatories or of members of universities.
- The Observatory commissions case studies on specific issues in individual countries or regions and publishes books and essays on a range of topics all connected to current issues related to either institutional autonomy or academic freedom.[94]
- The Observatory conducts site visits to universities or university systems in order to explore specific situations, "to offer an objective view, an outside reference point, to create shared ideas motivating sound and effective relations among actors in higher education and research".[95]
- The Observatory organises conferences, seminars, workshops and summer schools where it brings together academics, decision-makers and students from different backgrounds to discuss the issues at stake and build a consensus. The most important of these conferences are organised every year, at the anniversary of the signing of the *Charta*, at the University of Bologna, the Alma Mater of European higher education.[96]
- The Observatory cooperates with major university associations, such as the European University Association, the Council of Europe, UNESCO and the American Council of Education. As the Association becomes more globally active, it will cooperate with additional associations and related governmental and non-governmental organisations.
- The Observatory also mediates between governments and university leadership, between rectors, deans and students.

In the context of this article, it is instructive to note that the *Magna Charta* Observatory is planning to broaden its scope of activities, especially outside Europe.[97] Our African region in general and the Southern African sub-region in particular, would definitely benefit from the positive experiences from the past

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93 Bricall "From the Origins of the University in Europe to the Universities of Globalisation" in *Proceedings of the Conference of the Magna Charta Observatory, 18–20 September 2008* (2009) 45–73.

94 Recent publications include scholarly essays on the management of universities, such as *University Integrity* (2007), case studies, such as that on higher education in Turkey entitled *Institutional Autonomy and Responsibility in a Modernising Society* (2008) and see also Jónasson (ed) *Inventing Tomorrow's University: Who is to Take the Lead? The Past, Present and Future of the Magna Charta Universitatum* (2009).

95 www.magna.charta.org (accessed 19-9-2009).

96 I have been singularly privileged to attend two of these annual conferences in 2006 and 2008. See Bricall in *Proceedings of the Conference of the Magna Charta Observatory* 59–60.

97 Bricall in *Proceedings of the Conference of the Magna Charta Observatory* 73.

activities of the Observatory by engaging further in discussions about fundamental university principles and values in the context of our own region and subregion, so as to help universities fulfil their obligations towards society in the best possible way. Such regional collaboration would provide a much needed platform "to safeguard the unity of teaching and research, and uphold the value of autonomy and independence of universities, at the heart of the knowledge society, with a view to pursuing and developing collective interests and the public good".[98]

Finally, a discussion of the contribution of the *Magna Charta Universitatum* would not be complete without reference to the Bologna Process, one of the external processes in Europe, developing new partnership within the European higher education landscape and designed to promote the mobility of students and staff.[99]

7 THE BOLOGNA PROCESS

The Bologna Process, together with the *Magna Charta Universitatum*, is at the heart of major policy reforms within the Council of Europe, aimed at giving practical effect to the concept of "Europe as a single intellectual space", underpinned by the "freedom of movement of knowledge".[100]

The Bologna Process or Accords was conceived under the Bologna Declaration by Ministers of Higher Education from 29 European Countries.[101] The principal objective is to create a European Higher Education Area under a twin-pronged approach:

- Making academic degrees and quality assurance standards more comparable and compatible throughout Europe, organised in a three-cycle structure: bachelor – master – doctorate.
- Portability of qualifications across the area by providing for fair recognition of foreign degrees and other higher education qualifications.
- The Bologna Process was a major reform created with the claimed goal of providing responses to issues such as the public responsibility for higher education and research, higher education governance, the social dimension of higher educational research, and the values and roles of higher education and research in modern, globalised, and increasingly complex societies with the most demanding qualification needs.[102]

Other reformative initiatives include work on links between higher education, research and innovation, equitable participation and lifelong learning.[103]

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98 Bricall in *Proceedings of the Conference of the Magna Charta Observatory* 73.

99 Bologna Process http://www.ond.vlaanderen.be/Logeronderwijs/bologna/about/ (17-04-2009).

100 Türk in *Proceedings of the Conference of the Magna Charta Observatory* 33.

101 The Bologna Declaration was issued by Ministers of Higher Education from 29 European Countries.

102 Bologna Process http://www.ond.vlaanderen.be/Logeronderwijs/bologna/about/ (accessed 17-04-2009). See also "Guide to the Bologna Process" http:www.europeunit.ac.uk (accessed 17-04-2009).

103 Bologna Process http://www.ond.vlaanderen.be/Logeronderwijs/bologna/about/ (accessed 17-04-2009).

In the final analysis, the founders of the Bologna Process envisage a common intellectual space, based on international cooperation in academic exchanges that are attractive to European students and staff as well as to students and staff from other parts of the globe.

The envisaged JHEA will:

- facilitate mobility of students, graduates and higher education staff;
- prepare students for their future careers and for life as active citizens in democratic societies, and support their personal development;
- offer broad access to high-quality higher education, based on democratic principles and academic freedom.

It is submitted that the African region can learn from this very important experiment in regional integration and harmonisation.

8 SYNTHESIS AND EVALUATION

Although the *Magna Charta Universitatum* was originally signed by mainly rectors and vice-chancellors of universities from Western Europe, the *Charta* has now been signed by more than six hundred universities from all continents. It is common cause that while the *Charta* was intended to enshrine principles of certain universal truths and to promote the role of universities in the service of society as a whole, the environment in which these institutions are operating has changed significantly, posing new challenges for upholding, defending and strengthening academic freedom and institutional autonomy in diverse settings and contexts.[104] The deep-seated changes and challenges facing universities emanate from transformations of the societies and the institutions themselves.[105] They have been well documented and need not delay us here unduly.[106] It suffices to note that in a little over a hundred years since Humboldt articulated his view of an ideal university, the very idea of a university as a liberal institution concerned with the pursuit of knowledge for knowledge's sake is being increasingly eclipsed by what Collier has aptly called "business practices" and "managerialism" or corporatism in higher education within a broader context of neoliberalism and globalisation.[107]

In this constantly changing milieu, managers and leaders of higher education institutions are under intense pressure to run these institutions as business units, replete with strategic vision and mission statements and required to conform to pre-determined benchmarks, internal and external programme evaluations and external audits and monitoring mechanisms.[108] They are also required to conform

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104 Roversi-Monaco, "Introductory Remarks" Magna Charta Yearly Event, Bologna, Italy (2006) 1.

105 Rapp "Freedom in Research and Training, a Principle to be Respected by Governments and Universities" (paper presented to the XX Anniversary of the *Magna Charta Universitatum*, Bologna Italy (18-09-2008 – 20-09-2008)) 1–2; see also Bricall in *Proceedings of the Conference of the Magna Charta Observatory* 73.

106 Singh in *Proceedings of the Conference of the Magna Charta Observatory* 94–95; Sall and Mangu 2005 *Journal of Higher Education in Africa* 1–15.

107 Collier 2002 *Legal Studies* 16.

108 Jónasson *Inventing Tomorrow's University* 22 where he asks rhetorically: "How, indeed, is a well-run company administered, managed or governed?"

Although these principles may be taken for granted in the liberal democracies of Western Europe, the idea of •patrolling the boundaryŽ cannot be over-emphasised. In similar vein, the most important lesson that can be gleaned from the experiences of the Magna Charta Universitatum and of the Bologna Process is that universities need to be willing to undertake reform and adapt to changing times in order to avoid the risk of discontinuity and critical developments that had occurred in certain historical phases, in particular the risk of immobilisation due to an inability to deal with the demands of the outside world.

Within our own specific local, regional and country circumstances, I trust that we can lay claim to these underlying principles of university institutions on the basis of equality and universality. Academic freedom is a continuous challenge; it can also be abused in certain circumstances. In the same vein, institutional autonomy is a relative concept as no university is free of some sort of state regulation, and no higher education institutions can be effective if it is overregulated.[114] There is, therefore, the eternal challenge of striking a delicate balance between effective self-regulation and governance on the one hand and accountability and social responsibility on the other. In the ultimate analysis, we do well to remind ourselves of these immortal words from Judge Learned Hand on the Spirit of Liberty:

> •What do we mean when we say that first of all we seek liberty? I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognizes no check upon their freedom becomes a society where freedom is the passion of only a savage few, as we have learned to our sorrow.[115]Ž

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114 Jónasson *Inventing Tomorrow•s University* 21…23.

115 Judge Learned Hand •Spirit of Liberty Speech• *The Spirit of Liberty* (1944) 190.

Balancing Victims' Rights Against Those of Accused Persons: Challenges Posed by the Adversarial Criminal Justice System

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1 INTRODUCTION

Recent developments in South Africa and elsewhere have promoted the view that crime victims have, or ought to have, rights.[1] The victims' enjoyment of these rights, it is believed, would improve their status within the criminal justice system, increase victim satisfaction, and ultimately lead to the victims' full participation in the criminal process.[2] The victims' rights advocates argue that victims' interests should be considered because any outcomes in criminal proceedings affect them as much as they affect offenders and the public.[3]

The attitude towards complainants, and the treatment which they received at the hands of law enforcement agencies in the past,[4] prompted many countries to take measures that were designed to ensure that crime victims are treated with dignity, courtesy and sensitivity.[5] South Africa has included in existing legislation sections that are intended to extend "participation" in the criminal justice system to crime victims,[6] and has also introduced the Service Charter for Victims of Crime (hereafter "the Charter"). The Charter is a document which sets out the rights of crime victims. The legislation alluded to above, as well as the Charter, may not have gone far enough in addressing the question of victim participation, perhaps because of the adversarial nature of our criminal legal system.

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1 E.g. The South African Service Charter for Victims of Crime 2004. Also, see Spinellis "Victims of crime and the criminal process" 1997 *Israel Law Review* 337*ff* and Pizzi "Victims' rights: rethinking our adversary system" 1999 *Utah Law Review* 349 349.

2 Fenwick "Procedural 'rights' of victims of crime: private or public ordering of the criminal justice process?" 1997 *Modern Law Review* 317 317.

3 Stickels "The victim satisfaction model of the criminal justice system" 2008 *Criminology and Criminal Justice Research and Education* 1 3.

4 See the South Africa Service Charter for Victims of Crimes 2004. Also, see Henderson "The wrongs of victims' rights" 1985 *Stanford Law Review* 937 938–942.

5 UNODCCP "Handbook on Justice for Victims" http://www.uncjin.org/Standards/9857854.pdf (accessed 27-06-2011).

6 See, for example, s 299A of the Criminal Procedure Act 51 of 1977, as inserted by s 6 of the Judicial Matters Second Amendment Act 55 of 2003. Section 299A permits victim input, or representations to be made, when placement of the offender on parole is being considered.

The tension created by the conflicting interests of crime victims and offenders, it is submitted, cannot be resolved by providing more rights for victims.[7] It is in the nature of the adversarial justice system that the victim is a third party who has no role in a criminal trial other than as a witness,[8] and is an outsider whose rights should be exercised in another forum, namely, the civil courts.[9]

The idea of "victim participation" or "victim involvement" within the criminal process has appalled those scholars rooted in the adversarial tradition, and who consider such an idea to be in conflict with the essence of the adversarial legal system which, by design, conceives of only two participants in a criminal trial.[10] These participants are the accused person and the state.[11] Introducing the victim as an additional participant into the criminal process would, it is believed, impact negatively on the due process rights of the accused.[12]

The purpose of this article is to explore the idea of victims' participation in trials that are based on the adversarial legal system which, in my view, is inherently designed to exclude victims' meaningful participation in the criminal process. Can challenges posed by the adversarial system justify exclusion of victims from participation? Some writers have suggested that any meaningful exercise of victims' rights within the criminal process should be limited to what are termed "service rights", as well as to those procedural rights which have no adverse impact on the interests of criminal suspects.[13] Some jurisdictions have resisted being held captive by the adversarial nature of their legal systems, and have introduced pieces of legislation which are intended to empower victims of crime.[14] South Africa has incorporated into existing legislation some "rights" that facilitate victims' participation before, during and after the trial.

2 INSTRUMENTS THAT FACILITATE VICTIM PARTICIPATION

2 1 Introduction

Considerable attention has been focused on due process and the establishment of fundamental rights for criminal suspects and offenders; no corresponding focus on rights of crime victims has been evident, at least until recently. Some countries, including South Africa, have witnessed the development of victim empowerment programmes, and calls for victim participation within the various criminal justice systems have emerged. In response to these calls, and in order to comply with international instruments which have been ratified, some jurisdictions have enacted legislation intended to facilitate victim participation. As early as 1987, New Zealand enacted the first victim-centred statute, the Victims of Offences

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7 Blondel "Victims' rights in an adversary system" 2008 *Duke Law Journal* 237 274.
8 *Ibid*.
9 Henderson 1985 *Stanford Law Review* 1007.
10 Sankoff and Wansbrough "Is Three Really a Crowd: Thoughts about Victim Impact Statements and New Zealand's Revamped Sentencing Regime" http://www.isrcl.org/Papers/2006/Sankoff.pdf (accessed 19-05-2010).
11 *Ibid*.
12 Ashworth "Victim impact statements and sentencing" 1993 *Criminal Law Review* 498 499.
13 Fenwick 1997 *Modern Law Review* 323.
14 For example, the Victims' Rights Act 39 of 2002 in New Zealand. This Act, read with the Sentencing Act 9 of 2002, facilitate victim participation when bail, sentencing and parole are considered.

Act.[15] That Act was later repealed, with the Victims' Rights Act[16] replacing it. Similar legislation is found in most states in Australia and the United States of America. Commenting on the need for similar legislation in South Africa, Rauch[17] observed that "the absence of victim aid services has added a sense of powerlessness of victims, and contributed to the perception that perpetrators lie at the heart of crime prevention in South Africa". This perception breathes life to the popular resistance to human rights issues which are viewed as serving the perpetrators' rather than the victims' needs.[18] The Service Charter for Victims of Crime was introduced in an attempt to address the plight of the victims by providing them with some rights.

2 2 The Service Charter for Victims of Crime

In 2004, South Africa introduced the Charter, a document which, read together with the Minimum Standards on Services for Crime Victims: Your Rights as a Victim of Crime, purports to set minimum standards that promote services which victims are entitled to. The Charter guides law enforcement agencies and other role-players on how to improve on their treatment of crime victims. It is consonant with s 234 of the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution") which provides that "in order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution". In its Preamble the Charter contains a commitment to the implementation of measures which are aimed at "continuous reform of the criminal justice system to protect and promote the rights of the victims in compliance with international obligations under human rights instruments". These instruments include, among others, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power,[19] and the Prevention and Eradication of Violence against Women and Children Addendum to the 1987 SADC Declaration on Gender and Development. The Charter represents recognition that an equitable criminal justice system can only be achieved if the interests of crime victims and the rights of the accused persons are protected and balanced. The Preamble to the Charter further recognises the serious impact of crime on victims and the crime's potential for undermining victims' human rights.

The Charter contains the following provisions, the content of which is explained in the Minimum Standards on Services of Crime Victims:

(a) the right to be treated with fairness and with respect for dignity;

(b) the right to offer information;

(c) the right to receive information;

(d) the right to protection;

(e) the right to assistance;

(f) the right to compensation; and

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15 Act 173 of 1987.

16 Act 39 of 2002.

17 Rauch *1996 National Crime Prevention Strategy* (1999) http://www.csvr.org.za/docs/crime/1996nationalcrime.pdf (accessed 12-04-2010).

18 *Ibid.*

19 Adopted by the United Nations General Assembly at its 96th Plenary on 29-11-1985.

(g) the right to restitution.

The above rights, which may directly impact on the due process rights of accused persons, can conveniently be divided into service rights and procedural rights.

2 2 1 Service rights

Fenwick describes service rights as those rights which "ameliorate the criminal process for the victim and draw her into it by providing various services, but do not afford her an opportunity to make an impact on the criminal process itself".[20] These rights are easy to implement because their enjoyment does not encroach on the rights of accused persons at all. For example, police officers should not find it difficult to treat complainants with courtesy, or to assist victims when they come to report crime, as required in (a) and (e) above, respectively. Also, the prosecutor should find no difficulty in informing the victim of the next court date, or of the progress of the case, as required under (c) above.

Because service rights do not infringe the rights of accused persons, the state has enthusiastically taken steps to ensure that these rights are available to victims. The state has been hesitant in addressing the question of procedural rights for crime victims. In response to the Charter right to assistance the state has, for example, established a number of structures, including:

(a) child and witness facilities in most courts, with one-way glass partitions;

(b) a number of sexual offences courts;

(c) a Family Violence, Child Protection and Sexual Offences Unit; and

(d) the Thuthuzela Care Centres, established by the National Prosecuting Authority, to assist rape victims.

A closer look at the above structures reveals that the focus of the state is on vulnerable members of society like children, women and the elderly, with a bias towards sexual offences and acts of domestic violence. Most victims, it can be inferred, do not benefit much from most of the available programmes. Service rights can easily be accommodated within both the inquisitorial and the adversarial legal systems, since they have little or no negative impact on offender rights.

2 2 2 Procedural rights

Procedural rights have a potential to benefit crime victims. The rights that are of a procedural nature include the right of victims to offer information and the right to compensation. The right to information essentially means that the victim can express his views on the release of the accused on bail or on parole. He or she can inform the court of the impact the crime had on him or her, thereby influencing the court as to the sentence to be imposed. During plea negotiations the accused has a right to be consulted by the prosecutor. Commenting on the negative impact of the victim's right to offer information, Naudé[21] states:

(a) "Rights gained by the victim are rights lost to the defendant." In other words, whenever the victim exercises a procedural right, some of the accused person's rights are adversely affected;

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20 Fenwick 1997 *Modern Law Review* 317–318.

21 Naudé "Taking victims to court: a call for victim impact statements" 1993 *Crime and Conflict* 22 23.

(b) Bringing a victim into the process means a "reversion of the retributive, repressive and vengeful punishment of past centuries";

(c) The victim's anguish may be "exploited to support conservative ideology and harsher punishment"; and

(d) If victims are allowed to give input, "this may put unacceptable public pressure on the courts".

Other than information that is conveyed in terms of legislation, victims can give information through victim impact statements. Although reference to victim impact statements is made in the Minimum Standards under the Charter, South Africa has not yet embraced their use during criminal proceedings.

2 2 2 1 Victim impact statements at sentencing

The strongest fear with respect to victim impact statements being allowed during the trial is that they may, as Fattah[22] puts it, "influence or prejudice the court against the offender, and reorient the criminal process away from the offender, thereby infringing the accused's right to freedom of person". Victim impact statements are usually introduced before the accused is sentenced, but may be used at other stages of the trial.

The court in *S v Maphumulo*[23] stated that punishment is pre-eminently a matter for the discretion of the court. Also, in *S v Barnard*[24] the court, reiterating the view expressed in *Maphumulo*, stated that it is trite that sentence is a matter best left to the discretion of the sentencing court. Any form of influence from the victim is, therefore, unlikely to be countenanced by the sentencing court. The victim's exercise of the right to offer information would not only pose a threat to the rights of the accused, but would also amount to usurping the decision-making functions of the court before sentencing and during the bail hearing, as well as influencing negatively the decision of the Parole Board during the parole hearing.

There are instances where the exercise of procedural rights by victims will not necessarily encroach on due process rights of offenders. For example, most countries allow victims to claim compensation and/or restitution during trial proceedings.[25] In South Africa the provision for compensation and restitution is provided for in s 297(1) of the Criminal Procedure Act and in clause (f) of the Charter. The victims' exercise of this right does not encroach on the rights of offenders. Prosecutors do not normally advise the victim-witnesses of the existence of this provision in the Criminal Procedure Act and, as a result, the section has rarely been relied upon by the courts to benefit crime victims.[26]

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22 Fattah (ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (1986) 43.

23 1920 AD 56 57.

24 2004 1 SACR 191 (SCA) para 9.

25 In China, for example, art 31 of the Criminal Law of the Peoples' Republic of China provides: "Where the victim has suffered economic loss as a result of a criminal act, the criminal, in addition to receiving sanctions according to law, shall in accordance with circumstances be sentenced to pay compensation for the economic loss."

26 Also see s 300 of the Criminal Procedure Act which permits the court to order compensation. This order has the effect of a civil award in terms of s 300(2)(a) to (b).

Fenwick[27] argues that when the victim requests that his procedural rights should be respected, he is actually requesting the criminal justice system to depart from traditional practice in which, in an adversarial legal system, the state and the offender are the main role-players. He seeks to be allowed to be an additional role-player in the criminal process. Crime victims and accused persons pursue conflicting interests most of the time: while the rape victim desires conviction, followed by the imprisonment of the accused, the accused is fighting for his acquittal or, where this is not possible, a lighter sentence. Some crime victims will even seek revenge, something that falls outside the established purposes of punishment. Were the victims allowed party status, offenders would most probably be prejudiced.

2 3 Shortcomings of the Charter in brief

Having a Charter clearly demonstrates this country's commitment to protection of crime victims. It does, however, seem as if there is uncertainty as to how victims' procedural rights should be exercised. The root of the problem is in the country's adversarial legal system which prevents third parties from meaningful participation in the criminal process. The drafters of the Charter, realising the problem just mentioned, avoided rights that really matter to crime victims and provided rights that victims can do without, including being treated with courtesy. Providing a victim with service rights does not in any way threaten the accused's enjoyment of due process rights.

Unlike other jurisdictions, South Africa did not put so-called victims' rights into legislation, and as a result there is no legal obligation placed on law enforcement agencies to provide services. The Charter is a document with an obscure status – if role-players do not act in accordance with its provisions, no sanctions follow. Victims cannot go to court to vindicate their rights and are, therefore, left without redress. The question is whether the so-called "rights" are indeed rights – would it not be more appropriate to refer to them as victim interests rather than to call them victim rights?

Had Charter rights been legally enforceable, the risk is that they might compete with those of accused persons and offenders. According to Govender,[28] these Charter rights are aspirational rather than real because they create values to which everyone should aspire. The above discussion is not intended to suggest that the "rights" in the Charter have no value – they are a valuable guide for law enforcement agencies. They provide valuable, though limited, victim participation during trial proceedings.

2 4 Legislation

2 4 1 Introduction

South Africa has avoided legislation that deals exclusively with victims' rights. The country has instead inserted sections into various statutes, including the Criminal Procedure Act and the Correctional Services Act,[29] that accommodate victims' interests. These sections have little or no impact on the rights of accused persons.

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27 Fenwick 1997 *Modern Law Review* 323.

28 Govender "Giving Power to Victims of Crime" http://www.southafrica.info/services/rights/victimscharter-launch.htm (accessed 12-02-2010).

29 Act 111 of 1998.

2 4 2 Section 274 of the Criminal Procedure Act

The above section provides that a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be imposed. Contrary to what some authors believe, this section is not intended to assist victims to offer information in the form of victim impact statements, because:

(a) this section can only be invoked at the discretion of the court;

(b) the section has been in existence over decades and cannot be linked to victim impact statements which were conceptualised only after 1985;

(c) s 274(1), although wide enough to permit evidence to be led in other forms, allows evidence "primarily" to be led *viva voce*; some victims are not sufficiently articulate to convey their evidence orally; and

(d) the above section is about evidence in mitigation or in aggravation of sentence and cannot be construed as affording crime victims the right to present victim impact statements.

Section 299 is another section that affords the victim the opportunity to convey information to the court. This section enables the victim to give input or make representations when placement of the offender on parole is considered.

The above sections empower the state to "consult" victims, and nothing more. The consultation does not allow meaningful exercise of rights by victims because it is exercised at the discretion of the prosecutor in cases of bail, plea bargaining[30] and sentencing. Where placement of the accused on parole is being considered, the victim's views are, presumably, expressed through two community members who are appointees of the Minister.[31] The weight to be attached to the expressed views of victims is also unclear.

The sections referred to above, nevertheless, do afford crime victims some means of giving information that will assist the court or the Parole Board in arriving at the appropriate decision.

3 BARRIERS TO VICTIM PARTICIPATION

3 1 Adversarial and inquisitorial systems explored

A country's legal system is often described as either being adversarial or inquisitorial. Common law countries generally follow the adversarial legal system. Countries that follow the adversarial legal system include South Africa, Australia, Canada, New Zealand and the United States of America. The criminal

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30 Section 105A(1)(b)(ii)(dd) requires the prosecutor to give due regard to the interests of the community. Section 105A(1)(b)(iii) allows the prosecutor to enter into a plea agreement after having afforded the complainant an opportunity to make representations to the prosecutor where it is reasonable to do so. The wide discretionary powers enjoyed by the prosecutor may sometimes limit the victim's exercise of the right to make representations. The victim has no remedy, and the prosecutor's decision that it was not "reasonable to do so" cannot be challenged.

31 In terms of s 74(2)(f) of the Correctional Services Act the composition of the Correctional Supervision and Parole Board must include two members of the community. The Minister has the power to remove them in terms of s 75(7)(b). These members are, it is submitted, representing community interests, and not necessarily the victims' interests.

law of all these countries has its origins in English common law. Inquisitorial legal systems are found predominantly in civil law countries of continental Europe, like France, Switzerland and Germany, as well as those countries once colonised by them. In drawing a distinction between the adversarial and inquisitorial systems, Brants and Franken state:

> "The major theoretical differences between these traditions concern, on the one hand, the way in which the relationship between the law, the individual and the state is conceived of (including the conception of the individual fundamental rights and freedoms) and, on the other, the way in which the law is 'found'."[32]

Moohr, on the other hand, argues that these two systems "differ in their approaches to ascertaining the truth, largely as a result of their respective origins".[33] These distinctions are also reflected in the way in which the truth is to be discovered, and therefore affect the nature of checks and balances that achieve a fair trial. They also differ on the question of who controls the legal proceedings.

3 1 1 The two legal systems compared

In an adversarial system the contest is two-sided, involving the defence and the state. According to Kessler,[34] in adversarial legal systems each party manages her own case. She develops her evidence and determines the best and most effective way of arguing her position before court. A judge is a neutral umpire. Instead of undertaking independent investigations, the judge looks at the evidence brought by the contestants, and acquits or convicts the accused on the basis of available evidence. If a party fails to raise issues, or to question effectively his or her opponent during cross-examination, that party does so at their own risk. The presiding officer has no obligation to assist or fill gaps for either party, except when the accused person is not legally represented.[35]

Adversarial systems do not concern themselves so much with the truth. Even if evidence clearly indicates beyond reasonable doubt that X committed the crime, X will not necessarily be convicted if procedures preceding the finding of guilt were not adhered to. An adversarial system is more concerned with rules of evidence and procedure, requiring that disputes should be resolved through a fair process that is monitored by an independent and impartial presiding officer.[36] It is the procedure that precedes the correct result, and not the correct result itself, that determines whether the accused is guilty or not. Blondel states that "protecting

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32 Brants and Franken "The Protection of Fundamental Human Rights in Criminal Process: General Report" http://utrechtlawreview.org/Volume5Issue2 (accessed 09-06-2010).

33 Moohr "Prosecutorial power in an adversarial system: lessons from current white collar cases and the inquisitorial model" 2005 *Buffalo Criminal Law Review* 165 192.

34 Kessler "Our inquisitorial tradition: equity procedure, due process and the search for alternative to the adversarial" 2005 *Cornell Law Review* 1188.

35 *Ibid.*

36 Commenting on the need to protect the accused in trials of the International Criminal Court, Baum "Pursuing justice in a climate of moral outrage: an evaluation of the rights of the accused in the Rome Statute of the International Criminal Court" 2000–2001 *Wisconsin International Law Journal* 197 observes: "It is precisely at those times when moral outrage is at its highest that the burden on adjudicating bodies is heaviest both to satisfy society's collective need for condemnation and punishment of [war] criminals and simultaneously to assiduously protect the rights of those accused of [war] crimes. In order for a [war] crimes tribunal to possess legitimacy, it must ensure that rights of the accused are protected by the principles of due process and fundamental fairness."

the process, and thereby protecting party autonomy, justifies sacrificing some accuracy in the outcome of the litigation".[37] Were procedures not taken seriously by the courts, the risk is that criminal suspects would, for example, be treated harshly by police officers who want to extract confessions. Crime victims are interested in having the truth exposed and may feel that emphasis on due process for the accused stands in the way of discovering the truth.

Kessler[38] notes that in an inquisitorial legal system the court actively controls the case. The judge initiates proceedings, collects evidence and determines how to construct and resolve questions of law and of fact. The judge is an active participant in the proceedings and, together with the police and the public prosecutor, undertakes the major steps towards a trial.

According to Chase[39] the different approaches reflect cultural assumptions about the purpose of each legal system. Nagorcka, Stanton and Wilson[40] contend that with inquisitorial models social interests are the primary concern – a legal system is viewed as a tool to investigate and uncover the truth. Inquisitorial systems do not support rules that might obstruct the truth.[41] If, for example, the body of the deceased was discovered as a result of a "pointing out", this piece of evidence is admissible even if it was illegally or improperly obtained. The focus is on attaining the correct results, irrespective of the method used to arrive at those results.

Evaluating the two systems as to their strengths and weaknesses falls outside the scope of this article; suffice to say that this discussion does not consider either legal system to be superior over the other.

3 1 2 The role-players in the adversarial model

3 1 2 1 The accused or defendant

The accused is the person who is alleged to have committed the crime and is the state's or the prosecutor's opponent. Each party is afforded an opportunity to present and argue his or her case, and to cross-examine the other party. The accused enjoys a series of rights, both under common law and under the Constitution. The rights referred to above serve to protect the accused against improper conduct and to ensure that the accused is treated fairly before, during and after the trial.

3 1 2 2 The Director of Public Prosecutions' Office

The prosecutor acts on behalf of the Director of Public Prosecutions (hereafter "the DPP"). He represents the interests of the country, thereby vindicating the public interest in justice. The DPP, and no one else, decides whether to bring charges against the accused, or whether to prosecute the case. He participates in bail proceedings, in the trial as well as in the plea-bargaining process. Only in

37 Blondel 2008 *Duke Law Journal* 247.
38 Kessler 2005 *Cornell Law Review* 1188.
39 Chase "American exceptionalism and comparative procedure" 2002 *American Journal of Comparative Law* 277 280.
40 Nagorcka, Stanton and Wilson "Stranded between partisanship and the truth? A comparative analysis of the legal ethics in the adversarial and inquisitorial systems of Justice" 2005 *Duke Law Journal* 448 462.
41 *Ibid*.

the exceptional cases referred to in s 7(2)(a) of the Criminal Procedure Act[42] will the prosecution be conducted by a private individual or the victim. The prosecutor is expected to be impartial to the extent that he does not seek conviction at all costs. He has a duty to disclose information to the court, even if that information is adverse to the state's interests, or favourable to the accused's interests. Doak states that "the duty of prosecuting counsel is not to obtain a conviction at all costs, but to act instead as a 'minister of justice'".[43]

The following are some of the characteristics of an adversarial system:

(a) the prosecutor and the defendant enjoy equal standing before court;
(b) both parties must submit all relevant evidence that is at their disposal;
(c) parties may examine and cross-examine witnesses; and
(d) the presiding officer plays a predominantly passive role.[44]

3 1 2 3 The judge or presiding officer

A judge is an impartial guardian of the rule of law and has the responsibility to protect the defendants' constitutional and common law rights.[45] Because of her status, the presiding officer is expected to recuse herself from a case in which her impartiality might reasonably be questioned.

Nagorcka, Stanton and Wilson[46] suggest that in countries with inquisitorial systems, like France, the investigating judge may consider outsider interests like those of victims, minority groups, animals or the environment, or even permit these parties or their representatives to participate in proceedings, because the system is designed to allow broad participation. However, in an adversarial environment such participants might encroach on the due process rights of accused persons. The concept of victim involvement creates problems because there are many competing aims of the criminal justice including, according to Doak,[47] "the objective adjudication of guilt, the desirability of truth-finding, the preservation of public interests and the need to *preserve fair trial rights* for the accused" (my emphasis). The presiding officer would, in my view, find it extremely difficult to adjudicate on a matter in which the victim is also a party.

3 1 2 4 The victim as non-party

Sebba observes that, other than as a witness, the victim has no standing in criminal proceedings that are based on the adversarial procedure.[48] The witness

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42 Subsection (2)(a) of s 7 reads: "No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorised by law to issue such process a certificate signed by the attorney-general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the state."

43 Doak "Victims' rights in criminal trials: prospects for participation" 2005 *Journal of Law and Society* 294 305.

44 See Harnon "Criminal procedure in Israel – some comparative aspects" 1967 *University of Pennsylvania Law Review* 1091 1093.

45 According to Brants and Franken (*The Protection of Fundamental Human Rights* (2009) 22), it is the judge who plays the primary active role in establishing the truth.

46 Nagorcka, Stanton and Wilson 2005 *Duke Law Review* 460–461.

47 See Doak 2005 *Journal of Law and Society* 296.

48 See discussion in Sebba "The victim's role in the penal process: a theoretical orientation" 1982 *The American Journal of Comparative Law* 217*ff*.

may be called to testify at the discretion of the prosecutor. Blondel,[49] correctly in my view, notes that "because an adversary system relies on the parties [accused and prosecutor] to assert their interests before the court, it necessarily excludes outsiders like crime victims". This exclusion is reflected in the judgment in *S v Zinn*[50] where it was stated that, in determining the punishment to be imposed, the court should consider the "crime" that was committed, the "criminal" that committed the crime and the "interests of the community" – no reference whatsoever was made to crime victims.

Tsoukalas argues that the victim is an intruding civil claimant who disturbs the "mystic ceremony of the criminal process".[51] While the court and the public prosecutor are trying objectively to find the truth and the defence is fighting to avoid conviction, the civil claimant "only struggles for his own private interest . . . displaying his personal passion and irresponsibly attacking the defendant".[52]

It would be incorrect to assume that the prosecutor represents victim interests. Rock has correctly argued that the prosecutor is not speaking for the victim, nor is the prosecutor the victim's legal representative.[53] Sanders and Young[54] contend that the main function of the criminal justice system ought to be the punishment of the guilty and the acquittal of the innocent; if this is correct, the proper place of the private interests of a third party cannot be located in a process which is based on an adversarial legal system. Were a third party allowed to participate, core values like objectivity might be compromised. Further, how would the victim, in the exercise of the "right" to cross-examine, deal with a situation where the accused exercised the right to remain silent – which of the conflicting rights would prevail?

Doak[55] explains that victims once participated in criminal proceedings and were responsible for not only initiating, but also for prosecuting offenders without the assistance of the public prosecutor.[56] Those functions were later appropriated by the state, when the focus of criminal law shifted from the private to the public sphere.[57] The reasons which led to the appropriation of these functions by the state, and which are discussed by Langbein,[58] have not changed.

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49 Blondel 2008 *Duke Law Journal* 239.

50 1969 2 SA 537 (A) 540G–H.

51 Tsoukalas *Penal Procedure* (in Greek) (1943) 149 cited in Spinellis 1997 *Israel Law Review* 337 357.

52 *Ibid*.

53 Rock *The Social World of an English Crown Court* (1993) 169. Also, see Paciocco who states that the "victim has no place at the prosecutor's table. The lawyer who prosecutes the case, the Crown attorney, is not the victim's lawyer": Paciocco *Getting Away with Murder: The Canadian Criminal Justice System* (1999) 355.

54 Sanders and Young *Criminal Justice* (2000) 9.

55 See Doak 2005 *Journal of Law and Society* 299.

56 Corrie comments that in the courts of countries that follow the civil law tradition, victims often participate as third parties to the proceedings, and not only as witnesses: Corrie "Victims Participation and Defendants' Due Process Rights: Compatible Regimes at the International Criminal Court" http://www.amicc.org (accessed 15-07-2011).

57 For the evolution of early penal systems from the stage when the course of justice was the exclusive preserve of the victim, see Schafer *Victimology: The Victim and His Criminal* (1988) 21.

58 Langbein "The origins of public prosecution at common law"1973 *American Journal of Legal History* 313.

Garkawe, for example, explains that victims may be "too motivated by their desire for revenge and retaliation for the harm inflicted upon them . . . Revenge motives were seen as too arbitrary and severe, and thus consistency in the prosecution of criminals could be achieved through state control". He goes on to state that victim involvement would undermine the proper functioning of the criminal justice system, "particularly in respect of the civil liberties of accused persons".[59]

3 2 Due process and crime control models

South Africa's approach to crime is informed by, among others, the values expressed or implied in the Constitution. Section 39(2) of the Constitution, for example, provides that "every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". The Constitution in s 35 lists a series of due process rights to which arrested, detained and accused persons are entitled. Notably, no reference in the Constitution is made whatsoever to crime victims.

Most common law countries have mixed systems, with either the due process model or the crime control model being predominant. In South Africa the due process model predominates and, as a result, procedures which guarantee fairness to accused persons are of paramount importance. Due process serves a useful purpose: it ensures that people who are innocent will not be unjustly convicted.[60] It gives recognition to basic human and civil rights, so that one will be acquitted unless one's guilt has been proved beyond any reasonable doubt.[61] Briefly, due process is premised on the following:

(i) an accused person is presumed to be innocent until proven guilty;

(ii) as was stated in *R v Ndlovu*,[62] it is for the prosecution to prove the guilt of the accused, and not for the accused to prove his or her innocence. It is for the state (i.e. the prosecution) to prove the whole of its case;

(iii) the guilt of the accused should be proved beyond any reasonable doubt. In *R v Didfford*[63] the court said: "if he [the accused] gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false";

(iv) the accused should not be forced to give self-incriminating evidence. This is in line with the accused's right to a fair trial, which encompasses the right of the accused to remain silent; and

(v) an accused person has a right to a speedy trial.

These due process provisions, and others, are found in s 35 of the Constitution. They also exist under common law. Due process is about fairness to the accused, and to no one else. Taggart[64] states that "[t]he due process model fully recognises

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59 Garkawe "The role of the victim during criminal court proceedings" 1994 *UNSW Law Journal* 595 600. For comments supporting victim participation, see Stuart J in *R v Bullen* 48 110 (5th Cr 2001) (Yuk. Terr. Ct.) and Ellison "Rape and the Adversarial Culture of the Courtroom" in Childs & Ellison (eds) *Feminist Perspectives on Evidence* (2000) 39 40.

60 *R v Ndlovu* 1945 AD 369 386.

61 Schwikkard *Presumption of Innocence* (1999) 13.

62 1945 AD 369 386–387.

63 1937 AD 370 373.

64 Taggart (ed) *The Province of Administrative Law* (1997) 31.

the value of the overarching right to a fair trial". There can be no fair trial for the accused when victims are participants in trial proceedings. Imagine, for example, if in (ii) above both the prosecution and the victim had to prove the accused person's guilt. It would mean that the accused would have to contend with evidence, cross-examination and arguments from two sources, effectively defending herself twice for the same offence. Section 35(3)(m) of the Constitution protects against double jeopardy by providing that no one may be tried twice for the same offence. Assuming that both the prosecutor and the victim were allowed to prosecute the accused, and the prosecutor succeeded in proving guilt while the victim failed to do so – what verdict would the presiding officer pass? Would it be a verdict of "guilty" or "not guilty"?

A trial is about each party producing evidence to substantiate that party's case, and to destroy, or raise doubts about the credibility of the other party's evidence. Such a trial cannot be easily adapted to accommodate any meaningful participation of third parties. Victims' rights advocates assume, uncritically, that the law should remedy the injustice of excluding victims by incorporating them into trial proceedings. There are, however, structural barriers which are created by the adversarial nature of our legal system. As Doak observes:

> "One of the major obstacles to victim involvement in the criminal process stems from the bifurcated structure of the adversarial criminal justice system. The trial has been said to centre upon the 'sharp clash of proofs presented by litigants in a highly structured forensic setting',[65] where a heavy onus rests on the parties to produce evidence to substantiate their own case, and to perforate the arguments of their opponent. Without radical reform, existing trial structures could not be easily adapted to accommodate the meaningful participation of any third party."[66]

The crime control model, on the other hand, is an approach that is characterised by "zero-tolerance" to crime, and which places little emphasis on due process. The state often uses whatever methods it has at its disposal in order to suppress crime; these methods include torture to extract confessions, and detention without trial and for indefinite periods.[67] Police usually have wide powers of arrest, search and seizure, and of interrogation of suspects.[68] A suspect in a crime control environment has few or no rights, and cannot refuse to answer questions that are posed by investigating officers. The suspect may, as a result, falsely confess to having committed a crime in order to save himself from further assault by police; courts may convict the accused even if the confession was involuntarily made.[69]

Although the crime control model would easily fit into the inquisitorial legal system, most countries whose legal systems are inquisitorial do respect human rights and would protect accused persons against any form of inhuman treatment. Further,[70] all countries have mixed systems, with one model being merely predominant over the other. During the apartheid years, for example, South Africa

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65 Landsman *Readings on Adversarial Justice* (1988) 2.
66 Doak 2005 *Journal of Law and Society* 297.
67 Makiwane *Rights and Constitutionalism: A Bias towards Offenders?* (LLD-thesis, Unisa, 2008) 61.
68 Nicolson "Ideology and the South African judicial process – lessons from the past" 1992 *SAJHR* 50*ff*.
69 See, for example, *R v Somhando* 1943 AD 608.
70 E.g. countries like France and Germany.

was strong on crime control, but even in that era Holmes JA, in the case of *S v Lwane*,[71] could say:

> "The pragmatists may say that the guilty should be punished . . . The answer is that between an individual and the day of judicial reckoning there are interposed certain checks and balances in the interests of a fair trial . . . it is not in the interests of society that an accused should be convicted unless he has had a fair trial."

Some countries have reservations about integrating crime victims into the criminal process. There is, however, recognition that victims ought to play some role because they are the persons who have intimately experienced crime. Restorative justice is a development that is intended to bring crime victims and offenders together, through programmes like victim-offender mediation, circles and family group conferencing. These programmes have so far failed to break the structural barriers created by the adversarial system.

4 CONCLUSION

Changes which have been brought about by the Constitution have, as Packer observes, "created the impression, and at times the reality that the criminal justice system has turned into a due process course"[72] in which, according to Roach, "the defence lawyers and the Supreme Court blocked the efforts of police, prosecutors and Parliament to find and convict the guilty".[73] There is no doubt that our legal system, relying on the common law and the Constitution, jealously guards against encroachment on the rights of accused persons.

South Africa has avoided the pitfall of introducing legislation that deals exclusively with victims' "rights", as this might promote the false belief that victims have rights. While it is desirable that victims should enjoy rights, this desire remains an illusion when they cannot enforce those rights in a court of law, as is the case with Charter rights.

Since service rights are easy to implement and do not encroach on due process rights of accused persons, it is preferable that victims' rights should be confined to service rights. If service rights are legislated, this would enable crime victims to approach courts to seek redress for their infringement. Entities to which victims can at present lodge complaints, like the Public Protector and the Human Rights Commission, also have limited powers to enforce their decisions.

Procedural rights of victims are difficult to implement in an adversarial environment, because the focus of the courts is on fairness to the accused. An accused is treated fairly if he receives a fair trial as provided for in s 35 of the Constitution. If victims were provided with procedural rights, the impartiality of presiding officers would sometimes be compromised. Judges would have to protect rights of parties whose interests in the outcome of the trial diverge. Further, prosecutors serve the public interest;[74] too much work would be placed

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71 1966 2 SA 433 (A) 444.

72 Packer "Two models of the criminal process" 1964 *University of Pennsylvania Law Review* 1 3. Although Packer was referring to the American constitution, this statement is relevant to the South African situation today.

73 Roach *Due Process and Victims' Rights: New Law and Policies of Criminal Justice* (1999) 163.

74 It might perhaps be appropriate to abandon the public prosecution system and allow crime victims to prosecute cases themselves. The question that arises is whether most victims could afford the costs of conducting private prosecution.

on their shoulders if they were to serve victims' interests as well. As Blondel[75] correctly contends, "[r]epresenting victims' private interests creates an ethical conflict for prosecutors as soon as the victims' interests diverge from those of the public". As mentioned earlier, were the victim allowed party status, the accused would have to contend with more than one opponent, although he is confronted with the same facts.

It is the extent of victim participation, and not victim participation as such, that is relevant in determining the possible adverse impact on the accused's interests. It is suggested that victims should remain as non-parties and that their participation should be limited to those rights that do not impact negatively on offender rights. A cautious approach to victim rights has been adopted by South Africa. Although legislation to some extent allows victim input, the extent to which that input is allowed is limited by the discretion of the prosecutor or the Parole Board.

There is nothing inconsistent in having a strong and reliable trial system that denies party status to crime victims while, at the same time, acknowledging that crime victims have interest in the prosecution of cases affecting them.[76] It would be a positive step if victims' rights that do not encroach on due process rights of offenders were contained in legislation that is dedicated to victim interests.[77] The inclusion of victim rights in the Constitution, as is the case with those of detained, arrested and accused persons, ought to be considered. For victims to enjoy any meaningful participation within the criminal justice system, the adversarial system might have to be drastically modified.

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75 Blondel 2008 *Duke Law Journal* 263.

76 Pizzi 1999 *Utah Law Review* 349.

77 The United States of America had, at federal level and as early as 1984, enacted the Victims of Crimes' Act. Also see the Victims' Rights and Restitution Act of 1990. Also see the New Zealand Victims' Rights Act 39 of 2002, referred to earlier. These statutes permit the use of victim impact statements before the offender is sentenced.

Constitutional Perspectives on the Legal Position of Unmarried Fathers under Customary Law in South Africa

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1 INTRODUCTION

Customary law, which is part of South African law, is the law that regulates the activities of the majority of black South Africans. Despite its importance as part of South African law, customary law has not been granted the status it deserves, as it has often been ignored by the courts and the legislature. Customary law is not the only system of law that is applicable in South Africa. The common law as received also forms part of South African law, and this law is often unfairly applied to all South Africans. In private law, particularly family law, statutory law which is based on the common law, is often applied notwithstanding the existence and accessibility of relevant customary law provisions. For example, the courts began applying the common law system of maintenance to everyone, including Africans, from the 1940s onwards without much regard to customary law. This happened despite the fact that under customary law, all children, irrespective of whether they were born from marriage or not, are absorbed into a family, be it the family of the mother's husband, or that of the child's natural father.[1] In essence, under customary law the duty of support of children is a collective responsibility based not only on marriage relationships but also on relatives of the same blood.[2] If an unmarried father fails to support his children, the extended family provides such support. It is therefore unnecessary to enforce the maintenance obligation through the common law machinery. Furthermore, Maithufi also submits that the "best interests of the child" criterion, irrespective of the type of marriage contracted and irrespective of whether or not parents are married or *lobola* (bride wealth) has been fully provided, applies to all disputes concerning children.[3] The principles of customary law relating to the position of children therefore apply subject to the provisions of s 28 of the Constitution of South Africa. This limitation in the application of customary law has led to an increased

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1 Bennett *Customary Law in South Africa* (2004) 136.

2 Bennett *Customary Law in South Africa* (2007) 321.

3 Maithufi "The Best Interests of the Child and African Customary Law" in Davel *Introduction to Child Law in South Africa* 1 ed (2000) 137; Bekker *Seymour's Customary Law in Southern Africa* 5 ed (1989) 14; Kleyn and Viljoen *Beginner's Guide for Law Students* (1998) 96.

reliance on statutory enforcements in terms of the Maintenance Act[4] and the Child Care Act.[5] It is submitted that issues relating to the care or guardianship of children cannot be determined or made subject to the delivery or non-delivery of *lobola*. When children are born out of wedlock without payment of *lobola*, it will be unfair to deprive their natural father's parental rights. It will also not be in the best interests of the children involved, as they would be deprived of their right to be raised and cared for by both parents.

The purpose of this article is to give an account of how customary law applies to parental rights and responsibilities of unmarried fathers, and especially to consider how the courts have interpreted parental rights under customary law in light of the constitutional provisions and other statutes that preceded the adoption of the Constitution. This point is significant in that it establishes the imperative to explore the interface or relationship between the application of customary law and statutory law, in the form of the Children's Act,[6] in the context of the present discussion. Consequently, the article will reflect in particular on issues of developments in the recognition and application of customary law, the classification of children and the resulting parental rights and responsibilities under customary law, parental rights and responsibilities of an unmarried father under customary law, and particularly aspects of guardianship and care. Adoption and maintenance of children born out of wedlock in relation to their natural father will also be discussed.

2 DEVELOPMENTS IN RECOGNITION AND APPLICATION OF CUSTOMARY LAW

Until recently, African customary law was given limited recognition in South Africa, but with the advent of the Constitution of the Republic of South Africa, a paradigm shift in the approach to customary law was necessitated and the recognition thereof was enhanced. Thus, s 211(3) of the Constitution provides:

> "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

In other words, when the rules governing internal conflicts of law indicate that customary law is applicable to the facts of a particular case, the court is bound to apply that law, but always subject to the Constitution and any relevant legislation.[7] This obligation, however, is subject to three important qualifications: first, customary law must be "applicable", meaning that there must be a customary law rule or custom dealing with the situation; secondly, for customary law to be applied, it must be compatible with the Constitution and thirdly, it should not have been superseded by "any legislation that specifically deals with customary law". Furthermore, African customary law is based on the concept of human dignity, derived not necessarily through the relentless pursuit of individual liberty, but rather through membership of a group.[8] In this regard, s 30 of the Constitution provides:

> "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provisions of the Bill of Rights."[9]

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4 Section 15 of Act 99 of 1998. The duty to provide maintenance is enforced in special maintenance courts by way of civil action.
5 Act 74 of 1983 (repealed). Criminal prosecutions were made possible by s 50(2).
6 Act 38 of 2005.
7 Bennett *Customary Law in South Africa* (2004) 136.
8 Bennett *Customary Law in South Africa* (2004) 89.
9 Act 38 of 2006.

A right to culture may therefore be exercised if it does not conflict with other provisions of the Bill of Rights, and more particularly for the purpose of this article, the right to equality and treatment and protection and the recognition of Black customary law on issues of awarding parental rights and responsibilities. Similarly, s 31 provides that people who belong to a cultural community have the right to enjoy their culture. Section 31 also adds that this right may not be exercised in a manner inconsistent with the Bill of Rights. In essence, the Constitution gives people the right to practise and use their customary law, provided that the rules of customary law are not "inconsistent" with any provision of the Bill of Rights. This recognition would be facilitated by the provisions of s 211(3) of the Constitution, which mandates the courts to apply customary law whenever that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. Furthermore, s 39(2) mandates the courts to develop rules of customary law in a way that promotes "the spirit, purport and object of the Bill of Rights".

From the interpretation of the above provisions, it is clear that the Constitution recognises customary law as law in the Republic and mandates the courts to apply it in appropriate cases. However, this recognition means that customary law has been thrown into competition with the fundamental rights provisions of the Bill of Rights which may result in a number of conflicts, especially between the right to equality, parental rights, children's rights and various customary law rules that make women subordinate to men. It could be argued that this interface between customary law, statutory law and the Constitution (particularly the Bill of Rights) has elevated the common law even further above customary law because the common law is seen to be easily and readily accessible and well developed, and judicial officers are not well conversant with the rules of customary law, and consequently prefer to apply the common law rules to disputes.

However, it must be emphasised that customary law focuses on the protection of an individual through his or her family clan. The family clan to which a person belongs is thus of cardinal importance in determining the rights of a person. Although custom is its main source of origin, customary law has been codified over the course of time, and some of its principles have been repealed by legislation.[10] The courts have also, in their interpretation of customary law, developed it. For example, in matters of care and guardianship, although a father or husband acquires both care and guardianship over his children, the courts have considered what is in the best interests of the children in matters affecting them.[11] The courts have further modified customary law and allowed the children's mother to be joined in any action involving their care. Any arrangement suggesting the "sale of a child", namely, the transfer of rights against payment or consideration, would not be enforced on the ground that it was against public policy and good morals.[12] In the past, marriages under customary law had not been recognised in South Africa as valid marriages and have been termed "customary unions" to distinguish them from civil marriages. This meant that children born to these marriages were regarded as born out of wedlock.[13]

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10 Maithufi in Davel *Introduction to Child Law in South Africa* 137.
11 *French v French* 1971 4 SA 298 (W).
12 Bennett *Customary Law in South Africa* (2004) 311.
13 South African Law Reform Commission *Issue Paper 13 Project 110 Review of Customary Law Affecting Children* (April 1998).

The Births and Deaths Registration Amendment Act[14] has, however, for the first time provided for children born of African customary unions or marriages by religious rites not to be registered at birth as "extra marital" children.[15] This was followed by the Child Care Amendment Act[16] which included African customary unions and marriages concluded in accordance with a system of religious law, subject to specified procedures as legally recognised marriages for the purposes of the Act.[17] The Recognition of Customary Marriages Act[18] now confers full recognition of customary marriages and regulates celebration, registration, proprietary consequences and dissolution of such marriages. Customary marriages are defined by the Act as marriages in accordance with customary law.[19] The recognition of customary marriages in s 2(1) of the Act as valid marriages "for all purposes", has the effect that children born of such marriages are henceforth to be regarded as "legitimate" children. The Act is retrospectively applicable to marriages concluded before the coming into operation of the Act.

Under customary law, once *lobola* had been paid, the child is considered legitimate and part of the father's family; if *lobola* is not transferred, the child belongs to the mother's family.[20] Furthermore, s 9 of the Age of Majority Act[21] provides that "despite the rules of customary law" the age of majority of any person is determined in accordance with the Act. This means, at least for a woman who enters into a customary marriage, that such a woman will no longer be regarded as being under the marital power of her husband, but as a major in her own right.[22]

There can be no doubt that the South African Constitution recognises the importance of customary law to the majority of South Africans. The courts are now constitutionally obliged to apply and develop customary law.[23]

3 PARENTAL RIGHTS AND RESPONSIBILITIES UNDER CUSTOMARY LAW

The concept of parental rights and obligations has never been a problem in customary law. Bennett has submitted that children have no special favoured position in relation to their parents or other relatives; on the contrary, a child's interests might well be subordinated to those of the family.[24] However, the legal disadvantages of birth out of wedlock are not as great in customary law as they used to be in the common law. For example, the natural father's rights under common law and customary law differ remarkably. According to the former, a natural father had no inherent rights to his children. To acquire contact, or care and guardianship, he had to obtain a court order,[25] whereas under customary law

14 Act 40 of 1996.
15 Children born of African customary unions are now registered as legitimate children.
16 Act 96 of 1996.
17 Child Care Amendment Act 96 of 1996 and Child Care Act 74 of 1983.
18 Sections 4, 7 and 8 of the Recognition of Customary Marriages Act 120 of 1998.
19 Section 1 of Act 120 of 1998.
20 Bennett *Customary Law in South Africa* (2004) 307.
21 Act 57 of 1972.
22 SALRC *Issue Paper 13* 11.
23 Section 211(3) and s 39(2) of the Constitution.
24 Bennett *Customary Law in South Africa* (2004) 295.
25 Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 (repealed); Bennett *Customary Law in South Africa* (2004) 310.

the natural father acquires rights by simply paying *isondlo* and "a seduction fee" in private negotiations with the father or the child's guardian.[26] *Isondlo* signifies both the transfer of parental rights and responsibilities and compensation for bringing up a child. Lawful wedlock (which was critical to defining the status of illegitimacy at common law) is irrelevant in customary law. But bride-wealth is relevant because if it has been paid, the children have a secure status in their father's family as "legitimate" offspring; if it has not been paid, they belong to their mother's family. This position unfairly discriminates against and excludes an unmarried father in that his rights towards his children born out of wedlock are dependent on the payment of *lobola*.

It is submitted that children must feel secure about their status in their father's family, even if *lobola* has not been paid. There is a biological link, a "blood tie" between a natural father, his children and his family, and it is in the child's best interest to know both sides of his or her parentage (that is, mother's relations and natural father's relations). It is unfair discrimination to recognise the rights of an unmarried father only if *isondlo* and *lobola* have been paid. Marriage is also one of the most important criteria determining a person's rights under customary law. Thus, in determining the rights of children, the first question is whether the child's parents are married or not.[27] In general terms, the position of a mother determines the position of a child in the family group. A child is associated with the family to which the mother belongs. Once married, a child's mother is "transferred" from the family of the father to that of her husband. A family is defined in terms of marriage. A marriage under customary law is not only a personal relationship between spouses but also brings about a special relationship between the families of the spouses. The result is that both family groups acquire rights and obligations for which they are collectively responsible.[28] A father who then decides not to marry the child's mother is disadvantaged.

Notwithstanding the above broad aspects of parental rights, proper acquisition of parental rights under customary law is based on classification of children. Therefore, the status of children determines the relations with their parents. The following discussion will therefore focus on such classification and the status of such children, particularly in relation to their unmarried fathers.

3 1 Classification of children and resulting parental rights and responsibilities under customary law

3 1 1 Children of legally married couples

A child born of African parents who are married by customary law is legitimate. The child belongs to its mother's house within the father's family home. In effect, the child belongs to the father.[29] This fact is expressed in a saying that "cattle bring forth children" and that the children belong where the cattle are not.[30] This means that while the *lobola* cattle are with the woman's family, her

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26 Bennett *Customary Law in South Africa* (2004) 295.
27 Maithufi in Davel *Introduction to Child Law in South Africa* 140.
28 Bekker *Seymour's Customary Law in Southern Africa* 96.
29 Bekker "Children and Young Persons in Indigenous Law" in Robinson *The Law of Children and Young Persons in South Africa* (1997) 187; Bekker *Seymour's Customary Law in Southern Africa* 234–235, Maithufi in Davel *Introduction to Child Law in South Africa* 142.
30 Bekker in Robinson *The Law of Children and Young Persons in South Africa* 187.

children must be with her husband's family.[31] The payment of *lobola* for the woman gives her husband a legal right over her offspring. The general rule is that the children of a married woman belong to the man who paid *lobola* for her. It is immaterial whether that man is dead or whether his wife has been impregnated by another man, or whether a seed-bearer gives birth to the children. Thus, if a widow continues to live at her husband's family home, any children born to her, belong to her deceased husband's family home. However, the position articulated above has been changed by the Recognition of Customary Marriages Act[32] which grants spouses in a customary union equal status and capacity within their marriage.[33]

3 1 2 Children of an unmarried woman

The general principle in customary law is that children born to an unmarried woman belong to her guardian or his successor.[34] Such children belong to its mother's home.[35] She does not acquire guardianship over them as she is also under the guardianship of her father. Her father is entitled to claim a fine for her pregnancy.[36] The mother's family looks after the child and feeds and clothes the child, as they do with other children of the household. Such child is usually not considered when the estate of its mother's father is distributed but inherits the mother's cattle when she dies, and also benefits from cattle paid as damages for seducing her. The marriage is conducted by the mother's family, and if the child is a girl they receive *bogadi* given when she gets married. This position clearly discriminates unfairly against an unmarried father, as he does not have any rights to the child and he is treated as if he does not even exist. The same can also be said of the mother of the child, as she also does not have parental rights and responsibilities.

Among the Cape Nguni, if the fine has been paid and the natural father has also paid *isondlo,* such a father is entitled to claim care of the child.[37] Conversely, among the Sotho-Tswana group, however, payment of a fine for pregnancy gives the natural father no right to the child. It is interesting to note that Tswana custom recognises the part played by a man in procreation, but distinguishes clearly between physiological paternity and legal paternity.[38] Furthermore, it is submitted that a man may be a natural father of a child, but that he cannot claim that child, nor does he have any claims upon the child, unless certain legal conditions have been fulfilled. Of these the most essential is marriage and, above all, the payment of *lobola*.[39] It is only if he has given

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31 *Ibid.*
32 Act 120 of 1998.
33 Section 6.
34 Bennett *Customary Law in South Africa* (2007) 321.
35 Bekker in Robinson *The Law of Children and Young Persons in South Africa* 188.
36 *Ibid.*
37 *Ibid.*
38 Physiological paternity is when a person is a natural parent of a child and legal paternity can be established where rights and responsibilities accrue to a parent or any other person by law.
39 *Lobola* means property in cash or in kind, whether known as *lobolo, bogadi, bohali, xurna, lumalo, thaka, ikhazi, emabheka* or by any other name, which a prospective husband or the head of the family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.

bogadi[40] for its mother that a man is fully entitled to any child he begets by her.[41] However, this process does more than to establish a man's rights to his own children. It transfers the whole reproductive power of the woman from her own family to his. Therefore, if the man decides not to pay *bogadi*, he forfeits all the rights towards his child. In essence his rights towards the child are dependent on the fulfilment of the above condition, which is submitted as being unfair as it interferes with the right of the man to choose not to marry. This position becomes even more drastic and unfair should an unmarried woman contract a marriage with a man who is not the child's father and her husband acquires a right to the child, who is regarded as entirely legitimate because the natural father failed to pay *lobola* so as to legitimise his own child.

3 1 3 Children born to a widow

Children born to a widow may be divided into the following categories:

(a) Children born of an *ukungena* relationship with one of her late husband's relatives are entirely legitimate and belong to her house and so to her late husband's heir.[42]

(b) Children born to a widow as a result of extramarital intercourse during the subsistence of her marriage, irrespective of whether she was staying at her late husband's family home or away from it, belong to her house and so to her late husband's heir.[43] It is submitted that this customary practice disregards the unmarried father as a parent and violates the child's right to know and be cared for by his or her parents, which is guaranteed in our Constitution and other international human rights instruments. Children should be afforded the opportunity to know both sides of their parentage, whether they are born out of wedlock should be irrelevant. A child's best interests should be the paramount consideration in every matter concerning the child. Customary practices that are in conflict with this standard should be declared unconstitutional.

(c) Children born to a widow from her second marriage by customary rites. A widow's marriage to her late husband and her ties with his family are dissolved if her guardian gives her away in a second customary marriage to another man. Any children she may thereafter bear fall into the category of children of a wife and her new husband is entitled to the children he has by her. The new husband has no claim at all to either the property or the children of her first husband.

3 1 4 Adulterine children

These are children born to a woman in a customary marriage, during the subsistence of the marriage, from a man other than her husband. There is a presumption that children born of a married woman are her husband's children. The presumption can be rebutted only by convincing evidence to the contrary.[44] Adulterine children belong to the woman's husband. The natural father has no

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40 *Ibid.*

41 Schapera *A Handbook of Tswana Law and Custom* (1977) 169.

42 *Ukungena* relationship is a relationship that is created under customary law between the widow and her late husband's brother. The husband's brother or any adult male relative takes the position of the late husband in all respects including procreation of children.

43 Schapera *A Handbook of Tswana Law and Custom* 169.

44 Bekker in Robinson *The Law of Children and Young Persons in South Africa* 188.

right to such children.[45] However, if a fine and *isondlo* or *bogadi* in Tswana custom has been paid, such father is entitled to claim care of the child even if the marriage is not concluded. This position is unfair as it discriminates against the mother of the child. The father is placed in a better position to choose whether or not he wants to have any relation with the child, a choice that the mother does not have. Furthermore, this practice is unfair as it deprives children their identity, they are not related to the husband of their mother, the link is artificial and not in the child's best interest.

It is clear from the discussion above that broadly accepted customary law practices do not acknowledge and recognise parenting rights and responsibilities of unmarried fathers as the common law does. Both systems of law still use the marriage institution as a basis for conferring rights to children. This can be seen in the exposition below on aspects of guardianship and care. To supplement the discussion, adoption and maintenance will also be discussed as other aspects that impact on the relationship between an unmarried father and his children under customary law.

4 GUARDIANSHIP AND CARE

Under Tswana law and custom, the duty of a father to the care of his children born in wedlock was absolute, and could not be taken away from him merely because they might do better in the care of another of his relatives.[46] This position was, however, later modified by the courts in exercising their discretion as upper guardian of all minors. The courts began to consider the interests of children in matters affecting them. In the case of *Hlope v Mahlalela*,[47] the court held that the "best interests of the child" was the main criterion to be employed in disputes relating to the care of children, to the exclusion of any rule of customary law. This case indicates the court's willingness to protect the child's interests above any applicable rule of law, be it customary law or common law.

Where it is shown that the father is not a fit and proper person by reason of his ill-treatment or neglect to take care of his children, care of the children will normally be awarded to the mother.[48] In the case of young children whose mother and father are living apart, the court may place them in the care of the mother until they are able to live away from her without harmful results, unless it appears that she is not a fit and proper person to take care of them.[49] A father who has been deprived of the care of his child loses only the right to care but he retains all other rights that may accrue through the child, for example, *bogadi* payable for a daughter.[50]

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45 This rule was emphasised in *Lucingo v Mgiqika* 1920 4 NAC 40 where the assessors stated the following: "If a married woman has a child by an adulterer, it is the child of the husband, if the husband takes no steps to obtain possession of the child, his heir, after his death, can claim it. He does not lose his right to it, whether it be a male or female child."; see Bekker in Robinson *The Law of Children and Young Persons in South Africa* 188. If the husband should repudiate the child and send it back to its mother's people, it will belong to the wife's father, under whose guardianship it will be. This clearly deprives the natural father any parental rights in respect of his child. This practice is unconstitutional and does not enhance the best interests of the child.

46 Bekker in Robinson *The Law of Children and Young Persons in South Africa* 227.

47 1988 1 SA 409 (T).

48 *Hlope v Mahlalela* 458G–J.

49 *Motloung v Motaung* 1980 NAC (N–C) 159; *Mabuza v Nhlapo* 1980 NAC (N–E) 141.

50 Bekker in Robinson *The Law of Children and Young Persons in South Africa* 228.

However, the above position has been interpreted in light of the constitutional provisions and other events that preceded the adoption of the Constitution. South African courts are obliged, when interpreting any legislation and in developing the common law, to promote the spirit, purport and objects of the Bill of Rights.[51] Thus, besides the "best interests of the child" as a criterion to be employed in all actions or matters involving children either in terms of the common law or customary law, the spirit, purport and objects of the Bill of Rights must also be considered in the development of the common law and customary law relating to children.[52]

The position under customary law was that the guardianship of a child vested in its father if he was married to the mother, or in the father's heir if the father was deceased.[53] This was the position where a customary marriage existed between the child's parents. Children brought into the marriage by the wife, irrespective of who their natural father might have been, were also included.[54] In the case of an unmarried woman, the guardianship of her children vested in her father or guardian, since she is regarded under customary law as a minor.[55] Thus the guardian of such children was their mother. Because a customary marriage was not regarded as a valid marriage,[56] children of such a marriage were formerly regarded by the common law as having been born out of wedlock.[57]

The position changed with the promulgation of the Births and Deaths Registration Amendment Act, the Child Care Amendment Act and the Recognition of Customary Marriages Act, in terms of which the definition of marriage was amended to include a customary marriage.[58] These Acts thus consider these children to be on the same level as the children of civil marriages and therefore legitimate.[59] If *bogadi* had been paid the husband and his family group have full parental rights to any child born to a wife during marriage.

The rationale for this rule is that upon the payment of *bogadi* the reproductive capacity of the woman is transferred to her husband's family and this legitimises

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51 Section 39(2) of the Constitution.

52 Section 28(2) of the Constitution. Section 211(3) of the Constitution provides that the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. Section 39(2) contains a provision with regard to the interpretation and development of the common law and customary law. Every court or tribunal is to promote the spirit, purport and objects of the Bill of Rights in the interpretation of legislation and in the promotion and development of customary law or common law. Consequently, both customary law and common law have to be developed with this purpose in mind. Section 39(3) provides for the protection of rights or freedoms arising or accruing from either customary law, common law, or legislation, provided that they are not inconsistent with the Bill of Rights. Rights conferred by customary law or common law which are inconsistent with the Bill of Rights are therefore unenforceable and unconstitutional.

53 Maithufi in Davel *Introduction to Child Law in South Africa* 145.

54 *Ibid.*

55 However, since a woman is no longer a perpetual minor under customary law, it is submitted that this rule now only applies to the children of an unmarried woman who is still a minor. See s 6 of the Recognition of Customary Marriages Act 120 of 1998.

56 Before the Recognition of Customary Marriages Act 120 of 1998.

57 Maithufi in Davel *Introduction to Child Law in South Africa* 145.

58 Section 1(b) of the Births and Deaths Registration Amendment Act 40 of 1996.

59 Maithufi in Davel *Introduction to Child Law in South Africa* 145.

her children. Thus, the father or husband acquires both custody and guardianship over the children. The general rule under customary law is that such children belong to the father's family and the father is their guardian. This rule is, however, subject to the criterion of the best interests of the child as laid down in the Constitution. The court applied this standard in the case of *Hlope v Mahlalela*, as mentioned above.

5 ADOPTION

Both male and female children may be given in adoption;[60] they then belong to the person adopting them. Such a child would for all intents and purposes become the child of its adoptive parents.[61] The customary procedure as described by Bekker is as follows:

> "Since adoption entails an alteration in the status of a child, the relatives both of the family head giving the child and the adoptive parent, must be called to a meeting at which the adoption takes place. Thereafter, the matter must be reported to their chief. If these formalities are not observed, the alleged adoption is invalid, except where, in the case of the adoption of a female child, at any rate, there is no dispute between the parties concerned that the adoption did take place."[62]

Once the above procedure has been followed, a valid adoption under customary law exists but such adoption is not recognised as the law would still require the parties concerned to comply with the provisions of Chapter 4 of the Child Care Act.[63] Chapter 4 of the said Act required, amongst others, that consent to an adoption must be given by both parents of a legitimate child who was to be adopted, or by the child's mother if he or she was born out of wedlock and by the child if he or she was older than 10 years and understood the nature and import of such consent.[64] However, this position was altered in 1998 by the Adoption Matters Amendment Act[65] which now requires consent to be given by both parents of a child to its adoption, even if the child is born out of wedlock. This position is further reinforced by the Children's Act.[66] It must be noted that not all fathers will be notified but only those who show or have shown some interest in the children, who have acquired parental responsibilities or whose identity has been disclosed by the child's mother.

Bennett submits, on the basis of the *Zibi* and *Kewana* cases, that it could be argued that the Child Care Act[67] is inapplicable because the customary idea of

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60 Bekker in Robinson *The Law of Children and Young Persons in South Africa* 236.
61 Bekker in Robinson *The Law of Children and Young Persons in South Africa* 228.
62 *Ibid.*
63 Act 74 of 1983 and this position of the law, however, was not applied by the court in the case of *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA) where an unmarried women had assumed full responsibility for a related child and had marked the occasion by slaughtering a sheep and a goat. The court found that this ceremony constituted a valid adoption under customary law. In *Zibi* 1952 NAC 167 (S) the court held that the institution of an heir was a custom peculiar to Africans and that there was no need to comply with adoption legislation.
64 Heaton "Should the consent of the father of an illegitimate child be required for the child's adoption? A suggestion for the reform of South African Law" 1989 *CILSA* 346.
65 Act 56 of 1988.
66 Act 38 of 2005.
67 Act 74 of 1983.

adoption does not correspond to the statutory institution.[68] Furthermore, in *Metiso v Pandongelukfonds*[69] the court refused to declare the customary adoption invalid for failing to comply with all the statutory requirements and found the adoption to be in the child's best interests.[70] Bekker submits that there is no reason why an adoption under customary law should not be recognised.[71] Although in some tribes customary law provides for the adoption of a child, adoption in Tswana customary law is different and temporary in nature, the child's status does not change. According to Schapera it is very common for a child to be sent to live for a while with some paternal or maternal relative, particularly with its mother's father or brother.[72] The child is generally taken to their home soon after weaning, and may live there for a number of years, helping with domestic work. This is sometimes done simply as a sign of the attachment between the two families, and so that the child may enjoy the use of the *bogadi* cattle given to its mother.

If *bogadi* has been paid, the parents of the child are its natural guardians and they have the sole right to decide whether it should stay with them or go to a relative. The relatives cannot claim as of a right that the child should come and stay with them. The decision is a privilege of the parents and depends upon the intimacy and friendliness of the relations between the two families. It is submitted that the above Tswana adoption procedure, as illustrated by Schapera, clearly disregards the rights of an unmarried father because if he has not paid *lobola*, he does not have any say in matters involving his children as relatives are preferred over him. This violates the child's right to parental care that includes the right to be cared for by both natural parents.[73] This customary law rule is therefore unconstitutional. Payment of money should not be made a prerequisite for the acquisition of parental rights.

These instances of temporary adoption do not make any difference to the child's status at its own home or its parent's claim over it.[74] The adoption procedure in Tswana customary law is temporary; the adopted child does not sever the link with his or her natural parents. However, when it comes to the adoption of a child born out of wedlock, the natural father and his family are not consulted in the matter because an unmarried father acquires rights and responsibilities over the child only if *lobola* or a fine has been paid by him to the family of the mother. Clearly this discriminates unfairly against an unmarried father who does not wish to marry the mother of his child. The woman's position in relation to her children in this regard is secure as her children belong to her and her family.

6 MAINTENANCE

Under customary law, maintenance is an obligation that results from consanguinity (relatives of the same blood) and affinity (persons related by marriage).[75]

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68 Bennett *Customary Law in South Africa* (2007) 321.
69 2001 3 SA 1142 (T).
70 In this case, the mother failed to give consent for the adoption because she had previously abandoned the child to its adoptive parent.
71 Bekker in Robinson *The Law of Children and Young Persons in South Africa* 228.
72 Schapera *A Handbook of Tswana Law and Custom* 173.
73 Section 28(1)(b) of the Constitution.
74 Schapera *A Handbook of Tswana Law and Custom* 173.
75 Bekker in Robinson *The Law of Children and Young Persons in South Africa* 317.

However, the parents share the task of caring for the children. The father is legally responsible for ensuring, to the best of his ability, that he is able to provide them with food and clothing. A husband who wilfully fails to provide adequately for his children may be charged in the *lesika* court,[76] at his wife's instance, and may be reprimanded or even punished for his negligence. Therefore, there is a legal obligation upon parents married by customary law to maintain their children.[77] The obligation can be enforced by means of the machinery created by the Maintenance Act, which is directed at the enforcement of maintenance obligations when the duty in question exists at the time of the issue of the maintenance order and is expected to continue.[78] The duty extends to such support as a child reasonably requires for his or her proper upbringing, and includes the provision of food, clothing, accommodation, medical care and education.[79] The duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.[80] The effect of the application of this Act means that an unmarried father as a natural parent can be summoned to pay maintenance to his child born out of wedlock, irrespective of whether he had paid *lobola* or not. The sense of injustice would be further compounded if the child is a girl because her guardian, not the natural father, would be entitled to claim her *lobola* when she marries notwithstanding the fact that the natural father has been paying maintenance.[81]

7 CONCLUSION

It is clear from the discussion above, that an unmarried father has no absolute right to the children he procreates. He may, however, acquire parental rights and responsibilities by marrying the mother or simply by paying *isondlo* or *lobola*. Unlike the common law where an unmarried father is expected to support his children, an unmarried father under customary law has no duty to support his children unless he acquires full parental rights. It is submitted that this rule is not sustainable as it is not in the best interest of the child not to be supported by his father simply because the father has not acquired parental rights. In order to enforce the unmarried father's support obligations under customary law, the courts often ignore customary law and enforce such support obligations by the common-law system of maintenance. It is often argued that the child's best interests are better secured when the court is involved but it is submitted that such intervention undermines customary support obligations within the extended family. The extended family plays a meaningful role in assisting an unmarried

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76 *Lesika* court is a Tswana term which literally translated means the court of a family group or clan. The male elder of the family who plays an important role in unifying and developing the structure of the family presides over this court. He always reconciles members of the group in cases of disputes and misunderstandings.

77 Generally speaking, the natural father of an illegitimate child is not liable for its maintenance, but in the Cape Nguni tribes, where the natural child of an unmarried woman has been born and maintained at her guardian's family home, the child's father, having paid the fine for causing the woman's pregnancy, may claim its custody on tendering payment for *isondlo* to her guardian.

78 Section 15(1) of Act 99 of 1998.

79 Section 15(2).

80 Section 15(3)(a)(iii).

81 Bekker in Robinson *The Law of Children and Young Persons in South Africa* 317.

father where he is unable to support his child and it is in the child's best interest to allow them to do so.

Contrary to the common law rules that allow unmarried fathers to approach the courts to acquire rights and responsibilities over their children, customary law is silent in this regard. It is submitted that if an unmarried father is obliged to submit to the statutory procedure to acquire rights to his natural child, then it would be unfair if he is also required to pay *isondlo*.

In conclusion, it has emerged that although ultimately customary law is recognised in our law, it has not reached a stage where it could be applied in respect of every aspect of family law, particularly in relation to issues of parental rights and responsibilities. The reason for this is that most rules of customary law are not entirely codified. As a result such sources of customary law are not readily accessible and most times not well understood. Judicial officers are not well schooled in customary rules and norms. This inadequacy makes it very difficult to ascertain or apply customary law, even in deserving cases where the rules are easily accessible and not in conflict with the constitution. In deciding issues of family law, the courts often resort to the use of the common law. This tendency, although it is adopted to protect the interests of children, undermines customary law and hinders its development as a source of law equal to the common law.

It is therefore submitted that customary law should be applied only when the parties agree that their dispute is to be settled in accordance with the rules of customary law insofar as issues of parental rights and responsibilities and particularly on the relationship between the unmarried father and his child are concerned. This position might improve the position of fathers and their children born out of wedlock. Supremacy of the Constitution means that all law which treats people unequally must comply with the limitation clause. Furthermore, globalisation and South Africa's participation in international treaties and conventions mean that issues regarding parental rights and responsibilities of parents towards their children cannot be resolved by the application of customary law rules alone.

"Substantial and Compelling Circumstances": Looking at the Jurisprudence of the South African Supreme Court of Appeal since *Malgas*

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1 INTRODUCTION

When the South African Constitutional Court declared the death penalty to be unconstitutional in the landmark decision of *S v Makwanyane*,[1] the inevitable question of how to punish those convicted of the most heinous crimes came into the equation. Some courts reacted to the abolition of the death penalty by imposing unreasonably long sentences with some offenders being sentenced to hundreds of years of imprisonment.[2] The legislature reacted by introducing the Criminal Law Amendment Act[3] which, amongst other things, obliges courts to impose certain minimum sentences (ranging from 5 years' imprisonment to life imprisonment) on offenders convicted of certain offences,[4] unless there are "substantial and compelling circumstances" that justify the imposition of a lesser sentence.[5] The Criminal Law Amendment Act does not define what substantial and compelling circumstances are. However, section 51(3)(aA) provides for the following factors that should not be considered as substantial and compelling circumstances when imposing a sentence in respect of the offence of rape: the complainant's previous sexual history; the apparent lack of physical injury to the complainant;[6] the accused person's culture or religious beliefs about rape; or any relationship between the accused person and the complainant prior to the offence being committed. As a result, between 1997 (when the Criminal Law Amendment Act came into force)

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1 *S v Makwanyane* 1995 6 BCLR 665.

2 See in general, Mujuzi "Life imprisonment in South Africa: yesterday, today, and tomorrow" 2009 *South African Journal of Criminal Justice* 1–38.

3 Act 105 of 1997.

4 Section 51(1) and (2).

5 Section 51(3) of the Criminal Law Amendment Act.

6 Although some courts have continued to consider the apparent lack of physical injury to be one of the substantial and compelling circumstances in cases of rape. See *S v Tabethe* 2009 2 SACR 62 (T) (although the SCA set aside the sentence based on restorative justice, it did not criticise the high court for holding that the rape victim was not physically injured – see *DPP v Thabethe* (619/10) [2011] ZASCA 186 (30-09-2011); *S v Nkawu* 2009 2 SACR 402 (E) paras 14–17.

and March 2001 (when the Supreme Court of Appeal, in *S v Malgas*,[7] laid down the criteria to be used to determine what amounted to substantial and compelling circumstances) different courts gave different interpretations of what amounted to substantial and compelling circumstances.[8] In 2001, the Supreme Court of Appeal held that courts should follow the following criteria in determining whether substantial and compelling circumstances existed in a particular case:

> " . . . B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained . . . the particular prescribed period of imprisonment . . . as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts. D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded. E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process. G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained . . . I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence. J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided."[9]

2 WHAT IS TO BE CONSIDERED IN SENTENCING

In determining whether substantial and compelling circumstances exist, a court has to use the above yardstick. The purpose of this article is to highlight the jurisprudence of the SCA in which the above yardstick has been applied. The analysis of the Supreme Court of Appeal jurisprudence is based on some of the cases reported in the South African Criminal Law Reports between March 2001, when *Malgas* was handed down, and January 2011, when the research was completed.

2 1 The guidelines

Although the court lays down several guidelines, these guidelines can be divided into at least two different, but closely connected broad categories; those that

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7 *S v Malgas* 2001 1 SACR 469 (SCA).

8 See in general, Kubista "Substantial and compelling circumstances: sentencing of rapists under the mandatory minimum sentencing scheme" 2005 SACJ 77–86.

9 *S v Malgas* para 25.

further the objectives of the legislature, that is, those that focus on the nature of the offence and show that the prescribed offences must be punished severely; and those that focus on the nature of the offender. In this article, the guidelines that relate to the second category will be discussed. Before the court imposes a sentence, it has to bear in mind the following:

(a) Departing from the imposition of the minimum sentence requires "weighty justification", that is, the court must carefully look at the circumstances and only impose a lesser sentence if such a sentence can be strongly justified;

(b) There has to be, and there has to be seen to be, truly convincing reasons for the court to impose a lesser sentence. That is, it is not enough that there are *truly* convincing reasons for the court to impose a lesser sentence. Those reasons must also be seen to be truly convincing. It is also not enough that the reasons are merely convincing. They have to be *truly* convincing;

(c) Courts are expressly barred from taking into consideration the following factors, whether individually or otherwise, as the basis for imposing lesser sentences: speculative hypothesis favourable to the offender; undue sympathy; aversion to imprisoning first offenders; personal doubts as to the efficacy of the policy underlying the legislation; and marginal differences in personal circumstances or degrees of participation between co-offenders. Apart from the aforementioned factors that are expressly excluded, courts are at liberty to consider all factors that were traditionally considered in sentencing before the coming into force of the Criminal Law Amendment Act in deciding whether or not to impose a lesser sentence;

(d) Should the sentencing court be of the view that, in light of the circumstances, the imposition of a minimum sentence would be unjust, the court should impose a lesser sentence.

In throwing more light on its decision in *Malgas* regarding the factors that should be considered in determining whether substantial and compelling circumstances existed to justify the imposition of a lesser sentence, the SCA held that:

> "[I]n determining whether there are substantial and compelling circumstances present, a court must be aware that the legislature has set a benchmark of the sentence that should ordinarily be imposed for a specified crime, and that there should be truly persuasive reasons for a different response. And when a court decides whether the particular circumstances call for the imposition of a lesser sentence, it may consider factors traditionally taken into account in making this determination. These include the age of the accused, the nature and number of any previous convictions and the time spent awaiting trial. These factors must of course be weighed against the aggravating factors. But none need be exceptional."[10]

2 2 The effect the offence had on the victim

One of the factors that a court may take into consideration in imposing a sentence, is the effect the offence had on the victim. Before the December 2007 amendments to s 51(3) of the Criminal Law Amendment Act, the Supreme Court of Appeal considered the impact the offence, for example rape, had on the victim in determining the appropriate sentence. In *Rammoko v Director of Public Prosecutions*,[11] where the offender had been sentenced to life imprisonment for

10 *S v Mabuza* 2009 2 SACR 435 (SCA) 442 para 20.

11 *Rammoko v Director of Public Prosecutions* 2003 1 SACR 200 (SCA).

raping a 13-year-old girl, the court held that in deciding whether or not to sentence him to life imprisonment the high court should have considered the effect the rape had on the victim. In its words, the court held that "evidence relating to the extent to which the complainant has been affected by the rape and will be affected in future is relevant, and indeed important".[12] What is clear is that in the *Rammoko* decision the Supreme Court of Appeal took the view that in determining whether substantial and compelling circumstances existed, the sentencing officer should not only look at the seriousness of the offence or the intention of the legislature or the characteristics of the offender, but also the effect of the offence on the victim. In *S v Abrahams*, in sentencing the accused to 12 years' imprisonment for raping his 14-year-old daughter, the SCA held that although it did not condone rape, the kind of rape that the accused had committed was not of the worst nature.[13] This was the case although the court had observed earlier that the rape had had adverse effects on the victim such as poor performance at school and anti-social and rebellious conduct.[14] In *S v Mabuza*, although the SCA held that by raping the victim the accused had "invaded her body, humiliated her and stripped her of her dignity",[15] it concluded that one of the substantial and compelling circumstances that justified the imposition of a lesser sentence other than life imprisonment was that, although there was medical evidence of "forceful sexual intercourse[,] [t]here were no other injuries and . . . the . . . medical examination [report] note[d] that her physical powers, general state of health and mental state were not perceptibly impaired".[16] In *S v Mahomotsa*,[17] in sentencing the accused (respondent) to 8 and 12 years' imprisonment for raping two minors, the SCA held that the following were some of the substantial and compelling circumstances that justified the imposition of a sentence lesser than life imprisonment:

> "The rapes that we are concerned with here, though very serious, cannot be classified as falling within the worst category of rape. Although what appeared to be a firearm was used to threaten the complainant in the first count and a knife in the second, no serious violence was perpetrated against them. Except for a bruise to the second complainant's genitalia, no subsequently visible injuries were inflicted on them. According to the probation officer – she interviewed both complainants – they do not suffer from any after-effects following their ordeals."[18]

On the issue of whether indeed there had been no after-effects on both the complainants, the court held that it was "sceptical of that but the fact remains that there is no positive evidence to the contrary".[19] In *S v Nel*, in sentencing the appellant, a gambling addict, to 10 years' imprisonment for robbery with aggravating circumstances, the SCA considered the fact that the accused "did not physically injure the victims" to be one of the substantial and compelling

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12 *Rammoko v Director of Public Prosecutions* para 13.
13 *S v Abrahams* 2002 1 SACR 116 (SCA) para 29. See also *S v Mvamvu* 2005 1 SACR 54 (SCA) in which the SCA quotes this judgment with approval to sentence the accused, convicted of multiple rapes, to 10 years' imprisonment instead of life imprisonment.
14 *S v Abrahams* paras 18–21.
15 *S v Mabuza* para 29.
16 *S v Mabuza* para 28.
17 *S v Mahomotsa* 2002 2 SACR 435 (SCA).
18 *S v Mahomotsa* para 17.
19 *Ibid*.

circumstances.[20] What emerged from the above jurisprudence is that, in examining whether substantial and compelling circumstances existed, it was required of the sentencing court to not just focus on the fact that the accused committed a serious offence. The court was also required to assess the impact such an offence had on the victim. This means that in cases of rape, for example, the court was to ensure that reports on the effect the rape had on the accused are prepared by the necessary experts before the court can reach that conclusion on the extent to which the victim was physiologically affected by the crime. However, in 2007 s 51(3)(aA) of the Criminal Law Amendment Act was amended to specifically provide that "[w]hen imposing a sentence in respect of an offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence: . . . (ii) the apparent lack of physical injury to the complainant".[21]

2 3 Personal circumstances of the offender as substantial and compelling circumstances

In *Malgas*, the court makes it clear that undue sympathy favourable to the offender should be excluded as a substantial and compelling circumstance. However, this does not mean that courts are barred from considering the personal circumstances of the offender as substantial and compelling circumstances. This shows, *inter alia*, the elastic or confusing nature of substantial and compelling circumstances. In *S v Abrahams*, the fact that the accused's son had committed suicide years before he raped his daughter – which had affected him psychologically – was considered as one of the substantial and compelling circumstances that the court invoked to sentence the accused to 12 years' imprisonment, instead of life imprisonment.[22] In *S v Blignaut*,[23] the accused had been convicted of robbery and kidnapping and was sentenced to the minimum sentence of 15 years' imprisonment. In setting aside the 15 year sentence and substituting it with one of 5 years' imprisonment, the Supreme Court of Appeal held that the "cumulative effects of these factors constituted substantial and compelling circumstances": the appellant was a first time offender who had committed the offence in question at 34 years of age; before he lost his job he had been employed gainfully; unemployment forced him to "seek solace in alcohol" but "continued to have a warm and meaningful relationship with his family"; "the offence had been ineptly executed without any real forethought" as the appellant was not in possession of any lethal weapon; he had pleaded guilty which showed that he was remorseful which meant that "he was unlikely to resort to crime again".[24] In *S v Swart*, in sentencing the respondent to 12 years' imprisonment instead of life imprisonment for raping the complainant more than once, the SCA considered that he had a low IQ, he was an alcoholic and that he had had a short and unsuccessful marriage to be substantial and compelling circumstances.[25]

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20 *S v Nel* 2007 2 SACR 481 (SCA) para 20.
21 Section 51(3)(aA).
22 *S v Abrahams* para 28.
23 *S v Blignaut* 2008 1 SACR 78 (SCA).
24 *S v Blignaut* 79.
25 *S v Swart* 2004 2 SACR 370 (SCA) para 18.

In *S v Ferreira*,[26] the first appellant had contracted the second and third appellants to kill her former partner who had been abusive towards her for a long period of time. The high court held that there were no substantial and compelling circumstances and sentenced all of them to the minimum sentence of life imprisonment. In substituting the first appellant's life sentence with the one of six years' suspended sentence, the SCA held that the battered-woman syndrome was a substantial and compelling circumstance and that sentencing the appellant to life imprisonment was unnecessary because she "never presented a threat to society".[27]

The personal circumstances of the accused are critical if the court is to determine whether or not there are substantial and compelling circumstances. In *S v Gagu*, the appellants pleaded guilty to the offence of rape and were sentenced by the high court to 15 years' imprisonment, which the court thought was the minimum sentence for that offence. In setting aside the sentence as harsh and as having been based on a wrong interpretation of the Criminal Law Amendment Act, the SCA held that it would have "expected" the high court to request "reports by probation officers regarding the personal circumstances of the appellants" which reports would have helped the court to establish whether there were substantial and compelling circumstances.[28] In *S v Mahomotsa*, the SCA held the following to be some of the substantial and compelling circumstances that justified the imposition of a sentence other than life imprisonment on the accused who was convicted of raping two under-aged girls: the "accused's relative youth";[29] the fact that the rapes were not of the worst kind;[30] and the accused's personal circumstances, that is, he was born out of wedlock and grew up with his grandmother.[31] In *S v Makatu*,[32] the accused was convicted of murder and in sentencing him to 12 years' imprisonment, the SCA held that the following were some of the mitigating circumstances that justified the imposition of a sentence other than the minimum sentence:

> "[H]e had served in the Defence Force for 18 years without incident; he had pleaded guilty and shown remorse; he had been in a state of great anguish at the time of killing the deceased, who had rejected his attempts to save their marriage; he believed that she had cheated him both sexually and financially; after shooting her he had attempted to kill himself, sustaining serious and apparently permanent injuries; and he was responsible for the support of his children."[33]

In *S v Mambo*,[34] where the second appellant was convicted of robbery with aggravating circumstances which attracted a minimum 15-year prison sentence, the SCA held that the following were some of the substantial and compelling circumstances that justified the imposition of a sentence of 10 years' imprisonment on the accused: he was a first time offender, he was poor to the extent that he could not afford bail of R2000.00, he had spent one and a half

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26 *S v Ferreira* 2004 2 SACR 454 (SCA).
27 *S v Ferreira* para 46.
28 *S v Gagu* 2006 1 SACR 547 (SCA) para 13.
29 *S v Mahomotsa* para 20.
30 *S v Mahomotsa* paras 17 and 20.
31 *S v Mahomotsa* para 15.
32 *S v Makatu* 2006 2 SACR 582 (SCA).
33 *S v Makatu* 584.
34 *S v Mambo* 2006 2 SACR 563 (SCA).

years in prison awaiting trial, and that he was a young man of 21 years at the time of his arrest.[35] However, although the SCA observed that the first and the third accused had also been first time offenders, it sentenced them to life imprisonment for the murder of the court orderly and to 15 years' imprisonment for robbing the court orderly of his gun.[36]

In *S v Mvamvu*, the accused was convicted of raping his customary law wife several times and in sentencing him to 10 years' imprisonment instead of life imprisonment, the SCA held that his customary and unsophisticated way of life, which made him believe that he was entitled to have sex with his wife without her consent, should be considered as one of the substantial and compelling circumstances that justified the imposition of a lesser sentence.[37] In *S v Ndlovu*, the accused was convicted of robbery with aggravating circumstances and sentenced to 15 years' imprisonment by the high court. On appeal, the SCA held that his youthfulness (he was 20 years old), the fact that "the degree of violence involved in the robbery was limited", that "a significant number of the articles" that the accused had robbed had been recovered, that "[t]he robbery was executed in a clumsy and inept manner" and the fact that the "appellant spent approximately four months in custody pending the finalisation of the trial", were substantial and compelling circumstances that justified the imposition of a 10-year prison term.[38] In *S v Nel*, the fact that the accused was a gambling addict was considered by the SCA to be one of the substantial and compelling circumstances that justified the imposition of the sentence of 10 years' imprisonment instead of the ordained 15-year sentence for robbery with aggravating circumstances.[39] In *S v Nkomo*,[40] the accused was convicted of raping the complainant several times and sentenced to life imprisonment by the high court. The SCA reduced his sentence to 16 years' imprisonment because it found that the following circumstantial and compelling circumstances existed: "he was relatively young at the time (29 years of age), that he was employed, and that there may have been a chance of rehabilitation".[41] In *S v Roslee*, the SCA held that invoking emotional stress as the substantial and compelling circumstance for the imposition of a sentence of 18 years when the offender had been convicted of premeditated murder, the high court had "engaged in speculation in favour of the appellant" as "[i]t did not consider whether there were *truly* convincing reasons for departing from the prescribed minimum sentence".[42] In sentencing the accused to life imprisonment for the premeditated murder and 15 years' imprisonment for each of the two other unpremeditated murders, the SCA held that it put into consideration "the personal circumstances of the respondent, including his relative youthfulness (he was approximately 24 years old at the time of trial) and the community interest".[43] In *S v Thebus* where the appellants, who were part of a vigilante group, were convicted of murder, the SCA expressly

35 *S v Mambo* para 23.
36 *S v Mambo* paras 21 and 26.
37 *S v Mvamvu* 2005 1 SACR 54 (SCA) paras 13–16.
38 *S v Ndlovu* 2007 1 SACR 535 (SCA) paras 13–14.
39 *S v Nel* para 20.
40 *S v Nkomo* 2007 2 SACR 198 (SCA).
41 *S v Nkomo* 198.
42 *S v Roslee* 2006 1 SACR 537 (SCA) para 34.
43 *S v Roslee* para 37.

held that they had to be sentenced to life imprisonment unless there were substantial and compelling circumstances that justified the imposition of a lesser sentence.[44] The SCA held that the facts that "the appellants were employed and ha[d] families to support" were substantial and compelling circumstances that justified the imposition of the sentence of 15 years' imprisonment.[45]

In *S v Abrahams*, the court held that the fact that the accused had "reached his middle years without a criminal conviction"[46] was one of the factors considered in not imposing the minimum sentence of life imprisonment for the rape of his 14-year-old daughter. In *S v Johaar*[47] the two appellants were sentenced to 30 and 16 years' imprisonment respectively for, amongst other offences, armed robbery with aggravating circumstances and kidnapping. The SCA agreed with the high court that it was justified in imposing the sentence of 16 years' imprisonment on the third appellant because he had "no previous [criminal] record".[48] The SCA also added that in cases where the offenders have been convicted of heinous offences "the aim of rehabilitation should yield to the aims of deterrence and retribution".[49] Because of the fact that the second accused was a repeat offender, the SCA held that the sentence of 30 years' imprisonment was not harsh because a "strong possibility existed that . . . [he] would repeat his criminal behaviour and it was therefore necessary to remove him from society for a long period of time".[50] In *S v Makatu*,[51] the accused was convicted of murder and in sentencing him to 12 years' imprisonment, the SCA held that one of the substantial and compelling circumstances was that he was a first time offender. In *S v Mambo*,[52] one of the substantial and compelling circumstances why the SCA did not sentence the second accused to a 15-year minimum sentence for robbery, was that he was a first time offender.[53] In *S v Mvamvu*, the accused was convicted of raping his customary law wife several times and in sentencing him to 10 years' imprisonment instead of life imprisonment, the SCA considered the fact that no previous conviction had been proved against the accused to be one of the substantial and compelling circumstances that justified the imposition of the sentence lesser than life imprisonment.[54]

The above cases show that although the SCA held in *Malgas* that sentencing courts should not invoke undue sympathy to the offender as a justification for departing from the prescribed minimum sentence, the SCA has shown that there is nothing that bars courts from being sympathetic towards the offender. In particular, there is nothing that bars courts from considering the personal circumstances of the offender as some of the substantial and compelling circumstances that justifies the imposition of a lesser sentence than that prescribed in the legislation. The challenge is that in practice the difference

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44 *S v Thebus* 2002 2 SACR 566 (SCA) para 16.
45 *S v Thebus* para 22.
46 *S v Abrahams* para 27.
47 *S v Johaar* 2010 1 SACR 23 (SCA).
48 *S v Johaar* 25.
49 *Ibid.*
50 *Ibid.*
51 *S v Makatu* 589.
52 *S v Mambo* para 21.
53 *S v Mambo* para 23. The accused was sentenced to 10 years' imprisonment for robbery.
54 *S v Mvamvu* para 12.

between expressing undue sympathy to the offender on the one hand and expressing genuine sympathy on the other may be difficult to tell.

3 MITIGATING FACTORS

Although the Criminal Law Amendment Act does not expressly use the terms "mitigating factors",[55] the SCA has in some cases considered a combination of traditional mitigating factors as substantial and compelling circumstances in imposing sentences other than those prescribed in the Criminal Law Amendment Act. These factors have included the accused's old age and the fact that the accused "reached his middle years without a criminal conviction".[56] The SCA has also sometimes treated substantial and compelling circumstances to be the same thing as mitigating factors. In *S v Karolia*, the accused was sentenced to a 10-year suspended sentence for murder and attempted murder.[57] The SCA held that there were "undoubtedly a number of mitigating circumstances flowing from the personal circumstances of the accused"[58] which "constituted substantial and compelling circumstances which entitled the Court . . . to depart from the compulsory minimum sentence prescribed in the Amendment Act".[59] The SCA enumerated these circumstances as:

> "34.1 The accused is a first offender; 34.2 He was 49 years of age at the time of his conviction; 34.3 He suffers from a heart condition requiring chronic medication; 34.4 There are no indications of any deviant or criminal behaviour such as drug or alcohol abuse or the like; 34.5 He is in regular and steady self-employment; 34.6 From an early age whilst in high school the accused cared deeply for the under-privileged in his community, instigating numerous fund-raising events. He is apparently still involved in many such activities and is a valuable member of society; 34.7 He is actively involved with an orphanage in Mayfair, Johannesburg, and also works for a home for the aged and is actively concerned in fund-raising for both Muslim Mosques and Christian Churches."[60]

In some instances, the SCA has expressly held that its failure to find mitigating factors explains why it reached the conclusion that there were no substantial and compelling circumstances. In *S v Ferreira*[61] the second and third appellants, aged 22 and 20 years old respectively at the time of the offence, were convicted of contract murder and sentenced to life imprisonment by the high court. On appeal, the SCA upheld the sentence of life imprisonment imposed by the high court and held that:

> "The sum total of the mitigating features in their instance therefore amounts to their personal circumstances: Their comparative youth, their having no previous convictions and their humble backgrounds. There was nothing mitigating in their case in the actual commission of the offence such as, for example, intoxication, intimidation or unjust treatment by the deceased. Having regard to the nature of the crime they committed – killing for money – and the limited extent of the mitigating factors

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55 For a detailed discussion of what amounts to mitigating factors in the context of sentencing, see in general Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 185–210.
56 *S v Abrahams* para 27.
57 *S v Karolia* 2006 2 SACR 75 (SCA).
58 *S v Karolia* para 34.
59 *S v Karolia* para 33.
60 *S v Karolia* para 34.
61 *S v Ferreira* 469 and 470.

> referred to . . . There are, on the *Malgas* test, no substantial and compelling circumstances which justify a lesser sentence . . .".[62]

In *S v Sikhipha*,[63] the respondent had been sentenced to life imprisonment by the high court for raping a 13-year-old girl on the grounds that the court had not found compelling circumstances to deviate from the prescribed minimum sentence. In accepting the appeal and remitting the case to the high court for re-sentencing, the SCA held that:

> "The circumstances that a sentencing court was to take into account included the traditional mitigating and aggravating factors, none of which had to be exceptional. The trial Court had misdirected itself in looking for exceptional circumstances and failing to have regard to mitigating factors."[64]

In *S v Price*,[65] in dismissing the first appellant's appeal against the 15-year minimum sentence imposed on him for fraud, the SCA held that it did not:

> "[t]hink that the mitigating factors to which reference[66] was made and the fact that the first appellant was a first offender are sufficiently powerful to constitute substantial and compelling circumstances so as to justify a departure from the benchmark laid down by the Legislature".[67]

In *S v Roslee*,[68] the high court imposed an effective sentence of 18 years' imprisonment on the accused for premeditated murder of his former girlfriend and the unpremeditated murder of two other people who were at the same house as his former girlfriend. In justifying the 18-year sentence, instead of the ordained life imprisonment, the high court held that emotional stress that the accused experienced when his former girlfriend terminated the relationship, was a substantial and compelling circumstance that justified the imposition of a lesser sentence. The SCA disagreed with the high court and held that "[t]he termination of a love-relationship does not *per se* constitute a mitigating, extenuating, or substantial and compelling circumstance".[69] This decision shows that in some cases the SCA has not only looked at a combination of mitigating factors in finding that there are substantial and compelling circumstances, but it has also looked at what it considers to be extenuating circumstances. It is clear that the SCA continues to be influenced by the sentencing philosophy that existed before the CLA, this is evidence that the meaning of what substantial and compelling circumstances are, remains unclear.

4 CONCLUSION

This article has dealt with the jurisprudence of the SCA since 2001 to highlight what the court has considered to be substantial and compelling circumstances. It

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62 *S v Ferreira* paras 52–53. In *S v Mahomotsa* 2002 2 SACR 435 (SCA) 442 para 15, where the accused was sentenced to 8 and 12 years' imprisonment for raping two minor girls, the SCA appears to have endorsed the high court judge's view that mitigating factors were the same thing as substantial and compelling circumstances.

63 *S v Sikhipha* 2006 2 SACR 439 (SCA).

64 *S v Sikhipha* 440.

65 *S v Price* 2003 2 SACR 551 (SCA).

66 That the appellant was a first time offender, had not benefitted from the fraudulent activities he had carried out and had financial difficulties.

67 *S v Price* para 33.

68 *S v Roslee* para 1.

69 *S v Roslee* para 30.

Ownership of Copyright in Works Created in the Course of Employment: King v South African Weather Services 2009 3 SA 13 (SCA)

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1 INTRODUCTION

The primary objective of this case note is to highlight the legal principles governing ownership of copyright in computer programs created by an employee in the •course of employmentŽ. More importantly, the case note gives an exposition of how the court in *King v South African Weather Service*[1] interpreted the phrase •course of employmentŽ as found in s 21(1)(d) of the Copyright Act.[2]

2 COPYRIGHT … COMPUTER PROGRAMS

The statute regulating copyright in South Africa is the Copyright Act.[3] Section 41(4) of the Act stipulates that •no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalfŽ. Copyright is a form of intellectual property which gives the creator of original work exclusive rights over that work to do, or authorise others to do, certain acts in relation to that work for a certain period.[4] Certain defined works, of which computer programs are one, are eligible for copyright under the Act.[5] Until 1992, the Act listed •computer programsŽ as literary works. Currently computer programs are listed separately and enjoy copyright protection in South Africa as a *sui generis* copyright item.[6] Computer programs are defined •as a

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1 *King v South Africa Weather Service* 2009 3 SA 13 (SCA).

2 Copyright Act 98 of 1978.

3 Hereafter, the •ActŽ.

4 The aim of copyright is to allow authors to have control over and profit from their works, thus encouraging them to create new works and to aid the flow of ideas.

5 Section 2.

6 Section 2(1); see also *Northern Office Microcomputers v Rosenstein* 1981 4 SA 123 (C); *Haupt t/a Soft Copy v Brewer Marketing Intelligence (Pty) Ltd* 2006 4 SA 458 (SCA). Pistorius and Visser •The Copyright Amendment Act 125 of 1992 and Computer Programs: A Preliminary OverviewŽ (1992) 54 *THRHR* 346 have questioned the wisdom of creating this niche category. See also, Tong •Authorship of Computer Programs under South African Copyright Law: *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd*Ž (2005) 122 *SALJ* 513.

set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result".[7] The main criteria to prove subsistence of copyright is the following: (a) the work must be a work listed in s 2 of the Act as work which is eligible for copyright protection; (b) the work must be original;[8] (c) the work must be reduced to a material form;[9] (d) in addition, copyright must have been conferred by virtue of nationality, domicile or residence[10] or as a result of first publication of the work being in South Africa.[11] If the aforementioned criteria are met, copyright protection in a computer program will be obtained.[12] Copyright vests in the copyright owner of computer programs and grants the owner the exclusive right to do or authorise the performance of the following acts:[13]

(a) Reproducing the computer program in any manner or form;
(b) Publishing the computer program if it was hitherto unpublished;
(c) Performing the computer program in public;
(d) Broadcasting the computer program;
(e) Causing the computer program to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the computer program, and is operated by the original broadcaster;
(f) Making an adaption of the computer program;
(g) Doing, in relation to an adaption of a computer program, any of the acts specified in relation to the computer program in the first five items above;
(h) Letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer program.

Copyright is infringed by any unauthorised person who does or causes any other person to do any act which the owner has exclusive rights to do or to authorise.[14] Copyright infringement is actionable "at the suit of the owner of the copyright".[15] It is only actionable at the suit of the author if the author is also the owner.[16] Ownership in works of copyright is determined differently, depending on the type of work and the position or occupation of the author. Generally, the

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7 Section 1(1)(x) of the Act. This current definition for a computer program in the Act suggests a shift away from the definition of a computer program in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which does not divorce computer programs from literary works. There is therefore a difference between the South African and international handling of the protection of a computer program.
8 Section 2(1).
9 Section 2(2).
10 Section 3.
11 Section 4.
12 There is no need to register the copyright and, in fact, there is no mechanism whereby one can register copyright in a computer program.
13 Section 11B(a)–(h).
14 Section 23(1). Infringement of copyright leads to criminal liability where the perpetrator has knowledge that his actions will cause infringement (s 27(1)).
15 Section 24(1).
16 It is important to note that "author" is not necessarily the person who first makes or creates a work as this all depends on the nature of the work (section 1(1)(iv)). In the case of a computer program, the author is "the person who exercised control over the making of the computer program" (s 1(1)(iv)(i)).

author is the original copyright owner,[17] but there are several exceptions.[18] An exception which applies to computer programs amongst others, concerns the case of a work "made in the course of the author's employment" by another person under a contract of service (*locatio conductio operarum*). In this event, the employer is the owner of any copyright subsisting in the work.[19] In *King v South African Weather Services*[20] the Supreme Court of Appeal had the opportunity to give meaning to the phrase "in the course of employment" as it appears in s 21(1)(d) of the Act.

3 THE FACTUAL BACKGROUND

The appellant, Mr King, had been an employee of the Chief Directorate of the Weather Bureau (hereafter "the Bureau") for many years. In 2001, the Bureau was replaced by the South African Weather Service (hereafter "the respondent"). Mr King then automatically became an employee of the respondent. He was employed as a meteorological technical officer in charge of the Upington office. His duties included capturing, processing and storing weather-related data. During the course of his employment, a dispute arose concerning the source codes of computer programs he had developed which he refused to hand over to the respondent. This eventually led to his suspension and disciplinary steps being taken against him on the ground of insubordination.

During the period of suspension, Mr King sought to draw to the respondent's attention the fact that he was the copyright owner as the programs had neither been written in the "course and scope" of his employment nor "under the employer's supervision and control". He contended that he had written the programs in his own time at home to assist him in the performance of his duties as an employee. He used the computer programs to capture, rectify and transmit weather data to head office. Mr King further contended that it had not been part of his duties as meteorologist to write the programs. Neither his contract of service nor the respondent's personnel standard for meteorological technicians considered computer programming as part of his job description. However, it is important to note that while Mr King claimed that it was never an express duty in any of his job descriptions to develop computer programs, he had over the years prepared quarterly reports in which he detailed the performance of his duties of which a major component, by his own account, was programming. Be that as it may, he was subsequently found guilty at a disciplinary hearing and dismissed.

In the meantime, the respondent did not comply with Mr King's demand and continued using the computer programs to provide specialised weather forecasting and climate information and also reproduced or adapted them. Mr King thereupon sued the respondent for copyright infringement. He was unsuccessful in the high court and appealed to the Supreme Court of Appeal.

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17 Section 21(1)(a).

18 As found in s 21(1)(b)–(d) and s 21(2).

19 Section 21(1)(d); see also *Fax Directories (Pty) Ltd v Fax Listings CC* 1990 2 SA 164 (D). This, however, does not apply to contract of work (*locatio conductio operis*), for example, by an architect in private practice for a client; see *Marais v Bezuidenhout* 1999 3 SA 988 (W) or work created under the direction or control of the State, in which case the state will be the copyright owner (section 5(2)); see also *Biotech Laboratories (Pty) Ltd v Beecham Group plc* 2002 4 SA 249 (SCA). It is worth noting that parties are, however, allowed to contract out of the s 21(1)(d) provision, (see s 21(1)(e)).

20 2009 3 SA 13 (SCA).

4 THE JUDGMENT OF THE SUPREME COURT OF APPEAL

The Supreme Court of Appeal held that Mr King had been acting within the course of his employment when he wrote the computer programs in question and was therefore not the owner of the programs. Accordingly, the South African Weather Service could thus not be held liable for infringement of copyright in the computer programs as it was the owner of those programs. The appeal was therefore dismissed.[21]

The court reasoned as follows:

- Whilst computer programming would not normally be part of the duties of a meteorologist, Mr King's duties did include the collection and collation of meteorological data and its transmission to head office for analysis and storing. The nature of Mr King's job led him to develop the computer programs to aid the easier discharge of his duties. Had it not been for his employment with the Bureau and in particular the nature of his duties, Mr King would not have created the programs. It was therefore held that there was a close causal connection between his employment and the creation of the programs.[22]
- Some of the programs were specifically written for other weather stations of the Bureau, at their request and for their use. The programs were not created for external use by others but were purely work related. The Bureau prescribed their format and had to approve of them before they could be implemented and used in the system.[23]
- The quarterly reports prepared by Mr King about the performance of his duties stressed that the major component of his work was programming. Furthermore, the job evaluation investigation stated that he was responsible for system development and programming.[24] The estimate was that he was, at the time, spending some fifty percent of his time on system development and programming.[25] In light of this evidence, amongst other things, Mr King therefore could not be heard to argue otherwise.
- Although initially Mr King had written the programs after hours, he had increasingly spent more time during office hours developing the programs.[26] However, the fact that an employee creates a work at home after hours, or during working hours at the premises of the employee, is not a deciding factor by itself.[27]

5 AN ANALYSIS OF THE COURT'S JUDGMENT

In this case, the court pronounced on the meaning of the phrase "in the course of employment" as found in s 21(1) (d) of the Act.[28] The thrust of the decision was that for purposes of the section, the answer to the question what constitutes "in the course of employment" remains primarily a factual issue that depends not

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21 *King v South African Weather Services* para 24.
22 *King v South African Weather Services* para 20.
23 *Ibid.*
24 *King v South African Weather Services* para 21.
25 *Ibid.*
26 *King v South African Weather Services* para 22.
27 *Ibid.*
28 *King v South African Weather Services* paras 8–9.

only on the terms of the employment contract, but also on the particular circumstances under which the work was created.[29] This conclusion was justified on the basis of the principle that the scope of employment may change explicitly or by implication during the course of employment.[30] While that may be the case, it is, however, submitted that this would have the undesirable effect that in any given case, a factual analysis that goes beyond the provisions of the employment contract would also need to be conducted.

Be that as it may, the *King* case highlights the following:

(i) The inquiry as to what would constitute "in the course of employment" for purposes of copyright law is a factual matter.

It appeared to the judge that it would be dangerous to formulate generally applicable rules to determine whether or not a work was authored in the course of the employee's employment.[31] The enquiry as to what would constitute "in the course of employment" for purposes of copyright law therefore remains a factual matter. While the job description as stated in the employment contract is relevant to the enquiry, it alone does not suffice. Other factors also have to be taken into consideration, for example, the relationship between the computer programs in question and the nature of Mr King's duties in terms of the employment contract. Evidence such as the numerous quarterly reports prepared by Mr King in which he detailed the nature of his duties, of which a major component (by his own account) was programming was also considered.

(ii) Work not stated in the employment contract may be created in the course of employment.

The case also highlights the fact that work not stated in the employment contract may be created in the course of employment.[32] The scope of employment may change explicitly or by implication and such changes may have a bearing on whether or not a particular work was created during the course of employment and subsequently, whether the author or the employer is the copyright owner. In this case, Mr King had sought to rely on the Personnel Administration Standard, which contained a personnel standard for a meteorological technician. It did not list computer programming as part of the job description of a meteorological technician, but over the years Mr King's duties had involved programming. Hence the computer programs in question were found to have been created in the scope of Mr King's employment and the copyright to vest in the employer.

(iii) The argument that the work in question had not been prepared in the performance of one's duties is not in itself conclusive.

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29 *King v South African Weather Services* para 17.

30 *King v South African Weather Services* para 23.

31 *King v South African Weather Services* para 17, with reference to *Trewhella Bros (UK) Ltd v Deton Engineering (Pty) Ltd* 57 JOC (A); *Stephenson Jordan & Harrison Ltd v Macdonald & Evans* (1952) 69 RPC 10 (CA); *Noah v Shuba* [1991] FSR 14 (Ch); *Morewear Industries (Rhodesia) Pvt Ltd v Irvine* 1960 BPR 202 (Federation of Rhodesia and Nyasaland).

32 *King v South African Weather Services* para 23.

As has been shown in the *King*'*s* case, the fact that the work in question had not been prepared in the performance of one's duties in terms of the employment contract will not suffice. Other factors relevant to the enquiry must also be regarded. In this case, the court took into consideration a job evaluation investigation conducted some two years prior to the termination of Mr King's employment which revealed that he was responsible for system development and programming. Quarterly reports prepared by King about the performance of his duties also stated that the major component of his work was programming. In light of these factors, amongst other things, Mr King's claim that he was the copyright owner therefore failed.

(iv) The fact that the creation of the works took place at home and not at the workplace is not conclusive in deciding ownership of copyright.

While Mr King contented that he had created the computer programs at home and therefore not in the course of employment, his argument did not suffice. It was stated that the fact that an employee creates a work at home is but a factor that has to be taken into account in addressing the question whether the work was made in the course of employment.[33] The fact is thus not conclusive in itself.

(v) In situations where there is a close causal connection between one's employment and the work created, copyright may be found to vest in the employer.

In this case, the nature of Mr King's job led him to develop the computer programs. As a meteorologist, he had to collect and collate meteorological data and transmit it to head office for analysis and storing and for that purpose he developed the programs. The court pointed out that while his reason for developing the programs might have been to make his job easier, he would not have developed the programs had it not been for his employment with the respondent. It was therefore held that there was a close causal connection between his employment and the creation of the programs with the effect that copyright vested in the employer.[34]

6 CONCLUSION

The *King* case was a very costly matter and could perhaps have been avoided had the parties entered into proper written agreements governing the ownership of copyright from the outset. Although the Act is clear that where work is created in the course of employment, the employer is the copyright owner, parties are allowed to contract out of the s 21(1)(d) provision. In this way, an employer may agree that an employee will be the first owner of the copyright in a work that has been made in the course of employment.[35] It is therefore best that parties discuss, negotiate and agree on the essential terms of their working relations and ownership of copyright before commencing the development of intellectual property. The court's judgment in the *King* case brings clarity to the meaning of the phrase "in the course of employment" as found in s 21(1)(d) and should not be seen as a deterrent to employees creating works in the course of their employment.

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33 *King v South African Weather Services* para 22.
34 *King v South African Weather Services* para 20.
35 Section 21(1)(e).

Administrative Authority and School Governing Bodies: the Case of *School Governing Body of Ntilini JSS v Makhitshi* (615/2008) [2010] ZAECMHC 4 (25-03-2010)

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1 INTRODUCTION

Public shools are juristic persons vested with autonomous self-governing powers. They are in charge of their own school governance and govern themselves through a school governing body (hereafter "SGB"). This body is created by statute and derives all its powers and authority from the South African Schools Act[1] and the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution"). SGBs are also "organs of state" in that they are functionaries exercising public power and performing public functions in terms of legislation. These powers and functions are exercised by the SGB in the best interest of the school and all its learners.[2] Although the school remains subject to the overall control by the national Department of Education, it is an autonomous entity in charge of its own governance.

One of the most important administrative law principles is that the exercise of power must be authorised by law. Whether a specific body is empowered and has the necessary authority to perform a certain act depends to a large extent on the legislative language used in the empowering provision. When a court needs to determine the scope of the authorised power, it will take into account certain factors that include the language of the legislation, the breadth of the express power, the context of the provision and the nature of the action.[3] It is clear that in discovering the intention of the legislature, the language, and particularly whether a provision is peremptory or directory in nature, is very important. In addition, the purpose for which the Act was enacted plays a crucial role. As a general rule then, the statutory requirements must be observed.[4]

The purpose of this note is twofold. First it focuses on the decision by the Eastern Cape High Court (Mtatha) in *School Governing Body of Ntilini JSS v Makhitshi*,[5] where a school principal was appointed without the required

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1 Act 84 of 1996. Hereafter "the Schools Act".
2 Section 39 of the Constitution.
3 See Hoexter *Administrative Law in South Africa* (2007) 42*ff*.
4 See generally Du Plessis *Re-interpretation of Statutes* (2002) 17–18.
5 (615/2008) [2010] ZAECMHC 4 (25-03-2010).

recommendation of the SGB. The discussion emphasises the powers and important role of parents and teachers as duly elected members of the SGB in the appointment of school principals and educators. The second aspect addressed by the note, is the important question of whether the laws and regulations prescribing the procedure that has to be followed in the appointment of new teachers to posts are peremptory or merely directory, with reference to the case of *Observatory Girls Primary School v Head of Department of Education, Gauteng*.[6] The note concludes with a brief comparison between the court's approach in the two mentioned cases on the question and application of the requirement of substantial compliance with statutory provisions.

2 BRIEF FACTS OF THE *NTILINI* CASE

A vacancy for the principal's position at the Ntilini Junior Secondary School arose in 2007 and was advertised in the prescribed manner.

Normally, the SGB should appoint an interviewing panel from its membership to conduct interviews. This interviewing panel should comprise both parents and teachers. The panel conducts interviews and reports back to the SGB, which then makes a recommendation to the Head of Department (hereafter "HoD") of Education in the particular province regarding an appointment. Due to infighting between teachers and the SGB, the interviewing committee and the shortlisting committee were irregularly constituted and were consequently rejected by the District Director in charge of the school. The SGB then resolved to delegate its authority to shortlist and conduct interviews to the Department of Education (hereafter "DoE"). The Superintendent-General for Education[7] in the Eastern Cape Province thereupon appointed "Mr L" as school principal, without the recommendation of the SGB.

The DoE thus took over the statutory powers of the SGB to shortlist, interview and appoint a candidate as school principal of the Ntilini School.

3 QUESTION AND DECISION

It was argued in both the court *a quo* and on appeal that the SGB abdicated its duty to recommend a school principal and unlawfully delegated its duty to the HoD. It was further argued that while the HoD had the authority to appoint a principal, that authority was *only* to be exercised upon a recommendation from the SGB and that the appointment was consequently irregular and unlawful.

Section 6(3)(a) of the Employment of Educators Act[8] specifically states that "any appointment, promotion or transfer to any post on the educator establishment of a public school or a further education and training institution, *may only be made on the recommendation of the governing body of the public school* . . .".[9]

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6 2003 4 SA 246 (W).

7 The Superintendent-General is the Head of the Department of Education in the Province of the Eastern Cape, as defined in the South African Schools Act 84 of 1996.

8 Act 76 of 1998.

9 My emphasis.

The decision by the DoE to appoint "Mr L" was reviewed and thereupon set aside in accordance with s 6(2)(a)(i) and (ii) of the Promotion of Administrative Justice Act[10] (hereafter "the PAJA"). The relevant provision reads:

> "(2) A court or tribunal has the power to judicially review an administrative action if—
>
> *(a)* the administrator who took it–
>
> (i) was not authorised to do so by the empowering provision;
>
> (ii) acted under a delegation of power which was not authorised by the empowering provision."

The court *a quo* dealt extensively with the question of delegated authority and held that:

> "The SGB had no right to delegate its statutory powers. It is simply not empowered to do so by the Employment of Educators Act. The HoD should not have accepted the delegated power. In my view, the delegation of power by the SGB is unlawful as it is against the *maxim delegatus delegare non potest*."[11]

This common-law rule of delegation was explained in *Foster v Chairman, Commission for Administration*[12] as follows:

> "It is trite principle of our law that where a power is entrusted to a person to exercise his own individual judgement and discretion, it is not competent for him to delegate such power unless he has been empowered to do so expressly or by necessary implication by the empowering statute."[13]

On appeal, Ndengezi AJ approached the question of delegated authority with an emphasis on the rights of educators. In his view, teachers have a "substantial" interest in the appointment of a school principal and should be represented in the body that governs the school and that has the power to recommend the appointment of a school principal.[14] In light of this view, Ndengezi AJ held that the SGB had no right to delegate such a power to the DoE.

4 DISCUSSION

4 1 General

It has been stated that "the success of any country's education system depends to a large extent on the mutual trust and co-operation exsiting between all partners".[15] These partners include the DoE, SGBs, the principal, staff, learners, parents and the broader community.

Especially with regard to SGBs, a balance must be struck between the authority of the SGB on the one hand, and the authority of the state on the other. The roles and responsibilities of both the DoE and the SGB are clearly set out in the South African Schools Act. The Federation of Governing Bodies of South African

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10 Act 3 of 2000.

11 *School Governing Body of Ntilini J.S.S v Makhitshi* para 15.

12 1991 4 SA 403 (C) 412.

13 This common-law rule was confirmed by the court in various cases. See for instance *Chairman, Board of Tariffs and Trade v Teltron (Pty) Ltd* 1997 2 SA 25 (A) paras 34C–D; *Spier Properties (Pty) Ltd v Chairman, Wine and Spirit Board* 1999 3 SA 832 (C) 846D–I.

14 See para 14.

15 Clase, Kok and Van der Merwe "Tension between school governing bodies and education authorities in South Africa and proposed resolutions thereof" 2007 *South African Journal of Education* 243.

Schools (hereafter "FEDSAS") are clearly in favour of establishing and maintaining a healthy relationship between all the important partners in education and supports the "maximum transference of school governance to governing bodies of public schools".[16]

The SGB consists of the principal, representatives of the parent community, educators, other members and learners. Section 23(1) and (2) of the South African Schools Act provide for the membership of the governing body of an ordinary public school as follows:

> "(1) Subject to this Act, the membership of the governing body of an ordinary public school comprises—
> *(a)* elected members;
> *(b)* the principal, in his or her official capacity;
> *(c)* co-opted members.
> (2) Elected members of the governing body shall comprise a member or members of each of the following categories:
> *(a)* parents of learners at the school;
> *(b)* educators at the school;
> *(c)* members of staff at the school who are not educators; and
> *(d)* learners in the eighth grade or higher at the school."[17]

Parents make up the majority of members on the SGB and therefore demonstrates the importance of their involment in school governance.[18] In terms of s 20(1)(i) of the Schools Act, the SGB of a school *has* to recommend to the HoD the appointment of educators at the school. The section reads as follows:

> "Subject to this Act, the governing body of a public school **must**—
> (i) recommend to the Head of Department the appointment of educators at the school, subject to the Employment of Educators Act, . . . and the Labour Relations Act."[19]

This accords with the idea that the parent representatives "are in the best position to determine the specific employment needs of the school".[20] These parent representatives thus have an obligation towards the school community to recommend the best qualified, motivated and committed educators. This is an important obligation given that "international experience demonstrates that outstanding educators are the most important factor in the quality of education".[21] Ndengezi AJ's judgment reflects these sentiments when he held that not only teachers, but also parents, have a "substantial" interest in the appointment of school educators and principals.

This is further borne out by the fact that the SGB is entitled to establish committees to assist it in the performance of its functions and duties and these committees are responsible to the governing body and exercise only those functions allocated to it by the governing body. A SGB would further normally

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16 Clase *et al* 2007 *South African Journal of Education* 242.
17 Section 23(1) and (2).
18 Section 23(9) The number of parent members must comprise one more than the combined total of other members of a governing body who have voting rights.
19 My emphasis.
20 Prinsloo "State interference in the governance of public schools" 2006 *South African Journal of Education* 26 363.
21 Prinsloo 2006 *South African Journal of Education* 363.

appoint a committee or panel from amongst its members to conduct the interviews.[22] This committee comprises parents and teachers and parents should exceed the latter by one. After the committee has conducted the interviews, it reports to the SGB and the SGB makes a recommendation to the HoD.[23]

4 2 Lack of authority – section 6(2)(a) of the PAJA

In dealing with the HoD's alleged lack of authority, Ndengezi AJ relied on Brand JA's judgment in *Kimberley Junior School v The Head of the Northern Cape Education Department*.[24] This was an appeal against an unsuccessful revision, in which Brand JA found that the recommendation by the SGB is an objective jurisdictional fact and that, in the absence of such jurisdictional fact (i.e. a recommendation by the SGB), the HoD had no authority to make an appointment. Under the common law, a "jurisdictional fact" refers to a necessary precondition that must exist before an administrative power may be exercised. In the absence of such a precondition or jurisdictional fact, the administrative authority is not authorised to act.[25]

Section 6(2)(a)(i) and 6(2)(f)(i) of the PAJA reflect this position at common law by authorising judicial review of administrative action where the administrator who made the decision "was not authorised to do so by the empowering provision" or the action itself "is not authorised by the empowering provision". In accordance with the PAJA[26] this means that without any recommendation by the SGB, the HoD was not authorised by the empowering provision to make an appointment. The appointment of the principal was accordingly set aside. Brand JA declined the request by the school to appoint their preferred candidate as principal in the absence of the correct procedures, stating that:

> "Apart from the principle of separation of powers, which dictates that a court should be hesitant to usurp executive functions, there was not a proper recommendation by the SGB."[27]

This view was correctly followed by the court in *Ntilini*[28] and the appointment was accordingly set aside. A further important aspect is not only whether there was in fact a proper recommendation as considered above, but also whether the provision requiring the recommendation is peremptory or directory in nature and whether substantial compliance is sufficient. The next discussion focusses on the mandatory nature of, and substantial compliance with statutory provisions with specific reference to the case of *Observatory Girls Primary School.*

4 3 *Observatory Girls Primary School* – section 6(2)(b) of the PAJA

In *Observatory Girls Primary School*, the post for a mathematics teacher had been vacant at the school for approximately six months. The post had been properly advertised and the SGB recommended "Ms D" as the preferred candidate. The

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22 Normally a panel of three to five members.
23 See in general Colditz "Composition of governing bodies" 2003 *FEDSAS Legal Opinions* www.FEDSAS.org.za (accessed on 06-05-2010).
24 [2009] 4 All SA 135 (SCA) para 19.
25 See e.g. *Paola v Jeeva NO* 2004 1 SA 396 (SCA) paras 11, 14 and 16.
26 Section 6(2)(a)(i) and s 6(2)(f)(i).
27 Staff reporter "Court rules in favour of city school" *Diamond Field Advertiser* (01-06-2009) 3.
28 See para 16.

HoD, however, declined to appoint her to the post and justified the decision by alleging that the proper interview procedure for the appointment had not been followed.

The procedure for appointing teachers to vacant positions is found in various provisions in legislation. In terms of s 4 of the Employment of Educators Act, the Minister of Education enacted Personnel Administrative Measures. Of relevance to the present case are the provisions of s 3.3 thereof.

Subsections (a) and (b) of section 3.3 provide for the establishment of interview committees. Once the school governing body has received all the applications for a particular post, it must convene an interview committee, which must then deal with applications in accordance with certain guidelines and procedures. During a subsequent meeting of the SGB, an interview committee was appointed and was given the mandate to make a final recommendation to the Gauteng Department of Education. The applicable candidates had been considered by the interview committee and a form had been completed and sent to the Gauteng Department of Education (hereafter "GDE") recommending "Ms D" as the committee's first choice.

Unlike the case of *Ntilini* where it was essentially argued that the SGB unlawfully delegated and abdicated their power of appointment to the DoE, it was argued on review of *Observatory Girls Primary School* that the SGB abdicated its function to make the recommendation to the DoE to the interview committee. This argument relied on a recording in the minutes of the meeting of the SGB, which set out: "Interview committee given mandate to make final recommendation to GDE."[29]

Reference was made to the *dictum* of Friedman J in *Yates v University of Bophuthatswana*[30] where he held that:

> "It has been held repeatedly that, where powers are conferred on a statutory body, the body must be properly constituted in order to exercise its powers validly."

While the case of *Yates* is authority for this proposition, it was, however, as correctly pointed out by Horwitz AJ in *Observatory Girls Primary School*,[31] in a totally different context. The committee in *Yates* was exercising quasi-judicial powers in a disciplinary context and clearly different considerations apply. Just because the decision in *Observatory Girls Primary School* was not made by the entire committee (the SGB in this case) deliberating as a body, it is incorrect to state that the decision was fatally flawed. It is submitted that the interviewing committee in *Observatory Girls Primary School* must be seen as an "extension" of the SGB when it exercises its powers. This is so because reg 38(1) of the regulations made in terms of s 31 of the School Education Act[32] specifically authorises the SGB to delegate the function of making the relevant recommendation to the interview committee.[33]

It was also argued that the function of the applicable procedure followed by the school must be seen as achieving the purposes of the legislation to make sure

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29 *Observatory Girls Primary School* 254E.
30 1994 3 ASA 815 (B).
31 See 256H–I.
32 Act 6 of 1995 (Gauteng).
33 See *Observatory Girls Primary School* 254H–I.

that a fair and transparent procedure was put in place for appointing teachers to fill vacancies.[34] A fair and transparent procedure allows for teacher and parent representatives in the decision-making body that makes recommendations to the HoD regarding the appointment of educators and principals. The interview committee in *Observatory Girls Primary School* was thus appointed in accordance with these procedures while the delegation of powers to the DoE in the *Ntilini* case clearly did not achieve the same result.

Section 3.4 of the Personnel Administrative Measures (enacted by the Minister of Education in terms of s 4 of the Employment of Educators Act) further provided that the HoD could decline the recommendation of the governing body of the school *only* if it could show the existence of one of several sets of circumstances enumerated by the section, including the fact that the proper procedure for the appointment had not been followed. The HoD justified declining the recommendation on the ground that the interview procedure described in section 3.3 of the Personnel Administrative Measures for the appointment of "Ms D" had not been followed.

A further relevant question relating to the authority of the SGB in *Observatory Girls' Primary School* was thus whether the regulations, which prescribed the procedure to be followed in the appointment of new teachers, were "peremptory" or merely "directory" and whether substantial compliance was sufficient.

Section 6(2)(b) of the PAJA states that a court or tribunal has the power to judicially review an administrative action if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.

In *Makwetlane v Road Accident Fund*,[35] Horwitz AJ on review held that:

> "Given the discernible trend by the Courts in moving away from a strict, legalistic towards a more accommodating approach in interpretation, it may well be that one should avoid the traditional classification along the lines of peremptory and directory provisions and opt for something less rigid. Possibly a question along the following lines would suffice, namely, did the Legislature, in the case of non-compliance with the law in issue, intend to inflict unenforceability on an otherwise valid claim or did it not so intend and, in event that it required compliance, did the Legislature require exact compliance or merely substantial compliance with the provision in issue?"

In *Observatory Girls Primary School*, Horwitz AJ was satisfied that even if the prescribed procedure was peremptory, that strict compliance was not necessary, stating that "all that is called for is substantial compliance".[36] In *Sutter v Scheepers*,[37] Wessels JA sets out a list of useful guides to assist the courts as to when a provision is directory (permissive) and when it is peremptory (mandatory). However, some mandatory provisions need not also be strictly complied with. As pointed out by Klaaren,[38] when it comes to the failure to comply exactly with a mandatory provision, both the degree of compliance required by a statute, as well as whether that degree of compliance is a necessary

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34 255F–G.
35 2003 3 SA 439 (W) 458A–C.
36 See *Observatory Girls Primary School* 255D.
37 1932 AD 165 173–174.
38 Klaaren "Teaching procedural jurisdiction facts" 1998 *SAJHR* 14 60.

the action taken, are important questions. From our case law it is clear that condition for the validity of "substantial" or even "adequate" compliance may be sufficient.[39]

The Supreme Court of Appeal in *Maharaj v Rampersad*[40] formulated a test for compliance with a mandatory provision as follows:

> "The enquiry, I suggest, is not so much whether there has been 'exact' 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is, is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance."

This approach clearly emphasises the importance of the purpose of the provision in relation to the question of compliance, which requirement "cannot be determined by a mere label such as 'peremptory' or 'directory' without proper regard being had to the intention of the legislator".[41]

In *Daniels v Campbell NO*,[42] Ngcobo J stated that:

> "Section 39(2) of the Constitution contains an injunction on the interpretation of legislation. It requires courts when interpreting any legislation to 'promote the spirit, purport and objects of the Bill of Rights' in a manner that gives effect to the values of our constitutional democracy."

This approach clearly mandates both a purposive and value-based theory of interpretation, but also one that is regarded as "wider and more comprehensive than that of the narrow purposive approach".[43]

The Constitutional Court also took a purposive approach in *African Christian Democratic Party v Electoral Commission*[44] where O'Regan J steered away from the subjective concept of "the intention of the legislature" and used the more objective approach of focusing on the "purpose" or "design" of the legislation.[45]

In *Observatory Girls Primary School*,[46] the court was satisfied that the SGB had substantially complied with the prescribed procedure, especially given the purpose of the legislation that was explained as follows:

> "The purpose of the legislation is to ensure that there is a fair and transparent procedure in place for appointing teachers to fill vacancies. Nepotism and the like are to be eschewed. I am satisfied that the procedure that the school followed fully achieved the purpose of the legislation. To hold otherwise would be to elevate form above substance."

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39 See e.g. *Beukes NO v Mdhlalose* 1990 2 SA 768 (N) 774–775; *Municipality of Butterworth v Bezuidenhout* 1986 3 SA 543 (Tk) (object of provisions substantially achieved); *Stadsraad van VanderBijlpark v Administrateur, Transvaal* 1982 3 SA 166 (T) 191–193 where the court found that there were "sufficient compliance with peremptory provisions".

40 1964 4 SA 638 (A) 646C–E.

41 *Weenen Transitional Local Council v Van Dyk* 2000 3 SA 435 (N) 444C–D.

42 2004 5 SA 331 (CC) para 43.

43 Devenish "*African Christian Democratic Party v Electoral Commission*: The new methodology and the theory of statutory interpretation in South Africa" 2006 *SALJ* 123 401.

44 2006 3 SA 305 (CC).

45 Devenish 2006 *SALJ* 403.

46 255F–G.

The decision in *Ntilini* must also be seen in this context. In light of the purpose of the Schools Act as explained above, it is clear that a fair and transparent procedure allows for teacher and parent representatives in the SGB. They play an important role in the appointment of educators and principals. Even substantial compliance with these procedures does not imply that this responsibility can be unlawfully delegated to an unauthorised decision maker, as was the case in *Ntilini*.

5 CONCLUSION

It is clear that the Schools Act attempts to involve all role players in school governing bodies. SGBs have primarily one function only and that is to govern the school in terms of the provisions of s 16(1) and (2) in the best interest of the school and all its learners.

Ntilini clearly emphasises the important role and powers of both teachers and parents, as representatives in the SGB that governs the school, to recommend the appointment of school principals and educators. The SGB has no right to delegate such power to the DoE and, as a result, the Department has no power to usurp such a power of the school. While the DoE may decline the recommendation of the governing body, it may only do so if one or more of five defined sets of circumstances are found to exist in terms of s 6(3)(b) of the Employment of Educators Act. The court in *Ntilini* correctly found that the SGB had no right to delegate its statutory powers, but also that the HoD should not have accepted the delegated power and that the delegation of power by the SGB was accordingly unlawful.

Clearly, the courts are steering away from the strict compliance with mandatory provisions towards more substantial compliance. In both *Ntilini* and *Observatory Girls Primary School* the importance of the purpose of the legislation was also an important factor in determining the scope of authority of the SGB. The Schools Act makes it clear that state involvement in school governance should be limited to the minimum and the intention of the Act is clear: "[c]ommunities, and especially parents, must increasingly take responsibility for their schools".[47]

The fact that parents make up the majority of the SGB "demonstrates the importance of their involvement and constitutes the principle of partnership and mutual responsibility in a public school".[48] It also implies that parents have a very strong and decisive voice in matters such as recommendations to the HoD regarding the appointment of educators and principals. This responsibility can only be delegated with due regard to the empowering provision and the overall purpose of the legislation, following a purposive and value-based theory of interpretation as mandated above.

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47 Colditz "The principal's role in the governing body of public schools, and the relationship between the principal and the rest of the governing body" (unpublished paper, read at SATU Principal Symposium, Port Elizabeth, 07-09-2005) 4. At the time Colditz was the national chairperson of FEDSAS.

48 Prinsloo 2006 *South African Journal of Education* 357.