DE JURE

JAARGANG 50 2017 VOLUME 1

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"And as imagination bodies forth
The forms of things unknown, the poet's pen
Turns them to shapes and gives to airy nothing
A local habitation and a name"
(William Shakespeare from A Midsummer Night's Dream)

With the wise words of Shakespeare in mind, the editorial board of *De Jure* has pleasure in presenting the first volume of 2017. This volume paves the way for valuable discussions by a variety of academics on a wide variety of topics. Interesting discussions are provided for pertaining to amongst others issues relating to class action proceedings, ancillary customary marriages and matters relating to property rights to mention but a few as well as interesting case discussions dealing with a wide variety of topics. The *De Jure* team wish to thank all contributors as well as reviewers to this volume for their efforts and contributions to this volume.

The editorial committee would like to welcome Daniel Du Plessis who has been appointed to assist with the editorial process of *De Jure* as well as express our gratitude for his diligent assistance during the production of this volume. We would also like to express our gratitude to the team of Pretoria University Law Press (PULP), and especially Lizette Hermann, for making this volume a reality.

Prof GP Stevens
Editor

Constitutional interpretation in the so-called 'hard cases': Revisiting *S v Makwanyane*

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OPSOMMING

Grondwetlike interpretasie in sogenaamde 'moeilike sake': 'n Herbesoek aan *S v Makwanyane*

Grondwetlike interpretasie in sogenaamde 'moeilike sake' verg, in sekere gevalle, dat regters van subjektiewe maatstawe moet gebruik maak om definisie te verskaf aan grondwetlike regte en waardes. Dit beteken dat regters van nie-tradisionele bronne gebruik moet maak wanneer grondwetlike interpretasie plaasvind. Dit laat die moontlikheid dat die bevinding van die hof beïnvloed kan word, of selfs baseer mag wees, op die persoonlike geloof-, politieke- of waardesisteem van die regter. In *S v Makwanyane*, 'n voorbeeld van 'n moeilike saak, het die hof bevind dat subjektiewe interpretasie onontbeerlik deel is van grondwetlike interpretasie. Subjektiewe interpretasie is egter moeilik inaggenome die plig wat op howe rus om 'n beredeneerde rede vir hul beslissings te verskaf. Hierdie artikel stel voor dat regters die effek van eie persoonlike vooroordele moet ondersoek en indien dit moontlik 'n rol mag speel in die beslissing van die hof dit te erken. So erkenning word dan geartikuleer in die beslissing van die hof wat 'n mate van objektiwiteit daaraan verskaf en dit blootstel vir kommentaar en moontlike kritiek.

1 Introduction

In most cases commonly before the courts, the legal sources point to a clearly defined outcome after the facts and legal arguments have been heard. The sources of law that the judge must interpret to arrive at a just and fair conclusion are obvious. If the plaintiff in a delictual claim for damages proved, by fact and legal argument, that the defendant has assaulted him intentionally and unlawfully, he is entitled to the damages that he can prove. The legal sources point in one direction: a delict was committed and the plaintiff is entitled to damages. Therefore, there is conformity in the objective legal interpretation of the sources. However, adjudication is also sought in matters where the accepted sources of law are not always clear, may contradict one another, or may offer no clear and acceptable legal sources for the resolution of the dispute. These are referred to as 'hard cases', in which an objective way of reaching a judgment based on the accepted sources of law is problematic.

How to cite: Klaasen 'Constitutional interpretation of the so-called 'hard cases': Revisiting *S v Makwanyane*' 2017 *De Jure* 1-17
http://dx.doi.org/10.17159/2225-7160/2017/v50n1a1

In South Africa, the first source for judicial decision-making will be the Constitution,[1] followed by the accepted current law in the form of statutory law, common law, customary law; as well as court precedent, international, and foreign law.[2] However, in hard cases, the court will often have to reach a fair and just decision based on other sources. In some instances, these 'other sources' find their origin in the subjective identity of the judge – the sum of his or her upbringing, culture, life experience and religious- or political beliefs. However, this presents a conundrum, as the courts are duty-bound to give reasoned decisions.[3] The decision-maker, therefore, has to deliberate before reaching a decision - and justify the decision made. This means the decision of the court should be based on fact and sound reason, as well as being well-founded in prevailing law. It must present a just appraisal of the facts, evidence and arguments placed before the courts. This requires the judge to make the reasoning for the decision public in the form of a written court decision, which articulates the reasoning behind the decision.

This paper investigates the interpretation of the often vague and undefined constitutional rights and values fundamental to the South African Constitution by revisiting *S v Makwanyane*.[4] *Makwanyane* was chosen because the Court had to deal with the undefined rights and values articulated by the Interim Constitution.[5]

Makwanyane is an example of a 'hard case' due to its extremely difficult interpretive choices. The drafters of the Constitution and the incumbent government left the resolution of the question of the constitutionality of the death penalty up to the courts. The text of the Interim Constitution offered no guidance and section 11 was unqualified, stating that everyone has the right to life. The general limitation provisions of section 36 stated that rights could be limited, but there was no previous precedent or comparable South African jurisprudence to guide the adjudication.

The analysis shows that the original Constitutional Court followed a method of constitutional interpretation based on traditional methods of interpretation, as well as a measure of subjective constitutional interpretation. Interpretation, that is, not based on the traditional sources of the law. This article investigates how the subjective element in constitutional interpretation in hard cases can be balanced with the duty of the courts to give reasoned decisions.

1 Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).
2 Section 39(1) of the Constitution. When interpreting the Bill of Rights, a court (b) must consider international law; and (c) may consider foreign law. Hereafter, any reference to 'current law' includes these sources.
3 *Helen Suzman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC) para 16.
4 1995 (3) SA 391 (CC).
5 Constitution of the Republic of South Africa Act 200 of 1993.

2 Defining So-Called 'Hard Cases'

In hard cases, where the court is asked to resolve an issue fairly, the court is asked to decide something about which the parties themselves could not agree and for the determination of which no standard exists.[6] There is no precedent before the court and the law is unclear on the matter. This means that the objective application of the law to the facts of the case and the legal arguments before the court is problematic. Posner states the following regarding hard cases:[7]

> If a case is difficult in the sense that there is no precedent or other text that is authoritative, the judge has to fall back on whatever resources he has to come up with a decision that is reasonable, that other judges would also find reasonable, and ideally that he could explain to a layperson so that the latter would also think it a reasonable policy choice. To do this, the judge may fall back on some strong moral or even religious feeling. Of course, some judges fool themselves into thinking there is a correct answer, generated by a precedent or other authoritative text, to every legal question.

Hard cases require the judge to seek interpretation of the law in resources not traditionally associated with the law. The judge must look outside the law to find the sources for interpretation of the current law. This requires of judges, when the conventional legal materials fall short, to have 'recourse to other sources of judgment, including their own political opinions or policy judgments, even their idiosyncrasies.'[8] This requires subjective interpretation of the law from the judge; a self-imposition on him- or herself of his or her own moral, religious or political beliefs. The judge then is the 'interpreter for the community of its sense of law and order and must supply omissions, correct uncertainties, and harmonise results with justice through a method of free decision'.[9] In this context, the method of free decision means that previous precedent, or current law, does not bind the judgment of the court, but the judge must still make a decision based on the facts of the case and the legal arguments before the court.

According to Dworkin, a hard case is a situation in law that gives rise to genuine arguments about the truth of a proposition of law that cannot be resolved by recourse to a set of plain facts determinative of the issue.[10] Dworkin states that where the law is not clearly identifiable by reference to the facts of the case before the court (what he calls the rule of recognition) there is no law on the matter. In order to perform his duty to bring the case to a just and fair conclusion, the judge must consult resources other than legal ones. In other words, the judge must exercise

6 Fuller and Winston 'The forms and limits of adjudication' 1978 Harvard Law Review 373.
7 Segall 'The Court: A talk with Judge Richard Posner' The New York Review of Books http://www.nybooks.com/articles/archives/2011/sep/29/court-talk-judge-richard-posner/ 2011 accessed 2015-11-21.
8 Posner *How judges think* (2010) 9.
9 Cardozo *The nature of the judicial process* (1946) 16.
10 Guest *Ronald Dworkin* (1997) 136.

discretion in order to come to a decision.[11] This exercise of discretion allows a judge to consult his- or her own subjective disposition in order to conclude matters justly and fairly.

In a South African context, Dworkin's argument can be explained by reference to the rights and values imbedded in the Constitution. The rights and values are fundamental to the Constitution, establishing its character and structure. These rights and values are not defined and are often vague and abstract. The values are vague and abstract because they do not spell out the impact they are intended to have on any actual situation or how these values are to be compromised against other values or rights. The effect of this is twofold. As there is no clear definition or meaning attached to the constitutional values there is nothing to direct the judge in the interpretation thereof, but, on the other hand, there is also nothing that constrains the judge in his- or her interpretation. This concept is not as startling as it may first appear, it conforms to the principle of transformative constitutionalism, a grounding pillar of the Constitution, 'the primary purpose of which is to intervene in unjust and impermissible power and resource distributions, and liberates the judicial function from an austere legalism'.[12]

The views expressed by both Posner and Dworkin are contrary to the classical view of legalism, the view that judges base their decisions on the law. Posner suggests that legalism is overrated with legal materials rarely so clear that they provide unobjectionable, easily identifiable solutions to legal disputes.[13] The statement by Posner reflects a reality inherent in the rights and values fundamental to the South African Constitution, they are neither clear nor provide easy solutions to legal disputes.

3 Constraints on Judicial Decision-Making in South Africa

Transformative constitutionalism does not mean that there are no legal constraints flowing from the Constitution placed on the judge when interpreting constitutional values. Interpretation of the Constitution is governed by its own provisions, as expressed in section 39. When interpreting the Constitution courts must promote the values that underlie a democratic society based on human dignity, equality and freedom. The courts must consider international law and may consider foreign law. However, the concepts of human dignity, equality and freedom are also undefined and abstract concepts where the meaning in interpretation will defer from judge to judge. Furthermore, the fact that the Constitution allows judges to consider international and foreign law allows for the possibility of interpretive choice; a judge may choose to

11 Guest *Ronald Dworkin* 136-137.
12 Moseneke 'Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' 2002 *SAJHR* 318.
13 Posner 2008 *How judges think* 47.

rely on international and foreign law that supports his- or her own preconceived notions.

However, a court still has to give meaning and substance to the constitutional rights values even though the meaning thereof is often unclear. This requires of the judge to make a value judgment to give effect and meaning to constitutional rights and values.

In terms of the Constitution, courts are constrained in their decision-making by the supremacy of the Constitution and the rule of law.[14] However, the courts are further constrained by legislation, the common law, precedent and procedural rules in order to arrive at the outcome that is the most correct, both on the factual basis of the case and the application of the law to the matter. Examples of these include the exclusionary rules of evidence, the *audi alteram partem* rule and the right to legal representation. In the South African constitutional setting, established legislation, prevailing precedents and other accepted sources of law can be used by the courts in the adjudication process.

Courts are further restricted in the process of decision-making by the duty to provide reasoned decisions. The judgment of the court serves as the basis on which the legality of the trial is weighed.

In *Helen Suzman Foundation v Judicial Service Commission*,[15] the Court described the duty to give reasoned decisions:

> In the first place, a duty to give reasons entails a duty to rationalise the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conducive to public confidence in the administrative decision-making process. Thirdly — and probably a major reason for the reluctance to give reasons — rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications.

The decision-maker therefore has to deliberate before reaching a decision and justify the decision made. In this way, the duty to give reasons tempers the exercise of discretion present in the judge's decision-making. Furthermore, the furnishing of reasons allows an aggrieved party to evaluate and argue the rationality, lawfulness, reasonableness and justness of the impugned decision.[16] This means the decision of the court should be based on fact and sound reason and it

14 Section 1 of the *Constitution*.
15 2015 (2) SA 498 (WCC) para 14.
16 *Helen Suzman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC) para 16.

must be well founded in contemporary law. It must present a just appraisal of the facts, evidence and arguments placed before the courts.

4 The Interpretation of Constitutional Values by the Court in *S v Makwanyane*

In *Makwanyane*, the Court held that provisions of the Constitution should not be construed in isolation, but in their context, which includes the history and background of the adoption of the Constitution together with the other provisions of the Constitution itself and, in particular, the provisions of the Bill of Rights.[17] Provisions must also be construed in a way that secures for 'individuals the full measure' of its protection.

The Court further held that it was permissible, in interpreting a statute (in this case the Constitution), to have regard to the purpose and background of the legislation in question.[18] The Court referred approvingly to the *dictum* in *Jaga v Dönges*,[19] where the Court stated:

> Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.

The Court further found that, when interpreting a statute, it might be permissible to take into account debates of Parliament, statements by the Minister responsible for the legislation, explanatory memoranda providing reasons for new bills and the report of a judicial commission of inquiry on the object of the legislation.[20] Background material in the form of reports by technical committees assisting the multi-party negotiating process can provide a context for the interpretation of the Constitution.[21]

The Court held that, because there is no definition of what is to be regarded as cruel, inhuman or degrading punishment,[22] the Court had to give meaning to these words itself.[23]

Chaskalson CJ, pronouncing on whether the death penalty constituted cruel and unusual punishment, referred to reports by the South African

17 Para 10.
18 Para 13.
19 1950 (4) SA 653 (A) 662G-H.
20 *Makwanyane* para 14.
21 Para 17.
22 Section 11(2) of the *Interim Constitution.*
23 *Makwanyane* par 8.

Law Commission,[24] press statements by the Minister of Justice[25] and international and foreign comparative law.[26] The Chief Justice stated that public international law would include non-binding as well as binding law to be used as tools of interpretation. Furthermore, international agreements and customary international law provided a framework within which the Human Rights Charter of the Interim Constitution could be evaluated and understood. Therefore, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, could be sourced in constitutional interpretation.[27] However, in relation to interpreting the Constitution by sourcing comparative international and foreign law, he said:[28]

> In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the Constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

The Court acknowledged that the majority of South Africans favour the retention of the death penalty, but stated that public opinion could not sway the Court. The question that had to be answered was whether the Constitution allowed the sentence.[29]

The Court, therefore, listed appropriate sources for the interpretation of constitutional rights and values. However, the judges were not consistent in their interpretative method, nor in the sources used in their individual interpretation of constitutional values.

Although the judgment of the Court was unanimous, the judges based their reasoning and decisions on different aspects of constitutional interpretation and different values and sources of law.

Chaskalson CJ stated that the core argument against the death penalty is based on section 11(2), which prohibits cruel and inhuman punishment.[30] From this right other constitutional rights flow, such as the right to life, equality and dignity. Because of the arbitrariness of the death penalty, these rights would be breached.

Ackerman J also based his decision on the prohibition of cruel and inhuman punishment, but added that the constitutional right to life cannot be qualified.[31] He further relied on the fact that the arbitrariness of the death penalty results in unequal treatment of persons, therefore

24 Para 22.
25 Para 23.
26 Para 33.
27 Para 35.
28 Para 39.
29 Para 87.
30 Para 8.
31 Para 155.

violating the right to equality. The judge argued that, when deciding on whether to impose the death penalty, the decision maker had to make a subjective decision. This involved weighing up mitigating and aggravating factors and, subsequently, a value judgement as to whether the death sentence was appropriate. This left wide latitude for difference of individual assessment, evaluation and normative judgment that are inescapably prejudiced.

Didcott J emphasised the constitutional right to life.[32] He argued that the imposition of the death penalty called for a value judgment that could be influenced by one's own moral attitude and feeling. He acknowledged, however, that the courts' experience and training warned against the trap of undue subjectivity.

Kentridge J argued that the imposition of the death penalty was not a question of the right to life, but whether the imposition of the death penalty constituted cruel and inhuman punishment.[33] He found that the imposition of the death penalty was cruel and inhuman because it infringed on the right to life, dignity and equality.

Kriegler J argued that the question called for legal and not moral or philosophical reasoning.[34] However, value judgements in the answering of the question were inescapable. The judge stated that law does not operate in a vacuum and calls for value judgements, within which extra-legal considerations may loom large. The judge, unfortunately, did not specify what extra-legal considerations would be deemed acceptable. The judge found that the right to life was unqualified and, therefore, it was unnecessary to consider further inconsistencies with other constitutional rights.

Langa J emphasised the right to life and used the principle of *ubuntu* as a source to define the right to life and human dignity.[35]

Madala J also looked to the principle of *ubuntu* as a source to define constitutional values. Central to this was the ideas of humaneness, social justice and rehabilitation.[36] Because the death penalty offered no chance for rehabilitation, it was cruel and inhumane.

Mahomed J argued that the Constitution articulated the shared aspirations of a nation and defined the values which bind its people, and were the basic premises upon which judicial, legislative and executive power was to be wielded.[37] The judge was rational in his interpretational approach, reasoning that there was no rational justification for the death penalty. Facts and argument for the retention of the death penalty did not justify a rational and judicious judgment for its retention.

32 Para 177.
33 Para 194.
34 Para 207.
35 Para 215.
36 Para 235.
37 Para 261.

Mokgoro J referred to indigenous South African values that had to be recognised in promoting the underlying values found in an open and democratic society.[38] The concept of *ubuntu* embodied these values. According to the judge, constitutional interpretation involved making constitutional choices by balancing competing fundamental rights and freedoms. This could only be done by reference to a system of values extraneous to the Constitution. These principles constituted the historical context in which the text was adopted and which explained the meaning of the text. However, the courts would have to make the necessary value choices.

The judge argued that balancing opposing rights required value judgements, which form the nature of constitutional interpretation. However, because the Constitution allows the courts to seek guidance in international norms and foreign judicial precedent (reflective of the values that underlie an open and democratic society based on freedom and equality), and because the court articulated, rather than suppressed the values that underlie the judgment, the court was not being subjective. Because the courts set out the foundations for their interpretations in a transparent and objective way and made their decisions available for criticism, the courts were objective in their reasoning.

O'Regan J argued that the right to life encapsulated all other rights in the Constitution.[39] Therefore, the right to life could not be qualified. The Justice referred to acceptable common-law principles as sources for values to provide guidance for constitutional interpretation.

Sachs J did not agree with the reliance placed on the prohibition against cruel and inhuman punishment.[40] He argued that the right to life was unqualified. He further argued that whatever one's personal view might be, the response had to be a purely legal one. The judge took a rational interpretational approach by arguing that, based on rationality and proportionality, the death penalty could not be justified. The judge was also more formalistic in his interpretation, stating that section 9 should be read to mean exactly what it says: every person shall have the right to life. Because it was not qualified in any way, the drafters of the Constitution did not intend to allow the state to take the life of its citizens. He also referred to customary law as a source to interpret constitutional values.

The analysis of the *Makwanyane* case shows that although the judgment was unanimous, the judges reached their decisions by relying on different constitutional values and rights, different methods of constitutional interpretation and different sources for their interpretation. They were faced with an inescapable normative choice in deciding which constitutional values and rights should be prevalent. The argument of each judge presented an interpretive choice between the

38 Para 300.
39 Para 318.
40 Para 345.

constitutional values or sets of values. Six of the judges premised their arguments on the right to life, with two reasoning that this right could not be qualified. Three based their findings on the fact that the death penalty constituted cruel and inhumane punishment,[41] while two said that the death penalty violated the right to dignity and equality and, as such, was arbitrary and unconstitutional.

The *Makwanyane* judgment illustrates four methods of interpretation based on an adapted version of the Savignian model[42] described by Du Plessis:[43]

(a) Grammatical interpretation: concentrating on ways in which the conventions of natural language can assist legal interpretation and can help to limit the many possible meanings of a provision. The Court quoted approvingly from *Jaga v Dönges NO*,[44] where the Court held that words and expressions used in legislation must be interpreted according to their ordinary meaning.[45]

(b) Systematic interpretation: as a manifestation of contextualism, calling for an understanding of a specific provision in the light of the text or instrument as a whole and of extra-textual *indicia*. The Court held that constitutional provisions should not be construed in isolation but in their context, which includes the history and background of the provisions.[46]

(c) Purposive interpretation: that sheds light on the possible meanings of a provision with reference to its purpose. The Court must have regard to the purpose of the constitutional provisions.[47]

(d) Historical situating: a provision in the tradition from which it emerged and allowing qualified recourse to information concerning the genesis of the text in which the provision occurs and concerning the provision itself. The Court held that the history and background of the adoption of the Constitution together with the other provisions of the Constitution itself and, in particular, the provisions of the Bill of Rights must be taken into account when interpreting constitutional provisions.[48]

However, the analysis also shows that the judges acknowledged that subjective constitutional interpretation is unavoidable in constitutional jurisprudence. Mokgoro J argued that, because judgments of the courts are articulated and available for criticism and are based on acceptable

41 Kentridge J went so far as to state that the matter before the court was not a question of the right to life. *Makwanyane* para 194.
42 Le Roux 'Six (individually-named) notes on the counter-aesthetics of refusal' in Van Marle 'Refusal, transition and post-apartheid law' 2009 African Sun Media 73: The traditional continental model of interpretation in which various common-law canons of statutory interpretation must be classified into grammatical, systematic, purposive, historical and comparative reading strategies.
43 Du Plessis 'Learned Staatsrecht from the heartland of the Rechtsstaat' 2005 PELJ 86.
44 1950 (4) SA 653 (A) para 662g-h.
45 *Makwanyane* para 13.
46 Para 10.
47 Para 13.
48 Para 10.

sources in the form of applicable international and foreign precedent, the interpretation is not subjective.

This argument is not entirely correct. Although the Court considered applicable international law and foreign law, it did not consider sources that argued that the death penalty was an appropriate penalty.[49] This reflects the critical role of interpretive choice in adjudication.[50] Interpretive choice, choosing the sources of law that will support your own subjective view of constitutional interpretation, is still a measure of subjective interpretation. This, however, does not make the decision of the Court arbitrary or unrestricted.

The Court was transparent in its analysis of the inherent fundamental values of the Constitution. However, the judges did not explain their reliance on the particular case law of the countries in question. This leaves the possibility that the subjective disposition of the judges was a deciding factor in choosing these sources.

The *Makwanyane* case laid the foundation for a particular style of constitutional interpretation. The opinions of the judges were the product of a human rights text setting forth a liberal culture of rights founded upon human rights and values and premised on justification. The Court turned to these human rights and values for guidance in their constitutional interpretation. According to Harcourt, the judges were strongly optimistic and idealistic in the realisation of these rights and values. The Court was able to articulate forcefully and transparently the fundamental changes that have taken place in South Africa, thereby setting forth a culture of rights and justification.[51]

The *Makwanyane* case also shows the conundrum of constitutional interpretation. In hard cases, Judges will have to give meaning to the undefined rights and values of the Constitution by relying on a measure of subjective interpretation. How then can subjective interpretation and reasoning be presented as a reasoned decision on the part of the court?

49 The Court relied heavily on jurisprudence of the United States of America and India that argued against the death penalty, although the death penalty was considered a competent sentence in both of these countries. The Court also referred to African countries (Namibia, Mozambique and Angola), where the death penalty was abolished, but it did not refer to Botswana, a constitutional democracy, where the death penalty was a competent verdict. *Makwanyane* para 33.

50 Harcourt 'Mature adjudication: Interpretive choice in recent death penalty cases' 1996 *Harvard Human Rights Journal* 256.

51 Harcourt 'Mature adjudication: Interpretive choice in recent death penalty cases' 1996 *Harvard Human Rights Journal* 267.

5 Balancing Subjective Constitutional Interpretation With the Duty of the Court to Give a Reasoned Decision

Klare is of the opinion that judges will always be confronted with conflicting pulls and tensions of freedom and constraint. He articulated this tension between judicial constraint and judicial freedom as follows:[52]

> On the one hand, there is a grand constitutional text replete with broad phrases and redolent with magnificent hopes to overcome past injustice and move toward a democratic and caring society. Yet, on the other, just about everyone takes for granted that adjudication is not and cannot be infinitely plastic and open-ended, that judges and lawyers are not completely at large to say and do as they please by the lights of whatever personal vision of freedom they hold.

Klare's point of view is undoubtedly true of the rights and values contained in the South African Constitution. What encapsulates dignity for one reader of the Constitution will not necessarily mean the same for another. As such, subjective interpretation is an integral ingredient of constitutional adjudication in South Africa. While this does not mean that judges are not impartial, absolute neutrality in adjudication is impossible.[53] The culture of substantive adjudication must, however, be balanced by justification in the form of the court's decision.

The normative content of the Constitution is clearly based on Western liberal-democratic principles, with dignity, equality and freedom prominent. As these values are not defined, their interpretation will depend on the subjective value-system of the interpreter. In a constitutional democracy, set in a multi-cultural community, this is certainly a necessity:[54]

> Judges will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

Nevertheless, interpreters of the values of the Constitution, including and – especially – judges, should be aware of their own preconceived notions.[55]

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52 Klare 'Legal culture and transformative constitutionalism' 1998 *SAJHR* 149.
53 *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 14.
54 *R v S (RD)* (1997) 118 CCC (3d) 353 para 38.
55 Venter 'Judges, politics and the separation of powers' 2007 *Speculum Juris* 74.

In the *M & G Media Ltd* case,[56] the Supreme Court of Appeal acknowledged that discretion plays an important part in decision-making and that discretion 'permits abstract and general rules to be applied to specific and particular circumstances in a fair manner'. The scope of these discretionary powers may vary.[57]

Where broad discretionary powers are conferred, there must be some constraints on the exercise of those powers so that those who are affected by the exercise of the powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.[58]

An example of broad discretionary powers conferred on the courts can be obtained from the power of the courts to ascertain what constitutes a reasonable member of the public, and what their views would be. This is not done in a vacuum; it is context-specific. Judges often rely on their own experience as members of society to determine this.[59] The same principle holds true for the often vague and undefined constitutional rights and values.

In adjudication, the judge engages in a fact-finding exercise. The court attempts to give a meaningful interpretation of a set of events, so fact-finding seems unavoidable. According to conventional understanding, fact-finding involves establishing congruence between statements made about the world and the world itself.[60] However, most facts litigants seek to establish in adjudication, and in particular constitutional litigation, are social facts rather than phenomena intrinsic to nature.[61] When adjudicating on matters relating to social facts, divergent viewpoints can cause problems for the administration of justice. This is especially likely in a deeply split society, like South Africa, where normative standards are uncertain. The undefined rights and values fundamental to constitutional interpretation may aggravate this uncertainty.

Does this mean that constitutional interpretation has been reduced to a system of contradictory discourse, which can never be conclusive, as there is no prevailing standard method of interpretation of constitutional values; no supreme principle determining which value should prevail?

56 *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA) para 1.
57 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 53.
58 *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 34.
59 *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* 2015 (1) BCLR 1 (CC) para 207.
60 Damaska 'Truth in adjudication' 1998 *Yale Law School Faculty Scholarship Series* 291.
61 Damaska 'Truth in adjudication' 1998 *Yale Law School Faculty Scholarship Series* 293.

Judges are human and therefore absolute neutrality in judicial officers is not possible.[62] Cardozo describes this as follows:[63]

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals can. All their lives, forces which they do not recognize and cannot name, have been tugging at them, inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, the total push and pressure of the cosmos, which, when reasons are nicely balanced, must determine where choice shall fall.

Therefore, '[w]e may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.'[64] However, constitutional adjudication requires that judicial officers interpret the Constitution in ways which will give effect to its fundamental values. When the constitutionality of legislation is in issue, judges are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.[65]

Proponents of the Critical Legal Studies Movement highlight the role of ideology in law by claiming that the legal reasoning and justifications of courts are only argumentative techniques. There can never be a 'correct legal solution' that differs from the correct ethical and political solution to a legal problem. The Movement claims that legal text does not constrain the judge's interpretation in any significant way.[66] Therefore, adjudication cannot be separated from subjective interpretation or ideological influence. This statement is founded, at a fundamental level on the notion that, when assigning meaning to the values of the Constitution, each person seeking interpretation will face the danger that what is sought will be a construction of the 'search' instituted to find it. This means that each individual's search for constitutional value interpretation will be a construct of his or her own making. Such construct will depend, in turn, on the subjective disposition of the individual him- or herself. Therefore, when giving meaning to constitutional rights and values, the judge's search is an extension of his- or her own beliefs.

The interpretation by the courts of the Constitution, including its undefined rights and values, is critically important in constitutional litigation. These rights and values are fundamental to, and entrenched in, the Constitution, establishing its character and structure. Judges of the

62 *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 14.
63 Cardozo *The nature of the judicial process* (1946) 12.
64 Cardozo *The nature of the judicial process* (1946) 13.
65 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 22.
66 Kennedy 'Freedom and constraint in adjudication: A critical phenomenology' 1986 *Journal of Legal Education* 518.

South African Constitutional Court recognise the danger of unrestrained subjective interpretation of the Constitution. Therefore, the Constitutional Court seeks to implement the moral vision of the Constitution, as articulated by the imbedded values, while justifying its decisions in terms acceptable to the legal community. Furthermore, the process of interpreting the Constitution must 'recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights'.[67] However, these democratic values are themselves, in turn, open to a degree of subjective interpretation.

The courts recognise that legal training and experience prepare judges for the difficult task of fairly determining where the truth may lie in a welter of contradictory evidence.[68] Legal tradition, in the form of community expectations, the legal training of the judge and the traditions of the bench, the advocates' bars and the different law societies also condition a judge to be fair and just in adjudication. Furthermore, judicial conditions of service and codes of conduct provide valuable guidelines for ensuring a fair trial. Therefore, judges are assumed to be people of conscience and intellectual discipline, capable of judging a particular controversy fairly based on its own circumstances.[69] This will show in instances where the judge may differ from the political, religious or traditional ideology of a party, or may have sympathy with a party, but still adjudicate the case on the strength of constitutional principles to reach a just and lawful conclusion. Furthermore, it is appropriate for judges to bring their own life experience to the adjudication process.[70] Nevertheless, Cardozo asks the following questions:[71]

> If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?

When adjudicating, a judge must recognise the internal view that comes into play when hearing a case. The judge should look to his or her conscience, consider his or her own moral position, the facts and evidence of the case, the litigants and the constitutional rights and values at stake, and conclude that his or her own moral presumptions do not cloud the judgment. The internal view acknowledges that inherent personal views may influence the judgment of the court. This introspective view gives rise to a theory of acknowledgement, which

67 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 21.
68 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 40.
69 *United States v Morgan* 313 U.S. 409 (1941) para 421.
70 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 42.
71 Cardozo *The nature of the judicial process* 10.

allows judges to frame subjective predispositions into the court's reasoning.

In articulating the theory of acknowledgment, the argument of Mokgoro J in *S v Makwanyane*[72] may useful. The judge argued that, because judgments of the courts are articulated and available for criticism and are based on acceptable sources in the form of applicable international and foreign precedent, the interpretation is not subjective. This is true to a certain extent. However, in the quest for objectivity, judges should acknowledge and address the extent of their own predisposition on the case before them. Should the introspection show that the judge's own moral predisposition might be in play, this must be articulated in the court's decision.

CJ Mogoeng Mogoeng's ambivalence over gay rights was put in the spotlight when he dissented from a judgment of the Constitutional Court that said it was not defamatory to call someone gay.[73] The Chief Justice provided no reasons for his dissent. While it is not possible to determine the reason behind the dissent, it seems possible that it was based on his personal moral convictions. If that was indeed the case, for the sake of legal clarity and objectivity it would have been preferable if this was articulated in the judgment. Although it might have opened the decision of the Chief Justice to criticism, it would certainly have been more preferable than a bland denial of subjective predispositions and an absence of justification.

In *Justice Alliance of South Africa v President of the Republic of South Africa*,[74] the Court had to decide whether the Chief Justice might continue to serve after the expiry of the non-renewable term of twelve years.[75] The Court held that any attempt to extend the term of the Chief Justice would be unconstitutional. However, three members of the Court did not agree with the decision of the Court.[76] Neither the names of the dissenting judges nor their reasons for dissent were given. This again raised the spectre of possible subjective predispositions that should have been acknowledged and articulated in the judgment.

The theory of acknowledgment provides legitimacy and objectivity to the judgment by exposing the subjective interpretational element to criticism. The theory of acknowledgement allows for a process through which subjective interpretation becomes objectively verifiable and provides acceptable grounds for interpretation and justification. If subjective adjudication is influenced by the moral presumptions of our judges, it is their duty to articulate and make public such influences for insight and possible criticism.

72 1995 (3) SA 391 (CC) para 300.
73 *Le Roux v Dey* 2011 (3) SA 274 (CC).
74 2011 (5) SA 388 (CC).
75 Section 176 of the *Constitution.*
76 Justice Alliance of South Africa para 95.

The theory of recognition also allows for the realisation of the words of the late Chief Justice Pius Langa:[77]

> Articulating the subjective interpretational element in adjudication allows the realisation of our constitutional legal culture, which requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions.

6 Conclusion

Constitutional interpretation in the so-called hard cases sometimes requires subjective interpretation of the law from the judge. This means that the judge must look outside the accepted law to find sources of interpretation for the current law. In some instances, this could lead to a judgment of the court that is based on or influenced by the judge's own moral, religious or political belief.

In *Makwanyane,* the court had to make a normative value judgment to give effect and meaning to the undefined constitutional rights and values and the justices acknowledged that subjective constitutional interpretation is unavoidable in constitutional jurisprudence. However, this is not compatible with the duty of the court to give a reasoned decision for its judgment.

Therefore, judges should acknowledge and address the extent of their own predisposition on the case before them. Should this introspection show that the judge's own moral predisposition might be in play, this must be articulated in the court's decision. This provides legitimacy and objectivity to the judgment by exposing the subjective interpretational element to criticism. The acknowledgement then allows for a process through which subjective interpretation becomes objectively verifiable and provides acceptable grounds for interpretation and justification.

77 Langa 'Transformative constitutionalism' 2006 *Stell LR* 353.

Claims for damages arising from conduct prohibited under the Competition Act, 1998

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OPSOMMING

Eise vir skade voortvloeiend uit optrede wat verbied word deur die Wet op Mededinging, 1998

Hierdie artikel evalueer die regsraamwerk en sake (siviele eise) vir skade voortvloeiend uit verbode gedrag in terme van die Wet op Mededinging ('die Wet'). Die hoof uitgangspunt is dat die vermoë van individue en instansies (wat skade gely het as gevolg van sodanige verbode gedrag) om skade te eis teen verweerders, effektief sal bydra daartoe om toekomstige oortredings te voorkom en nakoming van die Wet te bevorder. Daar word kennis geneem daarvan dat die reëls met betrekking op siviele eise vir skade wat ontstaan as gevolg van verbode gedrag een van die mees onderontwikkelde areas van ons mededingingsreg is. Verskeie faktore mag die vermoë van klaers ondermyn om tot aksie oor te gaan in siviele howe vir skade wat voortspruit uit verbode gedrag ingevolge die Wet. Sodanige faktore sluit in swak geformuleerde en onvoldoende bepalings in die Wet wat handel met klaers se reg om siviele gedinge in te stel vir skade voortspruited uit verbode gedrag; en vrae rondom die gepastheid van siviele howe as geskikte forums om algemene mededingingskwessies te hanteer en die forums se rol in die evaluering en toekenning van skade gely deur mededinging. In die bespreking en analise wat volg, handel ek breedweg met hierdie kwesssies en ten slotte maak ek gepaste voorstelle om die situasie te verbeter.

1 Introduction

The most underdeveloped area of our competition law is the rules relating to civil claims for damages arising from conduct prohibited under the Competition Act.[1] At the time of the preparation of this paper, only five cases, four of which were class action certification cases and were dealt with, at first, as a single case, had been decided.[2] In terms of

1 89 of 1998.

2 *Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102; *Trustees for the time being of Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 2 SA 213 (SCA); 2013 3 BCLR 279 (SCA); 2013 1 All SA 648 (SCA); *Mukaddam v Pioneer Food (Pty) Ltd* 2013 2 SA 254 (SCA); *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC); 2013 10 BCLR 1135 (CC); and *Nationwide Airlines (Pty) Ltd (in Liquidation) v South African Airways (Pty) Ltd* [2016] ZAGPJHC 213.

How to cite: Munyai 'Claims for damages arising from conduct prohibited under the Competition Act, 1998' 2017 *De Jure* 18-35
http://dx.doi.org/10.17159/2225-7160/2017/v50n1a2

academic writing, there are only two credible textbooks[3] and a handful of accredited journal articles[4] that have attempted to cover the subject. When one adds the fact that civil claims for damages for anticompetitive conduct under the South African Competition Act is procedurally and substantively different from its foreign law counterparts, particularly American antitrust and European competition law, it becomes too apparent that there is not much to work with for anyone wishing to write in this area.

In most discussions and conversations I have had with lay members of the public and students on matters related to the Competition Act, I have often fielded questions around 'whether consumers and companies adversely affected by conduct in contravention of the Competition Act receive any part of the money the offending firm pays as part of a consent agreement with the Competition Commission and as an administrative penalty by an order of the Competition Tribunal'?[5] No, is my regular answer which, invariably, evokes surprise, and even disappointment, among my inquisitors. As is the norm, money paid by the offending firm pursuant to a consent order and as an administrative penalty imposed by the Competition Tribunal does not go to affected firms or consumers, but to the National Revenue Fund administered by the Treasury.[6]

In the nature of things, conduct by a producer or manufacturer found by competition authorities to constitute a prohibited practice may attract multiple suits from an endless chain of complainants. The complainants may range from direct customers (usually corporate customers) to indirect customers or end-users (usually individual consumers). The Competition Act does not preclude any of these customers and consumers, if they have suffered loss or damage as a result of conduct by a defendant found by competition authorities to constitute a prohibited practice, from pursuing action in a civil court for damages. This, as I shall show later, is slightly different from saying 'the Competition Act establishes a right for persons who have suffered loss as a result of conduct found by competition authorities to constitute prohibited practice, to pursue action in a civil court for damages'.[7] It is not clear

3 Brassey et al *Competition Law* (2002) 327–328; and Sutherland and Kemp *Competition Law of South Africa* (LexisNexis Online: last updated November 2015) par 12.3.7.

4 Moodaliyar, Reardon, and Theuerkauf 'The Relationship Between Public and Private Enforcement in Competition Law: A Comparative Analysis of South African, the European Union, and Swiss Law' 2010 *SALJ* 141-162; Mongalo and Nyembezi 'The Court Refuses to Grant a Certification Order in the Breadcartel Class Action Cases: A Closer Examination of the Western Cape judgement' 2012 *Obiter* 367-379; and De Vos 'Opt-in Class Action for Damages Vindicated by Constitutional Court: *Mukaddam v Pioneer Foods* CCT 131/12' 2013 *TSAR* 754-770.

5 The Competition Tribunal derives these powers from s 49D(1) (read together with 58(1)(b)) and 59 of the Competition Act.

6 S 59(4) of the Act. See also s 213 and 216 of the Constitution, 1996.

7 The relevant provision of the Act, section 65(6), only provides that:

whether the Act creates a unique statutory claim, or simply entitles complainants to pursue a common-law delictual claim. Affected parties may opt to pursue their damages claim against the defendant either individually, or collectively, by means of class action, if the requirements of a class action have been met.[8] However, in practice, complainants seeking to claim damages in the civil courts, either individually or in class actions for loss suffered as a result of anticompetitive conduct, will face significant challenges.

This paper evaluates the legislative framework and case law on civil claims for damages arising from conduct prohibited under the Competition Act. The paper proceeds from the general point of view that the ability of complainants to claim damages from defendants for anticompetitive conduct should be one of the main features of the enforcement of the Act. As Scallan, Mbikiwa and Blignaut argues, 'the ability of individuals and firms that have suffered harm, as a consequence of anticompetitive conduct, to claim damages against the defendant will contribute effectively in preventing future contraventions and increase the degree of compliance with the Act'.[9]

The paper observes that there are various factors that may undermine the ability of complainants to pursue successfully actions in civil courts for damages arising from conduct found by competition authorities to constitute prohibited practice under the Competition Act. These includes poorly drafted and inadequate provisions of the Act dealing with complainants' right to institute civil claims for damages arising from anticompetitive conduct; and questions around the suitability of civil courts as appropriate forums for dealing with competition matters generally and their role in the assessment and award of competition

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> A person who has suffered loss or damage as a result of a prohibited practice *may not* commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1).(Emphasis added).

8 As the Supreme Court of Appeal found in *Children's Resource Centre supra* n 2 par 28, these includes: the existence of a class identifiable by objective criteria; a cause of action raising a triable issue; common issues of fact or law raised by the claims of the members of the class; the appropriateness of the relief being sought; and a suitable representative in whose name the class action would be brought. However, in *Mukaddam supra* n 2 pars 34-35 the Constitutional Court warned that:

> These requirements must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise. (My emphasis).

See also Sutherland and Kemp *supra* n 3 par 12.3.7 ff 40-42.

9 Scallan, Mbikiwa, and Blignaut 'Compensating for Harm Arising from Anti-competitive Conduct' paper presented at the Seventh Annual Competition Law, Economics and Policy Conference held between 5 & 6 September 2013 at Sandton Sun, Sandton, Johannesburg, South Africa, 3. See also Moodaliyar et al *supra* n 4 150.

damages. In discussion and analysis that follows, I deal broadly with these issues and make appropriate recommendations in the end.

2 Background

In terms of the size of its staff component, the Competition Commission is a relatively small organisation. It also does not have the budget to equal some of the investigated corporate defendants, and often wrestles in litigation before the Competition Tribunal and the courts. Due to a limited staff component and budget, it is not inconceivable that, in some cases where they feel that the competition breach is too trivial, they may make a decision not to take enforcement action. Whenever they feel that infringement of the Act in a particular instance raises important issues of law and policy, they may, however, be more proactive and aggressive in their enforcement of the Act.

But where the Commission decides not take enforcement action in respect of particular conduct (for example by not referring the relevant conduct to the Competition Tribunal for adjudication) a complainant is not without remedy. A complainant my still initiate a 'private enforcement' in its own name by referring the complaint directly to the Competition Tribunal for adjudication in terms of section 51(1) of the Act.[10] However, even if a complainant is successful in a 'private enforcement' action before the Tribunal in terms of section 51(1), the success may be of little financial significance. This is because a complainant does not receive any part of the amount that may be levied against the defendant as an administrative penalty by the Tribunal in terms of section 59 of the Act. The public character of the remedy that follows the successful litigation of a 'private enforcement' action by complainants under section 51(1) reveals that, despite the identity of a complainant in these proceedings, there is nothing 'private' about this enforcement action. A successful complainant would, after obtaining leave of the Competition Tribunal or Competition Appeal Court in terms of the prescribed certificate, still have to initiate a fresh civil claim to recover damages suffered as a result of conduct by the defendant that has been found by competition authorities to constitute prohibited practice under the Competition Act.[11]

This is what distinguishes private enforcement in South African competition law from similar processes in other jurisdictions, notably European competition law and American antitrust law. In these jurisdictions, firms directly affected by competition law transgressions will prosecute the defendant in the civil courts and seek damages without the involvement of, or dependent upon, any prior finding on the merits by a competition authority.[12] In South African competition law, private

10 S 51(1) of the Act.
11 S 65(6)(b) of the Act.
12 In American antitrust law s 4(a) of The Clayton Act, 1914, 15 USCA § 12 provides that any person injured in his business or property by reason of

enforcement is therefore limited to the pursuit of damages in the civil courts, following a prior finding on the merits against the defendant by competition authorities.[13] In this regard, it is fair to say that competition law enforcement in South Africa is almost exclusively driven by public enforcement, where there is no direct financial reimbursement to complainants for the damage they may have suffered as a result of the defendant's anticompetitive conduct, nor is there a reward for the active role they may have played in the successful litigation against the defendant before competition authorities.

In other jurisdictions, particularly American antitrust law, private enforcement, which encompasses the pursuit for damages for losses arising from anticompetitive conduct, is an indispensable method in the effective enforcement of competition rules.[14] The encouragement of private enforcement in the United States has ensured that American public antitrust enforcement agencies can focus their attention and resources on cases that raise important questions of law and policy, while not allowing anticompetitive conduct to go unpunished.[15]

The effective enforcement of the Competition Act will require the development, and even prioritisation, of our private enforcement regime to ensure that private complainants can successfully claim and recover damages suffered as a result of anticompetitive conduct.[16] This will also

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anything forbidden in the antitrust laws may sue in court and recover threefold the damages sustained and the cost of suit, including a reasonable attorney's fee. In the United States, over ninety percent of antitrust proceedings are initiated directly in the courts by private individuals seeking damages. With regard to private enforcement in European competition law a party who suffered damage as a result of anticompetitive conduct may in terms of recitals 3 and 7 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty of Europe also directly approach a court for damages. See Berrisch, Jordan, and Roldan 'E.U. Competition and Private Actions for Damages, The Symposium on European Competition Law' 2004 *Northwestern Journal of International Law & Business* 588-591; Woods, Sinclair, and Ashton 'Private Enforcement of Community Competition Law: Modernisation and the Road Ahead' 2004 *Competition Policy Newsletter* 31-37; and Whish and Bailey *Competition Law* (2012) 295-296.

13 This is because civil courts in South Africa have no jurisdiction to pronounce on the merits of a competition dispute, including the question whether a violation of the Competition Act has occurred. See s 65(2) of the Competition Act.

14 Scallan et al *supra* n 9 24.

15 Indeed in the United States public enforcement action by antitrust agencies has been overtaken by private enforcement because in private enforcement a plaintiff, if successful, may recover threefold the damage suffered, the so-called 'treble damages'. See *LePage's Inc v Minnesota Mining and Manufacturing Company (3M)* 324 F 3d 141 (3rd Cir 2003) 146; Berrisch et al *supra* n 12 591; and Carstensen 'Remedies for Monopolization from Standard Oil to Microsoft and Intel: the Changing Nature of Monopoly Law from Elimination of Market Power to Regulation of its Use' 2012 *Southern California Law Review* 817.

16 Scallan et al *supra* n 9.

enhance complainants' constitutional right of access to justice embedded in section 34 of the Constitution.[17] Although the Competition Act does not prevent persons who have suffered loss as a result of anticompetitive conduct from pursuing action in a civil court for damages, the usefulness of the relevant provision, in particular section 65, to such persons is doubtful. I turn next to consider the provisions of section 65 of the Competition Act, which is relevant to civil actions for damages arising from prohibited conduct, with a view to highlight its important flaws.

3 Section 65 of the Competition Act

Section 65 provides, in parts relevant for current discussion, that 'a person who has suffered loss or damage as a result of a prohibited practice *may not* commence an action in a civil court for the assessment of the amount or awarding of damages, if that person has been awarded damages in terms of a consent agreement with the Competition Commission that has been confirmed by the Competition Tribunal'.[18] The provision goes on to state that:

> […] if entitled to commence action in a civil court for damages, a person must – when instituting proceedings – file with the Registrar or Clerk of the Court a notice from the Competition Tribunal or Competition Appeal Court certifying, among others, that conduct constituting the basis for the claim has been found to be a prohibited practice in terms of the Competition Act.[19]

The right of a person to bring a claim for damages arising out of a prohibited practice, the provision states further, 'comes into existence on the date of the decision of the Competition Tribunal or, where there is an appeal, on the date that the appeal process is concluded'.[20]

When one looks at section 65 critically, the conclusion is inescapable that the provision does not sufficiently embolden persons who have suffered loss as a result of anticompetitive conduct to pursue actions for damages against defendants. It is one thing to say 'a person who has suffered loss or damage as a result of a prohibited practice *may not* commence an action in a civil court for damages, unless a certain condition is met', which is what section 65 says.[21] It is quite another to say 'a person who has suffered loss or damage as a result of a prohibited practice *may* commence an action in a civil court for damages, provide the following conditions are met', which is what section 65 does not say. The latter is more positive and generous and can be seen to create or establish a statutory claim or right. However, the former is too negative

17 S 34 of the Constitution provides that:
> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

18 S 65(6)(a) of the Act.
19 S 65(6)(b)(i).
20 S 65(9).
21 S 65(6)(a).

and restrictive and can be seen as only permitting a right or claim that may exist under any other law, rather than create or establish a new one.[22]

In *Trustees for the time being for the Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others, Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others*,[23] a case that, in part, concerned an application for certification to commence a class action on behalf of consumers who suffered damage as a result of conduct prohibited under the Competition Act, applicants identified their cause of action as arising from 'the unlawful actions of the respondents in contravention of the Competition Act'.[24] It was not clear whether in this regard applicants framed their cause of action as a claim for damages arising from breach of a statutory duty, to be dealt with in accordance with common-law principles or a statutory action for damages arising directly from section 65 of the Competition Act.[25] However, with regard to the latter, Van Zyl AJ expressed the view that 'I do not regard the provisions of section 65 of the Act to have created such a cause of action'.[26]

On appeal, in *Trustees for the time being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*,[27] the Supreme Court of Appeal, per Wallis J, endorsed Van Zyl AJ's view when it also held that section 65 of the Competition Act does not establish an exclusive statutory claim.[28] This is because, Wallis J found, section 65 merely contemplates 'the possibility' of a claim for damages at the instance of a person who suffered loss or damage in consequence of a prohibited practice'.[29] The provision, he found further:

> does not state that a person who suffered loss or damage in consequence of a prohibited practice will have an action, nor does it purport to determine the requirements for such an action.[30]

The implications of Van Zyl AJ and Wallis J's findings in the above cases are that action for damages in the civil courts in terms of section 65 of the Competition Act may have to be dealt with in accordance with the usual common-law requirements of a delict.[31]

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22 However, Mongalo and Nyembezi argue that even on a cursory reading of s 65 of the Competition Act it is clear that the provision 'gives rise to a civil remedy', Mongalo and Nyembezi *supra* n 4 374.

23 *Children's Resource Centre* WCHC case *supra* n 2.

24 *Idem* par 87.

25 This is because, as other observers note, it is not yet clear what precise cause of action is available to a claimant in terms of s 65, See Scallan et al *supra* n 9 41.

26 *Children's Resource Centre* WCHC case *supra* n 2 par 87.

27 *Children's Resource Centre* SCA case *supra* n 2.

28 *Idem* pars 66–68.

29 *Idem* par 69.

30 *Idem* par 69.

31 In *Judd v Nelson Mandela Bay Municipality* [2011] ZAECPEHC 4 the Court, par 8, succinctly summarised these requirements as follows:
It is commonly recognised that an actionable wrong or delict has five

However, the interpretation given to section 65 of the Competition Act by Van Zyl AJ and Wallis J is not perfect. When the relevant parts of section 65 are considered, an argument can be made that the provision envisages a unique claim for damages arising from practices prohibited under the Competition Act different from a common-law delictual action. The provision, in relevant parts, states that:

> A person who has suffered loss or damage as a result of a prohibited practice may not commence an action in a civil court *for the assessment of the amount or awarding of damages* if that person has been awarded damages in a consent order confirmed in terms of section 49D(1).[32] *(emphasis added).*

If the civil courts were to proceed from the starting point that section 65 is the authority for them to exercise civil jurisdiction over conduct prohibited in terms of the Competition Act, they must apply its provisions faithfully. Civil actions in the courts in terms of section 65 of the Competition Act are *for the assessment of the amount or awarding of damages*. That is what the provision says and nothing more. Proceeding with a section 65 claim in terms of the common-law delictual requirements is different from what is envisaged by section 65. The provision only mandates the courts to *assess the amount or award damages*,[33] because all the relevant considerations that precede this exercise must have already been ventilated by the competition authorities.

The application of common-law delictual requirements to civil claims for damages arising from conduct prohibited under the Competition Act may result in an unacceptable situation where the civil courts inadvertently re-open the merits of a competition dispute. Civil courts have no authority to determine the merits of a competition disputes and may for this reason, arguably, not be a suitable forum for the assessment of the amount or awarding of damages in relation to the infringement of the Competition Act.[34] I turn to this issue in my next discussion.

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elements or requirements, namely; (a) the commission or omission of an act (*actus reus*), (b) which is unlawful or wrongful (wrongfulness), (c) committed negligently or with a particular intent (*culpa* or fault), (d) which results in or causes the harm (causation) and (e) the suffering of injury, loss or damage (harm).
See also Neethling 'Liability for Damage Caused by Veld, Forest and Mountain Fires' 2011 *SALJ* 223 223.

32 S 65(6)(a) of the Act.

33 *Children's Resource Centre* SCA case *supra* n 2 par 72.

34 Brassey et al *supra* n 3 328.

4 Suitability of the Civil Courts in Competition Matters and their Role in Competition Damages

It is important to note that section 65 of the Competition Act, which deals with competition damages, does not seek to establish a separate system of its own which serves a purpose different from that of other provisions of the Act. The Act and all its provisions are aimed at the promotion and maintenance of competition.[35] Just like awards for damages that may form part of consent orders and administrative penalties – which the Tribunal may impose on firms found to have contravened the Act[36] – competition damages are an effective means of ensuring compliance with the Act. Indeed public and private enforcement of competition law in South Africa are intertwined, as the availability of private damages is dependent upon a prior finding by the Tribunal or Competition Appeal Court.[37]

While the general administration of the Competition Act falls under the exclusive jurisdiction of competition authorities,[38] it seems odd that the assessment of the amount and awarding of damages arising from the infringement of the Act is entrusted to the civil courts.[39] As a matter of practical logic, it is hard to see why the assessment of the amount and awarding of damages arising from conduct in violation of the Competition Act should not also form part of the exclusive domain of competition authorities. As a general rule of competition law enforcement, a firm's conduct cannot or should not be found to be anticompetitive and illegal unless there is a valid legal presumption, or it has been factually proven that the conduct in question has caused competitive harm to competitors or consumers.[40] When civil courts address questions of harm and causation – as part of the requirements of a delict – in civil claims for damages arising from anticompetitive conduct, they are more likely inadvertently to re-open the question of competitive harm and thereby encroach into the domain of competition authorities.

35 S 2 of the Act.
36 S 49D(3) (read together with 58(1)(b)) and 59 of the Act.
37 Scallan et al *supra* n 9 25.
38 S 62(1) of the Act.
39 S 62(5) and 65(6)of the Act.
40 *Competition Commission v Patensie Sitrus Beherend Beperk* case no 37/CR/Jun01 2002 ZACT 18 par 95; *Sappi Fine Papers (Pty) Limited v Competition Commission* case no 62/CR/Nov01 2002 ZACT 26 pars 40 and 52; *Competition Commission v South African Airways* (Pty) Limited case no 18/CR/Mar01 2005 ZACT 50 pars 101-105; *Mandla-Matla Publishing (Pty) Ltd v Independent Newspapers (Pty) Ltd* case no 48/CR/Jun04 2006 ZACT 84 pars 77-78; *Competition Commission and Another v British American Tobacco South Africa (Pty) Ltd* case no 05/CR/Feb05 2009 ZACT 46 par 296; and *Competition Commission v Telkom SA Ltd* case no 11/CR/Febr04 2011 ZACT 39 par 99. See also Lewis *Enforcing Competition Rules in South Africa* (2013) 143.

4 1 Suitability of the Civil Courts in Competition Matters

The ability of civil courts to deal appropriately with competition matters is a matter for debate. There are practical and jurisdictional reasons justifying keeping the civil courts out of competition matters altogether. The majority of officials from our competition law enforcement agencies have a general sense of uneasiness around the involvement of the civil courts in competition matters. Many believes that judges, the majority of whom have no knowledge or experience in competition law, are ill-equipped to deal appropriately with competition matters. This argument, though somewhat patronising to the judges, has some merit.

The current Competition Act is a relatively recent piece of legislation, having being in force for only less than 20 years. The Act is in a sense also revolutionary in that its language, concepts, principles, and institutions as well as the economic philosophy underpinning it are very distinct from those of its predecessors.[41] Concepts such as 'abuse of dominance', 'anticompetitive harm', 'concerted practice', 'dominance', 'essential facility', 'excessive price', 'exclusionary act', and 'market power' have very distinct technical economic and legal meanings about which even seasoned competition practitioners often disagree. In view of the fact that judges are generally drawn from a pool of long serving lawyers – many of whom may have been in legal practice long before the Act came into force – it is a real possibility that some may not have the requisite training, knowledge, and experience in this new field of law. For example, in *Trustees for the time being for the Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others, Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others*,[42] the Western Cape High Court continuously referred, erroneously, to the Competition Tribunal as the 'Commission Tribunal'.[43] Although this error was not fatal to the judgment of the Court, it at least shows that civil courts may not be familiar with the Competition Act and its new institutions.

In *Woodlands Dairy (Pty) Ltd and Another v Competition Commission*[44] the Supreme Court of Appeal equated an administrative penalty in competition law to a fine that may be imposed as a sentence in criminal proceedings,[45] when there are obvious differences between the two.[46] In a subsequent matter, *Southern Pipeline Contractors and Another v Competition Commission*,[47] the Competition Appeal Court would complain that:

41 The Regulation of Monopolistic Conditions Act 24 of 1955; and The Maintenance and Promotion of Competition Act 96 of 1979.
42 *Children's Resource Centre* WCHC case *supra* n 2.
43 *Idem* pars 14; 21; 64; 78; and 79.
44 2010 6 SA 108 (SCA); 2011 3 All SA 192 (SCA).
45 *Woodlands Dairy supra* n 44 par 10.
46 *Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v The Competition Commission* 2005 1 CPLR 50 (CAC) 67. See also Munyai 'Making Administrative Penalties Work' 2008 *Juta's Business Law* 23 25-26.
47 Case no 105/CAC/Dec10; 106/CAC/Dec10 2011 ZACAC 6 par 9.

> [T]his equation of administrative penalties, which may be imposed in terms of s 59 of the Act, to criminal fines did not take any cognisance of the judgment of this Court in *Federal-Mogul Southern Africa v Competition Commission,*[48] nor to comparative authority cited in that judgment.[49]

In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*,[50] a case which concerned action by a group of fuel retailers to prevent a new entrant from entering the market in the same area they traded, (White River, Mpumalanga) on socio-economic grounds – *which included the viability of existing filling stations in the area if a new entrant is allowed to enter the market*,[51] the majority of the Constitutional Court judges decided in favour of the incumbent fuel retailers, effectively blocking the new entrant from entering the market.[52]

However, in his dissenting judgment Sachs J argued that he did not believe that the arrival of a new 'competitor' in the market doing the same business in competition with existing filling stations posed any measurable socio-economic threat – above the level of speculation.[53] Unlike the majority, Sachs indicated that he preferred to allow the new entrant to enter the market and, for this reason, he would accordingly dismiss the appeal by the incumbent fuel retailers.[54] Although *Fuel Retailers* was not formally pleaded and argued as a competition matter, but due to the centrality of the competition issues in this case the Constitutional Court, recognising the nature of its jurisdiction and own limitations on competition matters, should have referred the matter to the Competition Tribunal in order for the competition aspects of the case to be dealt with appropriately by a competent authority.[55]

The Competition Act explicitly confers exclusive jurisdiction on competition matters to the competition authorities.[56] However, in *American Natural Soda Ash Corporation v Competition Commission*[57] the

48 *Supra* n 46.
49 *Southern Pipeline Contractors supra* n 47.
50 2007 10 BCLR 1059 (CC); 2007 6 SA 4 (CC).
51 *Idem* pars 5, 9, and 16.
52 *Idem* pars 105 and 108.
53 *Idem* pars 112 and 118.
54 *Idem* par 119.
55 Although judicial etiquette requires that courts should only deal with and decide cases on the basis of issues pleaded and arguments made, the Constitution grants them powers to exercise discretion *mero motu* (of their own accord) to make appropriate interventions if the rule of law or interest of justice requires in order to find the most suitable and effective solution to the issues before them, which in this case could have included referring the matter to the Competition Tribunal, see *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 4 SA 222 (CC); 2009 2 SACR 130 (CC); 2009 7 BCLR 637 (CC) pars 33-34. S 65(2) of the Competition Act also enjoins the courts to refrain from dealing with competition matters but to refer them to the Competition Tribunal.
56 S 62(1) of the Act.
57 2003 5 SA 655 (SCA).

Supreme Court of Appeal, not to be outdone, held that the Competition Act had to be interpreted in accordance with section 168(3) of the Constitution,[58] which would allow the Supreme Court of Appeal (as the final court of appeal in all matters – other than constitutional matters) appellate jurisdiction on competition matters over decisions of the Competition Appeal Court.[59] Following the decision in *American Natural Soda Ash*, a number of subsequent cases went on appeal from the Competition Appeal Court to the Supreme Court of Appeal.[60] To reverse this undesirable trend, section 168(3) of the Constitution was amended in order to restore the exclusive jurisdiction of competition authorities on competition matters.[61]

4 2 The Role of the Civil Courts in Competition Damages

Despite the fact that the Competition Act entrusts civil courts with the responsibility to assess the amount and award damages arising from anticompetitive conduct,[62] the argument that civil courts are not an appropriate forum for this exercise is, in my view, persuasive. Section 65 of the Act, which is the primary authority for civil courts to exercise jurisdiction on competition damages, echoes the legislature's own scepticism over the expertise of civil courts in competition matters.

For example, when petitioned by a person claiming competition damages with notice from the Competition Tribunal or Competition Appeal Court, certifying that conduct constituting the basis for the civil claim has been found to be a prohibited practice, the civil court is bound by that finding.[63] This is consistent with the principle of section 65 that 'if, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, the court must not consider the issue on its merits'.[64] If the issue raised in the civil court is one in respect of which the Competition Tribunal or Competition Appeal Court has made a finding, the civil court must apply the determination of the Tribunal or the Competition Appeal Court.[65] And if the issue has never been determined by the Competition Tribunal or Competition Appeal Court, the civil court must refer the matter back to the Competition Tribunal to be considered on its merits.[66] Failure by a court

58 S 168(3) of the Constitution stated that: 'The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters …'.
59 *American Natural Soda Ash supra* n 57 pars 11-22.
60 *Woodlands Dairy supra* n 44; *Senwes Ltd v Competition Commission* case 118/2010 2011 ZASCA 99; *Competition Commission v Yara (South Africa) (Pty) Ltd* 2013 6 SA 404 (SCA); and *Competition Commission v Computicket (Pty) Ltd* case no 853/2013 2014 ZASCA 185.
61 S 4 of the 17th Constitution Amendment. See also *Computicket supra* n 60 par 10.
62 S 62(5) and 65(6)of the Act.
63 S 65(7).
64 S 65(2).
65 S 65(2)(a).
66 S 65(2)(b).

to adhere to these principles creates a real risk of intrusion into the domain of competition authorities by the courts.

4 3 The Risk of Intrusion into the Domain of Competition Authorities by Civil Courts when Assessing Competition Damages

The assessment of the amount of competition damages arising from anticompetitive conduct in the civil courts is not a straight forward process. At this stage of the development of our competition damages jurisprudence, the rules are not as yet clear. As I contended earlier, on a literal reading of the provisions of section 65(6) of the Act the role of the civil court under the provision is supposed to be a two-step process: the assessment of the amount of damages suffered by the plaintiff as a result of the defendant's conduct and awarding the damages. A court is not required to do more.

However, in *Trustees for the time being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*[67] the Supreme Court of Appeal expressed the view that civil courts, as the forum to which parties who suffer loss as a result of anticompetitive conduct must turn in order to recover those losses, will apply 'conventional principles'.[68] Conventional principles or requirements of a delictual claim are: conduct; wrongfulness; fault; causation; and harm.[69] But all of these requirements, bar fault – which is not a requirement for competition law liability, must already have been considered in the decision of the Competition Tribunal. It is unthinkable that the competition authorities would make their decision without having considered whether there was anticompetitive and therefore illegal conduct which has caused harm to either competitors or consumers. Accordingly, the application of conventional delictual principles would amount to the re-examination of the very issues that the competition authorities have pronounced themselves on and which the civil courts have no jurisdiction to deal with.

In the few decided cases concerning civil claims for damages arising from breach of the Competition Act, there are a number of instances where this has happened. For example, in the *Children's Resource Centre*[70] class action certification case in order to pursue a claim for damages arising from price fixing on behalf of consumers in the Western Cape, the Supreme Court of Appeal found that 'with regard to the proposed class it is clearly too broadly stated and the proposition that it includes virtually all consumers of bread in the Western Cape cannot be correct'.[71]

67 *Children's Resource Centre* SCA case *supra* n 2.
68 *Idem* par 70.
69 *Supra* n 31.
70 *Children's Resource Centre* SCA case *supra* n 2.
71 *Idem* par 77.

But the 'market definition', a concept of competition law used to identify the product(s) and geographic location(s) affected by the alleged anticompetitive conduct, as defined by the competition authorities clearly identified and accepted the Western Cape as one of the areas, in fact the primary area, in which the unlawful conduct of defendants were mostly clearly felt.[72] Not only is it an encroachment on the domain of competition authorities for a civil court to suggest a different market definition for damages purposes than the one already defined by a competition authority in the merits case, it is also unfair to require plaintiffs to claim damages in a narrower market than the one in which the effects of the prohibited practice were felt.

In the *Mukaddam and Others v Pioneer Food (Pty) Ltd and Others*[73] class action certification case, a group of bread distributors who purchased bread from the major bread producers and sold it to informal traders sought leave of the court to sue for damages against the bread makers, following a finding by competition authorities that the conduct of the bread makers, particularly the fixing of discounts the distributors would receive from the bread makers, constituted prohibited practice under the Competition Act.[74] The Supreme Court of Appeal made a series of regrettable findings.

In response to the argument made by the distributors that the conduct of the bread producers caused them to suffer a reduction in gross profit in violation of the Competition Act and their constitutional right to trade,[75] the Court found:

> that would be inconsistent with competition, which necessarily entails that enterprises might be unprofitable and fail. Far from supporting the appellants' constitutional claims, the Competition Act, which the appellants find themselves linking to their constitutional claim, altogether undermines it.[76]

The Competition Act, the Court found further, 'does not purport to protect the profits that an enterprise will make'.[77] On appeal, in *Mukaddam v Pioneer Foods (Pty) Ltd and Others*[78] the Constitutional Court agreed with the Supreme Court of Appeal that while the Constitution provides citizens with a right to enter a trade, profession or occupation, it does not guarantee a right to successful outcomes once having done so.[79] From a competition law perspective, these decisions of the Supreme Court of Appeal and Constitutional Court are wrong.

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72 Indeed the competition dispute had its origin in the Western Cape, see *Children's Resource Centre* WCHC case *supra* n 2 pars 2-20; *Children's Resource Centre* SCA case *supra* n 2 par 5; and *Mukaddam* Constitutional Court case *supra* n 2 par 5.
73 *Mukaddam* SCA case *supra* n 2.
74 *Idem* pars 1–3.
75 *Idem* par 5.
76 *Idem* par 8.
77 *Idem* par 9.
78 *Mukaddam* Constitutional Court case *supra* n 2.
79 *Idem* par 71.

Granted, the Constitution does not guarantee the right of enterprises to make profit. But, as Froneman J observed in his separate judgment in *Mukaddam v Pioneer Foods (Pty) Ltd and Others*,[80] it does not forbid the making of profit either.[81] But Nugent JA couldn't be more wrong in *Mukaddam and Others v Pioneer Food (Pty) Ltd and Others*[82] when he said the Competition Act does not protect or guarantee the profits that an enterprise will make.[83] It actually does. Section 8(c) of the Competition Act prohibits dominant firms from engaging in what it calls an 'exclusionary act'. An 'exclusionary act' is defined in section 1 of the Act as 'an act which impedes or prevents a firm from entering into or expanding within the market'.

The ability of a firm to enter into or expand within the market is inextricably intertwined with the firm's ability attract customers and make profit. If a firm's ability to attract customers and make profit is hampered by anticompetitive and unlawful conduct by a dominant firm, which all the bread producers were,[84] that would constitute an exclusionary act in contravention of the Competition Act. As Froneman J correctly pointed out in his separate judgment in the Constitutional Court *Mukaddam*[85] decision,

> it would be wrong to find that there is no tenable claim in our law when someone alleges that, had there been no price fixing, his or her business could have been better off in the competitive environment that would have followed.[86]

Indeed there are plenty of cases in which the competition authorities have declared conduct by dominant firms which prevents other firms from attracting customers and make profits as exclusionary, anticompetitive, and unlawful.[87]

However, when regard is had to the recent South Gauteng local division competition damages claims decision in *Nationwide Airlines (Pty) Ltd (in Liquidation) v South African Airways (Pty) Ltd*[88] there seems to be light at the end of the tunnel. The claim arose from the finding of the Tribunal in 2010 that SAA had used anticompetitive means to divert customers away from Nationwide and other rivals. In the High Court Nationwide was able to recover damages arising from SAA's breach of

80 *Supra* n 78.
81 *Idem* par 76.
82 *Mukaddam* SCA case *supra* n 2.
83 *Idem* par 9.
84 *Children's Resource Centre* WCHC case *supra* n 2 par 8; *Mukaddam* SCA case *supra* n 2 par 2; and *Mukaddam* Constitutional Court case *supra* n 2 par 3.
85 *Mukaddam* Constitutional Court case *supra* n 2.
86 *Idem* par 76.
87 *Nationwide Poles v Sasol (Oil) Pty Ltd* case no 72/CR/Dec03 2005 ZACT 17; *South African Airways supra* no 40; *Competition Commission v Senwes Limited* case no 110/CR/Dec06 2009 ZACT 8; *Nationwide Airlines (Pty) Ltd v South African Airways (Pty) Limited* case no 80/CR/Sept06 2010 ZACT 13; and *Competition Commission v Telkom* case *supra* n 40.
88 *Nationwide (in Liquidation) v South African Airways supra* n 2.

the Competition Act.[89] There are a number of aspects of this decision that constitutes a positive contribution to our competition damages jurisprudence under section 65(6) of the Competition Act. For example, instead of dealing with the claim on the basis of conventional principles of delict, the Court approached the matter from the angle or perspective proposed in this paper: limiting itself to the assessment of the amount and award of damages without re-opening the issues decided by the competition authorities.

The Court accepted that the causation inquiry in a delictual claim for damages arising from breach of the Competition Act must not go to the merits of the case, but rather to the quantum of the damages.[90] The Court accepted the findings of the Competition Tribunal and Competition Appeal Court on causation because it felt bound by those findings.[91] It, accordingly, rejected SAA's argument, that there are other causal factors which contributed to Nationwide's downfall, as irrelevant because the Tribunal and Competition Appeal Court had already made a finding in that regard against SAA.[92] The Court also made an award of damages that reflected or was based on the market definition as defined by competition authorities.[93] However, it is not easy to tell at this early stage of the development of our competition damages claim jurisprudence what the full implications of the South Gauteng High Court decision in *Nationwide* will be – for a number of reasons.

Firstly, the approach of the Court in *Nationwide* appears to differ with the suggestion made by the Supreme Court of Appeal in *Children's Resource Centre*[94] that when assessing competition damages under section 65(6) of the Competition Act a court must apply 'conventional principles'.[95] Secondly, the *Nationwide* decision does not even refer to or mention the two Supreme Court of Appeal decisions[96] and the Constitutional Court judgment,[97] by which it is bound – all of which deal with section 65(6) of the Competition Act. In fact, the South Gauteng High Court, as per Nicholls J, believed that the matter it was seized with was 'the first of its kind'.[98] Thirdly, in *Nationwide* the only issue for determination by the High Court was quantification of damages to be awarded to Nationwide because SAA had, for all intent and purposes, admitted delictual liability.[99] Accordingly, it is not clear how useful this decision will be in cases where, as is customary in civil actions, delictual liability is disputed and must be established.

89 *Idem* pars 162-163.
90 *Idem* par 12.
91 *Idem* pars 48 and 120.
92 *Idem* par 49.
93 *Idem* par 158.
94 *Children's Resource Centre* SCA case *supra* n 2.
95 *Idem* par 70.
96 *Mukaddam* SCA case *supra* n 2; and *Children's Resource Centre* SCA case *supra* n 2.
97 *Mukaddam* Constitutional Court case *supra* n 2.
98 *Nationwide (in Liquidation) v South African Airways supra* n 2 par 1.
99 *Idem* pars 12 and 14.

In such cases, where delictual liability is disputed and must be established, there is a reasonable possibility, in my view, that courts may inadvertently re-evaluate issues already decided by competition authorities in the merits case. This will be more so if they follow the guidance of the Supreme Court of Appeal, a court of higher authority than the South Gauteng local division, to apply 'conventional principles' when assessing and awarding competition damages in terms of section 65 of the Competition Act.[100] This leaves us with one question that must be answered: to avoid these problems, would it not have been better for the Competition Act to grant competition authorities the powers to assess and award competition damages to complainants who suffer harm as a result of prohibited practices? As I conclude the paper, I will attempt to answer this question.

5 Conclusion and Recommendations

The dominant view held by most commentators is that the Competition Act precludes competition authorities from awarding damages to persons who suffered loss as a result of practices prohibited under the Act.[101] This view is not entirely correct. In terms of section 49D(3) of the Competition Act a consent agreement between the Competition Commission and a respondent that may be confirmed as order of the Competition Tribunal may, with the consent of the complaint, include an award of damages to the complainant.[102] There is no logic, in my view, to allowing damages for losses arising from anticompetitive conduct to be awarded to a complainant in terms of a consent order, without not also allowing the Tribunal and the Competition Appeal Court the same authority to award damages to a complainant as part of their general remedial powers.

The amendment of the Competition Act to provide for the authority of the Competition Tribunal and Competition Appeal Court to award damages to complaints would be a welcome and positive development. The current system, where only a civil court has authority to award competition damages to a complainant outside consent agreements/ orders, must be repealed as it has a number of pitfalls. Firstly, civil courts are not well suited for the role of assessing and awarding competition damages. Although civil courts have considerable experience in dealing with civil claims generally, competition damages under section 65(6) of the Act – which serves a purpose no different from damages that may be awarded by competition authorities pursuant to a consent order – raises significant challenges for the courts due to their proximity to the merits of a competition dispute. As Wilson observes, 'for the same reason that the determination of prohibited practices lies within the exclusive jurisdiction of competition authorities, the assessment and award of

100 *Children's Resource Centre* SCA case *supra* n 2 par 70.
101 Brassey et al *supra* n 3 327; and Sutherland and Kemp *supra* n 3 par 12.3.7.
102 S 49D(3) (read together with section 58(1)(b)) of the Act.

competition damages should fall within the exclusive jurisdiction of such bodies'.[103]

Secondly, the long period it takes for complaints to recover damages for anticompetitive conduct in the civil courts undermines complainants' right of access to justice. A complainant must first wait for a decision of the Competition Tribunal (and the Competition Appeal Court in the event of an appeal) whether a particular practice is prohibited under the Act before commencing action in the high court for damages. Both the competition and civil proceedings usually take many years to complete. Depending on the nature and severity of the competition injury suffered by the complainant as a result of the prohibited practice, it is possible that, by the time the damages are awarded by a civil court, the complainant may already be out of business. Indeed that is what happened in *Nationwide Airlines (Pty) Ltd (in Liquidation) v South African Airways (Pty) Ltd*.[104]

In such circumstances competition damages, when awarded, do not play an important role of promoting competitive conduct in the market, in addition to compensating complainants for their loss. Therefore, amending the Competition Act to enable competition authorities to award competition damages, as proposed here, will not only resolve theoretical jurisdictional questions. It will also contribute effectively towards enhancing complainants' constitutional right of access to justice, which may be undermined by the long period it takes to recover damages.

Finally, the structure and hierarchy of competition authorities also make them well equipped to deal effectively with damages arising from anticompetitive conduct. The competition authorities comprise the Competition Commission; the Competition Tribunal; and the Competition Appeal Court. Decisions of the Competition Commission are appealable to the Competition Tribunal, while the Tribunal's decisions are also appealable to the Competition Appeal Court. The Competition Appeal Court is a court of similar status to a high court,[105] but with superior knowledge and experience on matters concerning the enforcement of the Competition Act. This is the court, together with its subsidiary institutions, with whom the responsibility to assess and award competition damages must lie.

103 Brassey et al *supra* n 3 328.
104 *Nationwide (in Liquidation) v South African Airways supra* n 2.
105 S 36(1)(a) of the Competition Act.

Comparative analysis of *commorientes* – a South African perspective: Part 1

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OPSOMMING

'n Vergelykende analise van *commorientes* – Suid-Afrikaanse perspektief

Die gelyktydige afsterwe van 'n familie, of lede van 'n gesin as gevolg van 'n katastrofiese gebeurtenis, het 'n direkte invloed op die aanwysing van begunstigdes en die bereddering van die oorledenes se boedels. Dit blyk dat natuurrampe en ander rampe aan die toeneem is. Die gelyktydige dood van families en verwante kan 'n geskil ontketen oor die verdeling van die boedels (van persone wat gelyktydig gesterf het). Hierdie artikel speek 'gelyktydige afsterftes' en die uitwerking daarvan op die erfreg oor 'n wye front aan. Die term '*commoriente*' word ontleed en die leerstuk word bespreek soos dit gemanifesteer het in die Romeinse siviele reg en die resepsie daarvan in die Romeins-Hollandse reg. Daarteenoor word die leerstuk in die Engelse gemeenregtelike jurisdiksies bespreek en vergelyk met die Romeins gebaseerde siviele reg wat Europese stelsels beïnvloed het. Die verskillende benaderings om 'gelyktydige sterftes' te bewys, word bespreek. Waar die Anglo-Amerikaanse stelsels die volgorde van sterftes reguleer deur wetgewing (siviele kodes) en gebruik maak van sekere vermoedens in die geval van onsekerheid oor die spesifieke volgorde, volg die Engelse gemeenregtelike jurisdiksies die benadering dat die volgorde van dood 'n feitevraag is wat telkens in die lig van die omstandighede wat gelei het tot die dood, bewys en beantwoord moet word. Die volgorde van dood op 'n oorwig van waarskynlikhede te bewys.

Die historiese aanloop tot hedendaagse benadering en die invloed daarvan op die Suid-Afrikaanse reg word onder die loep geneem. Uit enkele Suid-Afrikaans gerapporteerde hofsake oor die onderwerp, blyk dit dat die 'tradisionele gemenereg' gevolg word en dat die volgorde van dood 'n feitevraag is. Wetgewing wat in ander jurisdiksies in die loop van die twintigste eeu geïmplementeer is om voorsiening maak vir 'n vermoedens van gelyktydige afsterftes, word toegelig. Daar word aangetoon dat statutêre ontwikkelings in ander gemeenregtelike jurisdiksies hoofsaaklik ten doel het gesamentlike eiendomsreg (*joint tenacies*) te reguleer. Ander ontwikkelings hou verband met klousules wat vir substitusie voorsiening maak (in geval van vooroorledenes) en 'gelyktydige afsterf' klousules wat deur testateurs gebruik word by die verlyding van testamente. Ten slotte word 'n kritiese evaluering van die verskillende stelsels gedoen en aangetoon dat Suid-Afrika nie 'n behoefte het aan hervorming nie en waarskynlik die billikste en regverdige benadering van 'hy wat beweer moet bewys' volg.

How to cite: Schoeman-Malan 'Comparative analysis of *commorientes* – a South African perspective: Part 1' 2017 *De Jure* 36-59
http://dx.doi.org/10.17159/2225-7160/2017/v50n1a3

1 Introduction

Simultaneous deaths of spouses or family members are neither rare nor unique.[1] In the current age of globalisation where long distance travel has become commonplace, the chances of common disaster claiming an entire family have increased.[2] Shared tragedies, where unfortunate victims die instantaneously include car accidents, fires, massacres, plane crashes and explosions.[3] Nature also makes for catastrophes such as floods, earthquakes and volcanic eruptions, which have led to the simultaneous demise of thousands of people.[4] Whenever, two or more related people die in the same accident or common disaster, and the order of deaths is uncertain (i.e. which person died first), the issue of simultaneous death arises in relation to dispositions in their wills or concerning the operation of the rules of intestacy.

People who died in the same accident or catastrophe are called '*commorientes*', a term which originates from Latin.[5] From a law of succession perspective, family members are likely to benefit people who are related to them (their loved ones).[6] To inherit from a person, the beneficiary must have outlived (survived) the deceased person.[7] If the order of deaths is unknown or cannot be established, it might have far reaching consequences for the possible testate or intestate beneficiaries.[8]

Problems associated with the sequence of the deaths (of victims) are not novel and have existed from the beginning of humanity.[9] Ascertaining the sequence of deaths where several people died during

1 Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2001) 4-5 and 547; De Waal and Schoeman-Malan *Law of Succession* (2015) 12; Mee 'Commorientes, Joint Tenancies and the Law of Succession' 2005 *Northern Ireland Legal Quarterly* (*NILQ*) 171-199; Schoeman 'Commorientes in Heroënskou' (*Commorientes* Reconsidered) 1999 *De Jure* 108 ff; Derrett 'Commorientes' 1977 *University of Ceylon Review* (*UCR*) 55 ff (also in *Essays in classical and modern Hindu law* 270 ff).

2 See Tracy and Adams 'Evidence of survivorship in common disaster cases' 1940 *Michigan Law Review* (*MLR*) 801 for 'common disaster'; Nótári and Papp 'The problem of simultaneous death in the law of inheritance – historical and comparative approaches' 2013 *Fiat Justitia* (*FJ*) 12-28; Lazarus 'Work of Appellate Courts: Private law: Successions and donations: *Commorientes*' 1974 *Louisiana Law Review* (*LLR*) 363-365.

3 Tracy and Adams (*MLR*) 801; Nathan 'Common disasters and common sense in Louisiana' 1966-1967 *Tulane Law Review* (*TLR*) 30 39-40 fn 19.

4 Tracy and Adams (*MLR*) 801; Nótári and Papp (*FJ*) 12.

5 See *'commorior'* in *WordSense.eu Online Dictionary – commorior* (Latin). Alternative forms – '*conmorior*'. Verb – 'I die with another' (accessed 2016-02-16). See also Phillips and Berger *Encyclopedic Dictionary of Roman Law* (1953) 400.

6 Dollar '"Common Disaster": Confusion' (2014-08) *Sunlife Advisory Notes* (*SAN*) 1-7.

7 Corbett *et al* 4-5 and 547; De Waal and Schoeman-Malan 12.

8 Tracy and Adams (*MLR*) 801ff.

9 Rickards explains: 'Throughout human history, there have been many world events that have seen a multitude of deaths and widespread

war or as result of a natural disaster has always been problematic. The chaos that normally reigns in the aftermath of such disaster complicates the issue as one is often left with very little evidence of what precisely happened during the demise of people.[10] The following remarks made during the 1940's by Tracy and Adams evince of the long-standing problems concerning the simultaneous death of related people:[11]

> Almost daily, newspapers recount the details of another auto-mobile accident or airplane crash in which numerous persons are killed – a common disaster. *And determination of survivorship in common disaster cases present some of the most vexing problems that lawyers and judges meet*. Lawyers must search for evidence, frequently hard to obtain, and then must face difficult questions of relevancy, materiality, and probative value, since in almost all cases where any evidence is available it is wholly circumstantial.[12]

Although the *commorientes* doctrine is a universal concept recognised across legal systems,[13] there are material differences between the approach adopted by on the one hand, the Roman civil law (and later the Roman Dutch law), which regulated the order of deaths through codes (legislation and civil codes),[14] and, on the other hand, the common-law jurisdictions (influenced by English common law) which based their approach to 'simultaneous deaths' on precedents from case law to determine the sequence of death.[15]

Present day principles of law of succession on 'simultaneous death' have become a complex and intertwined set of rules,[16] and reflect

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destruction'. See Rickards '10 Deadliest World Events in Human History' *Listverse* available from listverse.com/2013/01/03/10-deadliest-world-events-in-human-history/ (accessed 2013-01-03).

10 Orji 'Simultaneity of death and survivorship – law of uncertainty and improbability' 2013 *The Conveyancer and Property Lawyer* (*CPL*) 501 504.

11 Tracy and Adams (*MLR*) 801. They refer to the first case *Broughton v Randall* Croke's Reports, during the time of Queen Elizabeth (Co Eliz) 502 (1596) where the principles of survivorship were apparently considered when a double hanging took place. The court found (on the evidence presented) that the son survived his father as his legs kicked (in reflex).

12 Own emphasis. See also Roeleveld 'Questions concerning simultaneous deaths' 1970 *Acta Juridica* 31-52 33.

13 De Beer *Simultaneous death: Arbitrary fact* (2012 LLM dissertation NWU) 6: 'Due to the uncertain, and at times impractical nature of the term, it is governed by statute in modern law'.

14 Using certain presumptions to prove the sequence in case of 'uncertainty'. See Hunter *A Systematic and Historical Exposition of Roman Law in the order of a Code* (1803) (D 34.5.18 pr) 928.

15 Here the order of deaths remained a factual question and had to be proved. See Re 'The Roman contribution to the Common Law' 1961 *Fordham L Rev* (*FLR*) 447 482; Chapman 'The presumption of survivorship' 1914 *University of Pennsylvania Law Review* (*UPLR*) 585; Yntema 'Roman law and its influence on Western civilization' 1949 *Cornell Law Review* (*Cor LR*) 77 ff and Gallanis 'Death by Disaster: Anglo-American Presumptions, 1766-2006' in Helmholz & Sellar (eds) *The law of presumptions: Essays in Comparative Legal History* (2009) 189-200.

16 This contribution does not deal with the harmonisation of law of succession. See Thomas 'Harmonising the law in a multilingual environment with different legal systems: lessons to be drawn from the

different approaches which, understandably, sometimes result in confusion and anomalies.[17] In this contribution the origin, history and differences of approached to the doctrine as manifested in civil and common law jurisdictions are investigated. The diverse approaches (and developments) in different systems are identified and compared.[18] In addition, the impact of joint tenancies and common calamity clauses are considered in the context of simultaneous deaths.[19] The current state of the '*commorientes*' doctrine in South African law is discussed critically and appropriate reform proposed will be considered.[20]

2 Requirements for Death and Survivorship in the Law of Succession

In all legal systems, two universal requirements have to be met for both testate and intestate succession to become operative.[21] Firstly, there must be a deceased person[22] and, secondly, the beneficiaries of the deceased must be alive at the time of *delatio*.[23] As the estate only falls open (*dies cedit*) and rights vest (*dies venit*) upon the death of a person,[24]

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legal history of South Africa' 2008 *Fundamina* 133-155; Verbeke and Lelue *Harmonisation of the Law of Succession in Europe* (2010) 335 ff and Working group Max Planck Institute for Comparative and International Private Law 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession' 27-05-2010 (version of 26-03-2010) *Rabels Zeitschrift* (*RZ*) 74 (2010) 27.

17 88th Report of the Law Reform Committee of South Australia 'Relating to problems of proof of survivorship as between two or more persons dying at about the same time in one accident' *LRCSA* (1985) 3-39. Especially in mixed-jurisdictions such as South Africa. See Tetley 'Mixed jurisdictions: common law vs civil law (codified and uncodified)' Part I 1999 *Uniform Law Rev* (*ULR*) 591 599: 'Mixed jurisdictions are legal systems in which the Romano Germanic tradition has become suffused to some degree by Anglo-American law'.

18 Garner *A Dictionary of Modern Legal Usage* (1995) 180.

19 See Pawlowski and Brown 'Joint tenancies and English *commorientes*: a question of survivorship or severance?' 2011 *Property Law Review* (*PLR*) 122-134.

20 Verbeke and Lelue 335 ff; Max Planck Working group (*RZ*) 27.

21 See Maasdorp *The Law of Persons* (1947) 130 ff; Corbett *et al* 5; De Waal and Schoeman-Malan 12; Lazarus (*LLR*) 363; Schuster *The principles of German Civil law* (1907) 31; Kimbrough,'Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection' 1994 William & Mary L Rev 269; Van der Burght and Ebben *Erfrecht* (2004) § 18-20; Casey *et al Will Probate and Estates* (2014) 26-27.

22 See *Succession of Feist* 274 So 2d 806 [La Ct App (1973)].

23 *Ex parte Wessels and Venter: In re Pyke-Nott's Insolvent Estate* 1996 2 SA 677 (O) 681B-C; See Van der Burght and Ebben § 19; Asser-Perrick *Erfrecht en Schenking* (2009) n 28; Boezaart *Law of Persons* (2010) 17; De Waal and Schoeman-Malan 12.

24 Corbett *et al* 5; De Waal and Schoeman-Malan 11-12; Lazarus (*LLR*) 363; Schuster 31; Van der Burght and Ebben § 18; Casey *et al* 26-27. Capron and

the division of the estates of several persons that have fallen open more or less at the same time, the interpretation of their wills or the application of the rules of intestate succession impacts on the distribution of their estates.[25] The establishment of the exact time of death,[26] consequently, becomes crucial – particularly when the devolution of assets depends upon the order of death on the one hand, and the determination of survivorship on the other.[27] Once a disaster or tragedy (in the context of the law of succession) has occurred and it has been established that there were several deaths, the sequence of deaths of related people become of the utmost importance for survivors.[28] In *Thomas v Anderson* the moment of death was explained as follows:[29] 'Death occurs precisely when life ceases and does not occur until the heart stops beating and respiration ends. Death is not a continuous event and is an event that takes place at a precise time.' Corbett and others explain it as follows:[30]

> Succession is conditional on survivorship. No person can succeed as an heir or legatee unless he or she survives the deceased person. One who has predeceased or died simultaneously with the deceased person cannot take any benefits from the estate; the will, however, may specifically provide that such person's estate may benefit.'

Determination of the facts (who died first and who survived) is, however, only the first step of a comprehensive exercise to establish the status of the deceased and also, at the same time, to establish the survival and

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Kass 'A statutory definition of the standards for determining human death: An appraisal and a proposal' 1972 *University of Pennsylvania Law Review* (*UPLR*) 87 and 89-90.

25 *S v Williams* 1986 4 SA 1188 (A); *Harris Trust & Savings Bank v Jackson* 412 Ill 261; 106 N E 2d 188 (Supreme Court of Illinois 1952) (heirs of person determined as of time of death of that person). See also Tracy and Adams (*MLR*) 804; Lazarus (*LLR*) 362; Corbett *et al* 5.

26 See Murray 'Law of Succession (including Administration of Estates)' 1978 *Annual Survey* 347 364: 'A further complication is the differing views that have been held as to when death is deemed actually to have occurred. Is it when the heart stops beating, or breathing ceases, or when the nerve centre of the brain ceases to function'. See De Beer 6; Chapman (*UPLR*) 585; Belkin *Death before dying: History, medicine and brain death* (2014) 100 101; Provence 'Proof of life: Understanding the Uniform Simultaneous Death Act' (2014-19-06) *Advanced Estate Issues* Probate (*AEI*) 101 and Breslauer 'Foreign presumptions and declarations of death and English Private International Law' 1947 *Modern Law Review* (*MLR*) 122 ff.

27 See Phillips 'Time of death: does it matter?' 2010 *California Law Journal* (*Cal LR)*; Derrett (*UCR*) 62 and Chapman (*UPLR*) 585; De Beer 6; Casey *et al* 26-27.

28 See also Capron and Kass (*UPLR*) 89-90: 'The right to a portion of the testator's estate therefore depends upon the beneficiary surviving the deceased. When several people related to one another die together, survivorship will determine the vesting of rights and the lawfulness of claims'.

29 1950 215 P 2d 478 (California District Court of Appeals). See also Ryan 'The Uniform Determination of Death Act: An effective solution to the problem of defining death' 1982 *Washington and Lee Law Review* (*WLLR*) 1517-1518; Lazarus (*LLR*) 363; Schuster 31; Van der Burght and Ebben § 18; Casey *et al* 26-27.

30 Corbett *et al* 5 and 574.

standing of potential heirs in terms of the testate or intestate succession.[31]

3 Origin of 'Simultaneous Deaths' and *'Commorientes'* Doctrines

The term '*commorientes'* is universally used across legal systems, to describe people who died simultaneously (in the same disaster or catastrophe).[32] The origin of the word lies in the Latin word *commorior* (die together).[33] Kinsella explains '*commorientes'* as the phenomenon of several persons respectively entitled to inherit from one another, who die simultaneously in the same event (such as a shipwreck), without any possibility of ascertaining who died first.[34] The Latin word '*commorientes*' (*de commorientibus*) is found in one text of *Ulpianus,* while similar words, such as '*simul perierint', simil obissent*', are mentioned in other texts to refer to people who died due to the same accident.[35]

'Simultaneous deaths' and '*commorientes*' have been used and are still used as synonyms in both civil law and common law jurisdictions. Although the literal interpretation of 'simultaneous death' means that people died together (factually at the same time), it is apparent that the term '*commorientes'* is not only used in a literal sense but also to refer to persons who died in the same event or catastrophe (common disaster).[36] Chapman explains it as follows:[37]

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31 In *Thomas v Anderson* the court ruled on the issue of who of two persons died first is *a question of fact for the determination* of the trial court.

32 See Garner 180. Also see http://legaldictionary.thefreedictionary.com/Simultaneous+death and http://dictionary.thelaw.com/commorientes/ (accessed 2015-08-28); Roeleveld 31 ff; Schuster 31; Van der Burght and Ebben § 20; Asser-Perrick n 28.

33 See *WordSense.eu Online Dictionary - commorior* (Latin); Phillips and Berger 400.

34 'Common-law terminology and its relationship to Civil law terminology' http://www.kinsellalaw.com/wp-content/uploads/publications/kinsella_civil-law-dictionary-pba.pdf (accessed 2015-12-23).

35 See De Beer 6. Hamza (*AUV*) 43 ff: 'In the sources of the Roman right [law] one doesn't find *any general technical term* that appears in the fragments treating legal questions been born following the décés in the same event of several people. The expression relative 'commorientes' to several deceased in the same event is only [found] in only one source (D 24.1.32.14).' See also Nótári and Papp (*FJ*) 12.

36 See De Beer 6. The definition was recently confirmed in *Mandin Estate v Willey* 160 DLR 4th 36 (1996); *Re Mandin Estate* 1998 Alberta Court of Appeal (ABCA) 165 § 2; See also Contributor 'Statutory solutions of the problem of survival in a common disaster' 1936 *Harvard Law Review* (*HLR*) 344 and n 5 http://heinonline.org (accessed 2015-11-13); Tracy and Adams (*MLR*) 802; Nótári and Papp (*FJ*) 14; Mee (*NILQ*) 174; Pauchard 'How ancient Rome influenced European law' 19-08-2013 *Legal Roman Eagles* (*LRE*).

37 (*UPLR*) 585.

> The terms 'common disaster,' 'same accident,' 'common calamity,' 'same catastrophe,' and similar terms – are used to indicate the event which has ended the lives of two or more persons and made it necessary to determine which if any survived. The terms are broad enough to include anything from death in battle or by murder, to death in flood, fire or shipwreck.

A present-day denotation of the word confirms that it is still used as a broad concept,[38] to indicate those who died at the *same time,* as well as being applicable to situations where several persons die in the *same accident* (the phenomenon of people dying in the same (related) circumstances).[39] The term is, furthermore, also used to refer to situations where there is *uncertainty* about who survived or who died first, often due to the fact that there is no evidence as to what the sequence of death was.[40]

Although the specific word (*commorientes*) is used only once,[41] it is generally accepted that the origin of the 'principle of simultaneous death' lies is Justinian's *Digest*.[42] Hohmann refers to the relevant manuscripts in the *Digest*:[43]

> For similar reasons, presumptions establishing a sequence of death for parents and children dying together cannot claim to have a firm probabilistic foundation either. In some cases, the parents are presumed to have died before the children (D.34.5.9[10].1; D.34.5.9[10].4; D.34.5.22[23]), and in others, the reverse is presumed (D.23.4.26; D.34.5.9[10].4; D.34.5.23[24]). The cutoff [sic] point at which the presumption switches is the reaching of

38 Tracy and Adams (*MLR*) 802 explain that 'common disaster' as a brought concept.

39 See Anonymous, "Commorientes", available at http://dictionary.thelaw.com/commorientes/ (accessed 2015-11-13). See also Lazarus (*LLR*) 363. In the 'Joint Response of the Law Society of England & Wales and the Society of Trust & Estate Practitioners to the European Commission's Green Paper on Succession and Wills' (*LCEW* and *STEP*) 1-20 *ec.europa.eu/justice/news/consulting_public/successions/.../contribution_ls_en.pdf* (accessed 2016-06-01) it is suggested that the use of the established term '*commorientes*' may be more useful than the term 'simultaneous death'.

40 Kinsella http://www.kinsellalaw.com; Mee (*NILQ*) 171; Corbett *et al* 5; Nathan (*TLR*) 39. See also Derrett (*UCR*) 60 explains that '*commorientes*' is also used to refer to the dying persons themselves.

41 Chapman (*UPLR*) 585; Hohmann 'Presumptions in Roman Legal Argumentation' (2001-05-17) *OSSA Conference Archive* Paper 61 1-15; See Voet 34 5 3 and 36 1 16 (Gane's translation 1956) 256-257; Schuster 31; Von Madai ?*Roman law Lehrbuch des Pandecten-Rechts* (1844) 373; Conway and Bertsche 'The New York Simultaneous Death Law' 1944 *Fordham L Review* (*FLR*) 18 n 10; Roeleveld 31-32; Nótári and Papp (*FJ*) 14; Pauchard (*LRE*).

42 Some modern-day scholars do not agree that the word '*commorientes*' stems directly from presumptions in the *Digest* of Justinian. See *D* 24 1 32 14: '… licet de commorientibus oratio non senserit'. See Scott *The Digest or Pandects of Justinian* (1932) translation. See Hamza 'Réflexions sur les présomptions relatives aux comourants (*commorientes*) en Droit romain' (Reflexions [sic] on the presumptions relating to commorientes in Roman law) 1976 *Acta Univ Budapestinensis Sectio Politico Juridica* (*AUV*) (2008 translation) 43-68 and Nótári and Papp (*FJ*) 12 ff.

43 *OSSA* 2.

puberty, which in Roman law marked the coming of age and was set at twelve for girls and at fourteen for boys.

4 Historical Approaches to '*Commorientes*'

In essence, the foremost difference between Roman civil law, as reflected in the *Digest,* and uncodified English common law, lies in the approach to the *proof of simultaneous deaths* (order of death).[44] Roman law applied presumptions to establish the sequence of death, while English common law required factual proof of the exact order and applied the 'no presumption rule'.[45] If there is proof of the order of death, the distribution of the estates will follow that sequence. However, if the order of deaths is 'uncertain', the methods of determining survivorship by means of presumptions based on the relative strength of the parties – as opposed to proof of death by evidence – can lead to different results for instituted beneficiaries.[46] For example: If A and B are heirs of each other and the younger of the two deceased persons, A, is presumed to have survived the older, B, the estate of the presumed first deceased, B, would be channelled through the presumed survivor, A, barring the beneficiaries of the presumed predeceased, B, to inherit from the first deceased.[47] If there is no presumption, A and B, would be regarded as having died simultaneously and they will not be beneficiaries of one another.

4 1 Roman Law 'Presumption of Survivorship'

As seen above the Roman law used presumptions, explained in *Justinian's Digest,* to establish the sequence of deaths.[48] Characteristic of the Roman manuscripts is that it discloses several tailor-made presumptions to establish the order of death when simultaneous deaths due to a common cause had occurred.[49] The order of deaths is based on

44 See Tracy and Adams (*MLR*) 801; Gallanis 189-200; Roeleveld 31-33; Corbett *et al* 4-5; Nótári and Papp (*FJ*) 12; Corbett *et al* 4-5 and Mee (*NILQ*) 178.

45 See Hamza (*AUV*) 43; Hunter 928; Benas and O K F 'Notes of Cases' 6 1942 *Modern Law Review* (*MLR*) 88-90; *LRCSA* (1985) 1-39. Nótári and Papp (*FJ*) 12.

46 *HLR* 344 and n 5; Nathan (*TLR*) 39-40 fn 19; Nótári and Papp (*FJ*) 12.

47 Derrett (*UCR*) 56-62. *Re Bate* [1947] 2 All ER 418; *Ross's Judicial Factor v Martin* [1955] SC (House of Lords) 56; *Adare v Fairplay* [1956] OR 188 (Court of Appeal for Ontario) where a couple died together in their house from carbon monoxide poisoning; *Re Trenaman* [1962] South Australian State Reports (SASR) 95; *Janus v Tarasewicz* 135 Illinois Court of Appeals 3d 936, 482 NE 2d 418 Ill 1985; *Leete v Sherman* 290 Michigan App 647 803 NW2d 889 (2010).

48 Sherman *Roman Law in the Modern World: Manual of Roman law illustrated by Anglo-American law and the modern codes* (1917) 42-43. See Scott's translation on *Digest* 34 5 23; *Digest* 34 5 24; *Digest* 34 5 9; *Digest* 24 1 32 14. See also Derrett (*UCR*) 62 ff and Hohmann *OSSA* 2.

49 Chapman (*UPLR*) 585; Hohmann *OSSA* 1-15; Voet 34 5 3 and 36 1 16 (Gane's translation 1956) 256-257; Schuster 31; Von Madai ? 373; Conway

different status significances,[50] namely relationship, physical strength, age and gender of the departed persons.[51] Nótári and Papp, in their discussion of the old Justinian manuscripts, conclude:[52]

> With regard to the regulation of inheritance from each other of persons who died in a common event / common disaster Roman law textbooks state, that [sic] the following: '*To make it easier to decide inheritance disputes, in post-classical Roman law it has been presumed that in circumstances where ascendants and descendants died in a common disaster, underage children were deemed to have died before their parents, and grownup children to have died after their parents'.*

Despite the 'situation specific presumptions', it is important to note that the presumptions in the *Digest* (although based on age and gender) were applicable in circumstances where there was 'uncertainty'. Phrases such as: 'If it *cannot be ascertained* which of them died first' and 'but *if this cannot be proved*, the question becomes difficult,' indicate the broader principle which Derrett refers to when he explains the underlining principles of Roman law:[53]

> The Romans had a regard for the likelihood in the situation under discussion; and where the doubt was as to what course should be taken they adhered to that which was most practical. True to this outlook we find numerous discussions belonging to the topic *de commorientibus* which assume that two persons die at the same time or about the same time in the same disaster, in all of which the first question asked is whether one survived.

As will be discussed below, the broader principle of 'uncertainty' is also reflected in later Continental codes influenced by the Roman law.[54]

4 2 Roman Dutch Law Presumptions

The presumptions known in Roman law were received into the Roman Dutch Law.[55] Voet refers (amongst other presumptions) to the presumption of simultaneous death when a freeman and his son die in a

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and Bertsche (*FLR*) 18; Roeleveld 31-32; Nótári and Papp (*FJ*) 14; Pauchard (*LRE*).

50 For a discussion of Gaius, Bartolus and Iavolenus see Derrett (*UCR*) 65 fn 19-20.

51 Hamza (*AUV*) 43.

52 (*FJ*) 12; Hohmann *OSSA* 1-15; Hunter 928; Conway and Bertsche (*FLR*) 18; Roeleveld 31-32.

53 (*UCR*) 63. He notices that in many of these cases the jurists were content that for practical purposes neither survived the other. See also Sherman 42; Gallanis 189-200; Hohmann *OSSA* 3; Conway and Bertsche (*FLR*) 18 n 10; Roeleveld 31-32; Nótári and Papp (*FJ*) 14.

54 Chapman (*UPLR*) 586 refers to *Cowman v Rogers* 73 Md 403; 21 At Rep 64 (1891).

55 Sherman 42; Cowan *Roman Dutch law* (undated) http://global.britannica.com/topic/Roman-Dutch-law states: 'In the southern Netherlands (today's Belgium), the reception of Roman law began in the 13th century and was completed by the 16th century'.

shipwreck together.[56] He also refers to the 'general presumption' that if people die together (in the same catastrophe),[57] no one is deemed to have survived the other unless it is proved otherwise.[58] This presumption (that neither survived the other) became known as the 'no survivorship rule'.[59] The reception of this doctrine from Roman law sometimes seems to be ambiguous and one must keep in mind the following remark by Derrett:[60]

> It is little wonder that the countries of the civil law tradition have not spoken with one voice on this subject. The Roman law was complicated, and, illustrated with these few examples in Justinian's Digest, not entirely perspicuous and decisive. It left a good deal of room for judicial equity, which hampers the descendants of the jurists who do not share their atmosphere or their skill.

Although the Roman Dutch scholars managed to merge Roman law with some legal concepts taken from the traditional Germanic customary law of the Netherlands, they themselves abandoned Roman-Dutch law when they placed themselves under the code of the usual Continental type.[61] The Dutch, however, had introduced the legal system of their state to their colonies.[62] In this way, the Dutch variety of the European *ius commune* came to be applied in South Africa, Scotland and Sri Lanka and forms the foundation of South African law (of succession).[63] As will be

56 See *D* 34 5 3 and *D* 36 1 16. See Derrett (*UCR*) 62; Van Mourick *et al* 25; Schuster 31; Mee (*NILQ*) 171-199; Roeleveld 34 and his reference in n 5 to '*Tractatus de repraesentatione* (1676) and n 6 '*Leges Municipales adMechlin* (Antwerp 1626). *Cf* Nathan (*TLR*) 42; Nótári and Papp (*FJ*) 16. Kaser *Das Römische Privatrecht* 1 (1955), 237 who gives references to modern continental discussions of the presumptions (at n 21).

57 Voet *D* 34 5 3. Williams (*YLJ*) 156; Derrett (*UCR*) 64 n 16 refers to Johan à Someren '*Tractatus de Repraesentatione* (1673) III 59-60.

58 When there is doubt as to who survived, the son (younger) is presumed to have died first. See Cowan (undated); Hunter 929; Heubner *A History of Germanic Private law* (Philbrick's translation) (1918) 46; Hamza (*AUV*) 43-68; Derrett (*UCR*) 62; Nótári and Papp (*FJ*) 19 and Van Mourick *et al Erfrecht* (2011- II 2) 25.

59 See Derrett (*UCR*) 64 fn 17 explain the reception of presumptions.

60 (*UCR*) 63. They advised that the *Digest* should be read with the commentary of Voet. They refer also to Menochio *De Praesumptionibus Coniecturis* VI 50 (Venice 1590 II 108-111), where the principles and instance are compendiously and clearly set out.

61 See Lee *An Introduction to Roman-Dutch Law* (1946) 369; Zimmermann and Visser 'South African Law as a Mixed Legal System' in *Southern Cross: Civil Law and Common Law in South Africa* (1996) 3 n 16 and 2-13 and 2-13; Williams (*YLJ*) 156.

62 Du Toit 278.

63 Williams (*YLJ*) 156 explains: 'The consequence is that one must go back to a comparatively remote period for the majority of the text-writers and cite as authorities books no longer authoritative among the Dutch themselves'. See also Meijer and Meijer 'Influence of the Code Civil in the Netherlands' 14 2002 *European Journal of Law and Economics* (*EJLE*) 227-236. For SA law see Lee *The History of South African Law and its Roman-Dutch Roots* (2002) 1; Lee (1946) 369; Du Toit 282.

discussed below, neither Roman nor Roman Dutch law influenced the simultaneous deaths-doctrine in the South African context.[64]

4 3 Continental Codifications on '*Commorientes*'

Most continental jurisdictions received the civil law doctrine on '*commorientes*' from ancient Rome and retained it by codification.[65] The early application of the principles is explained by Chapman:[66]

> As illustrations of the way in which the civilians decided these cases, we find that in 1572 the Parliament of Paris dealing with survivorship in the Massacre of St. Bartholomew, decided that parents would be slain before their children because the slayers would regard them as the more dangerous. In 1629 a mother and her daughter, aged four years, were drowned in the Loire, the Parliament of Paris held that it would be presumed that a child of such tender years died first.[67] In 1658 a father and son were slain in the battle of the Dunes and on the same day the daughter became a nun and therefore civilly dead at the same hour the battle began. The court held that the son should be decided to have survived.[68]

The *Napoleonic Code*, enacted in1804, showed similarities with the Roman law approach towards 'simultaneous deaths'. It provided for a complex set of presumptions where persons who were entitled to inherit from one another, had died in the same catastrophe.[69] The following rules were applied when it was not possible to ascertain who had died first: If all persons were over 60 years of age, the youngest is presumed to have survived; if they are all under 15 years of age, the eldest is presumed to have survived; if they are between 15 and 60 years of age, the male is presumed to have survived, provided there is a difference of age of not more than one year; or if they are all males or all females the youngest is presumed to have survived.[70]

Yntema explains the outline of the Code:[71]

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64 See Roeleveld 33; Schoeman 108-109; Corbett *et al* 5; Boezaart 157; De Waal and Schoeman-Malan 12.

65 For the position in Italy see Menochio *De Praesumptionibus Coniecturis* 108-111, where the principles and instance are compendiously and clearly set out. In 1495, Roman law was officially declared as subsidiary applicable in Germany. Sherman 42-43.

66 (*UPLR*) 587.

67 Stryk Diss io C.

68 Fodere Vol 2 220. Also see Puelinckx-en Coene 'De commoriëntenleer, een voorbijgestreefde theorie' 1970 TPR 239.

69 See also Tracy and Adams (*MLR*) 806 n 40; Hamza (*AUV*) 43-68; Lazarus (*LLR*) 364; Nathan (*TLR*) 42; Tetley (*ULR*) 600.

70 See Derrett 66-67. See the former Art 720–722 of the *French Civil Code* (until 2001) and Hunter 928: 'When it is uncertain whether the legatee or the testator died first. In cases of apparently simultaneous death of two or more people, as by shipwreck, fire, or in battle, it often was material, in determining the devolution of an inheritance or the fate'. See also Garb and Wood § 3.28 for Austria; Sherman 42; Pauchard (*LRE*); Roeleveld 38 for France and Belgium. Roeleveld refers to Planiol *Traitepratique du droit civil francais* 1710-1719 who apparently criticise the presumptions.

71 (*Cor LR*) 77.

> The theoretical refinement of the modern civil law, however deeply indebted for its inspiration to the Roman sources, is largely post-Roman, and its symmetrical organization in the Code Napoleon and succeeding modern codifications is the product of scholastic attainments or at least interest in synthetic analysis, that neither the Roman jurists nor the English judges customarily displayed.

The Code was originally introduced into areas under French control such as Belgium, Luxembourg and parts of Western Germany, either in the form of (i) simple translation of the provisions or (ii) sometimes with considerable modifications. The influence of the *Napoleonic Code* was diminished at the turn of the 20th century by the introduction of the moderated *Dutch Civil Code* (1838),[72] the *German Civil Code* (1900)[73] and, the *Swiss Civil Code* (1907).[74] The reason why the detailed rules of the French law were not adopted in other continental jurisdictions is that they were regarded as to complicated.[75] The Dutch, German, Swiss and Austrian law adopted a presumption of 'no survivorship'.[76] Derrett explains:

> Although the approach (to use presumptions) is retained, the presumption was simplified. Germany, Switzerland and Greece have remained faithful to the fundamental Roman concept, and have enacted the simple rule that simultaneous death is presumed. As we have seen, the rule that neither is understood to have survived the other amounts in fact to a presumption of simultaneous death. As we saw at the outset this solution causes serious problems when property is limited to pass upon a survival or non-survival or predecease.

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72 *Burgerlijk Wetboek* (BW – *Dutch Civil Code*) of 1838. See also Williams (*YLR*) 156; Asser-Perrick n 28. See Van der Burght and Ebben § 20; Meijer and Meijer (*EJLE*) 227-236; Yntema (*Cor LR*) 77 ff and Roeleveld 40 ff who explains that the presumption is only valid if the moment of death is uncertain and that the rule of the French law was not adopted because it was far too complicated.

73 See Art 32. See also Schuster 31 who explains the position in Germany: 'BGB 20 on the other hand establishes a presumption to the effect that persons who have succumbed to common danger have died at the same moment. The effect of this is that neither person can become entitled to any right in the estate of the other as his survivor'. While common law countries generally follow the procedural characterisation of simultaneous death and apply the *lex fori*, German law was applied as the *lex causae* in *Re Cohn* [1945] Ch 5. See Garb and Wood § 3.28 for Austria, § 16 France and § 17 for Germany.

74 See also the *Austrian Civil Code* (1891) Art 25; *Italian Civil Code Book* Art 4; Roeleveld 43.

75 See Cowan (undated); Von Madai 373; *HLR* 344 fn 6-9 for case law before 1936; Derrett (*UCR*) 62; Nótári and Papp (*FJ*) 19; Verbeke and Lelue 335 ff; Pauchard (*LRE*). See also Breslauer (*MLR*) 131-132; Meijer and Meijer (*EJLE*) 227-236. Roeleveld 42 refers to Völker (*Neue Juristische Wochenschrift* (1947/1948) 375 who points out that the application of the presumption could have unreasonable results. In the opinion of Völker the Roman Law had more reasonable results and emphasises equity more than probability'.

76 Lee (2002) 2. See also Chapman (*UPLR*) 586; Sherman 42; Derrett (*UCR*) 55.

According to Derrett, the aim of the provisions was to reproduce the logically most reasonable state of facts, rather than to settle the financial standing as fairly as possible.[77] The variation (modification) adopted in these jurisdictions was to the effect that, if the sequence of death is 'uncertain', the presumption is that people died at the same time. France continued using a highly complicated casuistic system to establish who died first, until 2001.[78]

Since 2001, France has also recognised a presumption that the persons involved in a common disaster, died simultaneously (similar to other Germanic countries).[79] Apart from initially finding favour in European civil law systems, presumptions based on the *Napoleonic Code* were also adopted in, for example, Louisiana and some territories in Canada.[80]

4 4 English Common Law Before 1925

As mentioned above, the English common law followed a different approach towards establishing the order of deaths. The traditional common law of England has always refused to indulge any guessing as to survivorship and has enforced the well-known rule 'he who affirms must prove'.[81] The following remark, from a law of succession perspective, was made in the *Harvard Law Review*:[82]

> The sinking of the Lusitania, the flood at Johnstown, the San Francisco earthquake, the fire that destroys a home in the night – all present variations

77 (*UCR*) 67.

78 See also Nótári and Papp (*FJ*) 17; Gallanis 192. See Max Planck Working group (*RZ*) 27.

79 See Art 725–1 of the *French Civil Code* (since 2001). Art 4:2 of the *New Dutch Civil Code* provides: 'Order of death of two or more persons – 1. When it is impossible to determine the order of death of two or more persons, those persons are considered to have died at the same time, so that none of them shall benefit from the estate of the other.' See Van der Burght and Ebben § 19. See also Art 2 of the Annex to the 1972 'Benelux Convention on *Commorientes'* which was adopted in Art 721 of the *Belgian Civil Code* and Art 720 of the *Luxembourgian Civil Code* and Max Planck Working group (*RZ*) 27 and 100 ff.

80 Louisiana receipt the Napoleonic Code in 1825 (revised in 1870 and still in force). See also HLR 344; Nathan (TLR) 41; Lazarus (LLR) 363 who explains the Louisiana Civil Code (LCC) arts 938 and 939. Most case law on the principles of the French Code (presumptions of death) is found in Louisiana and California. See Cowman v Rogers 73 Md 403; 21 At Rep 64 (1891); Hollister v Cordero 76 California 649, 18 Pac Rep 855 (1888); In re Succession of Langles 105 Louisiana 39; 29 So Rep 739 (1900); *Collins v Becnel* 297 So 2d 506 (La Ct App 1974); In re Estate of Schmidt 67 Cal Rptr 847 854 (1968); Roeleveld 31-33. Haneman and Booth '120 Hours Until the Consistent Treatment of Simultaneous Death Under the California Probate Code' 2015 Nova Law Review (NLR) 451-471.

81 Chapman (*UPLR*) 594; Gallanis 189-191; Re (*FLR*) 482; Roeleveld 44 ff and *LRCSA* (1985) 3-39. See also Garb and Wood § 2.35 for Australia.

82 *HLR* 344 and n 5 http://heinonline.org (accessed 2015-11-13). See also Nathan (*TLR*) 39-40 fn 19; Nótári and Papp (*FJ*) 12; Corbett *et al* 4-5; Roeleveld 31 ff and Mee (*NILQ*) 178.

> of the perplexing enigma: 'Who dies first in a common disaster?' Unable to answer the riddle, but faced with the necessity of determining the devolution of property, *the common law relied on the incidence of the burden of proof*.[83]

The influence of the Roman civil law on law of succession in England and Wales has not been significant,[84] and at no time did it form part of it.[85] Sir Henry Maine, in his book *Ancient La*w, explained the possibility of Roman law influence as follows:[86]

> The early ecclesiastical chancellors contributed to it, from the Canon Law, many of the principles which lie deepest in its structure. The Roman Law, more fertile than the Canon Law in rules applicable to secular disputes, was not seldom resorted to by a later generation of Chancery judges, amid whose recorded dicta we often find entire texts from the *Corpus Juris Civilis* imbedded, with their terms unaltered, though their origin is never acknowledged.

The traditional common law position (proof requirement) was long established in case law such as *Underwood v Wing,*[87] and *Wing v Angrave*[88]*,* where any presumption to establish the sequence of death was rejected. These cases became acknowledged as authoritative on the position of '*commorientes'*.[89] Although the 'no presumption rule' differs in theory from the 'no survivorship presumption', it has, by implication, the same result. As was explained in *Re Phen's Trusts*[90] the rule that became established in English law, was that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence (proof).[91] If the order of death could not be established, the victims were regarded as having died simultaneously.

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83 Own emphasis.

84 Reference to the 'traditional common law' means for this discussion the position as it was in England and Wales before 1925. See also Von Madai 373; *HLR* 344 n 6-9 for case law before 1936. See also De Colyar 'Notes on the presumptions of death and survivorship in England and elsewhere' 1911 *Journal of the Society of Comparative Legislation* (*JSCL*) 255-277; Gallanis 189 fn 2 for common law cases and Verbeke and Lelue 335 ff in general.

85 See *Mason v Mason* (1816) 35 ER 688; See also Derrett (*UCR*) 71-2 where he discussed case law from 1767-1816. See also Re (*FLJ*) 482; Freeman 'Influence of Roman Law in English Courts' (undated) 1-8 http://damienfreeman.com/wp-content/uploads/2014/11/PDF38-Influence-of-Roman-Law-in-English-Courts.pdf (accessed 2016-02-21).

86 (1883) 44-45.

87 (1855) 4 De G M & G 633. See Tracy and Adams (*MLR*) 809, Chapman (*UPLR*) 589-600 and LRCSA (1985) 3-8 for a thorough discussion of older common law cases. See also De Colyar (*JSCL*) 255 *ff*; Hubback *A Treatise on the Evidence of Succession to Real and Personal Property* (1845) 150; Gallanis 190 fn 4 for *Sillick v Booth* (1841) 62 Eng Rep 1137.

88 (1861) 8 HLC 183. See also *Taylor v Diplock* 2 Phillimore's Ecclesiastical Reports 261 267; 161 Eng Rep Repr 1137 1140 (1815); Gallanis 190-191; De Colyar (*JSCL*) 255 ff;

89 See also *Rex v Dr Hay* (1767/8) 96 ER 372; *Mason v Mason*; *LRCSA* (1985) 3-5 for case law in Australia; Roeleveld 44; Gallanis 193.

90 LR 5 Eq 139 (1870).

91 *LRCSA* (1985) 5.

The traditional English common law approach (as it was before 1925) was followed in most American states and can be best clarified with reference to the 1934 case *Matter of Burza*:[92]

(i) There is no presumption either of survivorship or of simultaneous death;[93]

(ii) there is no presumption of survivorship from difference in age, sex or even relative strength;[94]

(iii) proof of the facts and circumstances concerning the survival of one or the other must be put forward;[95]

(iv) the party asserting survivorship has the burden of proving it.[96]

The application of no presumption results in the *assumption* by the courts that the deceased all died at the same time.[97] However, if the order of death can be proved by the sequence in which the deceased persons died, that sequence will determine the distribution of the estate. When the order of death remains 'uncertain', a presumption will not facilitate the order of death. This might result in the claimant being unable to inherit from the departed, *as no one of them is regarded as having survived the other*.[98]

Although the common-law principle was replaced in England by section 184 of the *Law of Property Act* 1925, this common-law approach is currently still followed in jurisdictions such as South Africa and Northern Ireland.[99]

92 151 Misc 577 Surrogate's Court of the City of New York (1934). See the case law in Tracy and Adams (*MLR*) 806 and 831; Zadnik 'Simultaneous Deaths of Joint Owners' 1951 *Western Reserve Law Review* (*WRLR*) 70-71.

93 See also Roeleveld 33 and Schoeman 108-109. *Estate Rowley*; *Schmitt v Pierce* 344 SW 2d 120 Supreme Court of Missouri En Banc (1961).

94 *HLR* 344-5; Tracy and Adams (*MLR*) 810-813; De Beer 10.

95 Tracy and Adams (*MLR*) 810-813; Chapman (*UPLR*) 589. See *Schmitt v Pierce*.

96 Folkerth 'The Uniform Simultaneous Death Act for Ohio' 1948 *Ohio State Law Journal* (*OSLJ*) 684; Tracy and Adams (*MLR*) 808 refer to *In re Herrmann* (1912 case) to illustrate the common law position. For more recent case law see also *Brundige v Alexander* 547 SW 2d 232 234 (Tenn 1976); *In re Estate of Moran* 77 Ill 2d 147, 395 NE 2d 579 (1979); *Estate of Nancy Schweizer v Estate of Roland* 7 Kan App 2d 128 (1981); 638 P 2d 378; Hubback 149-151; Mee (*NILQ*) 179 ff; Pawlowski and Brown (*PLR*) 122.

97 Own emphasis. *LRCSA* (1985) 5-8.

98 Own emphasis. Zadnik (*WRLR*) 71: 'In cases where rights depend on survivorship, the result of the common law rule that no presumption whatever exists is, in legal effect, the same as a presumption in favor of simultaneous death.'

99 Schoeman 108-109; Corbett *et al* 5; De Waal and Schoeman-Malan 12; Mee (*NILQ*) 171 ff; Orji (*CPL*) 501; *LRCSA* (1985) 8 for South Australia.

5 Developments on '*Commorientes*' After 1925

5 1 England – Legislation

As seen in the previous paragraph, when the order of death was in dispute in traditional common law jurisdictions, the person who asserts the sequence of deaths, had to prove same.[100] This evidentiary burden often led to a state of affairs where courts are required to make a ruling (often with very little evidence to assist them) on the order of deaths.[101] This sometimes led to cautious judgements. Contributing to the problem with simultaneous deaths was the property regime known as joint tenancies.[102] Helmholz explains simultaneous deaths of joint tenants to property:[103]

> The common law joint tenancy is very old, going back at least to the thirteenth century. In its main features, it has exhibited a remarkable durability. As the preferred form of common ownership in earlier English law, the joint tenancy's existence was presumed over a tenancy in common in cases where there was doubt about which had been created.

In estate law, joint tenancy is a special form of ownership by two or more persons of the same property.[104] The individuals (joint tenants) share equal ownership of the property and have the equal, undivided right to keep or dispose of the property. Joint tenancy creates a right of survivorship.[105] Conway and Bertsche explain the predicament that arises with simultaneous deaths as follows:[106]

> The problem presented when two or more persons die in a common disaster, there being no evidence as to the order of death, is an intricate one, not easily solved without recourse to arbitrary rules of law.

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100 Conway and Bertsche (*FLR*) 19 who refer to earlier cases in America: *Newell v Nkholś,* 75 N Y 78 (1878); *Young Women's Christian Home v French* 187 US 401, 23 Sup Ct 184 (1903). See also Chapman (*UPLR*) 589-600; Mee (*NILQ*) 173 and the *LRCSA* (1985) 19.

101 *LRCSA* (1985) 9 ff; Orji (*CPL*) 501 and Sawyer and Spero *Succession, Wills and Probate* (2015) 156.

102 For a detailed discussion of joint tenancies in English common law jurisdictions see Spitzer 'Joint Tenancy with Right of Survivorship: A Legacy from Thirteenth Century England' 1985 *Texas Tech Law Revue* (*TTLR*) 629 635-636.

103 'Realism and Formalism in the Severance of Joint Tenancies' 1998 *Nebraska Law Review* (*NLR*) 1-34. Chapman (*UPLR*) 585; Yntema (*Cor LR*) 77 ff; Gallanis 189 and Kerridge 'Intestate Succession in England and Wales' *Comparative Succession Law Volume II: Intestate Succession* (2015) (eds) Reid, De Waal and Zimmermann 328.

104 See also Folkerth (*OSLJ*) 684; Re (*FLR*) 482.

105 See http://legal-dictionary.thefreedictionary.com/Joint + Tenancy (accessed 2016-12-21). Tenancy in common is a form of concurrent ownership of real property in which two or more persons possess the property simultaneously; it can be created by deed, will, or operation of law.

106 (*FLR*) 17-18 fn 9 refer to the marginal notes in *Taylor v Diplock* 2 Phillimore's Ecclesiastical Reports 261 267, 161 Eng Rep Repr 1137 1140 (1815). Zadnik (*WRLR*) 70.

When the sequence of death was doubtful, due to scanty evidence, the courts (as it did in the *Underwood* case),[107] tend to lean towards accepting the proof that the victims did not die together.[108] England, therefore, reverted to legislation. The *Law Reform Committee of South Australia* explains this development:[109]

> A number of jurisdictions decided that reform was called for. The relevant reforming legislation while partly aimed at ensuring that the unsatisfactory result in *Underwood's case* would be avoided, appears to have been principally aimed at doing away with the difficulties of proof of survivorship. Under the provisions introduced into a large number of common law jurisdictions (but not in South Australia), a presumption was introduced that deaths occur in order of seniority.

Zadnik states that '[l]egislation was to save unnecessary applications to the Court for orders presuming deaths where, for instance, the deceased have been drowning together.'[110] The English legislature adopted legislation in the form of the *Law of Property Act* 1925.[111] Orji explains the motive behind section 184 as follows:[112]

> This statutory rule sets out a default position which is to be assumed or followed by the court unless some other position is established 'subject to any order of the court'. The displacement of this default provision may be effected by evidence, or the exercise of judicial discretion, or both. There may be a need for the interplay of science and the philosophy of law to work out the final destination of properties jointly owned by the deceased in this event.

Lord Walker of Gestingthorpe explains the provisions in section 184 (which introduced a presumption of seniority) as follows:[113]

> In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in

107 When a husband and wife were swept into the sea by the same wave and were never after-wards seen the court, rejecting all speculations and presumptions and held that there was no evidence to show which was the survivor, and that therefore they must be taken to have died at the same time. The words 'and in case my said wife shall die in my lifetime' were interpreted strict.

108 Zadnik (*WRLR*) 71.

109 (1985) 8.

110 (*WRLR*) 72; *Carpenter v Severin* 201 Iowa 969 204 N W 448 (1925) (held, since there was no presumption of survivorship in a common disaster, the burden of proof was on the party alleging survivorship).

111 *Idem* 189. See also Breslauer (*MLR*) 131; Garb and Wood § 15 for England and Wales; Kerridge 328 and Walker 'Cold-blooded and warm-blooded presumptions' paper presented 10-2008 *Statute Law Society Conference* (*SLSC*) 2.

112 (*CPL*) 502. Wislizenus 'Survival in Death by Common Disaster' 1921 *St Louis L Re* 1 (argument in favour of civil law presumptions).

113 (*SLSC*) 1-5; Mee (*NILQ*) 177. See Zadnik (*WRLR*) 71: 'All other factors are disregarded. Evidence of actual survivorship, however, is not excluded.'

> order of seniority, and accordingly the younger shall be deemed to have survived the older.

Section 184 applies 'for all purposes affecting the title to property', including joint tenancy.[114] Whenever property was held as joint tenants, and the tenants die in circumstances where the sequence of death is uncertain, they would have been regarded as if they had died simultaneously.[115] The main difference between ownership by tenants in common and joint tenants is that the latter includes the right to survivorship.[116] When a property is owned by joint tenants, the interest of a 'deceased joint owner' automatically gets transferred to the 'surviving owners'.[117] On the contrary, co-owners have no rights of survivorship.[118] Unless the departed co-owners' wills specify that his or her interest in the property is to be divided among the surviving owners, a deceased tenant in common's interest belongs to his or her estate and their estates will be distributed separately.[119] Another question that might arise is whether a person, married in community of property, is entitled as the 'surviving spouse' to the (half) share of the first dying (the estate is channelled through the 'survivor') if they die in a common calamity. in this regard, Corbett and others opine as follows:[120]

> ... [W]here a man or woman who was married to his or her spouse in community of property dies, the heirs of the predeceased spouse do not acquire co-ownership in individual assets of the joint estate, but merely the right to claim from the executor half of the net balance of the joint estate. Nor is the survivor, despite the fact that he was during the lifetime of the predeceased spouse co-owner of half of the joint estate, vested with *dominium* or half of the assets. Like the heirs of the predeceased spouse, he is restricted to a right against the executor to half of the balance.

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114 See Curtis 'The benefits and pitfalls of joint tenancy' http://www.investopedia.com/articles/pf/08/joint-tenancy.asp#ixzz3s6ySGuRl (accessed 2015-11-21).

115 See http://legal-dictionary.thefreedictionary.com/Tenancy+by+the+Entirety (accessed 2015-10-17): 'A type of concurrent estate in real property held by a Husband and Wife whereby each owns the undivided whole of the property'.

116 Phillips (*Cal LR)*. The most distinctive characteristic of a joint tenancy is indeed that of survivorship and the immediate transfer of ownership to the survivor'.

117 *Sloan v Jones* 192 Tenn 400 402; 241 S W 2d 506 507 (1951); *Bennett v Hutchens* 133 Tenn 65 69; 179 S W 629 630 (1915). Instead, upon the death of one spouse, the surviving spouse possesses an undivided interest in the whole estate that is no longer subject to the undivided interest of another in that estate, or, in other words, the surviving spouse possesses the property simple absolute.

118 In South Africa, however, only co-ownership of property is known. See Du Bois *et al Wille's Principles of South African law* (2007) 558 and 673: 'The modern position is therefore that a beneficiary has merely a personal right, *jus in personam ad rem acquirendam*, against the executor and does not acquire ownership by virtue of a will'. See also *Booysen v Booysen* [2011] ZAGPJHC 27.

119 *Ibid*.

120 *Idem* 14-15.

Interestingly enough, the words in section 184 narrate the civil law presumption known in Roman law and shows similarities with the French civil law approach (as it made provision for the younger being presumed to have survived the older).[121]

As far as intestate succession goes, section 184 was subsequently modified in 1952. Spouses were presumed to have survived each other for the purpose of distributing each spouse's inheritance.[122] Kerridge explains that after World War II the rule (in section 184) tends to favour wives, as they are usually younger than their husbands.[123]

5 2 Developments in Other Common Law Jurisdictions

The acceptance of legislation (section 184) in England was the result of certain seemingly unfair interpretations of the 'traditional common law principles'.[124] Soon commonwealth jurisdictions, as well as traditional common law jurisdictions were influenced by section 184.[125] While certain jurisdictions adopted legislation based on the seniority principle similar to that of England, other jurisdictions enacted Acts that deal with simultaneous deaths in their *Succession Acts.*[126] All these jurisdictions also regulate aspects of joint tenancies.[127] If there is proof that one joint tenant has survived the other, the survivor succeeds to the whole estate, not by virtue of survivorship, but because there is no other tenant

121 Gallanis 193 indicate that the source for s 184 could have been the Roman or French law. He refers to *D* 34 5 9 4 and *D* 34 5 22.

122 Gallanis 189. See *Intestates' Estate Act* 1952 and s 46 [3] of the *Administration of Estates Act* 1925. See also Roeleveld 45 See Sawyer and Spero 155-156; Mee (*NILQ*) 179; Zadnik (*WRLR*) 71.

123 *Idem* 329. Since 1995 it is required that a spouse survives the intestate spouse by 28 days in order to inherit. If the husband and wife have had a tragic accident and the husband dies and the wife survives by more than 28 days and both parties have not made a will then the wife will take the estate of her husband. See also Kerridge 343-344 n 121.

124 *Underwood v Wing* 660-661 per Lord Cranworth LC. In *Wing v Angrave* at 213, Lord Wensleydale commented that the evidence left it 'in total uncertainty whether the husband died before or after the wife, or whether they both died at the same instant. Whoever has to maintain any one of these propositions, must certainly fail.' Since these two cases have been reported the principles were followed in a number of cases in America, Australia and New Zealand.

125 For Commonwealth jurisdictions see *LRCSA* (1985) 1-39. See also Law Institute Victoria *Review of the Property Law Act* 1958 (Vic) (2011) 'Presumptions of Survivorship' § 44. See also Coffey and Long *The Law Handbook* (2014) 1315 who explain the Australian position; Pawlowski and Brown (*PLR*) 122 for New South Wales and Garb and Wood § 2.49-2.51.

126 See Zandik 73 for Ohio. *LRCSA* (1985) 8-9 for Australia and New Zealand. See below the *USDA* and *UPC*.

127 Conway and Bertsche (*FLR*) 27; Phillips (*Cal LR)*; Dollar (*SAN*) 3; Pawlowski and Brown (*PLR*) 122-134; Mee (*NILQ*) 186-189 discusses and criticise the conventional understanding of 'joint tenancies' in the case *Bradshaw v Toulmin* (1784) 2 Dick 633 and Orji (*CPL*) fn 3 and 507-508 for the origin of joint ownership. *Cf* Hubback 149-150 and Walker (*SLSC*) 1.

(owner) with whom to share the title.[128] When the presumption in section 184 was applied in *Hickman v Peacey,*[129] the House of Lords ruled that *unless it was possible to say for certain* which of the persons died first, the younger is presumed to have survived.[130]

5 3 Republic of Ireland, Northern Ireland and Scotland

The traditional common law still applies in Northern Ireland and the *Law of Property Act* was never extended to it.[131] The *Northern Ireland Law Reform Commission,*[132] recommends:

> Under the common law there is a presumption of simultaneous death[133] but the Commission is inclined to adopt a provision whereby commorientes is treated as an event which severs a joint tenancy. In that case the deceased persons would be treated as holding their jointly owned land as tenants in common at the time of their death.[134]

The Republic of Ireland, adopted limited reform in the shape of section 5 of the *Succession Act*.[135] Section 5 provides for a *presumption of simultaneous death* in cases of uncertainty.[136] It differs from the English rule and applies only 'for the purposes of the distribution of the estate of any *commorientes*'.[137] It does not apply, as the relevant English legislation, 'for all purposes affecting the title to property'.[138] Section 5

128 Phillips (*Cal LR)*; Dollar (*SAN*) 3; Pawlowski and Brown (*PLR*) 122-134; Nótári and Papp (*FJ*) 20; Coffey and Long 1315; Gorgopa; Kerridge 329.

129 [1945] Appeal Case (AC) 304. See also *In re Pringle* [1946] Ch 124; *Ex parte Chodos* 1948 4 SA 221; *LCRSA* (1985) 11.

130 There was no evidence to show whether any of the deceased had survived the other. See also *Re Lindop Lee-Barber v Reynolds* [1942) Ch 377 382; Mee (*NILQ*) 179; Roeleveld 45.

131 See Mee (*NILQ*) 173: 'In the absence of legislative intervention, the common law position (established in the English case law) still applies in Northern Ireland'.

132 *Report – Land Law NILC* 8-2010 para 7.22-7.23. Orji (*CPL*) 506-507 and the proposal of the *NILC* clause 50 on '*commorientes*' which implements the recommendation of the Commission for the introduction of a provision dealing with '*commorientes'* (simultaneous deaths of joint tenants).

133 The common law didn't follow a presumption of simultaneous death approach but follows a 'no presumption' rule. See Garb and Wood § 22 for Ireland § 36 for Northern Ireland. See also *Law Institute Victoria* § 44.

134 (*NILC*) 2010 par 7.15. The provision is modelled on one contained in the *Republic's Civil Law (Miscellaneous Provisions) Act* 2006 (No 20).

135 1965. See also *Republic of Ireland Law Reform Commission* (*LRC*) 70-2003 Ch 3.

136 See Mee (*NILQ*) 173-176. S 5 was applied in *Re Kennedy* [2000] 2 Ireland Reports 571; where a married couple was killed when they had driven off a pier in bad weather. See Belkin 100, 103 and Casey *et al* 374.

137 Mee (*NILQ*) 175 for a discussion on s 5 and how s 184 influenced the outcome in *Re Rowland*: *Smith v Russell* [1963] Ch 1. See also Casey *et al* 30-31.

138 Mee (*NILQ*) 176 recommendation that s 5 should also apply to all purposes as does s 184; Orji (*CPL*) 501. See also *Wills and Administration Proceedings* (NI) Order 1994, Art 30 and *Succession* (NI) Order 1996 a 3.

does little more than to codify the common-law position.[139] Section 68 of the *Civil Law (Miscellaneous Provisions) Act*[140] amended section 5 of the *Succession Act* and made it applicable to joint tenancies.

Scottish law had applied the traditional common law rules until 1964, when they enacted section 31 of the *Succession (Scotland) Act*.[141] Although it was modelled on section 184, there are three distinct improvements. Firstly, it does not apply between husband and wife. Secondly, it does not apply where a testator made a gift to one beneficiary with a direct gift over to another beneficiary. Thirdly, it omits the ambiguous parenthesis 'subject to any order of the court'.[142] The position is explained by Tainsh:[143]

> Section 31 of the 1964 Act, provided rules for two situations where two people die simultaneously and it is not known who survived the other. For the purposes of succession, spouses and civil partners were deemed to have failed to survive each other and where the parties weren't married or in a civil partnership, the younger was deemed to have survived the elder.

The laws of succession in Scotland have recently been brought up to date for the first time in 50 years. The new Succession (Scotland) Act,[144] which came into force on 4 March 2016, is intended to clarify certain situation and make it fairer. One such change is that section 9 of the Act has revoked the rule for spouses and civil partners and provides that, where two people die simultaneously, neither is presumed to have survived the other, provided the rule in section 10 below does not apply. Section 10 regulates the equal division of property if the order of beneficiaries' deaths is uncertain. Tainsh explains it as follows:

> Section 10 covers situations where property will pass to a person depending on the order of death but that property does not form part of either estate. An example of this is the proceeds of a life policy. This situation wasn't covered by the 1964 Act so this is a new addition to the legislation. The new rules therefore provide that in situations such as this, the property is to be divided equally between the estates of those persons unless there is express provision to the contrary.'

139 Mee (*NILQ*) 175 explains that the provision was derived from Art 20 of the *German Civil Code*.

140 2008.

141 See s 31(1)(b). Garb and Wood § 40 for Scotland. See *Lamb v Lord Advocate* 1976 Session cases (Scotland) 110.

142 Orji (*CPL*) 506; Walker (*SLSC*) 5.

143 'New rules on Succession in Scotland – how they will affect who inherits your estate' 2016-03-11 https://www.harpermacleod.co.uk/hm-insights/2016/march/new-rules-on-succession-in-scotland-how-they-will-affect-who-inherits-your-estate/ (accessed 2016-10-29).

144 2016.

5 4 United States of America

Most American states,[145] have received the 'traditional common law' principle based on the traditional English law to establish the order of deaths.[146] Typically, whenever the order of death could be established (through evidence), even when it was evidenced that one deceased survived the other deceased only for a very short period of time (seconds), the distribution follows the facts of the situation (and the 'no presumption'-rule was applied).[147] However, acceptable proof of the facts and circumstances concerning the survival of one or the other (victim) should have been put forward by the asserting party.[148] In general, most states did not adopt the post-1925 English approach.[149]

Since 1940, most states had, however, adopted the *Uniform Simultaneous Death Act* (*USDA*) which originally attempted to simplify situations where 'simultaneous deaths' occur,[150] and specified that if spouses died together, their estates passed to their individual heirs, unless proof existed of who died first.[151] This provision represents a codification of the prevailing common law view. Phillips explains it as follows:[152]

> This presumption, codified by adoption of the Uniform Simultaneous Death Act, is an attempt '… to supplant the former arbitrary and complicated presumptions of survivorship with effective, workable and equitable rules

145 Tracy and Adams (*MLR*) 808 refer to *In re Herrmann* (1912 case) to illustrate the common law position. See also Belkin 101 and Kimbrough (*W&M L Rev*) 289-299.

146 See Folkerth (*OSLJ*) 684; *Young Women's Christian Home v French* in general; Nathan (*TLR*) 40; Lazarus (LLR) 636. See Gallanis 194-195 for the position in all the different states and case law; Tracy and Adams (*MLR*) 810-813; Chapman (*UPLR*) 589.

147 *Estate Rowley*; *Schmitt v Pierce*; *HLR* 344-5; Tracy and Adams (*MLR*) 810-813; Roeleveld 33; Schoeman 108-109 and De Beer 10.

148 Zadnik (*WRLR*) 77; Folkerth (*OSLJ*) 684; For more recent case law see *Brundige v Alexander* 547 SW 2d 232 234 (Tenn 1976); *In re Estate of Moran* 77 Ill 2d 147, 395 NE 2d 579 (1979); *Estate of Nancy Schweizer v Estate of Roland* 7 Kan App 2d 128 (1981); 638 P 2d 378; Hubback 149-151; Mee (*NILQ*) 179 ff; Pawlowski and Brown (*PLR*) 122.

149 The statutory presumption that was adopted in England is quite different from their contemporary American counterparts. See Kerridge 328. Some States followed the *Napoleonic code*. See Phillips (*Cal LR)* for California (*Uniform Determination of Death Act* 1954) and Lazarus (*LLR*) 363 for the *Louisiana Civil Code* (*LCC*) arts 938 and 939. See Mee n 22 who explains: 'The tendency in modern times has been to discard the presumptions.' He refers to Samuel 'The 1997 Successions and Donations Revision - A Critique in Honor of AN Yiannopoulos' 1999 *Tulane Law Review* 1041 1043.

150 See the *Uniform Simultaneous Death Act* 1940 (*USDA*). Haneman and Booth (*NLR*) 451-471; See also *LRCSA* (1985) 8 *ff* and Cohen 'The Common Law in the American Legal System: The Challenge of Conceptual Research' 1989 *Law Library Journal* (*LLJ*) for the different *Survivorship and Presumption of Death Act* and *Succession Acts* in the different States.

151 S 3 of the *USDA*. See Folkerth (*OSLJ*) 684; Zandik (*WRLR*) 82.

152 (*Cal LR)* (n 48). He refers to *Azvedo v Benevolent Soc of Calif* 125 California App 2d 894 (1954). See also Belkin 101.

> applicable to the ever-increasing number of cases where two or more persons have died under circumstances that there is no sufficient evidence to indicate that they have died otherwise then simultaneously'.[153]

The original *USDA* supposes that the estates divide separately and provided for cases where 'there is no sufficient evidence' of survival.[154] Nótári and Papp summarise the position in America as follows:[155] 'In the United States of America, the *Uniform Simultaneous Death Act* with almost identical text in all of the states from the 1950's regulates the issue'. Following the *USDA,* the *Uniform Probate Code* was promulgated in 1969.[156] It is a comprehensive statute that unifies, clarifies, and modernises the laws governing the affairs of decedents and their estates, certain transfers accomplished other than by a will, as well as trusts and their administration.[157]

The 'sufficient evidence' principle was criticized after the Illinois Court of Appeals case *Janus v Tarasewicz*. In this instance, there was evidence of survival (by a very short time), and the estate of the first dying (husband) was channeled through the survivor's (wife) estate.[158] As a result, the *Uniform Probate code,* in the early 1990's, introduced a requirement that the survivor should outlive the first deceased by at least 120-hours to qualify as a survivor.[159] This rule replaced the 'no sufficient evidence' standard rule.[160] The Act contains a clause that makes provision for a situation where the end result would be an intestate estate devolving to the state.[161] Gallanis explains:

> The reason for the drop-off in enactments is that the Act works well when the order of deaths is unknown, but when the details occur in a rapid but ascertainable sequence the Act fails to achieve the desirable result.

153 (*Cal LR)*. See Gallanis 200; Provence 'Uniform Simultaneous Death Act: Part II' 09-07-2014: (*AEI*) *Advanced Estate Issues*. He explains the latest development in the South Carolina Probate Code where the *USDA* includes both intestate and testate estates. See *Estate of Meade* California Court of Appeal [Civ No 295 Fifth Dist June 24 [1964] for the application of the *USDA*.

154 Amongst, the adopting jurisdictions, there are variations from state to state, some of which are significant. To determine the law in a particular state one should check the code *as actually adopted* in that jurisdiction.

155 (*FJ*) 13.

156 Andersen 'The Influence of the Uniform Probate Code in Non-adopting States' 1985 *University of Puget Sound Law Review* (*UPSLR*) 599-600.

157 Art II, sec 2–104 and 2–702. Garb and Wood § 48-50; De Beer 25. It is not the purpose of this article to discuss the Acts in detail.

158 *Supra*. See also *Olson v Estate of Rustad* 2013 North Dakota 83.

159 Gallanis 198. The 120 hour requirement of survival sought to implement the testators possible intention.

160 Haneman and Booth (*NLR*) 451-471; Zadnik 77. S 6 of the *USDA* contributes toward this flexibility by allowing the parties to make a different disposition of the property in any will, deed, trust, or contract of insurance.

161 Gallanis 197 explains: 'The reason for the drop-off in enactments is that the Act works well when the order of deaths is unknown, but when the details occur in a rapid but ascertainable sequence the Act fails to achieve the desirable result'. Haneman and Booth (*NLR*) 451-471.

From a South African point of view the 'uncodified traditional common law', as it applied before the *USDA* and *UPC* remains important, as the courts still rely on the traditional common law position in South Africa.[162]

162 Saslaw 'Simultaneous deaths: Testator's will v State law' 1993 The *CPA Journal* 60. See also *Estate Acord* 946 F 2d 1473 (9th Cir 1991) where the court found that the will of the husband overrides the 120-hour rule where his wife died 38 hours after her him.

Opting in or opting out in class action proceedings: from principles to pragmatism?

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OPSOMMING

Intree of uitree in klasaksie-gedinge: van beginsels na pragmatisme?

Die groepsdefinisie is een van die belangrikste aspekte van 'n groepsgeding. Nie alleen is hierdie definisie deurslaggewend ten aansien die bepaling van lidmaatskap van groep nie, maar is ook bepalend ten aansien van die kennisgewing aan die potensiële lede van die groep wat hulle moet inlig aangaande die groepsgeding en hulle in staat moet stel om te besluit om deel te hê aan die groep of nie. Hierdie artikel ondersoek die twee gebruiklike metodes (die sg '*opt-in*' en die '*opt-out*' model) in gebruik in sekere gemeneregjurisdiksies wat dien as meganisme om die samestelling van die groep te bepaal. In die proses word aandag geskenk aan die komplekse afweeg van fundamentele prosesregtelike beginsels en beleidsoorwegings wat in die gedrang kom by die maak van die keuse. Die Suid-Afrikaanse groepsgedingbestel is nog nie volledig ontwikkel nie, en gevolglik word daar hiermee gepoog om 'n bydrae te lewer in die soeke na die mees geskikte model vir Suid-Afrika.

1 Introduction

The manner in which a class is defined determines class membership. The class definition is, therefore, of utmost importance in class action proceedings, as not only will the class action judgment be binding on all those individuals who have been described or defined as members of the class, but it will also determine how the requisite notice to potential members should be framed, informing them of the class action to enable them to decide to either remain in the class or to opt out, or where applicable, to actively take steps to become part of the class (opt in).

Although there are many aspects regarding the class definition (such as over-inclusiveness and the moment of class closure) that are problematic and worth exploring separately, the focus of this article is on

* This article is based on work supported financially by the National Research Foundation. Any opinion, findings and conclusions or recommendations expressed in this material are those of the author and therefore the NRF does not accept any liability in regard to them.

How to cite: Hurter 'Opting in or opting out in class action proceedings: from principles to pragmatism?' 2017 *De Jure* 60-89
http://dx.doi.org/10.17159/2225-7160/2017/v50n1a4

the method or choice of model to be used to determine class composition. Even a cursory review of international literature reveals that the debate surrounding the opt-in and opt-out option in the various class action regimes is far from settled. So for example, although federal class actions in America follow the opt-out model, critics favour the opt-in model, while Britain's opt-in Group Litigation Order seems set to be challenged by the Consumer Rights Act 2015.[1] Past debates have been spirited and partisan, and have often been used as opportunities to revisit the bimodal debate[2] over the class action procedure itself and to continue its vilification.[3]

More recently, the question regarding the feasibility of a common ground (thus a move away from the bimodal position regarding the opting mechanism), was raised,[4] and a hybridised form thereof was put forward. Although this suggestion is not novel (the existence of numerous mechanism configurations has been acknowledged in the past),[5] it could re-ignite the American debate. Whether such debates will merely remain ongoing debates, or whether they could be harbingers of an actual reconsideration of the option mechanism to be employed in some jurisdictions, the timing is fortuitous. The South African class action is still developing and the option mechanism has so far only fleetingly received attention.[6] An analysis of the bimodal approach is thus warranted, and could contribute towards the further development of our class action procedure.

The focus of this article is not the debate regarding which one of the two options is superior (that debate which includes lengthy lists of perceived pros and cons has been waged eloquently by erudite and eminent scholars in the field), but is rather the attempt to establish what considerations should inform the selection of the most appropriate option for the developing framework regulating the South African class action regime. Part 2 of this article provides an explanation of key concepts as well as an outline of the models currently available in some common law jurisdictions such as the United States, Canada and Australia. (Although Britain does, strictly speaking, not have a class action, the British position will be included here due to certain relevant

1 The launch of the first United Kingdom opt-out class action under this Act has taken place in March 2016: see Shearman & Sterling LLP client publication 'Launch of first UK opt-out class action' 11 March 2016 available at http://www.shearman.com/en/newsinsights/publications/2016/03/launch-of-first-uk-opt-out-class-action-AT-031116.pdf (accessed 2016-08-10).

2 The class action is either supported or rejected.

3 See eg Redish Wholesale justice: constitutional democracy and the class action lawsuit (2009) 174-175 231.

4 See Dodson 'An opt-in option for class actions' 2016 *Michigan Law Review* 171.

5 See Mulheron 'Opting in, opting out, and closing the class: some dilemmas for England's class action lawmakers' 2010 *Canadian Business Law Journal* 376 379-401 where she discusses some ten potential models.

6 See M*ukaddam v Pioneer Foods (Pty) Ltd* 2013 2 SA 254 (SCA) 258F-G. and more recently *Nkala v Harmony Gold Mining Co Ltd* 2016 5 SA 240 (GJ).

points of contact.) In Part 3 the dilemma associated with the choice of option will be considered, and policy considerations that should inform the choice will be discussed in Part 4. Part 5 contains the main conclusions arrived at.

2 Choices Made in Common Law Jurisdictions

The non-hybridised[7] 'opt out' class does not require a class member following certification[8] to take a formal step (such as a formal consent by letter or other document) in order to be bound by the final outcome of a class action – a member simply need not do anything at all.[9] Once a class member falls within the ambit of a particular group definition, the default position for his or her inertia is class membership. (Unsurprisingly this state of affairs has given rise to the epithet 'free riders'[10] to describe members of an opt-out class!) The class will normally remain 'widely-drawn'[11] during the course of the action. Should a member not wish to be bound by the outcome of the action and to share in any resultant benefit, that member is required to take affirmative action to withdraw from the class, but retains the right to commence individual action. Such a right of withdrawal (or exclusion) necessarily requires that adequate notice be given to all members informing them of the action and of the opportunity to withdraw from the litigation. When drafting this notice the class definition is important, as it enables class members to determine whether or not they are class members.[12]

By contrast, a 'true' or purely 'opt in' class requires a class member to take affirmative action following certification, usually in the form of a prescribed step within a prescribed period in order to be included in the class, to ultimately be bound by the final outcome and to share in any resultant benefit if the action is successful. Because of the affirmative action on the part of class members, they are identified by name (rather

7 This description excludes the options in terms of which a court requires action to be taken by the class members that in effect amounts to requiring them to opt in (such as filing proof of claim forms) and where the option affords the court a discretion to decide whether a right of exclusion should extend to all or some members.

8 Certification refers to the preliminary process whereby a court assesses whether the threshold criteria for commencing a class action in a particular jurisdiction have been met. However, not all class action regimes require certification: see iro the Australian position Mulheron *The class action in common law legal systems* (2004) 24-28; Cashman *Class action law and practice* (2007) 7.

9 In *Phillips Petroleum Co v Shutts* 472 US 797 (1985) 810 the court phrased it thus: 'He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.'

10 See eg Murphy and Cameron 'Access to justice and the evolution of class action litigation in Australia' 2006 *Melbourne University Law Review* 399 419; *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061 par 48; Freer *Introduction to civil procedure* (2006) 696.

11 See Mulheron *supra* n 5 at 384.

12 Freer *supra* n 10 at 731.

than by description as in the case of opt outs). Failure to respond to the notice given to potential claimants/plaintiffs alerting them to the proceedings would exclude an individual claimant/plaintiff from the class, and such individual would be unable to share in any benefit derived from the litigation.

To trace the origin of the opt-out model, one has to go back in history. It is trite that the class action has its ancient roots in the Supreme Court of Judicature Act, 1873 in England and the fusion of common law and equity[13] from where it was imported, reinterpreted and developed in America through Equity Rule 38[14] in particular before spreading to other jurisdictions. When Federal Rule 23 became part of the original Federal Rules of Civil Procedure of 1938,[15] it distinguished between three types of class actions of which the third (created to accommodate permissive joinder among diverse members who shared a common interest),[16] required their consent for litigation purposes in the form of an opt-*in* mechanism.[17] When the present Rule 23 of the Federal Rules of Civil Procedure[18] was cast in its present mould in 1966, Federal Rule 23(b)(3) not only acquired two additional requirements that had to be fulfilled,[19] but seemingly in order to alleviate concerns regarding due process,[20] the

13 36 & 37 Vict c 66 (UK). See in general the seminal work by Yeazel *From medieval group litigation to the modern class action* (1987).

14 Yeazell *supra* n 13 at 225. This was in fact the renumbered Rule 48 which stated that absentee class members were not bound by a judgment: James Hazard Leubsdorf *Civil Procedure* (2001) 648. Cassels and Jones *The law of large-scale claims. Product liability, mass torts, and complex litigation in Canada* (2005) 324 acknowledge that although the American class action provided an example for the Canadian legislature to follow, Canadian mass tort law owes 'at least as much' to English jurisprudence.

15 Kaplan 'Continuing work of the Civil Committee: 1966 amendments of the Federal Rules of Civil Procedure (1)' (1967-68) *Harvard Law Review* 356 376-377.

16 Hazard Gedid Sowle 'An historical analysis of the binding effect of class suits' (1997-98) *University of Pennsylvania Law Review* 1849 1937-1938.

17 Hazard Gedid Sowle *supra* n 16 at 1938, and they remark that this category was a 'permissive joinder device' rather than a class action according to then commentators.

18 383 US 1029 (1966) (hereafter FR).

19 The 'basic' requirements for all class actions (numerosity, commonality, typicality and adequacy) contained in FR 23(a) are well known. FR 23(b)(c) in addition requires predominance and superiority. As the other types of class actions (FR 23(b)(1)(A); 23(b)(1)(B) and 23(b)(2)) do not expressly provide for opt-out, they are not considered. See in general Kaplan *supra* n 15 at 390.

20 Kaplan *supra* n 15 at 377 391-394 states this as a fact, but Williams 'Due process class action opt outs, and the right not to sue' 2015 *Columbia Law Review* 599 607 points out that an Advisory Committee note which explains the 1966 amendments 'suggested a possible link' between due process and the opt-out right. He also points out that certain early courts held that due process required said notice and opt-out right in particular class actions, while others held that such a right was 'solely a creation of Rule 23 itself' and not a Constitutional requirement. However, it is submitted that the recent cases of *AT & T Mobility LLC v Concepción* 131 S Ct 1740 (2011) and *Wal-Mart Stores Inc v Dukes* 131 S Ct 2541 (2011) which favoured the due-process-based opt-out-right view first espoused in *Phillips Petroleum v*

rule makers included notice to absent members and opt-out rights for them.

Although Federal Rule 23 creates three different types of class actions, notice to class members is mandatory only for a class action for damages under Federal Rule 23(b)(3)[21] and discretionary for Federal Rule 23(b)(1) and (b)(2) class actions[22] in which instances damages are not sought. There is also no automatic right of opt out in relation to these two categories, although the courts have on occasion relied on the wide discretion afforded by Federal Rule 23(d)(2) to allow members to opt out.[23] Notice in the Federal Rule 23(b)(3) category is particularly onerous, as individual notice is required[24] where members 'can be identified through reasonable effort', while the others must receive the 'best notice practicable under the circumstances'. The dire results of this requirement are amply illustrated by the protracted litigation and culminating in the well-known *Eisen v Carlisle & Jacquelin*.[25]

Although most common law jurisdictions favour the opt-out class action (with Britain being the notable exception),[26] notice to potential class members is not necessarily mandatory and the courts are generally speaking, given a wide discretion regarding the type of notice (individual or not) where required.

Shutts supra, seem to suggest a settled Supreme Court view in this regard. As to due process generally, see Wasserman *Procedural due process A reference guide to the United States Constitution* (2004).

21 See FR 23(c)(2)(B).

22 FR 23(c)(2)(A). See also Freer *supra* n 10 at 730.

23 The rule provides: 'In the conduct of actions to which this rule applies the court may make the appropriate orders: […]
(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action …'.

24 See Federal Judicial Centre *Manual for Complex Litigation* (1995) par 30.211.

25 417 US 156 (1974). In this matter the court held that the expense of notice was to be borne by the class representative. The mailing of individual notices to well over three million members proved to be hugely expensive.

26 And probably set to remain 'conservative': Hodges 'From class actions to collective redress: a revolution in approach to compensation' 2009 *Civil Justice Quaterly* 41 66. Unsurprisingly Scottish Law Commission (Scot Law Com No 154) *Multi-Party* Actions (July 1996) par 4.55 recommended that 'group members must elect to be members of the group'. The trend in the European Union is also to favour the opt-in class: see in general Hodges *The reform of class and representative actions in European Legal Systems: a new framework for collective redress in Europe* (2008); Hodges 'Collective redress in Europe: the new model' 2010 *Civil Justice Quaterly* 370. The Netherlands is an interesting exception in the EU: although the procedure is not a class action in the usual sense but rather a collective settlement mechanism under the *Wet Collectieve Afwikkeling Massaschade* (WICAM), victims who are not in agreement with the settlement agreement have the option to opt out on notice within three months: see Dutch Civil Code art 7:908 par 2. See in general Hurter 'Class action developments in the Netherlands' 2012 *SAPL* 178.

In Canada, Ontario[27] led the way with the other provinces fairly rapidly following.[28] In Ontario a notice is mandated by statute, but the court, after considering matters such as the cost of the notice; the size of the claims; the number of class members and where they are located, may decide that dispensing with the notice to class members is warranted.[29] The notice is also mandated by legislation in British Columbia, and the provisions are similar to that of Ontario.[30] In both instances judicial approval of the notice is required and the content must clearly set out matters such as a description of the proceedings and the relief sought; the opt out date; the size of the individual claims; the number of class members; the financial consequences of any agreement regarding fees and disbursements, etcetera.[31] The clear aim of the provisions is to ensure that the notice is clearly drafted and understandable to laypersons. No specific type of notice is mandated, and therefore it is reasonable to assume that the courts will use their discretion based on the facts of each case to prescribe the type that would ensure effective notice. Methods that are used include posting; advertising; publishing; leafleting[32] and internet sites.[33]

In Australia Part IVA of the Federal Court of Australia Act 1976 (Cth)[34] introduced the opt-out model in 1992[35] and notice to class members is mandatory, except where the action does not involve a claim for damages.[36] The best possible notice to class members is required, and the court has a wide discretion to determine the type of notice, which may include press advertisements, and radio and television broadcasts.[37]

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27 See Class Proceedings Act SO 1992 c6. As the legislation of the other provinces has by and large been modeled on that of Ontario, reference will mostly to be to the Ontario Act and the British Columbia Act where necessary. As explained by the Alberta Law Reform Institute *Class Actions* Final Report No 85 (December 2000) 98 'e. …an 'opt out' system is the normal choice in Canada. We view harmony with the law in other Canadian jurisdictions and the discouragement of forum shopping as important.'

28 See British Columbia Class Proceedings Act RSB 1996 c50; New Foundland and Labrador Class Actions Act SNL 2001 cC-18.1; Saskatchewan Class Actions Act SS 2001 cC-12.01; Manitoba Class Proceedings Act CCSM 2003 c130; Alberta Class Proceedings Act SA 2003 cC-16.5; New Brunswick Class Proceedings Act SNB 2006 cC-5.15. The Rules for regulating the practice and Procedure in the Federal Court of Appeal and the Federal Court, Pt 4 ss 299.1 – 299.42 'Class Actions' must be read in conjunction with the applicable legislation.

29 *Idem* s 17(1)-(3); s 18(1); s 29(4).

30 *Idem* s 19(1)-(3); s 20(1); s 21(1); s 35(5).

31 *Idem* s 17 (6); s 20 Class Proceedings Act (Ont) and s 19(6); s 22 Class Proceedings Act (BC).

32 *Idem* s 17(4)(b) Class Proceedings Act (Ont); s 19(4)(c) Class Proceedings Act (BC).

33 *Idem* s 19(4)(e) Class Proceedings Act (Man).

34 *Idem* s 33E; s 33H; s 33J.

35 See Federal Court of Australia Amendment Act 1991 (Cth).

36 *Idem* s 33X(1)-(2).

37 *Idem* s 33Y.

Finally, the British Group Litigation Order (GLO) continues the tradition of employing opt in mechanisms, and has withstood criticism and calls for change as well as review.[38] As already indicated, the GLO is neither a class action, nor a representative action, but is in fact a case management tool under the Civil Procedure Rules:[39] a court may make such an Order for the 'case management of claims that give rise to common or related issues of fact or law'.[40] In effect individual cases that have already been instituted[41] are grouped together and court managed, causing the GLO to be described as no more than a 'permissive joinder device'.[42] Litigants wishing to form part of the group have to take an affirmative action to litigate by being entered onto the group register.

3 The Opt-in or Opt-out Choice Dilemma

A discussion regarding this aspect cannot be divorced from certain fundamentals regarding the origins of the class action and of civil procedure. These matters informed not only the original design of the device, but continue to play a role in subsequent developments and certainly direct most of the arguments for or against the opt-in/opt-out choice.

3 1 Principles and Policy

One of the main values of the adversarial system of civil procedure adhered to in common law jurisdictions, is that of litigant autonomy: through the features of party presentation and party prosecution, the ultimate control over what is submitted to a judge for decision vests in the litigants. And, since it is a litigant who independently (individually)

38 See eg Lord Woolf *Access to justice: Final report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996); Mulheron 'Some difficulties with Group Litigation Orders – and why a class action is superior' 2005 *Civil Justice Quaterly* 40; Mulheron 'Justice enhanced: framing an opt out class action for England' 2007 *Modern Law Review* 550; Mulheron *supra* n 5 at 376.

39 See rule 19.10 and Zuckerman *Zuckerman on civil procedure* (2013) para 13.103. It was apparently introduced on the 'assumption' that opt out representative actions did not exist in England: see Sorabji 'The hidden class action in English civil procedure' 2009 4 *CJQ* 498 512 who argues that that assumption fails to 'take account of the true nature of the representative rule, which … in some circumstances is a mandatory class action'.

40 Commonly referred to as the 'GLO issues'. After such issues have been identified, rule 19.11(2)(a) requires that a register of group claims be established. A management court will oversee the claims and manage the proceedings. It is important to note that any judgment or order that is given on a GLO issue binds all parties on the group register or which are subsequently entered onto the register (rule 19.12). See in general on the GLO, Zuckerman *supra* n 39 at 676-692.

41 Or been 'issued' as referred to in the Civil Procedure Rules and Practice Direction.

42 Andrews 'Multi-party proceedings in England' 2001 *Duke Journal of Comparative and International Law* 249 262.

chooses to either institute or defend an action, it is clear that civil litigation is voluntary,[43] and that a litigant is the master of the litigation.

Arguments in favour of the retention of the opt-in mechanism which existed in the original Federal Rules of Civil Procedure of 1938 (discussed above), were largely based on litigant autonomy and featured strongly in presentations to the Advisory Committee on Civil Rules. However, this option was rejected, as its consequences were viewed as lacking moral justification due to the fact that it would effectively lead to the 'freezing out'[44] of particularly small people with small claims who, for reasons such as ignorance, timidity and unfamiliarity with business or legal matters, will simply not take the affirmative step of opting in. A possible reason why litigation autonomy assumes such importance in America is that it is viewed as one of their 'deeply held' social values, namely to have one's say, and more particularly, to have one's 'day in court'.[45] This, in turn, is linked to their constitutional guarantee regarding due process that might be interpreted to create a 'right' to a 'day in court'.[46]

Although these particular concerns and the American class action developments have not formed part of the background of class action development in other common law jurisdictions,[47] the debate for or against the opt-out mechanism has nevertheless been held along similar lines, as will be seen below.

3 2 The Basis for the Choice

The difference between the opt-out and the opt-in mechanism is easily comprehended, but it is the particular choice of mechanism that is problematic. The choice is not simply based on considerations of

43 It has also been argued that even if civil procedural law's only purpose is to supply civilization with a substitute for vengeance, the starting point for the law that provides the institutions and regulates the litigation process to achieve this, is the voluntary nature of civil litigation: see Jolowicz *On civil procedure* (2000) 77.

44 Kaplan *supra* n 15 at 397-398.

45 See James Hazard & Leubsdorf *supra* n 14 at 383. The other two social values highlighted are open opportunity (to be a judge or lawyer or to participate as citizen) and having checks and balances to limit the power of *all* participants in civil litigation.

46 Jones *Theory of class actions* (2003) 6; Williams *supra* n 20 at 603 614-615; Moller 'The checks and balances of forum shopping' 2012 *Stanford Journal of Complex Litigation* 107 157.

47 See eg Jones *supra* n 46 *at* 5-6 stating that '[t]he Canadian constitutional system does not offer any of the impediments experienced in the United States: there is no constitutional right to a jury trial, no civil 'property' or 'due process' guarantee that might be interpreted so as to preserve a 'right' to the 'day in court'. In Britain the principle of party autonomy is still very much in evidence despite the so-called New Culture which is governed by the Overriding Principle introduced by the Woolf reforms and captured in CPR rule 1.1. See in general Andrews *Andrews on civil procedure* Vol 1 (2013) par 1.11; Jacob *Civil litigation. Practice and procedure in a shifting culture* (2001) 38-39.

convenience, and the decision requires the balancing of complex issues as discussed later.[48]

A discussion of each mechanism cannot completely be divorced from the arguments for and against each one, and, while it is not the focus of the present discussion, some will thus necessarily form part of the discussion of each mechanism where appropriate.

3 2 1 The Opt-in Mechanism

This may be a 'true' opt-in procedure, or an opt-out procedure which in effect requires members to 'opt in' by filing proof of claim after certification (in whatever form is required) as a prerequisite to obtain relief in a successful action.[49] (In the latter instance serious consequences attach to a failure to respond).[50] For purposes of this discussion the latter procedure is not considered further, as it serves an efficacious purpose at that point, and does not serve to define the initial class.

At the heart of this mechanism lies the principle of individual autonomy, and much of the arguments in defence thereof is aimed at its preservation, that is, to ensure that an individual participates in litigation only by own choice.[51] Freedom of choice satisfies the principle that a person's legal rights should not be determined without his or her express consent, and it is argued that the act of opting in ensures that consent is 'no longer implied or fictitious'[52] (obviously due to the individual's conscious action). Many commentators are very vocal in their criticism of the opt-out mechanism on this point, because by not unequivocally expressing their consent to litigation, absent class members are seen to be giving up their rights to individual litigation. Accordingly, the low opt-out rates[53] are viewed as indicative of the fact that most class members, for whatever reason, will not opt out – whether or not they want to

48 See eg Ryan 'The development of representative proceedings in the Federal Court' 1993 *Australian Bar Review* 131 137 referring to the commencement of class actions without the consent of the absent class members as 'controversial'.

49 As in the case of various matters in America under FR 23(b)(c). See also Legg 'Reconciling litigation funding and the opt out group definition in Federal Court of Australia class actions – the need for a legislative common fund approach' 2011 *Civil Justice Quaterly* 52 55.

50 Such a member will not be able to obtain his or her share of any monetary award, but moreover will also be prevented from commencing his or her own action against the defendant.

51 This view is not confined to the American debate: see eg Scottish Law Commission (Scot Law Comm No 154) *Multi-party actions* (July 1996) par 4.54 and recommendation 4.55.

52 See Bassett 'US class actions go global: transnational class actions and personal jurisdiction' 2003 *Fordham Law Review* 41 89.

53 This refers to the number of class members who exercise their right to opt out, either because they are not interested in pursuing litigation, or wish to litigate independently. It is well known that these rates are low: see eg Carvana and Morabito 'Australian unions – the unknown class action

remain in the class. For this reason, the opt-out mechanism is referred to as a 'poor proxy for consent' and the consent is termed 'fictitious'.[54] Bassett[55] takes further issue with the view that a member's failure to opt out constitutes consent to the court's personal jurisdiction, and argues that this silence on the part of the member should rather be interpreted, not as consent, but as confusion. Nevertheless, the view is held that true consent is ensured only in opt-in classes, and that the rights of absent members to individual litigation are thus protected.[56]

The opt-in procedure allows the class members to be individually identified as each member has to take a prescribed step[57] in order to join the action. At the same time, the number of class members is thus easily determined. Therefore, not only is the class precisely determined[58] (making certification easier), but also the class size. However, this procedure has a significant consequence: a much reduced class size (compared to opt-out procedures).[59] Although it was argued before the Ontario Law Reform Commission that the low take-up rate is due to disinterest in the claims, it was also suggested that the failure arose from various reasons other than lack of interest, such as social and psychological barriers; fear of involvement in the legal process; ill-founded concerns over legal costs; fear of legal sanctions from employers and others in a position to take reprisals, and simply the demands of everyday life.[60]

Nevertheless, proponents of this particular mechanism, apart from stressing the benefit regarding autonomy and class ascertainability, argue that the reduced size of the class allows for an easier ascertainment of damages, and prepares the defendant(s) for the extent of any potential liability (in other words, the size of the pool of potential claimants).[61] However, it should be noted that ease of ascertainability does not bring with it anonymity, and this may dissuade opt ins in circumstances where

protagonists' 2011 *Civil Justice Quarterly* 382 398; Cottreau 'The due process right to opt out of class actions' 1998 *New York University Law Review* 480 481; Hodges *supra* n 26 at 121; Mulheron 2007 *MLR supra* n 38 at 557; Lahav 'Are class actions unconstitutional?' 2011 *Michigan Law Review* 993 1005-1006; Dodson *supra* n 4 at 200.

54 Bassett *supra* n 52 at 89.

55 'Class action silence' 2014 *Boston University Law Review* 1781 1783.

56 Bassett *supra* n 52 at 89.

57 It may entail entering their particulars on a group register, but it may also entail the commencement of individual actions which are then grouped together and case managed as in the case of the British GLO – see in general Andrews *supra* n 47 par 22.45 – 22.46.

58 Or 'ascertainable' as required in a seemingly growing number of federal court decisions (despite not being specifically required under Federal Rule 23): see Shaw 'Class ascertainability' 2015 *Yale Law Journal 2354 2357*.

59 See eg Ontario Law Reform Commission *Report on class actions* (1982) Vol II 131; 482-483 (hereafter Ontario LRC *Report*).

60 Ontario LRC *Report supra* n 59 Vol I 132. See also Hodges *supra* n 26 at 120.

61 The Law Reform Commission of Hong Kong *Class actions* (May 2012) par 4.5; Ontario LRC *Report supra* n 59 Vol II 48.

there are ongoing relationships (as referred to above) and there is fear of reprisals.

The opponents are quick to point out a number of deficiencies in this option. Individual autonomy may be rendered meaningless to an individual if in a class action his or her identity is not initially known. If notification that an opt-in act is required does not reach these individuals, they are effectively denied an opportunity to indicate their interest in the case. Also, even if notification reaches them, it will not necessarily ensure action on their part. The Ontario Law Reform Commission pointed out that the 'same social and psychological factors that discourage persons from bringing their own civil actions will prevent them from taking other forms of affirmative action'.[62] Referring to an American study, it also pointed out that despite 'a generally high level of education' many putative members also did not understand the messages contained in the notices with respect to their consumer rights in the action.[63] This clearly indicates that an almost automatic assumption that the level of education is a determining factor in the choice of a mechanism is risky – it would thus seem that even if a notice reaches the target group, it does not mean that the significance of the notice will be understood or that the content will not pose problems for its understanding, or not cause uncertainty. Clearly this aspect raises serious concerns regarding access to justice.

In similar vein, Hodges[64] warns that where many individuals may not know of their right to claim or of the arrangements, this may result in a situation where an insufficient number of them opt-in and participate in any judgment. Not only do under-inclusive classes not secure access to justice for all who fall within the class definition, but they neither ensure that the size of the class accurately reflects the group that has been harmed in order to establish an appropriate sanction for the harm caused, nor do they provide class closure for the defendant,[65] causing uncertainty regarding numbers of members who may litigate independently.[66]

As far as the establishing of potential claims by the defendant is concerned, the matter may also not be so clear-cut. Proponents seem to lose sight of the fact that a defendant will, in any event, not be able to

62 Ontario LRC *Report supra* n 59 Vol II at 480.

63 In America the problems related to badly drafted notices and general legalese were recognised, and FR 23(c)(2)(B) now requires that a notice state 'concisely and clearly' the required contents in 'plain, easily understood language'. Freer *supra* n 10 at 732-733 quote a few 'telling responses' to a class action notice collected by Prof Miller in a matter involving allegations of over-charging for antibiotics, one being: 'Dear Sir: I received your pamphlet on drugs, which I think will be of great value in the future. I am unable to attend your class, however.'

64 *Supra* n 26 at 120.

65 Closure refers to the cut-off date for making claims to achieve finality. See in general Mulheron *supra* n 5 at 376.

66 Walker 'Are national class actions constitutional? A reply to Hogg and McKee' 2010 *Osgoode Hall Law Journal* 95 137.

completely accurately estimate his or her ultimate liability for the simple reason that the defendant cannot know the number of individual actions that may be brought before the advent of the expiry date of the limitation (prescription) period for claims. Furthermore, although it may be assumed that a large number of members who have opted in will pursue their claims, it is conceivable that some will not for various reasons (such as loss of interest).

Finally, the Ontario Law Reform Commission expressed the opinion that a 'true' opt-in procedure would result in the creation of a procedure which is not a class action, but would in fact amount to a 'permissive joinder device'[67] as it obliges each class member to join the action after certification.

3 2 2 The Opt-out Mechanism

In terms of this mechanism, individuals become members of a particular class without having had a prior relationship with the representative plaintiff (and his or her lawyer), and a class action may be commenced without their (the so-called absent members'[68]) express consent. As a consequence, opt-out classes are generally more inclusive than opt-in classes, which translate into greater numbers of members.[69] These typically larger class numbers of opt-out classes are viewed as a positive, because if viewed against the background of the objectives of the class action device, the so-called economies of scale are greater, making claims of small value better viable and preventing multiplicity of actions. Individual litigation is a costly affair and considerable benefit is achieved when any number of claims sharing common issues are adjudicated simultaneously instead of individually – both in respect of the individual and in respect of judicial resources.[70] Duplication of litigation so avoided lessens the burden on court resources,[71] and also avoids the possibility of inconsistent determinations of the same issue in different proceedings. Other 'knock-on judicial economies' such as the bringing about of early settlement, may also ensue.[72] These classes are also seen

67 Ontario LRC *Report supra* n 59 Vol II at 483.

68 The term 'absent class members' refers to class members who did not commence the action.

69 This fact is undisputed by all commentators. Recent studies in American literature in particular have indicated that almost 99% of class members take up the default position: Eisenberg and Miller 'The role of opt-outs and objectors in class action litigation: theoretical and empirical issues' 2004 *Vanderbilt Law Review* 1529. See also Lahav *supra* n 53 at 1005 and Cottreau *supra* n 53 at 481 n10. For a comparable position in Australia, see Carvana and Morabito *supra* n 53 at 397-398.

70 See eg Williams *supra* n 20 at 616-617; Ontario LRC *Report supra* n 59 Vol II at 487.

71 Mulheron *supra* n 8 at 59 points out that not every class action will promote judicial efficiency, and later (239-245) discusses this in terms of the 'no need' (for a class action) argument with relation to whether a class action is the superior device for obtaining large-scale relief.

72 Mulheron *supra* n 8 at 60. It is also pointed out that the vast majority of class actions (like other civil matters) settle before trial.

as levellers of the litigation playing field when individuals face large, powerful and well-financed defendants.[73]

The right of class members to exclude themselves from a class action by taking an affirmative step and 'opt out' is a valuable right, as it enables members to commence their individual actions (thus preserving the day-in-court ideal) and to escape being bound by a judgment that is adverse to the class. Opt-out rights, therefore, have a dual function: they may signify consent[74] to jurisdiction (and acceptance to being bound by a subsequent judgment of the court), and they also provide the procedural protection of a class member's right to pursue an individual action, or not to pursue it.[75] (It may even be argued that this right also comes to the assistance of those members who simply are not interested in pursuing any action at all, thus putting paid to the argument that the opt-out regime obliges class action members to sue the defendant).[76]

The required notice to the class must take a form that will adequately inform them, not only of the proceedings, but also of the consequences of their involvement. Notice, thus, guarantees due process and provides a reasonable opportunity for class members to exclude themselves from the class.[77]

The opt-out mechanism therefore not only provides a measure of individuality for a class member, but it also provides finality for both the class member and the defendant: once excluded, the class member either has to 'go it alone', or give up on litigation, giving the defendant the opportunity to prepare to meet the potential maximum number of further (individual) actions, based on the opt-out number. Finality for the defendant of course also lies in the fact that the judgment binds all class members who have not opted out, regardless of outcome. Bearing in mind the general low opt-out rate, it is submitted that this holds a considerable benefit for defendants (especially corporates who could be facing multiple consumer claims).

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73 Williams *supra* n 20 at 616-617; Legg *supra* n 49 at 62.

74 See eg Bone 'The puzzling idea of adjudicative representation: lessons for aggregate litigation and class actions' 2011 *George Washington Law Review* 577 592 referring to 'inferred consent' and *Phillips Petroleum Co v Shutts supra* at 892-893.

75 Thus protecting the 'day in court' ideal as class members' claims are not extinguished in the class proceeding. It has been argued that this right protects an individual's ability to decide whether his or her claim will be litigated: Cottreau *supra* n 53 at 488-659.

76 Williams *supra* n 20 at 659 argues that opt-out rights preserves an individual's ability to *decide* whether or not his or her claim will see the inside of a court at all.

77 The effectiveness of such notices is debatable: the language in which notices are drafted may render them incomprehensible to the lay reader: Cottreau *supra* n 53 at 481.

4 Policy Considerations

Law develops within a particular social context. This is clearly illustrated by Yeazell's[78] description of the social background to the origin of the 1966-version of the American class action. It was the recognition of the existence of many access-to-justice problems that gave rise to the modern class action,[79] and subsequent developments illustrate that the class action device can be a powerful device to facilitate socio-legal change.

However, the class action is an anomaly within the context of traditional Anglo-American procedural law. The much-revered principle of party autonomy (or individualism) is not a comfortable fit with the class action device, as illustrated by the tension created between this principle and collectivity in group litigation. Essentially, a class action allows an individual to institute and conduct legal proceedings – not only on his or her behalf, but also on behalf of other individuals without their express consent, while the only connection is shared common issues after suffering injury caused by the same defendant. And to compound matters, the objective is to obtain a single determination of these issues through a judgment that is binding on all class members (including the absentees). The effect thereof is that individual claims are destroyed, and the ideal of the 'day-in-court' is not preserved, causing some commentators to reject the device while others have defended it as 'the most useful remedy in history'.[80]

Although the anomaly is not easily explained or justified, it is at the core of the debate regarding the highly controversial issue whether the binding effect on class members should be achieved through an opt-in or an opt-out mechanism. It is at this point where the principle of party autonomy (often encountered as the insistence on an individual's right to a 'day in court') is used as an argument in favour of either the opt-in or the opt-out mechanism as seen from part 3 above. Unfortunately, the endless listing of pros and cons by either side in the debate in the literature and before various law reform commissions, as well as the mere weighing of mechanism attributes have (it is submitted) also contributed relatively little towards reaching a definitive answer. While

78 See Yeazell *supra* n 13 at 239-245 and 3 1 above, describing the social background made up of racial politics and the failure of market capitalism that shaped the 1966 revision of the Rule 23 of the Federal Rules of Civil Procedure in the US.

79 See Mulheron *supra* n 8 at 52 where she notes that access to justice has been described as the 'cornerstone of class proceedings'. See also Davis 'Towards the proper role for mass tort class actions' 1988 *Oregon Law Review* 157 169.

80 See Pomerantz 'New developments in class actions – has their death knell been sounded?' 1970 *Business Law* 1259 1259. See also Handler 'The shift form substantive to procedural innovation in antitrust suits' 1971 *Columbia Law Review* 1 9 calling it 'legalised blackmail' and Miller 'Of Frankenstein monsters and shining knights: myth, reality and the "class action problem"'. 1979 *Harvard Law Review* 664 for a more positive view.

these actions are not considered unimportant (as they certainly highlight the complexities that accompany the choice), they obscure the fact that the choice lies in the balance of fundamental legal principles and rights and values.

What has become clear from these debates is that arguments amounting to the valuation of fundamental legal rights above all else point towards a restrictive approach and towards choosing an opt-in mechanism, while considerations of justice for the plaintiffs (and thus an independent good) point towards adopting an opt-out mechanism and a less restrictive approach. As many proponents of opt-in are usually also opposed to the class action device, it is possibly safe to deduce that their insistence on adhering to individualism and all it entails is, in fact, a way of expressing their opposition to this device. The reasons for such opposition are varied, but could probably be encapsulated in the suggestion that it is because of the class action's 'potential … to upset the *status quo*' in a legal system.[81] If this is indeed a correct deduction, then one should be very careful in selecting a mechanism, especially where the class action device has already been accepted in a system. What should then be borne in mind is that opt-in regimes do not promote inclusivity, and an under-inclusive class does not ensure access to justice for all the individuals who fall within the class definition, but only for those opting in. As a result the group that suffered harm is not reflected accurately, and a class action in such instance is prevented from achieving its stated objectives.

It has long been recognised that class actions aim to achieve three major goals,[82] the first being 'judicial economy'. This goal is seen to be achieved by having issues that are common to a group determined in a single action, thus saving costs, ensuring efficiency of process and avoiding conflicting judgments in individually commenced actions. A second goal is increased access to justice in facilitating access to courts by enabling individuals with non-recoverable claims[83] or whose claims would not have been brought due to social or psychological barriers to litigate. The third goal is behaviour modification to deter wrongful

81 Morabito 'Class actions: the right to opt out under Part IVA of the Federal Court of Australia Act 1976 (Cth)' 1994 *Melbourne University Law Review* 615 628.

82 See Ontario LRC *Report supra* n 59 at 140-146; Cassels and Jones *supra* n 14 at 336. However, the objective of deterrence has not unanimously been accepted across all common law jurisdictions: in Australia the ALRC Report (Australian Law Reform Commission *Grouped proceedings in the Federal Court* Report No 46 (1988)) par 67; 323; 354 did not accept it as a goal. Some Australian commentators do, however: see Morabito *supra* n 81 at 627-628, as well as Alberta Law Reform Institute Report *supra* n 21 at 9.

83 These refer to claims of which the individual litigation costs would be greater than the expected amount of recovery (but would justify the lesser expense required to obtain a share of a class action judgment). This term has been taken from Note 'Developments in the law – class actions' 1976 *Harvard Law Review* 1318 1325 1356. Based on this work, claims are often divided into three categories: individually recoverable, individually not recoverable and 'non-viable': see eg Ontario LRC *Report supra* n 59 at 116.

behaviour on the part of defendants where such behaviour may affect large numbers of individuals. Furthermore, the strict adherence to the principle of individualism presupposes equal litigative power for all individuals, but loses sight of the reality of socially and economically disenfranchised individuals in modern society.

The low take-up rate in respect of opt ins should, further, be counter-indicative to choosing this mechanism, especially in societies where potential groups are more vulnerable due to social and economic barriers and where illiteracy, distrust or fear of the legal system and ignorance regarding personal rights are not uncommon. To address socio-economic exclusion and imbalances, a mechanism which provides for the greatest possible inclusion should be favoured to ensure that the vulnerable are 'swept in'.[84]

As already stated, in designing a class action regime the choice of mechanism is, in essence, one of policy to determine the question surrounding the participation in litigation by an individual and the determination of his or her rights without his or her express consent. South Africa still has to establish its own class action policy in this regard. Although the American influence on class action jurisprudence worldwide is unmistakable, it is suggested that it bears pointing out that there was no wholesale introduction of the American class action (including its procedural baggage and doctrinal eccentricities) by the other common law jurisdictions, and that their class action developments bear the stamp of their own unique legal culture with a clear emphasis on access to justice values.[85] In particular there is an absence of the dominant consideration of due process,[86] and the consequent almost myopic focus[87] on the day-in-court ideal which directs much of the American bimodal mechanism debate. Although the prominent attention to this issue in America is constitutional[88] and thus relevant for South African developments (due to section 34 of the Constitution[89] that provides that 'everyone' has the 'right to have any dispute … decided … before a court …'), this does not mean that this section should be interpreted in a manner that leads to an over-statement of a litigant's choice not to surrender his or her claim to the group. It should instead be

84 See Alberta Law Reform Institute Report *supra* n 27 at 98 where in the principal recommendation agreement is expressed with the Ontario LRC Report *supra* n 59 on the choice of regime, and it is stated with approval that the 'vulnerable should be swept in'.

85 American doctrine is contained in their Constitution (see above), while the English approach stems from the common law. The Canadian and Australian approach, while acknowledging the common law principles, followed a more pragmatic legislative route and access to justice values: see Jones *supra* n 46 at 2; Williams *supra* n 20 at 5-15; Cashman *supra* n 8 at 26-28.

86 See eg Williams *supra* n 20 at 44; Cottreau *supra* n 53 at 480 *et seq*.

87 Williams *supra* n 20 at 603.

88 Galligan Due process and fair procedures A study of administrative procedures (1996) 187-194.

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

interpreted as a right of access to justice, in terms of which the legal system provides a mechanism to allow, from the point of view of public policy, that a class be defined as broadly as possible to either benefit (depending on whether the action is successful) or bind (even if unsuccessful), the greatest number of class members. In order to implement this suggested policy the local approach need not be dogmatic, for although common law jurisdictions have steadfastly incorporated the opt-out mechanism into their class action regimes, a number of 'varying approaches'[90] (models) have been identified, raising the possibility of a more flexible approach than the strictly bimodal approach discussed above.

One such an approach, although the option has so far never been enacted, is to leave the opt-in or opt-out decision entirely to the court, as was recommended by the South African Law Commission.[91] However, this proposal has not received unequivocal support from law reform commissions, and the Alberta Law Reform Institute was particularly critical of this choice, due to the host of uncertainties that may conceivably be created by such judicial choice.[92] Their criticism mainly focussed on the fact that parties would be:

(1) placed in an uncertain position regarding their case preparation, because they would have no advance knowledge which procedure would be followed;

(2) that expensive litigation over the procedural choice made by the court could ensue; and,

(3) finally, on the difference in limitation (prescription) periods – as under the opt-in scheme time stops only once a plaintiff files his or her request, while for an opt-out scheme time is suspended when the class action is filed.

The argument against judicial choice is persuasive, and the recommendation of the South African Law Commission can accordingly not be supported. It can also be questioned whether a model which includes an opt in should in any event be considered, as it bears repeating that an opt-in regime has rightly been viewed by various American commentators and law commissions (such as the Ontario Law Reform Commission) as a 'permissive joinder device', and not as a class action at all. Moreover, purely on access-to-justice considerations, it is a difficult regime to defend – in recommending the adoption of the opt-out regime, the Alberta Law Reform Institute went so far as to state that an opt-in requirement would be 'fundamentally inconsistent with the access

90 Mulheron *supra* n 8 at 29-34.
91 South African Law Commission The recognition of class actions and public interest actions in South African law (Project No 88) (1998) par 5.11.4.
92 See *supra* n 27 at 98-99; 241-242. See also Mulheron *supra* n 5 at 394.

to justice rationale endorsed as a basic justification for expanded class proceedings legislation'.[93]

Against this background certain pertinent aspects of the recent decision in *Nkala and others v Harmony Gold Mining Co Ltd and others*[94] are briefly considered to establish whether the case provides some indication of the direction future developments may take and if it lends some support for the expansive approach advocated above. In this matter the court considered an application for the certification of an action comprising two separate and distinct classes on behalf of current and past mineworkers who contracted silicosis or TB while in the employ of various gold mines as a class action. Of relevance to the present discussion are two matters. In the first instance the court in no uncertain terms expressed its commitment to support a litigant's constitutional right of access to court,[95] and held that the class action in this matter was the 'only realistic option' through which the mineworkers could realise this right in view of their dire personal circumstances.[96] This view clearly does not indicate a leaning towards strict adherence to the principle of individualism. Secondly, the court adopted a so-called bifurcated process involving two stages in which it directed the members of the two classes to opt out of the proceedings[97] if they did not wish to be bound by the judgment or judgments in the first stage, and to opt in during the second stage. It was envisaged that the issues common to all the mineworkers would be decided in the first stage,[98] whereas the individual issues is to be dealt with in the second.[99] It was made clear that those who did not opt out during the first stage would be bound by the findings of the court during this stage. Should the mineworkers be successful during this stage, then only would the opportunity to opt in arise.[100] It is contended that, despite the terminology used and statements that mineworkers may wish to take advantage of 'both the opt-in and opt-out options' and that this process affords them the 'widest choice possible', [101] the court did in fact not adopt the 'judicial choice'-model, but the opt-out model, albeit in hybridised form.[102]

93 See *supra* n 27 at 98. See also Part 3 where the concern was discussed that many potential class members who fail to opt in due to ignorance or because of social exclusion would be deprived of the benefits of the class action – precisely those in most need thereof.
94 See *supra* n6.
95 *Idem* par 104-108.
96 It was uncontested that they are poor, that they lack the sophistication necessary to litigate individually, that they have no access to legal representatives and are constantly ill – see *idem* par 100.
97 *Idem* par 230 point 9.
98 *Idem* par 85; 90-99; 119; 223.
99 *Idem* par 116; 119; 225.
100 *Idem* par 119.
101 *Idem* par 121.
102 Based on par 223; 225 and 230 point 10.

The split process envisaged by the court accords with the practice often encountered in America[103] where members are required to 'opt in' in order to identify those who are to share in the award *after liability has been determined* (e.g. by submitting proof of claim), and is thus not used to *establish* a class. This distinction is important: a class action is an action on behalf of a group defined at the commencement date, and it is at that point that a right to opt out is conferred on them. A reference to 'opt in' after determination of liability (as envisaged in *Nkala*'s stage one) is therefore not problematic as it does not change the *initial* regime (opt out in *Nkala*) – the original group or class description is unchanged, and it is only the number of persons who meet the class description that is affected. There is thus no 'new' members seeking inclusion in the class, and for this reason there is no opt-in in the conventional sense as referred to in the bimodal debate. (Hence the contention that one is in fact dealing with a hybrid version of the opt-out model.) As the term 'opt in' as used in the context of *Nkala* in respect of stage two may be confusing, such use should be avoided in future and descriptive wording be used instead. It is suggested that this matter has indeed laid the foundation for the adoption of an opt-out regime and an expansive approach.

5 Conclusion

The choice between implementing an opt-in or an opt-out model in a class action regime has been shown to be controversial when individualist ideals are pitted against ideals of greater participation by individuals through group litigation. These ideals need not be viewed as being in opposition and can co-exist as they are 'mutually vital components'[104] in a system which seeks to enhance access to justice.[105] Choice, as stated above, is eventually determined by policy.[106]

Most common law jurisdictions have placed a strong emphasis on access to justice values, and have consequently adopted the opt-out model which appears to be a natural choice: because of its inclusive effect it gives expression to access values. The only common law system to date in which the opt-in model is used – albeit not in a strictly class action context – has provided evidence of its unsuitability as a model, and criticism is no longer confined to academic commentary.[107] Thus far

103 See Friedenthal Kane and Miller *Civil Procedure* (2005) par 16.6.

104 See e.g. Friedman 'Constrained individualism in group litigation: requiring class members to make a good cause showing before opting out of a Federal class action' 1990 *Yale Law Journal* 745 763.

105 A Valdes 'Procedure, policy and power: class actions and social justice in historical and comparative perspective' 2007 *Georgia State University Law Review* 627 649 eloquently states: 'Throughout the zigs and zags of time, the virtue of the class action was and is in the effort to provide access to justice – to deliver justice to those who don't have access to justice. It is this virtue that motivates and justifies the modern class action specifically.'

106 See also Mulheron *supra* n 8 29.

107 See Mulheron *supra* n 38 556-557 where the drawbacks of such a model is discussed in the context of the British GLO regime.

it appears (but is not yet firmly established) that South African developments are leaning towards the adoption of the opt-out model, motivated by access to justice values: in *Mukaddam v Pioneer Food (Pty) Ltd*[108] the Supreme Court of Appeal indicated that the circumstances would have to be 'exceptional' before an opt in would be allowed, and in *Nkala* an opt-out was directed. Unfortunately, in the absence of class action legislation our courts have had to devise on a case-by-case basis solutions and develop procedural guidelines for a procedure that was given express constitutional recognition. *Nkala* will require further such court action, as the case will undoubtedly present numerous challenges to the trial court due to its size and complexity. This situation is undesirable, and a renewed call for legislation and supporting rulemaking is surely not amiss: legislation offers not only clarity and uniformity of practice and approach, but allows that matters of substantive law be dealt with.[109] It is therefore recommended that such legislation specifically include a provision providing for the opt-out model similar to that contained in section 9 of the Ontario *Class Proceedings Act, 1992*.[110] It is commendably brief and clear, yet efficacious in implanting access to justice values.

108 *Supra* n 6 258F.
109 Mulheron *supra* n 8 38-42.
110 SO 1992 c6. It reads:
Opting out
9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

The legal character of ancillary customary marriages

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OPSOMMING

Die regsaard van aanvullende gebruiklike huwelike

Die Wet op Erkenning van Gebruiklike Huwelike is 'n kernkomponent van Suid-Afrika se plurale regsbestel. Bykomstig tot die huwelike deur die Wet geskep, is daar egter ook ander, huwelike, wat as "aanvullende" huwelike beskryf sou kon word. Hierdie huwelike val uiteen in verskeie kategorieë, nl. 'n huwelik gesluit tussen twee vroue om die baar van kinders vir 'n betrokke *lapa*, huis of kraal te bewerkstellig; sororate huwelike; leviraatshuwelike; en, laastens, ukungena. In hierdie artikel word elk van bogenoemde bespreek en word daar, kortliks, ondersoek ingestel na die vraag of hierdie huwelik as sodanig erken kan word binne die bestek van die Wet op Erkenning van Gebruiklike Huwelike en die Handves van Regte.

1 Background and purpose

South Africa has a plural legal system consisting of the common law (applicable to everybody) and customary law (applicable to black South Africans only). The people to whom these laws apply are largely socially integrated but Africans, especially those who live in rural areas, follow traditional and customary practices and ways of living to varying degrees. For instance, family law among a mostly urban section of the population (particularly Whites) is based on notions of the nuclear family, whereas African families form extended social units consisting, broadly speaking, of all who belong to the family.[1] The status of spouses and their children, therefore, is inextricably interwoven with their membership of the family.[2]

In the following outline Coertze[3] explains the concept of 'family' in black African communities:

> Among the African peoples, including the Bafokeng the social structure is not composed of a number of separate nuclear family atoms, but of networks of

1 *Bafokeng Family Law and Law of Succession* (1987) 3.
2 *Bafokeng Family Law and Law of Succession* (1987) 3.
3 *Bafokeng Family Law and Law of Succession* (1987) 3.

How to cite: Bekker & Buchner-Eveleigh 'The legal character of ancillary customary marriages' 2017 *De Jure* 80-96
http://dx.doi.org/10.17159/2225-7160/2017/v50n1a5

> family connections within which the reciprocal relationships between all members may also be governed by legal maxims.
>
> The basic unit – and the primary interest of this study – is the conjugal-natal or nuclear family consisting of a man, his wife, and his children. This is the *lapa* unit, of which the father is the head and has authority over all the other members.

Africans nowadays are obliged to enter into a form of marriage akin to common law marriages.[4] Moreover, succession is regulated by the Reform of Customary Law of Succession and Regulation of Related Matters Act (RCLSA).[5] The lowest identifiable social unit still is the family, consisting of a man, his wife (or wives in former polygamous units) and all the children born out of this marital union (or unions in the case of polygamy).[6]

This description is not merely an idealised version of traditional African life: to this day Africans place a high premium on family solidarity and ancestor veneration. According to Mbiti:[7]

> When (a man) gets married, he is not alone, neither does his wife 'belong' to him alone. So also the children belong to the corporate body of kinsmen, even if they bear only their father's name. Whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. The individual can only say: 'I am, because we are, and since we are, therefore I am'.[8]

In the rural areas there are many such family homes in which a family head – male or female – plays an indispensable role in caring for all the occupants. These family homes (the household) may have little of monetary value worth distributing among heirs and may consist of a single house or a cluster of houses occupied by the family.

It is in accordance with these circumstances that African marriages (formerly called unions) were recognised as marriages in terms of the Recognition of Customary Marriages Act[9] (RCMA). Marriages concluded in terms of customary law,[10] for all purposes, were recognised as marriages.[11]

The RCMA largely focused on monogamous marriages but indirectly, included polygynous marriages. However, in addition to polygyny, there are a number of other unions that may be termed ancillary marriages. These unions formerly were called cognate unions, but as all customary marriages now for all purposes are marriages, the term 'ancillary

4 Recognition of Customary Marriages Act 120 of 1998.
5 Act 11 of 2009.
6 See Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.
7 *African Religions and Philosophy* (1969) 108-109.
8 *Ibid*.
9 120 of 1998.
10 S1 of the Recognition of Customary Marriages Act 120 of 1998.
11 S2(1) of 120 of 1998.

customary marriages' is more appropriate. The purpose of these further unions was not merely another conjugal relationship between a man and a woman but revolved around the preservation of the family and the continuation of the lineage. This purpose is expressed by Nhlapo:

> Children are at the centre of the African concept of marriages as an arrangement serving interests wider than the immediate needs of the spouses. A man needed many sons to ensure the survival of the lineage and to increase his power within the clan, and daughters who by their marriages would swell his herds and create beneficial alliances with other clans. As members of the family children were also important participants in the household economy. The whole clan thus had an interest in the children of its members, their upbringing, socialization and eventually, marriage.
>
> It would be perverse to argue for the abolition in Africa of the role of the wider family and the community in marriage. The positive aspects of this communal value are too clearly demonstrated.[12]

In the light of this understanding the authors describe the following ancillary marriages, as well as customary marriages akin to same-sex marriages, and, briefly, pose the question whether they can be recognised as marriages within the ambit of the RCMA and the Bill of Rights:[13]

(1) a woman marrying another woman to bear children for the *lapa,* house or kraal,

(2) marriages akin to same-sex marriages (which include true woman-to-woman marriages),[14]

(3) the sororate,

(4) the levirate and

(5) *ukungena*.

What follows is a discussion of the different types or categories of ancillary customary marriages.

12 'The African Family and Women's Rights: Friends or Foe's?' 1991 *Acta Juridica* 135 143.

13 Ch 2 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

14 Although these marriages are not ancillary marriages, they are discussed here to emphasise the fact that marriages between a woman and another woman for the purpose of bearing children for the house, *lapa* or kraal and same-sex marriages are different marriage institutions.

2 Discussion of the legal character of ancillary marriages

2 1 A woman marrying another woman to bear children for the *lapa*, house or kraal[15]

A large volume of legal and related literature exists which deals with the subject of a woman marrying another woman for *lapa*, house or kraal, mostly written and interpreted by non-African writers.[16] The most prominent reporting of the existence of this traditional form of marriage was by Oomen in 2000.[17] According to Mokotong and Monney,[18] the literature contains distorted information as it fails to appreciate the true nature of this marital practice. The authors state that generally this marital practice carelessly and erroneously has been described or translated in English as referring to a 'woman marriage or marriage involving a female husband or woman-to-woman marriage': descriptions which imply and advance a notion of lesbianism in this particular marriage practice.[19] In a quest to record a 'true' African version of this marriage practice and address misunderstandings and the misrepresentation of this institution, they explain that this marriage is used as an intervention to save or revive a family name facing extinction.[20] In other words, this form of marriage is resorted to if there is no one within a family or kraal to continue a family name in the form

15 This cultural marriage institution is known as *go nyalela mosadi lapa* in Sepedi or *u malela musadzi muta* in Tshivenda. Bennett *Customary law in South Africa* (2004) 198 noted that this type of marriage is commonly practised amongst the Pedi, Venda, Lovedu and Zulu societies in South Africa.

16 Mokotong and Monney 'A Study of Complex and Unfamiliar Customary Marriage Outside the Recognition of Customary Marriages Amendment Bill: Distortion of a Traditional Customary Marriage' 2013 27 *Speculum Juris* 78 79. See also literature cited therein, for example Krige 'Woman Marriage with Special Reference to the Lovedu: Its Significance for the Definition of Marriage' 1974 *Journal of the International African Institute* 11-37; Rautenbach and Meyer 'Lost in Translation: Is a Spouse a Spouse or a Descendant or Both in terms of the Reform of Customary law of Succession and Regulation of Related Matters Act' 2012 1 *TSAR* 149-160; Bekker *Seymour's Customary Law in Southern Africa* (1989) 147; Smith Oboler 'Is the Female Husband a Man? Woman/woman Marriage among the Nandi of Kenya' 1980 19 *Ethnology Journal* 69-88; Bonthuys 'Race and Gender in Civil Union Act' 2007 23 *SAJHR* 526-542; Oomen 'Traditional Woman-to-woman Marriages and the Recognition of Customary Marriages Act' 2000 63 *THRHR* 274-282.

17 2000 *THRHR* 274.

18 2013 *Speculum Juris* 78.

19 Mokotong and Monney 2013 *Speculum Juris* 78. See also Armstrong 'Uncovering Reality: Excavating Women's Rights in African Family Law' 1993 *International Journal of Law and the Family* 314 316; Bonthuys 'Possibilities Foreclosed: The Civil Unions Act and Lesbian and Gay Identity in Southern Africa' (2008) http://sex.sagepub.com/content/11/6/726.full.pdf + html (last accessed 2015-09-15) 730.

20 2013 *Speculum Juris* 83.

of procreating and bearing offspring. Factors that may contribute to the absence of a biological family member to carry the family name, for example, are the death of the family head survived by the wife only; death by the family head survived by the wife and married daughters only; a childless woman with no brothers or sisters[21] or a purely childless or barren woman.[22]

Mokotong and Monney[23] describe this marriage as

> a traditional form of marriage in which a woman is married into a family (*lapa*/house/kraal) to revive and continue with the family name of her newly parent-in-law. It must be pointed out that this form of marriage does not result in the bride becoming a couple to a parent-in-law or becoming someone's wife … All various requirements for the conclusion of a valid customary marriage e.g. consent of the bride, negotiations with her family, payment of *lobolo/magadi*, exchange of gifts, transfer of the bride and celebration of the wedding are also observed. But the bride does not become the wife of or become a couple to her parent-in-law. *Go nyalela mosadi lapa* is not a marriage between one woman and another.

Upon the conclusion of a marriage the bride becomes the woman's daughter-in-law and not the wife of the woman and (the bride) refers to the woman as parent/mother-in-law.[24] The woman married for the purposes of reviving the *lapa* has a duty to continue the family name of her new parent-in-law. If the woman already has children, her children automatically assume the surname of their new family and they will continue the family name. The woman and her children thus become the descendants of their new family or parent-in-law.[25] If the woman has no children, a suitable, specially chosen, male partner normally will be selected for the daughter-in-law.[26] The bride's children refer to the woman (parent-in-law) as grandmother (*mmakgolo*).[27] The bride does not relinquish control, guardianship or any parental rights over her existing or future children, rather the children remain the bride's children and attain the status of the woman's (or, parent-in-law's) grandchildren.[28]

Oomen[29] also correctly called the parent-in-law or older woman a grandmother (*mmakgolo*). She then referred to the same grandmother as

21 Oomen 2000 *THRHR* 274.
22 Mokotong and Monney 2013 *Speculum Juris* 83.
23 *Ibid*.
24 Mokotong and Monney 2013 *Speculum Juris* 87, 94.
25 Mokotong and Monney 2013 *Speculum Juris* 84.
26 *Ibid*. See also Bonthuys http://sex.sagepub.com/content/11/6/726.full.pdf+html 730; Bekker in *Seymour's Customary law in Southern Africa* 147 where he gives an account of such marriage process among Venda traditional communities.
27 Mokotong and Monney 2013 *Speculum Juris* 94.
28 *Ibid*.
29 Oomen 2000 *THRHR* 275.

a female husband[30] in order to show that the younger woman is her wife. According to Mokotong and Monney, Oomen's description fails to understand and appreciate the importance of calling the older woman a grandmother. In calling her grandmother the community by no means infers that the older woman is in a position equivalent of a spouse or a partner to a younger woman.[31] This misconception was entrenched in section 3(1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act (RCLSA).[32] This section created a certain group of women who qualify as spouses for purposes of intestate succession. Section 2(2)(c), read together with section 3(1), of the RCLSA adopts an inclusive conception of the term 'spouse' for the purposes of intestate succession by providing that 'any woman who was married to another woman under customary law for the purpose of providing children for the deceased [woman's] house …, if she survives the deceased, [must] be regarded as a descendant of the deceased'.

No sexual relationship arises in this form of marriage between the bride and her parent-in-law.[33] Oomen's description of this type of marriage makes it explicit that it is different from same-sex marriages. She emphatically states that this form of marriage and same-sex marriage are entirely different marriage institutions.[34] The absence of conjugal rights in this form of marriage is also confirmed by Smith Oboler[35] and Bonthuys.[36] By way of contrast, the true nature of same-sex marriage is to be found in the fact that it creates *consortium omnis vitae,*[37] [38] in other words, a same-sex marriage is contracted in response to the sexual emotions or attractions of the parties involved. The form of marriage as described by Oomen lacks this foundational function.[39]

30 Brien in 'Female husbands in Southern societies, in sexual stratification: A cross cultural view' (undated) http:www.angelfire.com (last assessed 2015-09-19) writes that the term 'female husband' refers to a woman who takes the legal and social roles of husband and father by marrying another woman according to the approved rules and ceremonies of the community.
31 Mokotong and Monney 2013 *Speculum Juris* 86.
32 See also Mokonong and Monney 2013 *Speculum Juris* 87.
33 Mokotong and Monney 2013 *Speculum Juris* 84.
34 Oomen 2000 *THRHR* 280.
35 1980 *Ethnology Journal* 80.
36 Bonthuys http://sex.sagepub.com/content/11/6/726.full.pdf + html 730.
37 With reference to *Best v Samual Fox* 1952 ALL ER 394, *consortium* can be explained as companionship, love, affection, comfort, mutual services, sexual intercourse – all belong to a married state. See also *Grobbelaar v Havenga* 1964 (3) SA 522 (N) 525; *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) 9F.
38 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 200 2 SA 1 (CC).
39 Mokotong and Monney 2013 *Speculum Juris* 93.

From the above the form of marriage under discussion emanates as a result of peculiar circumstances and thus can be termed a special kind of marriage. It is also important to note that from its inception this form of marriage has not been popular:[40] it has always been a form of marriage resorted to by few members of the tribal community. Notwithstanding this qualification, empirical evidence shows that this form of marriage is still concluded and celebrated in some African tribes.[41]

The RCMA makes no explicit provision for this type of marriage and appears not to allow or provide for the accommodation of this type of marriage. Most commentators[42] are of the view that the RCMA simply equates customary with civil marriages concluded in terms of the Marriage Act[43] as many of the requirements and consequences that the Act imposes in respect of customary marriages are the same as those which apply to civil marriages. According to Himonga[44] the nearly complete substitution by the Act of the customary law consequences of a customary marriage with the consequences which apply in a civil marriage has created a 'common law African customary marriage'. Bakker[45] goes further and states that customary marriages have been turned into civil marriages in which polygyny is permitted. Bekker and Van Niekerk[46] state that customary marriages have become civil marriages in all but name. Thus, the RCMA retains and enforces a single, homogeneous, cultural version of customary marriage. According to Mokotong & Monney,[47] the Act gives legal recognition to customary marriages conducted according to customary law involving heterosexual couples (this includes both monogamous as well as polygamous marriages). It can be argued, because customary marriage practices manifest different and unique features from the recognised conventional customary marriage in terms of the RCMA, that there is no leeway to interpret the Act to accommodate the marriage practice that has been described above.

40 See Warmelo and Phophi *Venda Law Part 1: Betrothal Thaka, Wedding* (1948) 33; Mokotong and Monney 2013 *Speculum Juris* 83.
41 Mokotong and Monney 2013 *Speculum Juris* 92.
42 See Himonga 'The Advancement of African Women's Rights in the First Decade of Democracy in South Africa: The Reform of Customary Law of Marriage and Succession' 2005 *Acta Juridica* 82; Bakker 'Die Civil Union Act, Draft Domestic Partnership Bill en Moontlike Deregulering van die Huwelik' 2009 34 *Journal for Juridical Science* 1; Bekker and Van Niekerk '*Gumede v President of the Republic of South Africa*: Harmonising or the Creation of New Marriage Laws in South Africa?' 2009 24 *SA Public Law* 206 214.
43 Marriage Act 25 of 1961.
44 2005 *Acta Juridica* 82 84.
45 2009 34 *Journal for Juridical Science* 1 17.
46 2009 24 *SA Public Law* 206 214.
47 2013 *Speculum Juris* 81.

2 2 Marriages akin to same-sex marriages

A clear account of true woman-to-woman marriages, for example, is reported to exist among traditional healers known as *sangomas*.[48] The *sangomas* derive many of their powers from their relationship with the ancestral spirits who, it is believed, choose or approve of ancestral wives for both male and female *sangomas*. A female traditional healer, on the instruction of the ancestral spirit, will marry a so-called ancestral wife. The functions of these wives are to assist the *sangomas* in their healing ceremonies and practices.[49] Recent research indicates that sexual relations take place between the female *sangomas* and their wives[50] and there is clear evidence that marriages between men also exist. Louw[51] describes in the 1950s and 1960s marriages between men were publicly celebrated in the township of Mkhumbane in Natal. Moodie[52] also gives an account of early mine marriages which were publicly celebrated between older migrant workers and younger men on the mines.

Although these marriages are not widespread or numerous in African communities, they nevertheless demonstrate that the customary law concept of marriage was flexible enough to accept and accommodate different family formations long before the enactment of the Civil Union Act.[53] These marriages demonstrate no discernible difference from same-sex marriages legalised by the Civil Union Act.[54]

It is stated above[55] that the RCMA simply equates customary and civil marriages and, therefore, retains and enforces a single, homogeneous, cultural version of customary marriage. The Act gives legal recognition to customary marriages conducted according to customary law only involving heterosexual couples (both monogamous as well as polygamous marriages). In addition, various sections in the Act explicitly

48 See Mokotong and Monney 2013 *Speculum Juris* 89; Bonthuys http://sex.sagepub.com/content/ 11/6/726. full.pdf + html 731.

49 Bonthuys http://sex.sagepub.com/content/11/6/726.full.pdf + html 731.

50 See Bonthuys http://sex.sagepub.com/content/11/6/726.full.pdf + html 731; Nkabinde and Morgan 'This has Happened Since Ancient Times …. It's Something You are Born with: Ancestoral Wives amongst Same-Sex S*angomas* in South Africa' in Morgan and Wieringa (eds) *Tommy Boys, Lesbian Men and Ancestral Wives: Female Same-Sex Practices in Africa* (2005) 231-260; Mokotong and Monney 2013 *Speculum Juris* 90.

51 'Mkhumbane and the New Traditions of (Un)African Same-Sex Weddings' in Morrell (ed) *Changing Men in Southern Africa* (2001) 287-96. See also Bonthuys http://sex.sagepub.com/content /11/6/726.fu ll.pdf + html 731.

52 'Black Migrant Mine Labourers and the Vicissitudes of Male Desire' in Morrel (ed) *Changing Men in Southern Africa* 297-315. See also Bonthuys http://sex.sagepub.com/content/11/6/726.full.pdf + html 731.

53 Civil Union Act 17 of 2006.

54 The legislation was adopted as a direct result of the case of *Minister of Home Affairs v Fourie* 2006 1 SA 542 (CC). The Act defines a civil union as 'a monogamous, voluntary union of two persons who are at least 18 years of age, which is solemnised and registered in accordance with the procedures prescribed in the Act'. The term 'civil union' includes a marriage and a civil partnership concluded in terms of the Act.

55 Par 2.1.

make use of the words 'husband' and 'wife' and not merely of the term 'prospective spouses':[56] 'husband' and 'wife' refer to spouses of the opposite sex only. Therefore the RCMA does not provide for so-called customary same-sex marriages, whether they were concluded before or after the coming into operation of the Act.

Same-sex marriages have gained legal recognition by way of the Civil Union Act in fulfilment of the constitutional dispensation opposing unfair sexual and gender discrimination. The Act is currently the only means available to same sex couples who want to obtain full legal recognition of their relationship.[57] In others words, if same-sex couples, including those joined in customary same-sex marriages, want their marriage to have legal recognition, that marriage must be solemnised and registered in terms of the Civil Union Act.

2 3 The sororate

In African customary law,[58] if a married woman is infertile or dies young or without having borne children, the husband's family has a right to approach the woman's family and ask that he be given a substitute (or seed raiser).[59] The substitute could be an unmarried sister or another female relative of the infertile or deceased woman who has to bear children for the house of the infertile or deceased wife.[60] This practice is referred to as a sororate union.

This practice stems from the marriage agreement between the husband's and wife's families and is connected to the function and significance of marriage goods (*lobolo*) delivered by a husband to his wife's family.[61] Thus, this practice can be properly understood only if one takes cognisance of the nature of the marriage agreement and the

56 See for example s 1 which defines lobolo as 'the property in cash or in kind, whether known as lobolo, …, which a prospective husband, or the head of this family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage' and s 6 which expressly provides that 'the wife has on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law'. Further reference can also be made to ss 7(4)(b), 7(5), 7(6), 8(4)(b) and 10(1).

57 Heaton *South African Family Law* (2010) 195 fn 19, 201.

58 The study will limit itself to the Pedi, Xhosa and Tswana customs.

59 In Pedi custom it is not only the man's duty but the woman, of her own volition, will approach her parents and request them to give her a sister to help her. See Mönnig *The Pedi* (1967) 203.

60 Bennett *Customary law in South Africa* (2008) 355; Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 103; Mahlobogwane 'Surrogate Motherhood Arrangements in South Africa: Changing Societal Norms?' 2013 27 *Speculum Juris* 45.

61 Boonzaaier and Hartman 'Regsimplikasies van die Sorroraat by die Tsonga van Gazankulu' 1988 11 *SA Journal of Ethnology* 99 107.

special significance and function of *lobolo*. From sources consulted, the functions of *lobolo*, amongst others, are to legalise the marriage,[62] ensure proper treatment of the wife by the husband and his family, legitimize the children born from the woman and to transfer the reproductive capacity of the woman from her family into that of her husband.[63] Thus *lobolo* plays an indispensable function in providing legitimate offspring and increasing the lineage of the husband and his family group. By accepting the marriage goods, the wife's family undertakes that she will honour her child-bearing responsibilities towards her husband and his family, even if circumstances beyond her control make it impossible for her to fulfil the responsibilities.[64] This view is in agreement with that of Mönnig,[65] who defines a customary marriage as follows:

> Marriage … is not an individual affair, legalising the relationship between a man and a woman, but a group concern, legalising a relationship between two groups of relatives …

If the wife cannot fulfil her child-bearing responsibilities, her father has a moral obligation to provide a substitute who can bear children for the husband.[66] This arrangement does not call for the conclusion of a separate marriage with the substitute.[67] The customary law position is that the substitute becomes an additional asset to the house of her sister. No additional *lobolo* is due[68] because the arrangement is that she is considered to be the womb of the original wife and, because she is the womb, she has to raise that house.[69] She has the rights and duties of an ordinary wife,[70] but the children borne by her belong to the house of her

62 *Lobolo* is not prescribed as a requirement in the Recognition of Customary Marriages Act but most commentators confirm that it is still a requirement for a valid customary marriage. For instance, Jansen 'Customary Family Law' in Rautenbach and Bekker (eds) *Introduction to Legal Pluralism* (2014) 105 states that '*lobolo* embodies and expresses the views and convictions of the African community in terms of the distinction between a real and binding marriage and an informal relationship'. See Boonzaaier and Hartman 1988 *SA Journal of Ethnology* 107; Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 101.

63 Bekker and Koyana 'The Legislative Reconstruction of Customary Law of Marriage' 2014 77 *THRHR* 23 29; Bekker *Seymour's Customary Law in Southern Africa* 150; Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 101; Boonzaaier and Hartman 1988 *SA Journal of Ethnology* 99.

64 Customary marriages and procreation go hand in hand; without procreation, marriage is incomplete.

65 Mönnig *The Pedi* 129.

66 Boonzaaier and Hartman 1988 *SA Journal of Ethnology* 101. However, see Olivier *et al Indigenous Law* (1995) par 1.53 where he states that the husband may choose a seed raiser.

67 However, see Olivier *et al Indigenous Law* (1995) par 1.53 where he states that the union of a seed raiser is a normal customary marriage, concluded with its usual ceremonies.

68 Some form of consideration might be paid, but it is less than a full *lobolo*. See also Bekker and Koyana 2014 *THRHR* 33; Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 103.

69 Mahlobogwane 2013 *Speculum Juris* 46.

70 *Ibid*. See also Maqutu *Contemporary Family Law of Lesotho* (1992)156.

sister.[71] The substitute is not given the rank or status of the childless wife.[72] The substitute virtually loses her personality[73] and becomes absorbed into the house for which she has to bear seed. In the case of a deceased wife the substitute will replace her and, therefore, she assumes the deceased wife's position. The substitute wife has no status of her own but becomes the body of the woman for whom she has to bear seed.[74]

From the above it is evident that the institution of sororate was designed to remedy a woman's infertility or to fill a gap created by her death. The sororate union does not constitute a new house or *lapa*.[75] Instead, it is described as a secondary union aimed at preserving an existing marriage and honouring the duties flowing from it.[76] It is also interesting to note that the Reform of Customary Law of Succession Act also does not refer to the relationship between the deceased and the substitute woman as a marriage, but as a union: the reason for the union is for the purpose of providing children for the traditional house[77] of the husband's spouse.[78]

The RCMA makes no express provision for sororate unions. The RCMA, which became operational on 15 November 2000, gives full recognition to all existing monogamous and polygamous customary marriages that comply with customary law requirements[79] and establishes a set of minimum requirements for future customary marriages.[80] It is argued, because these unions are not accompanied by typical marriage ceremonies and payment of *lobolo*, they do not constitute valid marriages and do not fall within the purview of the Act.[81] It was argued above,[82] because the Act equates customary with civil

71 Bekker and Koyana 2014 *THRHR* 33; Mahlobogwane 2013 *Speculum Juris* 46.

72 Bennett *Customary law in South Africa* 338; Maqutu *Contemporary Family Law of Lesotho* 156; Mahlobogwane 2013 *Speculum Juris* 45. The substitute will only assume the status of the childless woman should she die.

73 See Maqutu *Contemporary Family Law of Lesotho* 156 where he writes that the substitute wife 'nevertheless become virtually a servant of the house she is married into and is completely under the shadow of the childless woman'.

74 Bekker and Koyana 2014 *THRHR* 33; Bennett *Customary law in South Africa* 346; Maqutu *Contemporary Family Law of Lesotho* 156. See also Bekker and Coertze *Seymour's Customary Law in Southern Africa* 4th ed (1982) 274-8.

75 Bennett *Customary Law in South Africa* 198, 355.

76 Boonzaaier and Hartman 1988 *SA Journal of Ethnology* 99.

77 'House' for purpose of the Act is defined in s 1 of the Act as the 'family, property, rights and status which arise out of the customary marriage of a woman'.

78 S 2(2)(b) read with s 3(1).

79 S 2(1) and (3).

80 S 3(1) provides that the prospective spouse must both be over the age of 18; they must consent to be married to each other under customary law; and the marriage must be negotiated and entered into or celebrated in accordance with customary law.

81 See also the South African Law Commission *Report on Customary Marriages* Project 90 (1998) 30.

82 Par 2 1 above.

marriages, that it retains and enforces a single, homogeneous, cultural version of customary marriage. Therefore the RCMA does not include other forms of marriages which are recognised by African societies under customary law.

2 4 Levirate

The levirate is a system according to which a man marries the widow of his deceased brother and where the children born of the union are considered to be the progeny of the deceased brother, which enables them to remain in the deceased man's descent group.

Hartman and Boonzaaier write:

> The levirate does not create a new marriage but merely perpetuates the existing union, the rights and duties of the substitute towards the widow, and those of the widow towards the substitute, are only slightly different from the reciprocal rights and duties that obtained between husband and wife before the former's death. Similarly, the substitute's duties towards the deceased's children are no different from those which any household head is normally expected to fulfil with regard to his own children.[83]

The custom is beneficial in that it safeguards the interests of the weakest links in society, namely fatherless children and widows. Maluleke[84] indicates his approval of this custom in the following words

> The African traditional culture has an almost infinite capacity for the pursuit of consensus and reconciliation, as opposed to being individualistic and competitive. Further, in terms of African culture, there are no orphans because a child is a child of a community in which the child lived. Decision making in the African culture (as expressed in terms of the principle of *Ubuntu*) is by consensus – productivity is optimised, not maximised, as the case may be in other cultures. Rewards are shared and so is suffering, as opposed to the context of an individualistic culture, where rewards are given according to individual merit and suffering is viewed as a penalty for one's carelessness. Sustainable competitive advantages come from loyalty to group goals in terms of *Ubuntu*.

Whelpton conveys a view which is similarly favourable, indicating that the widow has a choice but is unlikely to refuse partnership in a levirate union because it ensures that the deceased's lineage is perpetuated, that she and the children are taken care of and that they continue to have a male head who represents their interests in the wider family. No social welfare scheme or adoption achieves the same objectives.

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83 'Verwekkings en Versorgingsimplikasies van die Leviraat by die Tsonga' 1988 11 *SA Journal of Ethnology* 80-81.

84 'Culture, Traditions, Customs, Law and Gender Equality' 2012 15 *PER* 1/428 17/428.

2 5 *Ukungena*

The practice of ukungena is resorted to in the case of a widow, whereby a brother of the deceased husband or another near male relative is given access to the woman in order to father children on behalf of her deceased husband.

In terms of section 1(3)(f) of the Natal Code of Zulu Law *ukungena* is defined as

> a union with a widow undertaken on behalf of her deceased husband by his full or half-brother or other paternal male relative for the purpose of either raising an heir if there is nobody to inherit the property rights attaching to the widow's hut or, if she has male issue, of increasing the nominal offspring of the deceased.[85]

Bekker[86] says the reasons for the perpetuation of the custom are the following:

> Since a widow continues to keep her status as 'wife' at her husband's family home after his death, she is expected to continue to give effect to one of the main objects of matrimony, namely, the procreation of children; no widow who is young enough to bear children is required to live a chaste life after her husband's death. In most tribes, however, custom leads her husband's relatives to prefer that such children should be fathered by a man of their own blood, rather than by an outsider to the family group to which they belong. If possible, therefore, she will be induced to accept as a consort one of her husband's male relatives. She cannot be compelled.

The union does not create a legal obligation between the parties and it may be terminated unilaterally by either one of the parties. In traditional customary law the status of the children born from the *ukungena* union vis-à-vis children born from the marriage had to be resolved. In terms of the RCLSA the family head's estate would be wound up and cannot be revived after his death: children born from an *ukungena* union would succeed to their mother's estate. Vis-à-vis the male *ukungena* consort such children would be regarded as his extra-marital children who could inherit from him, but in terms of the common law of intestate succession. As the reason for the custom, namely the continuation of the family home, falls away by the statutory devolution of the deceased's estate (including the family home) the deceased's wife, the children and the consort find themselves in a legal vacuum.

If people should enter into an *ukungena* relationship not knowing that it has lost its traditional role – it has no legal effect – they will have to make alternative arrangements such as a will, to govern the patrimonial consequences of *ukungena* relationships.

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85 Proc R151 of 1987. The Act is to be repealed, but the repeal has not been effected yet. It is not suggested that it is current law, but it serves as a reflection of the nation.

86 Seymour's *Customary Law in Southern Africa* 286.

3 Cultural rights versus constitutional issues

Advocates for the recognition of the ancillary customary marriages, as discussed above, argue that on constitutional grounds non-recognition of these marriages potentially violates, *inter alia*, the right not to be subject to unfair discrimination on the ground of culture[87] and the right to culture.[88] Section 30 of the Constitution affords everyone the right to participate in the cultural life of his or her choice and section 31(1)(a) provides that persons belonging to a cultural community may not be denied the right to enjoy their culture.

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) adopted the Draft Declaration on Cultural Diversity which provides:

> Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent… all persons have therefore the right to express themselves, and to create and disseminate their work in the language of their choice, particularly their mother tongue; all persons are entitled to quality education that fully respect their cultural identity; and all persons have a right to participate in the cultural life of their choice and conduct their own cultural practises, subject to respect for human rights and fundamental freedoms.[89]

These cultural rights, however, may not be exercised in a manner which is inconsistent with human rights[90] or any of the provisions of the Bill of Rights.[91] They, for instance, may not relegate women to an inferior status.

It can be argued that these ancillary marriages should not be recognised in their present form due to their patriarchal nature, as it undermine a woman's rights to equality and to dignity.[92] Section 1 of the South African Constitution elevates gender equality and human dignity to be founding constitutional values.[93] Ackermann J has stated that people are equal before the law and they enjoy the equal protection and the benefit of the law, which means that the law must protect and benefit all people equally with respect to their human dignity.[94] In the case of S *v*

87 S 9(3)-(4) of the Constitution.
88 Ss 30-31 of the Constitution.
89 Art 5 of the Declaration, adopted at the United Nations Educational, Scientific and Cultural Organisation (UNESCO) General Conference Paris October 2001.
90 *Ibid*.
91 Ss 30 and 31(2).
92 Ss 9 and 10 of the Constitution.
93 The Constitution describes South Africa as 'one sovereign state founded on the … values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism'.
94 Ackermann 'Equality and Non-discrimination: Some Analytical Thoughts' 2006 *SAJHR* 597-612.

Makwanyane,[95] O Regan J explained the right to human dignity as follows:

> Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: Human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in … the Bill of Rights.

In addition, the Constitution, the United Nation's Convention on the Elimination of All Forms of Discrimination against Women[96] and the Optional Protocol to the African Charter on the Rights of Woman in Africa all require governments to take action to eliminate all forms of unfair sex and gender discrimination, even in the sphere of domestic relations.[97]

It can be argued that recognising these ancillary marriages in their present form perpetuates the social inequality of African women based on gender. However, Nhlapo[98] disputes the claim by stating

> In the context of a subsistence economy the very rules that appeared designed for the subjection of women often operated to ensure their security. The economic priorities underlying the pre-eminence of marriage and large families produced practices which worked in part to ensure that no woman was left without someone directly responsible for her maintenance.

Bekker[99] opines that there is more to customary law than is perceived and that it is wrong to say that customary rules constitute another form of inequality and discrimination. African traditional practices, therefore, were not considered detrimental, although they are currently. There is a viewpoint which suggests that consideration should be given to people who adhere to cultural and traditional practices, such as a woman marrying another woman for *lapa*, the sororate and levirate. Quiet a number of people do not find these practices offensive as it is part of the culture of people adhering to these marital practices for very real and practical reasons. According to Robinson[100] culture and customs are valuable and important parts of people's lives and women experience some aspects of customary law as affirming. The positive aspects of

95 1995 (3) SA 391 (CC) 328.

96 The Convention was adopted in 1979 by the United Nations General Assembly and came into force on 3 Sept 1981. South Africa signed the Convention in January 1993 and ratified the Convention on 15 December 1995, without entering any reservations.

97 S 9 of the Constitution, art 5(a) of the Convention and art 2(1) of the Protocol. Art 5(a) of the Convention provide that states parties are obliged '[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles of men and women'.

98 1991 *Acta Juridica* 135.

99 'How Compatible is African Customary Law with Human Rights? Some Preliminary Observations' 1994 57 *THRHR* 440-447.

100 Robinson 'The Minority and Subordinate Status of African Women under Customary Law' 1995 11 *SAHJR* 457 469. See also Mahlobogwane 2013 *Speculum Juris* 56.

customary law can be measured by the extent to which they affirm a woman's personhood or are not experienced as oppressive. According to Mahlobogane[101] it is evident that some human rights principles undermine or conflict with certain human dignity orientations that human rights are supposed to protect. For instance, in customary law the husband in a family is regarded as the head of the family, whereas human rights afford his wife equal rights. Male leadership is an ancient supposition of family life.

On the other hand, Bekker and Koyana argue that these traditional marriage practices limit the woman's individual freedom of choice.[102] Mahlobogane[103] points out that customary marriage essentially is an agreement between two families in which the individual interest of the groom and bride, though implicitly or formally recognised, are a subordinate element to the wider dominating interests of their families.[104] An individual exists as a member of a group and, consequently, an individual's rights are subject to the interests of the group. Mahlobogane[105] further advances that African people consider the culturally universal values guaranteed by the authority of a super human being first before individual considerations and believe that the ancestors will bring harm upon those who ignore the ancestors and break the laws of the family. Women, who are ostensibly willing role-players, within these social circumstances are expected to obey.[106]

It is important to note, although African traditional marriage practices are becoming obsolete,[107] these practices are not experienced as disruptive in the African communities that have institutionalised them within socially-accepted patterns of marriage. It is the authors' opinion that these practices promote social cohesion and unity and are not discriminatory, oppressive and dehumanising.

3 Conclusion

From the above discussion it is clear that ancillary unions and true woman-to-woman marriages are not recognised as marriages within the ambit of RCMA. As indicated above these practices are moving towards being obsolete. However the cultural importance of these unions and true woman-to-woman marriages should not be underestimated as it promotes social cohesion and unity and these practices are not experienced as discriminatory, oppressive and dehumanising in the communities that have institutionalised them.

101 2013 *Speculum Juris* 55.
102 2014 *THRHR* 33; Mahlobogwane 2013 *Speculum Juris* 56.
103 Mahlobogwane 2013 *Speculum Juris* 56.
104 See also Holleman *Shona Customary law* (1952) 73.
105 2013 *Speculum Juris* 56.
106 2014 *THRHR* 33.
107 See Bekker and Koyana 2014 *THRHR* 33; Bennett *Customary law in South Africa* 355; Mahlobogwane 2013 *Speculum Juris* 58; Mokotong and Monney 2013 *Speculum Juris* 92; Bennett *Customary law in South Africa* 347.

Some customs enjoy almost universal recognition among Africans in that they support the integrity of families, they perpetuate the name of the community (tribe) and they are not compulsory. They are sure in time to adapt to legal, social and economic change but, for the present, there is no necessity for change, especially as there is no need.

It is not known how many of these ancillary marriages exist. They are not registered or counted anywhere. Most, in any event, are of a personal and intimate nature. They are known by family members and members of the community, but are not publicly discussed. Family members involved in an *unkungena* union, of course, will know about it, but its existence is not public knowledge: the practice is a family affair. Questions may be raised about certain aspects, such as how and by whom the births of children born from an *unkungena* relationship are registered, but the status of the children is never debated.

The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1

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OPSOMMING

Die beskerming van belanghebbendes: die Suid-Afrikaanse maatskaplike- en etiekkomitee en die Verenigde Koninkryk se verligte aandeelhouersbelang benadering: Deel 1

Maatskappyereg is nog altyd baseer op die beginsel dat die direksie die maatskappy moet bestuur in die beste belang van die maatskappy. "Maatskappy" in hierdie sin beteken die maatskappy as afsonderlike regsentiteit, met verwysing na die vermoënsmaksimalisering van die belange van die aandeelhouers. Die belange van die ander belangehouers, soos die werknemers, staat en verbruikers kon in ag geneem word, maar die fokus is die aandeelhouers se belange. Hierdie teorie van die uitgebreide aandeelhouersbelang ("enlightened shareholder approach") is ook aanvaar as die basis van die Suid-Afrikaanse Maatskappywet 71 van 2008, in stede van die meervoudige belange benadering ("pluralist approach"). Daar is egter 'n duidelike verandering ten opsigte van die voortgesette absolute toepassing van eersgenoemde benadering te bespeur, nie net in die Suid-Afrikaanse konteks nie, maar ook wêreldwyd. Hierdie beweging is miskien begin deur instrumente soos Kodes, maar in die Suid-Afrikaanse Maatskappywet is daar ook nou spesifieke bepalings wat aan sekere belangegroepe direkte remedies verleen. Daar is twee modelle wat die direksie in staat stel om hierdie ander belange in ag te neem, en in Suid-Afrika geskied dit deur die Sosiale en Etiese Komitee, terwyl dit in die Verenigde Koningkryk gedoen word deur middel van 'n spesifieke statutêre bepaling, alhoewel laasgenoemde nie direk afdwingbaar is deur die belangegroepe nie. In hierdie artikel word die twee modelle in oënskou geneem en die effektiwiteit daarvan word ge-evalueer, veral in die lig van die praktiese probleme en die wenslikheid van sulke inisiatiewe, sonder dat die basiese gemeneregreël ten opsigte van die aandeelhouerfokus uitdruklik gewysig word.

How to cite: Esser & Delport 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' 2017 *De Jure* 97-110
http://dx.doi.org/10.17159/2225-7160/2017/v50n1a6

1 Introduction

A basic element of the duties of directors is that directors must act in the interest of the company. The company in this sense was always interpreted as the 'metaphysical entity', and this translated into the interest of all the members, present and future, and, in certain instances, such as when the company is insolvent, also the creditors. '[T]he interests of the consumers of the company's products, the nation as a whole and even… the employees are legally irrelevant.'[1] This philosophy changed and, in South Africa at least, it was initially led by codes. The self-regulatory South African *King III Report on Corporate Governance*[2] specifically addresses corporate social responsibility (CSR) and opted for the so-called inclusive stakeholder value approach.[3] This implies that the board should consider the interests of all legitimate stakeholders, like

1 Gower, Cronin, Easson and Lord Wedderburn of Charlton *Gower's Principles of Modern Company Law*, Stevens & Sons (1979) 577 and authorities cited. See also Lombard *Directors' Duties to Creditors* (LLD Thesis 2006 University of Pretoria). See further Hodes 'The social responsibility of a company' 1983 *SALJ* 468 in respect of the initial basis of corporate social responsibility.

2 *The King Code of Governance for South Africa 2009* (the *Code*) and the *King Report of Governance in South Africa 2009* (hereafter *King III*). The Institute of Directors in Southern Africa (the IoDSA) also issues Practice Notes on *King III*. The *King II Report on Corporate Governance* of 2002, replacing *King I*, was applicable to South African enterprises until the end of February 2010 after which *King III* became effective. The *Code* is available at: www.iodsa.co.za. Copyright of the *Code* and the *Report* rests with the Institute of Directors in Southern Africa. The *Report* is also available at www.iodsa.co.za. On *King II*, see: Loubser 'Does the *King II Report* solve anything?' 2002 Juta's Business Law 135. For a detailed discussion of *King III* see: Loubser 'The King Reports on corporate governance' in Esser and Havenga (eds) *Corporate Governance Annual Review 2012* 2012 20ff. *King IV* was launched on 1 November 2016 (http://www.iodsa.co.za/page/KingIVReport.) Disclosure on the application of *King IV* is effective in respect of financial years starting on or after 1 April 2017 but immediate transition is encouraged. *King IV* replaces *King III* in its entirety. *King IV* operates in terms of practices, principles and governance outcomes. The practices will support the principles and this will lead to the governance outcomes. *King IV* is, similar to its predecessors, a set of voluntary principles and practices. Some of these practices have been legislated being in line with international hybrid systems of good governance. The main objective with *King IV* was to make it as accessible and fit to as many organisations as possible. In view of this *King IV* is based on an 'apply and explain' approach of disclosure. As all principles are phrased as aspirations and ideals that organisations should strive to achieve to give effect to the governance outcomes, application of the principles is assumed. The explanation that is given will be a high level disclosure of the practices that have been implemented and the progress that has been made in the journey towards giving effect to each principle.

3 See par 9 of the Introduction and Background part in the *King III Code* as well as 8 in the *Report*. This is still the case in *King IV* (see page 25 where a stakeholder-inclusive approach is recommended).

employees and creditors, and not just those of the shareholders.[4] The various interests of different stakeholders should be determined on a case-by-case basis, and the decision to act in the best interests of the company and a particular stakeholder may well, in a particular situation, receive preferential treatment, provided it serves the ultimate interests of the company best. This self-regulatory approach was complimented with some legislative provisions and stakeholders in general are now, at least indirectly, protected in the 2008 South African Companies Act.[5] Various provisions of the 2008 Companies Act provide stakeholders with some form of protection,[6] while particular classes of stakeholders, such as employees, are afforded specific protection measures.[7] A critical analysis of these provisions is not within the scope of this article and our aim is to focus on the new procedural requirement of a social and ethics committee in respect of certain companies and the protection that it offers stakeholders in general. A detailed analysis and appraisal will be provided, focusing on the appointment and functions of this committee, the practical relevance and, specifically, the effect that it will have on the shareholders. Regulation 43, under the Companies Act,[8] deals with the social and ethics committee as referred to in section 72 of the Act.

A comparison will be made with the position in the United Kingdom.[9] Both South Africa and the United Kingdom make use of a hybrid system

4 Section 1 of the Companies Act 71 of 2008 ('2008 Companies Act') defines a 'shareholder' as the holder of a share issued by the company and whose name is entered as such in the (certificated or uncertificated) securities register. The 'holder' of shares (without it being entered as such in the (certificated or uncertificated) securities register) or of voting rights or other 'beneficial interest' is used in different contexts throughout the Act. A 'holder of shares' and a 'shareholder' are therefore, for purposes of the Act, not synonyms. See Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (Service issue April 2016) (hereafter *Henochsberg*) 30(1). The extended definition of a shareholder as in s 57 of the 2008 Companies Act which in essence includes the beneficial shareholder, only applies to Part F of Chapter 2, i.e. in respect of the governance of companies.

5 *See also Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 5 SA 333 (W) where it seems if the courts are holding directors liable if they do not comply with *King* (in this case, *King II*) stating that that in itself can result in a breach of the duty to act with care, skill and diligence.

6 This is discussed in detail in Esser 'Corporate social responsibility: a company law perspective' 2011 *SA MercLJ* 317.

7 See for examples para 3 infra.

8 GN R 351 of 26 April 2011 in terms of s 223 of the Companies Act ('Regulations'). The Regulations are subordinate legislation and the power to make the regulations is restricted by the particular enabling provision in the Act. As subordinate legislation it cannot amend the Act or be used to interpret the enabling Act: See in general about subordinate legislation *Executive Council, Western Cape v Minister for Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa* 2000 1 SA 661 (CC).

9 See *De Jure* 17(2) for part 2 of this article.

of corporate governance, where rules and principles are embedded in legislation, as well as self-regulatory codes.[10] Despite this, the approach with regard to the protection of the interests of stakeholders has been dealt with differently in South Africa and the United Kingdom.

The United Kingdom has opted to alter the best interest duty of directors legislatively to include the interests of stakeholders when acting to promote the success of the company.[11] South Africa has instead placed the monitoring of stakeholder interests within the ambit of the above-mentioned committee, whose task is to report to the shareholders and draw the attention of certain matters, within its mandate, to the board.

The different approaches, i.e. of process versus rules, of the United Kingdom and South Africa respectively will be compared to indicate the preferred one. This article is divided into two parts.[12] Part 1 provides the theoretical background on the nature of the company and the stakeholder debates in South Africa and the United Kingdom. In Part 2 we discuss the practical application of the stakeholder concepts in South Africa and in the United Kingdom and reach certain conclusions and form a view on whether or not the South African procedural approach of a social and ethics committee or the United Kingdom's rule approach of a codified duty best protects the interests of stakeholders.

2 The Nature of the Company

In South Africa and the United Kingdom, at common law, directors have to act honestly in the best interests of the company. This has always been interpreted as the shareholders collectively, both present and future.[13]

10 This article will not evaluate the advantages and disadvantages of self-regulation versus legislation. As mentioned the focus is on the protection of the interests of stakeholders. On self-regulation versus legislation, see generally: DeJong A, DeJong DV, Mertensa and Wasley 'The role of self-regulation in corporate governance: evidence and implications from the Netherlands' 2005 Journal of Corporate Finance 473–503; Graham and Woods 'Making corporate self-regulation effective in developing countries' 2006 World Development 868–883; Demaki 'Proliferation of codes of corporate governance in Nigeria and economic development' 2013 Business and Management Review 37–42.

11 See, generally, Wilkinson *Will Social and Ethics Committees Enlighten Shareholders? A Comparison of the South African provisions relating to Social and Ethics Committees with the Enlightened Shareholder Value Approach in the United Kingdom Companies Act 2006* (LLM Dissertation 2011 University of Johannesburg).

12 See De Jure 17(2) for part 2 of this article.

13 See *Hutton v West Cork Railway Company* (1883) LR 23 ChD 654, 673 and the well-known quotation that: 'The law does not say that there are to be cakes and ale, but there are to be no cakes and ale except such as required for the benefit of the company.' According to *Re Smith & Fawcett* [1942] Ch 304, 306 directors were supposed to 'exercise their discretion *bona fide* in what they consider – not what a court may consider – is in the interests

During the company law reform processes of both South Africa and the United Kingdom the issue as to whom directors owe their duties was debated in detail.[14] There are, generally, two schools of thought on the issue of whose interests must be granted primacy when directors manage companies. In the enlightened-shareholder-value approach, the primary role of the directors should be to promote the success of the company for the benefit of the shareholders as a whole and to generate maximum value for shareholders. The second school is that of plurism, which sees shareholders as one constituency among many and the interests of a number of groups are recognised. Thus, a company's existence and success are seen as inextricably intertwined with the consideration of the interests of its employees and other potentially

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of the company, and not for any collateral purpose.' See the discussion in Kershaw *Company Law in Context* (2012) 331ff. See also *Percival v Wright* [1902] 2 Ch 421 and *Peskin v Anderson* [2000] All ER (D) 2278. See *Dawson International Plc v Coats Paton Plc* [1989] BCLC 233 where a distinction was drawn between the 'interests of the company' and the 'interests' of 'current shareholders'. See also *Brady v Brady* [1988] BCLC 20 on the interests of the company, as an artificial person, being those of the shareholders both present and future. Observance of this duty entails only the honest exercise by the directors of their judgment as to what is in the company's interests (*In re Smith & Fawcett Ltd supra* 306). The Court is not concerned to enquire into the commercial or financial wisdom of the directors' decisions (*Levin v Felt & Tweeds Ltd* 1951 (2) SA 401 (A) 414–415; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126 (PC) 1131). But in deciding whether the duty has been observed the Court may properly consider whether in the circumstances a reasonable man could have believed that the particular act was in the interests of the company (*Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62 74 (*obiter*); [1969] 2 All ER 1185 1194; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 5 SA 179 (WCC) para 74; *Howard Smith supra* 1133; and see the Canadian case of *Teck Corporation Ltd v Millar* 1973 33 DLR (3d) 288 315–316 where Berger J stated: 'I think the Courts should apply the general rule in this way: The directors must act in good faith. Then there must be reasonable grounds for their belief. If they say that they believe there will be substantial damage to the company's interests, then there must be reasonable grounds for that belief. If there are not, that will justify a finding that the directors were actuated by an improper purpose.' *Cf*, in a different context, *Shuttleworth v Cox Brothers & Co* (*Maiden head*) *Ltd* [1927] 2 KB 9 (CA) 23. This is discussed in detail in *Henochsberg* 295.

14 See on the company law reform processes in South Africa: The *Policy document of the Department of Trade and Industry. The guidelines for corporate law reform, South African company law reform for a 21st Century* (GG 26493 of 23 June 2004, hereafter the *Policy document*) and in the United Kingdom: The CLRSG, *Modern Company Law for a Competitive Economy: The Strategic Framework* (DTI February 1999) (the *Strategic Framework*); CLRSG, *Modern Company Law for a Competitive Economy: Developing the Framework* (DTI March 2000) (*Developing the Framework*); *CLRSG, Modern Company Law for a Competitive Economy: Completing the Structure* (DTI November 2000) (*Completing the Structure*); *CLRSG, Modern Company Law for a Competitive Economy: The Final Repor*t (Vols I and II, DTI 2001) (*Final Report*) *White Paper, Company Law Reform* (March 2005) Cm 6456 (the *White Paper*). On the UK reform process, see: Rickford 'A history of the company law review' in De Lacy (ed) *The Reform of United Kingdom Company Law* (2002) 3–37 and Goddard 'Modernising company law: the government's white paper' 2003 *Modern Law Review* 402–424.

qualifying stakeholders in the business, such as suppliers and customers.[15]

The protection that has to be afforded to stakeholders has been widely debated in South Africa.[16] The *Policy document*, issued prior to the commencement of the company law reform process which commenced in 2004, referred to it as an important issue that the drafters of the new Companies Act had to consider. The *King* reports emphasise CSR principles and that companies must act as responsible corporate citizens. The common law position that a director has to act *bona fide* in the best interests of the company is now entrenched in the Act.[17] The common law will still be applicable, as long as it does not conflict with the current Act. Even though the common law position is still applicable, and now

15 As to corporate social responsibility in the context of directors' duties see, *inter alia*, Olson 'South Africa moves to a global model of corporate governance but with important national variations' 2010 *Acta Juridica* 219-247; Esser 2011 *SA MercLJ* 317–335; Stoop 'Towards greener companies – sustainability and the social and ethics committee' 2013 *Stell LR* 562–582; Kloppers 'Driving corporate social responsibility (CSR) through the Companies Act: an overview of the role of the social and ethics committee' 2013 PER 165–199; Esser 'Shareholder interests and good corporate governance in South Africa' 2014 *THRHR* 38-52 and for a critical evaluation of the concept also Welling 'Corporate social responsibility – a well-meaning but unworkable concept' 2009 *Corporate Governance e-Journa*l, Bond University. On the various theories see: Coase 'The nature of the firm' 1937 Economica 386; Alchain and Demsetz 'Production, information costs, and economic organization' 1972 *American Economic Review* 777; Jensen and Meckling 'The theory of the firm: managerial behavior, agency costs and ownership structure' 1976 *J of Financial Economics* 305-360; Wishart 'Models and theories of directors' duties to creditors' 1991 *New Zealand Universities LR* 323; Dine 'Company law developments in the European Union and the United Kingdom: confronting diversity' 1998 TSAR 245. See further Garcia *et al* 'Shareholder vs. stakeholder: two approaches to corporate governance' 2008 Business Ethics, A European Review 1-7 and Mason and Simmons 'Embedding corporate social responsibility in corporate governance: a stakeholder systems approach' 2013 *Journal of Business Ethics* 1-10.

16 See Muswaka 'Shareholder value versus stakeholders' interests – a critical analysis of corporate governance from a South African perspective' 2015 Journal of Social Sciences 217-225 where it is argued that 'Traditionally, corporate governance focuses on the regulation of the directors' duties for the maximum welfare of the shareholders. As a result, stakeholder interests have held very little relevance under classical company law. However, the argument for imposing wider accountability on companies has gained importance and the issue of protecting stakeholders' interests has thus become crucial. Given this background, this paper examines the issue of the protection of stakeholders' interests under the Companies Act 71 of 2008. The main concern is whether the Companies Act adequately protects the interests of stakeholders. The paper concludes that even though efforts have been made in the Companies Act to ensure that other stakeholders, apart from just shareholders are protected, it seems that legislation is far from effectively providing for the rights of stakeholders. In this regard, recommendations for law reform are made.' See also Esser and Delport 'Shareholder protection philosophy in terms of the Companies Act 71 of 2008' 2016 Journal of Contemporary Roman Dutch Law 1-29.

17 See ss 76(3)(a) and (b) of the 2008 Companies Act.

part of company legislation, the Companies Act brought some substantial changes to directors' duties and to whom they owe these duties. This is discussed below.

In the United Kingdom directors' duties were fully codified in the 2006 Companies Act.[18] Section 172 replaced the common law duty to act in good faith in the best interests of the company.[19] The duty now placed on directors is to promote the success of the company, but not as a separate legal entity, but rather for the benefit of the shareholders collectively. This section is, therefore, still in line with shareholder primacy.[20] This section and the practical implications of it are discussed in detail later in this article.[21]

The nature of the company and the ultimate beneficiary of directors' duties determine the extent to which directors can consider the interests of other stakeholders and ultimately how far they can go to act corporate socially responsible, but still within their fiduciary duties.[22] With this in mind, we will consider the protection afforded to stakeholders, focusing on the social and ethics committee in South Africa and the codified duty of directors to promote the success of the company having regard to various matters in the United Kingdom.

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18 See ss 171-177 of the 2006 Companies Act.

19 See also Keay 'Tackling the issue of the corporate objective: an analysis of the United Kingdom's 'enlightened shareholder value approach' 2007 Sydney Law Review 577-612; Fisher 'The enlightened shareholder – leaving stakeholders in the dark: will section 172 (1) of the Companies Act 2006 make directors consider the impact of their decisions on third parties' 2009 ICCLR 10 and Keay 'Shareholder primacy in corporate law: can it survive? Should it survive?' 2010 *ECFR* 369.

20 See Copp 'S.172 of the Companies Act 2006 fails people and planet?' 2010 CoLaw 406 where it is held that '… s.172 has raised expectations that it cannot deliver and would be better replaced with a traditional statement of a director's fiduciary duty of loyalty'. See Kong Shan Ho 'Is section 172 of the Companies Act 2006 the guidance for CSR?' 2010 Company Lawyer where it is stated that: 'Arguably s.172 does not in reality change directors' practice substantively. Indeed, the CLRSG during the consultation process thought that it simply reflected existing law and best practice.' and then concluded that section 172 enshrines 'the concept of the enlightened shareholder value approach and some of the potential implications which s.172 may have on corporate governance. Our starting point was whether company law can provide a solution to companies that want to integrate CSR into their long-term development strategies. The biggest problem with CSR is that it seems to be an altruistic utopia which is distant from the practical business world. Yet a provision like s.172 at least provides some guidance for businesses faced with the task of balancing different competing interests. So long as management can justify why they have come to a particular decision based on those statutory criteria, then there is no reason why they cannot claim they have integrated social and environmental concerns in their operations.'

21 See part 2 of this article in *De Jure* 17(2) at para 6.2.1. See also Kershaw 382-385 for a concise summary of s 172.

22 See McBarnet, Voiculescu and Campbell *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2009) on CSR against the law.

3 Background: CSR in South African Company Law[23]

As stated above, the generally accepted view has traditionally been that companies are managed primarily in the interests of their shareholders collectively. Thus the duty of directors, to act in the best interest of the company, is to maximise profits for the shareholders. Over time, there has been a shift in public opinion towards the recognition of a variety of other interests that should be considered by company management. These include environmental concerns and the interests of other stakeholders like investors, employees, consumers and the general public.

King III[24] became effective on 1 March 2010 and provides general principles regarding ethical leadership and corporate governance (Chapter 1) as well as principles of good governance relating to the board and directors (Chapter 2), audit committees (Chapter 3), the governance of risk and information technology (Chapter 4 and 5), compliance with laws, regulations, standards and rules (Chapter 6), internal audit (Chapter 7), governing stakeholder relationships (Chapter 8) and integrated reporting and disclosure (Chapter 9).

King III applies to all entities regardless of the manner and form of incorporation or establishment and whether in the public, private or non-profit sectors.[25] The Institute of Directors also issued 'Regulations' that provide guidelines on how to implement the *King Code*, issued with the *King III Report*. *King III* operates on an 'apply or explain' basis. This is somewhat different from the 'comply and explain' basis that *King II* operated on as 'apply' gives less of an indication of prescriptiveness and the *King III* committee found the word 'apply' therefore more appropriate than 'comply'.[26]

23 See Esser 2011 *SA MercLJ* 317 for the CSR legal framework in South Africa.

24 The King reports are issued under the auspices of the Institute of Directors of South Africa ('IoDSA'). The *King III Report* and the *Code* together are referred to as *King III*, although it is two separate documents.

25 See par 13 of the Introduction and Background part in the *King III Code*.

26 It is stated on the website of the IoDSA (iodsa.co.za accessed 2016-05-27) that: 'Like its 56 commonwealth peers, *King III* has been written in accordance to the 'comply or explain' principle based approach of governance, but specifically the 'apply or explain' regime. This regime is currently unique in the Netherlands and now in South Africa. Whilst this approach remains a hotly debated issue globally, the *King* III Committee continues to believe it should be a non-legislative code on principles and practices'. See also par 3 of the Introduction and Background part in the *King III Code*.

King III once again opted for the inclusive stakeholder value approach[27] and indicates that, because a company is so integral to society, it should be considered as much a citizen of a country as any natural person. A company must therefore act as a responsible citizen. This involves that companies must follow the triple-bottom line approach by considering, social, environmental and economic factors when managing a company.[28] In terms of the inclusive approach, directors must thus consider the interests of various stakeholders on a case-by-case basis. In the end, the decision must be in the best interests of the company, even if that particular decision may, in the short-term at least, be to the detriment of the shareholders.[29]

The *King III Report* pays specific attention to CSR issues in Chapter 1 dealing with ethical leadership and corporate citizenship, in Chapter 8 that deals with stakeholder relationships and Chapter 9, dealing with integrated reporting and disclosure.[30] Many of the recommendations of *King III* are now embedded in the Companies Act,[31] which could have the effect that some may be directly enforceable, while others not so contained in the Companies Act may lead to liability, even if not directly enforceable.

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27 See par 9 of the Introduction and Background part in the *King III Code* as well as Chapter 8 of the *Report*. See on stakeholder protection in terms of the *King III Report* and for a comparison between *King II* and *King III*: Esser and Du Plessis 'The stakeholder debate and directors' fiduciary duties' 2007 *SA MercLJ* 346; Esser *Recognition of Various Stakeholder Interests in Company Management* (LLD Thesis 2008 Unisa) and Esser 'The protection of stakeholder interests in terms of the South African King III report on corporate governance: an improvement to King II?' 2009 *SA MercLJ* 188.

28 See p 12 of the *King III Report* and see Principle 1.2 of the *King III Report*.

29 See e.g. *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 5 SA 422 (GNP); *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2015 5 SA 192 (SCA); *Absa Bank Limited v Caine NO and Another, In Re; Absa Bank Limited v Caine* (3813/2013, 3915/2013) [2014] ZAFSHC 46 (2 April 2014); *Shoprite Checkers (Pty) Ltd v Berryplum* 47327/2014 [2015] ZAGPPHC (9 March 2015); *Panamo Properties (Pty) Ltd and Another v Nel* 2015 5 SA 63 (SCA); *Richter v Absa Bank Ltd* 2015 5 SA 57 (SCA) para 13 on how the court balances the interests of shareholders and creditors in the context of the new business rescue proceedings. Employees also receive extensive protection in the 2008 Companies Act. See Katz 'Governance under the Companies Act 71 of 2008: flexibility is the keyword' 2010 *Acta Juridica* 248 261-262 where it is stated that employees receive, for the first time, significant rights of participation in the governance of companies. See, for example, ss 20(4), 45(5), 162(2), and 159 of the 2008 Companies Act. Employees also have extensive rights during business rescue proceedings. See in general also Davis and Le Roux 'Changing the role of the corporation: a journey away from adversarialism' 2012 *Acta Juridica* 306–325.

30 Integrated sustainability performance and integrated reporting are recommended in *King III* to enable stakeholders to make informed assessments on the economic value of a company. See par 9 of the Introduction and Background part in the *King III Code* as well as Chapter 9 of the *Report*.

31 See King 'The synergies and interaction between King III and the Companies Act 71 of 2008' in Mongalo (ed) *Modern Company Law for a Competitive South African Economy* (2010) 446 – 455; Loubser (2012) 20ff.

As stated before *King IV* was recently launched and will be effective in respect of financial years starting on, or after, 1 April 2017. The stakeholder-inclusive approach is once again preferred.[32] Part 5.5. deals with stakeholder relationships. Principle 16 provides that 'In the execution of its governance role and responsibilities, the governing body should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the organisation over time'. The stakeholder approach advocated by *King IV* is that:

> [D]irectors owe their fiduciary duties to the company and to the company alone as the company is a separate legal entity from the moment it is registered until it is deregistered … The company is represented by several interests and these include the interests of shareholders, employees, consumers, the community and the environment. Thus, requiring of directors to act in good faith in the interest of 'the company' cannot nowadays mean anything other than a blend of all these interests, but first and foremost they must act in the best interest of the company as a separate legal entity … An interest that may be primary at one particular point of time in the company's existence, may well become secondary at a later stage.[33]

In a recent South African case, the court referred to a previous King Report by testing directors' conduct against the requirements in that *Report*.[34] This may have far-reaching consequences, not just for directors of listed companies, as *King III* is now, in contrast to previous King Reports, applicable to all companies. The court found that by not complying with the principles embedded in *King*, directors may be in breach of their duty of care and skill. Directors' duties are now (non-exhaustively) codified in the Companies Act[35] and this, coupled with a new liability provision in section 218(2) which provides: 'any person who contravenes any provision of the Companies Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention', could have the effect that liability for breach of duties, also the duty of care and skill, can be extended to third parties, such as outside stakeholders.[36] Although no direct rights are given to stakeholders, third parties still have some recourse available. First, any third party has the option of using section 218(2). Third parties can therefore argue that directors did not act in the best interests of the company, thus not as directed in section 76(3)(b) of the Companies Act, by not considering their specific interests. This will, however, be difficult

32 See *King IV*, page 25.

33 This approach is taken from: Esser and Du Plessis 2007 *SA MercLJ* 346. Reference is also made to Esser and Delport 2016 *Journal of Contemporary Roman Dutch Law* 1-29.

34 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd supra*. See on this case: Luiz and Taljaard 'Mass resignation of the board and social responsibility of the Company: *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*' 2009 *SA MercLJ* 420 and Esser and Delport 2011 *Journal of Contemporary Roman Dutch Law* 449.

35 See for example section 76(3)(b) that requires directors to act in the best interests of the company. As to the ambit of this duty see *Henochsberg* 295.

36 Section 218(2) of the Companies Act, 2008.

to prove as the third party will have to show that by not acting in his or her best interest the director did not act in the best interest of the company. Section 218(2) is drafted in very wide terms and this type of provision may prevent experienced people from serving as directors, although it may be difficult for third parties to succeed with a claim based on section 218(2). Third parties may also have some of the general remedy provisions of the Companies Act at their disposal.[37] Directors may therefore be held accountable under the 2008 Companies Act for not complying with *King*. This does not make the duties legally enforceable, but non-compliance could lead to liability.[38]

In addition to the protection afforded to stakeholders in *King III* (and now *King IV*), stakeholders and the protection offered to them have more prominence in the Companies Act than in any previous company legislation in South Africa and is, at least indirectly, expressly recognised. As stated before, our focus is on the social and ethics committee as provided for in section 72(4). Several other sections afford protection to stakeholders too, especially section 218(2) referred to before.[39] Section 7(d) also confirms that one of the purposes of the Act is to reaffirm the concept of the company as a means of achieving economic and social benefit.[40]

Section 76(3)(a) and (b) of the Companies Act provide as follows:

37 See Ch 7 of the 2008 Companies Act on remedies.

38 See Esser and Delport 2011 Journal of Contemporary Roman Dutch Law 449. Based on the *Stilfontein* decision *supra* it seems that if King is not complied with it will be taken into account when determining whether a director acted with the necessary care and skill. See Joubert 'Reigniting the corporate conscience: reflections on some aspects of social and ethics committees of companies listed on the Johannesburg Stock Exchange' in: Visser and Pretorius (eds) *Essays in Honour of Frans Malan* (2014) 183-195 187 where he states that: '… the fact that conforming to the code is taken into account by the courts when they determine whether directors have acted bona fide in the interest of the company is not authority for the proposition that the code has become legally enforceable …'

39 See Esser 2011 *SA MercLJ* 317ff for a detailed discussion of the CSR provisions in the 2008 Companies Act. However, the exact ambit of s 218(2) is uncertain, and especially whether it offers a remedy in addition to other remedies (e.g. for a shareholder who has certain personal common law and statutory remedies) or only in the circumstances if there are no other remedies. See *Henochsberg* 639; Austin, Ramsay *Ford's Principles of Corporations Law* (2013) para 8.360; *Phoenix Constructions Queensland Pty Ltd v Coastline Constructions Pty Ltd and McCracken* [2011] QSC 167: reversed on appeal in *Phoenix Constructions (Qld) Pty Ltd v McCracken* [2012] QCA 129; Lombard and Joubert 'The legislative response to the shareholders v stakeholders debate: a comparative overview' 2014 *Journal of Corporate Law Studies* 211-240.

40 See Jennings 'Are shareholders exclusive beneficiaries of fiduciary duties in South Africa? The role of fiduciary obligations in the 21st Century' 2015 *The Journal of Corporate and Commercial Law & Practice* 54-81.

> A director of a company, when acting in that capacity, must exercise the powers and perform the functions of director (a) in good faith and for a proper purpose; (b) *in the best interests of the company* […].[41]

When considering section 76(3)(b) on face value, it seems if the common law position of shareholder primacy has been retained, despite the concept of 'the company' (as metaphysical entity) always being contentious.[42] When considering this section against the remainder of the 2008 Companies Act, it soon becomes clear that the philosophy of stakeholder protection in the Act is not clear. To provide a few instances: Section 5(1) of the Companies Act states that the Act must be interpreted in such a way that gives best effect to the purposes listed in section 7. As indicated before, section 7(d) specifically provides that directors have to manage a company in such a manner that promotes both economic and social benefits.[43] Section 1, on the other hand, defines a profit company as '… a company incorporated for the purpose of financial gain for its shareholders.' The same principle is found in section 81(1)((d)(i)(bb), which provides for the winding-up of a solvent company[44] in deadlock if its business cannot be conducted to the advantage of shareholders generally. Clearly, these sections focus on profit maximisation for shareholders, as opposed to benefiting all stakeholders. Thus, although it may be argued that the general philosophy of the Act, as stated above, is to take account of the interests of all the stakeholders, this philosophy is not applied consistently in the provisions that are more specific, which creates uncertainty.

41 Emphasis added.

42 See *Percival v Wright* [1902] 2 Ch 421; *Pergamon Press Ltd v Maxwell* [1970] 2 All ER 809 (Ch); *Bell v Lever Brothers Ltd* [1932] AC 161 (HL); *SA Fabrics Ltd v Millman* NO 1972 (4) SA 592 (A); *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W). In some circumstances directors may become bound by special duties to members, creditors or others, e.g. a duty of disclosure or a duty not to give incorrect information: see eg *Coleman v Myers* [1977] 2 NZLR; *Brouze v Wenneni Investments* (20427/2014) [2015] ZASCA 142 (30 September 2015).

43 It is doubtful that section 7(d) establishes a new, *sui generis*, duty on directors. It rather seems, against the background of the *Policy Document,* that section 7(d) should also be interpreted to mean that directors must pay attention to the interests of stakeholders, but that it does not provide stakeholders with direct rights. Furthermore, if the legislator wanted to create a new duty applicable to directors it would have been done explicitly (maybe by listing it in section 76 with the other duties) and not by merely incorporating it into the 'purpose' provision. Also, in section 158(b)(i) it is held that if a provision in the Act, read in its context, can be reasonably construed as having more than one meaning the meaning that best promotes the purposes of the Act must be preferred by the courts. See also Joubert 186, footnote 15 where he states that s 7(d) is only one of the objectives. See, for example also s 7(b)(iii) on the 'promotion of enterprise efficiency'.

44 A solvent company is one that is commercially solvent, i.e. not commercially insolvent: *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 2 SA 518 (SCA) ([2014] JOL 31202 (SCA)) para 21.

Be that as it may, stakeholders receive substantial protection in the Act: many of the provisions in section 7 are drafted in line with wider purposes than merely profit maximisation and the establishment of the social and ethics committee provides stakeholders with good protection as their interests cannot be ignored. *King III*, and now *King IV*, although self-regulatory, is also clearly in favour of the inclusive approach. Case law, as indicated, also shows a very direct move towards protecting stakeholders where necessary.[45]

The *JSE Listings Requirements* furthermore impose a duty to report on social, health, environmental and ethical performance, the efficiency of risk management and internal control, and to disclose the degree of compliance with the *King Report* on all listed companies.[46] In addition to requiring listed companies to comply with the *King Report*, the JSE Limited also launched a Socially Responsible Investment Index (SRI Index) in May 2004.[47] In terms of this Index the JSE developed criteria to measure the 'triple-bottom line' performance of the FTSE/JSE All Share Index.[48] The SRI Index therefore offers companies a benchmark for structuring their environmental, social and governance programmes. The criteria measure how companies have integrated principles into existing frameworks of governance across three areas: policy and strategy, management and performance and reporting.[49] The establishment of this Index is a good starting point, but the standard of measurement will always be controversial. The SRI Index was replaced

45 See here, very recently, the case of *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* [2015] JOL 33744 where corporate governance was defined as '… the animating idea of which is to ensure net gains in wealth for shareholders, protect the legitimate concerns of other stakeholders and improve efficiency, organisational performance and resource allocation.'

46 See *Listings Requirement* 3.84 dealing with corporate governance requirements and *Potgieter and Another v Howie* 2014 3 SA 336 (GP) in respect of enforcement. The JSE is one of the top 20 exchanges in the world in terms of market capitalisation. More than 400 companies are listed on the Main Board. South Africa is currently ranked 1st in the world in terms of regulation of securities exchanges and second for raising capital through the local equity market according to World Economic Forum's Global Competitiveness Survey for 2013-2014. Almost one fifth of the Main Board companies are dual listed. See: www.jse.co.za/capital/main-board.

47 For the SRI Index see: https://www.jse.co.za/About-Us/SRI/Criteria.aspx. The last annual review of the Index took place in 2014. The SRI Index will continue to be calculated until the end of 2015, based on the results from the 2014 review. Going forward, assessment will take place as part of the collaboration with FTSE Russell. See: https://www.jse.co.za/services/market-data/indices/socially-responsible-investment-index for the announcement.

48 See http://www.jse.co.za/sri/index.htm.

49 The following companies were the best performers of the SRI Index during 2014: Anglo American plc, Anglo American Platinum, Barloworld Medium, Illovo Sugar Limited, Lonmin plc, Netcare Limited, Royal Bafokeng Platinum, Standard Bank, Vodacom Group Ltd. See: https://www.jse.co.za/content/JSEIndexConstituentsandWeightingsItems/2014SRIIndexConstituentsbestperformers.pdf.

at the end of 2015 and the FTSE ESG[50] Ratings are now used to select the constituents for the creation of the FTSE/JSE Responsible Investment (RI) Index.[51]

4 Conclusion

The main objective of companies, at least from the viewpoint of the shareholders, remains the maximisation of profits for its shareholders. A failure by companies to meet the financial expectations of shareholders is often dealt with by instructions to sell their shares and the shareholders therefore 'vote with their feet'.[52] This being said; society also expects companies to be good corporate citizens[53] and '[i]t is clear that it cannot be business as usual for SA companies going forward'.[54]

It is submitted in this article that a committee such as the Social and Ethics Committee is a move to protect the interests of stakeholders in the context of company law in South Africa.[55] However, the efficacy of this committee in achieving this will be evaluated hereafter.

50 The acronym for 'environmental, social and governance'.

51 *JSE FTSE/JSE Responsible Investment Index Series* (October 2015) 2 and www.jse.co.za, Products and Services – FTSE/JSE Responsible Investment Index Series and also Van der Ahee *An Investigation of the Influence of ESG issues on the Decision Making of Institutional Investors in South Africa* (MCom thesis 2012 University of Pretoria).

52 Joubert 183-185.

53 Joubert 185 refers to interesting statistics where he states that the aggregate market capitalisation of companies listed on the JSE (of more than $800 billion) was more than twice the South African GDP in 2011.

54 Jennings 2015 *The Journal of Corporate and Commercial Law & Practice* 80.

55 Locke 'Enhanced accountability' in Esser & Havenga (eds) *Corporate Governance Annual Review 2012* (2012) at 107 also states that 'The enhanced accountability requirement that best illustrates the prominence that the 2008 Companies Act places on the role of companies in greater society is the requirement to appoint a social and ethics committee'.

An appraisal of the Ethiopian bankruptcy regime

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OPSOMMING

'n Beoordeling van Ethiopië se bankrotskapregime

Boek V van die 1960 *Commercial Code* van Ethiopië maak voorsiening vir Ethiopië se bankrotskapregime en handel oor die bankrotskap van handelaars en kommersiële besigheidsorganisasies wanneer betalings opgeskort word. Die bankrotskapregime wat vir meer as 'n halfeeu van krag was, maar selde gebruik is, het verouderd geraak in sowel die filosofiese grondslag as aanwending daarvan. Behalwe vir die wysiging wat kragtens proklamasie 592/2008 aangebring is, en net op banke van toepassing is, was daar geen hersiening ten einde die insolvensieregime op datum te bring nie. Laasgenoemde regime word baseer op die veronderstelling dat die skuldenaar te blameer is en hy of sy staar ernstige gevolge in die gesig in geval van bankrotskap. Tensy die skuldenaar om 'n reëlingskema ("scheme of arrrangement") aansoek doen, maak die regime geen voorsiening vir besigheidsredding nie. Bankrotskap betrek verskeie belange, insluitend dié van werknemers, verskaffers, verbruikers, die regering en die publiek – en veral die belange van skuldeisers wat die onmiddellike slagoffers van insolvensieverrigtinge is. Die insolvensiereg fokus op die verdeling van die opbrengs van likwidasie tussen skuldeisers. Dit slaan egter nie voldoende ag op ander belange nie. Die artikel ondersoek die bestaande reg in die lig van internasionaal-aanvaarde standaarde en beste praktyke en beveel veranderinge aan die stelsel aan. Die feitlik nie-bestaande insolvensiepraktyk word ook ondersoek ten einde die faktore te identifiseer wat die beoefening daarvan verhinder het.

1 Introduction

The Commercial Code of Ethiopia, which came into effect in 1960,[1] is the main source of the Ethiopian bankruptcy regime. Although the regime has been in force for over half a century, its underlying theories have remained intact, despite the makeover they have undergone due to the dynamism of commerce. It has, accordingly, remained static, contrary to observations by scholars that the law of insolvency has been in a state of

1 Commercial Code of Ethiopia Proclamation No 166 of 1960, Negarit Gazeta, Gazette Extraordinary, 19th Year, No 3, Addis Ababa, 5 May 1960 (hereafter the Code, Commercial Code or Com Code).

How to cite: Meheret 'An appraisal of the Ethiopian bankruptcy regime' 2017 *De Jure* 111-135
http://dx.doi.org/10.17159/2225-7160/2017/v50n1a7

flux.[2] A close look at its provisions reveals that its precepts come from a by-gone era where a trader was blamed for any failure and bankruptcy was a form of punishment. The interests of creditors were the regime's only concern. The regime has reached this juncture with little application of transcending kaleidoscopic economic models. It is, therefore, essential to closely examine the law to assess whether it has served the nation and whether it has been kept abreast of the times.

This article is a modest contribution to the scant literature on the bankruptcy law of Ethiopia and aims at shedding some light on its contents and application. It does not set out discuss all the parts or provisions of the law because of time and space constraints. It is, rather, an attempt to evaluate the law by examining certain core elements, selected to illustrate the theme of the article. In particular, the policy underpinnings of Ethiopian bankruptcy law, which determined the contents of the provisions, are scrutinised to ascertain their timeliness and suitability to modern times. It attempts to question both the law and practice regarding their comprehensiveness, clarity and consistency regarding the requirements to subject one to the full force of the bankruptcy regime.

In what follows, the law, as it currently stands, is explored to understand its fundamental tenets. It is also tested against the standards of modern bankruptcy law in order to identify its shortcomings and drawbacks, to analyse the underlying policy of the law, and to test the theories that gave content to the bankruptcy provisions. As Taddesse pointed out, 'Ethiopian basic codes in general were drafted in a vacuum, overarching public policies'[3] – said codes obviously including the Commercial Code. The drafters chose the policy considerations of the Code from the options available at the time. Now, it may be asked whether a law, which emanated from a mental exercise of the drafters (who were not in a position to fully comprehend the prevailing socio-economic reality on the ground) can fit in the system. It cannot be expected to respond to the reality on the ground if the policy was based on 'assumptions'[4] made by the drafters. With the above in mind, the discussion below deals with the legal framework for insolvency, policy choices made, the proceedings recognised, the participants (and their roles), and the insolvency practice itself. However, it is first necessary to find clarity on the concepts and terminology employed in the legal system.

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2 Bridge 'Insolvency – a Second Chance? Why Modern Insolvency Laws Seek to Promote Business Rescue' 39, available at http//www.ebrd.com/download/research/law. See also UNCITRAL Legislative Guide on Insolvency Law (2005)16

3 Taddese 'Ethiopian Bankruptcy Law: A Commentary (Part II)' 2008 *Journal of Ethiopian Law* 86.

4 Taddesse insists that the public policies to be served by the enactment of the codes were, if anything, afterthoughts and often came from the drafters themselves as being what suited Ethiopia's needed at the time. See *supra* n 3.

2 Concepts and Terminology

Terminology is not a problem if one limits oneself to the last book of the Commercial Code. However, if reference is made to other parts of the Code or other laws, the use of the two terms 'insolvency' and 'bankruptcy' can be confusing in the absence of a proper definition. Generally, the terms may have the same or a different meaning, depending on the legal system on which one is focusing. In legal systems where the two terms have different meanings, insolvency denotes either the factual situation regarding the financial position of the debtor, or it refers to the bankruptcy of a non-trader.[5] Against this background, it is pertinent to inquire whether the terms have the same or different meanings under Ethiopian law.

The Commercial Code consistently uses the term 'bankruptcy' in all but one provision, while almost all the other codes[6] employ both terms. Article 542(3) the Commercial Code uses both terms in the alternative, which may mean that they denote the same concept. The terms seem to be used interchangeably in the Civil Procedure Code[7]; while, in the Civil Code, the two terms appear to connote indebtedness and status.[8] For instance, the insolvency of an association or an endowment can be a ground for the dissolution of an association[9] or the termination of an endowment[10]; issues beyond the scope of the bankruptcy regime of Ethiopia. Thus, the law refers to the factual situation due to which the association or the endowment could not pay debts when they became due. There are also provisions indicative that insolvency does not presuppose a decision by a court of law.[11] These and other provisions[12]demonstrate that the Civil Code simply refers to a situation

5 See Bhardwaj *Towards Establishing Modern Insolvency and Bankruptcy Codes for Small Enterprises in India*, Federation of Indian Micro and Small & Medium Enterprises (FISME) 2009 4.

6 Maritime Code of the Empire of Ethiopia Proclamation No 164 of 1960, Negarit Gazeta, Gazette Extraordinary, 19th Year, No 1, Addis Ababa, 5 May 1960. Art 299/1 uses the term 'bankruptcy' in only one of its provisions.

7 Cf art 15(2)(b), 28, 42(d), 54 and 55 of the Civil Procedure Code of the Empire of Ethiopia, Decree No 52 of 1965, Negarit Gazeta, Gazette Extraordinary, 25th Year, No 3, Addis Ababa, 8 October 1965.

8 The latter requires a judgment as incorporated in the Commercial Code whose usage is replicated in art 1145, 1932, 2000, 1947 and 2697/3 of Civil Code of the Empire of Ethiopia Proclamation No 165 of 1960, Negarit Gazeta, Gazette Extraordinary, 19th Year, No 2, Addis Ababa, 5 May 1960 (hereafter the Civil Code).

9 Civil Code art 461/d.

10 Civil Code art 504/d.

11 From art 1981 of the Civil Code one can gather that insolvency can exist without judicial pronouncement while article 298/2 mentions notoriously insolvent. Art 1986 mentions an act done to become insolvent or to increase insolvency, which is fraudulent.

12 See Civil Code art 2109/c/, 2400/1 and 2475/1. Further, art 2582 uses the two terms, which shows that they refer to different ideas.

without a judgment by a court to ascertain the factual situation. The Criminal Code makes the same distinction between the two terms.[13]

Even though there is no conceptual clarity, it can be said that Ethiopian law by and large uses the term 'insolvency' to signify the inability of a debtor to pay debts which are due, whether or not the debtor is a trader and whether or not the debt is commercial. On the other hand, the term 'bankruptcy' is a legal term that describes the status of a person with the concomitant legal consequences.[14] Bankruptcy cannot exist in fact unless there is a judicial pronouncement that recognises the fact of the financial distress of an enterprise.[15] Insolvency of a person does not give rise to bankruptcy, unless the debtor is a trader or a commercial business organisation and a court of law hands down a judgment that confirms the factual situation.

It is interesting to note that the Banking Business Proclamation No 592/2008 introduced 'receivership' instead of the word 'bankruptcy'. It defines 'insolvent' as the financial condition of a bank when its liabilities exceed its assets as determined by the National Bank.[16] Two important deviations can be pinpointed. First, the date of commencement to be used to determine whether a bank is insolvent differs from the test for insolvency adopted in the Commercial Code. Second, the central bank will determine whether insolvency exists, which differs from the judicial pronouncement required by the Code. Apparently only the National Bank can invoke insolvency and trigger receivership. The proclamation uses the term 'insolvency' to signify the financial situation of a bank, although it is more than a mere fact, as a decision is required by the regulatory organ. It is not liquidation *per se,* as it is one of the grounds for the appointment of a receiver. The proclamation uses the term 'receivership' instead of 'bankruptcy' to denote corrective measures to be taken, which include liquidation.[17] Hence, the proclamation exacerbates the disparity in the use of the terms.

13 Criminal Code of Federal Democratic Republic of Ethiopia, Proc No. 414/2004, art 725 and 727.

14 The Code distinguishes between bankruptcy and scheme of arrangement as separate proceedings. It is suggested that this term should be used to refer to all proceedings under Book V of the Commercial Code rather than limiting it to liquidation. See Position of the Business Community on the Revision of the Commercial Code of Ethiopia, Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectoral Associations, (2009) 81;See alsoTaddese 'Ethiopian Bankruptcy Law: A Commentary (Part I)' Vol XXII No 2 2008 *Journal of Ethiopian Law* 66-67

15 Com Code art 970.

16 Banking Business Proclamation No 592/2008, Federal Negarit Gazeta 14th Year No 57, Addis Ababa, 25 August 2008 (hereafter 'Banking Business Proc) art 2/12.

17 Banking Business Proc art 49, 58/6/c and 33 ff.

3 The Legal Framework for Bankruptcy

An economy or a society in general cannot exist without an efficient mechanism and a sound insolvency system, which must be designed to work in harmony in order to enable creditors to enforce their claims.[18] Certainty brought about by these systems is vital for the smooth functioning of commercial transactions and for maintaining confidence in business. Uncertainty about the enforceability of contractual rights increases the cost of credit to compensate for the increased risk of non-performance or, in severe cases, leads to the tightening of the granting of credit.[19] The insolvency process is an extension of the enforcement options available to creditors which must be triggered when a credit impact encompasses more than a dispute between two parties. Hence, the risk of insolvency is one of the risks of non-performance.[20]

Although questions may be raised as to their efficiency, predictability and effectiveness, Ethiopian law provides for systems for the enforcement of claims. A creditor has two options available at the same time even though they cannot be seen as alternatives. In fact, bankruptcy has a narrower application as it can be used as an enforcement mechanism against traders, commercial business organisations and public enterprises. However, it is maintained that bankruptcy is more than debt collection[21] and should reconcile and balance diverse interests affected by the insolvency process. Unlike the ordinary enforcement procedures, in bankruptcy a creditor's interest is balanced against a wider range of interests. The importance of debt collection in insolvency is not overlooked. However, it is not a mere debt collection process as it attempts to respond to other interests affected by the proceedings.[22]

The bankruptcy regime of Ethiopia comprises the overarching provisions of the Commercial Code (Book V) and the provisions of Proclamation 592/2008 which specifically apply to banks. The Code has been in force for more than sixty years without amendment or revision save for the changes introduced by the banking proclamation. During this period the bankruptcy regime moved from 'debtor repression to debtor protection' and a 'redefinition of bankruptcy from sin to risk, from moral failure to economic failure'.[23] For the Code has been immune from these transformations, it still clings to the philosophy that underpinned its provisions six decades ago.

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18 The World Bank *Principles and Guidelines for Effective Insolvency and Creditor Rights System* (April 2001) 3. It is also available at http://www.worldbank.org/ifa/ipg_eng.pdf.

19 *Idem* 4.

20 *Idem* 17.

21 For a detailed exposition of the debate on whether bankruptcy is mere debt collection see Teo 'Bankruptcy Law: Is it Really Only about Debt-collection?' Vol. V 2009 *Cross-sections*, available at https://eview.anu.edu.au/cross-sections/vol5/pdf/10.pdf, accessed on 2014-08-12.

22 *Idem* 116.

23 *Supra* fn 2 32.

It is submitted that the law should be reappraised at regular intervals to ensure that it meets current social needs, taking into account the realities of the country and international best practices.[24] Against this backdrop, one important question which must be posed is whether the bankruptcy regime/system of Ethiopia which is rarely utilised has taken into account the realities existing in the country. It is obvious that an effective insolvency system responds to national needs and problems based on the country's broader cultural, economic, legal and social context.[25] The drafter of the Code gave the assurance that the law would respond to the realities prevailing at the time and in the immediate future.[26] However, the application of the law hardly testifies in favour of such assertion.[27] This raises the question whether the policy decisions made respond to the factors relevant to such a law. The primary policy issues are raised below to determine their responsiveness to current realities.

3 1 Policies and Goals of the Law

It is obvious that the promulgation of a bankruptcy law is a product of policy decisions and has some objectives in mind which the law aims to achieve. Bankruptcy law is heavily influenced by public policy as several competing interests converge. This calls for a choice to be made when determining the contents of the law. For instance, an advisory report submitted to the Ministry of Economic Development of New Zealand identified the reduction of the cost of credit and the promotion of entrepreneurship as public policy factors which the law should address.[28] Once a decision is made on the preference and emphasis of the law, the next step is to articulate the 'appropriate incentives and sanctions to encourage behaviour which will promote those underlying values'.[29]

The purposes and goals of a bankruptcy law depend on the theory that the law adopts.[30] It is, therefore, pertinent to explore the preferences and theory that underpin Ethiopian bankruptcy law. However, it was mainly the choice made by the drafters that determined its contents. The Code was necessitated by the fact that the development of commerce had outgrown the provisions of the laws relating to business organisations and bankruptcy which were promulgated earlier.[31] The person tasked with drafting a code for Ethiopia borrowed from the bankruptcy law of

24 *Supra* fn 18 27.
25 *Idem* 1.
26 Winship *Background Documents of the Ethiopian Commercial Code of 1960* (1974) 1.
27 It is described as the least known and least practiced part of the Code. See *supra* fn 14 81
28 *Insolvency Law Reform: Promoting Trust and Confidence. An Advisory Report to the Ministry of Economic Development* (2001) 14.
29 *Ibid*.
30 Keay and Walton *Insolvency Law, Personal and Corporate* (2003) 21.
31 Com Code preface.

the Continental system, mainly from France and Italy.[32] The law was transplanted in the context that the country had not made policy choices in advance, taking into account the socio-economic setting prevailing at the time or expected to be attained in the immediate future.

In fact, transplantation of a law cannot be carried out without borrowing the theory of the source. If one accepts that transplanting laws is a mechanism of improving legal systems, it should be noted that in this instance the law was transplanted from a country that had different cultural, economic and political conditions prevailing at the time. It is necessary to ask whether in such a case the transplant fits the situation or whether the necessary adaptations were made to make it fit. New insolvency systems must reflect how individual nations have experienced the growth of market economies, and how, philosophically, countries have viewed debt. Bankruptcy systems are social tools. As such, they are value-laden and must be drafted with care to reflect the particular values of a culture.[33]

It has been said that the design of an insolvency legal system is influenced by several policy objectives pertaining to a variety of goals, rights and interests. The choices to be made include promoting discipline or to encourage entrepreneurial activity; being pro-debtor ('debtor friendly') or pro-creditor ('creditor friendly'); having a wider social or collective purpose, or the resolution of individual competing interests; protecting investment or to protect employment; and rehabilitation or liquidation.[34] The discourse on bankruptcy law cannot overlook these and other policy issues. If one examines the provisions of the Code in search of answers to these questions, one will meet with some success. The problem is whether it is a conscious decision on the pertinent policy matters taking into account the realities prevailing at the time. Likewise, the background documents give some idea as to why a particular approach was selected even though one may question whether that is a systematic explanation based on a single theory or priorities of goals set based on domestic needs.

The question whether a bankruptcy law has an organising principle has been raised and some have insisted that it aims at creating the bankruptcy estate.[35] Others maintain that the key objective of bankruptcy law is supposed to be the maximisation of the proceeds of the estate.[36] It is further insisted that the first task of any insolvency system is to establish a framework of principles that determine how the

32 *Supra* fn 26 100.
33 Martin 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' 2005 28(1) *Boston College International & Comparative LR* 5, available at http://lawdigital commons.bc.edu/iclr/vol28/iss1/2.
34 *Supra* fn 18 27.
35 Carlson 'Bankruptcy's Organizing Principle' *Florida State University LR* Vol 26 550.
36 Cabrillo and Depoorter *Bankruptcy Proceedings* (1990) 264, available at http://encyclo.findlaw.com/7800book.pdf.

estate of the insolvent debtor is to be administered for the benefit of all affected parties.[37] It can, therefore, be said that substantial disparities can be identified among national insolvency regimes with regard to their underlying policy considerations, structure and content even though they focus on liquidation.[38]

The absence of policy choices leaves one with no option but to rely on the theories on which the sources are based. However, the sources have undergone several amendments and significantly shifted from their earlier stance and it is now necessary to develop an indigenous justification to maintain the existing bankruptcy regime. Currently, despite the fact that there is a difference in approach, the allocation of risk among participants in a market economy in a predictable, equitable and transparent manner and protection and maximising value for the benefit of all interested parties and the economy in general are the two objectives that are shared by most systems.[39] Even in such case, there is a need to balance these objectives and choices also need to be made as to the beneficiaries of the value that is maximised.[40]

Bankruptcy law represents a balancing of several objectives which necessitates making policy decisions to strike a balance between competing interests. A series of choices must be made in designing this distribution system in order to ensure that the law embodies goals and priorities consistent with the values of the society.[41] It aims at protecting creditors' rights while safeguarding the interests of shareholders and customers on the one hand and at avoiding liquidation of potentially viable businesses on the other hand. Within this context insolvency law fosters discipline and honesty in financial management and facilitates the rehabilitation or orderly market exit of business enterprises that are inefficient.[42] On the other hand, the focus of modern insolvency regimes has moved steadily from the liquidation of enterprises to their rescue and, increasingly, to financial restructuring rather than a realisation of the assets of the business.[43] Hence, although the underlying fundamental consideration of the Code is the protection of creditors, other interests are not given due consideration and the law opens the door for more questions in its attempt to strike a balance among those competing interests. In the following sections a close examination of the objectives of the existing Ethiopian law, their compatibility with modern bankruptcy laws and the dilemma encountered in drafting or reforming a bankruptcy law are illustrated.

37 *Supra* fn 18 27.
38 European Parliament *Harmonization of Insolvency Laws at the EU Level* (2010) 5.
39 *Supra* fn 28 15-16.
40 *Ibid*.
41 *Supra* fn 18 27.
42 *Supra* fn 36 5.
43 Kornberg *Insolvency Law in the UK and the US* 4 available at http://fds.oup.com/www.oup.com/pdf/13/9780199579693.pdf accessed on 2012-12-31.

3 1 1 Blameworthiness of the Bankrupt

The prosperity or collapse of a business may be seen as a natural phenomenon although the reasons for any of these outcomes may be diverse. It is in the nature of business that a commercial decision or a series of decisions are made regarding the risk it takes which may result in making or losing money. The decision could be so vital that it may bring about the downfall of the business enterprise which may raise the question as to whom is to blame for the collapse. Of course responsibility should be ascribed based on the decision maker's contribution to the failure. The consequent loss may stem from a lack of foresight, aptitude or business inexperience on the part of the owner or the decision making organ. At times, the cause for failure could be extraneous and may therefore not be foreseeable or controllable. With this in mind, it may be asked whether the trader or a business organisation should be held responsible and face the severe consequences whenever a financial debacle occurs.

Following the Latin approach, the drafter of the Code deliberately made the choice that the debtor is blameworthy.[44] Escara[45] identified the choices available, namely, to consider bankruptcy as blameworthy and a punishable offence or a simple accident of commercial life which needs correction. He chose the former, more severe attitude towards the debtor, which was made law with the approval of the Codification Commission[46] and parliament. The rationale for this approach has been summarised as 'Ethiopian commerce must be oriented towards severity which, although it will inhibit some persons, nevertheless will assure the prosperity of the greatest number'.[47] Hence, the law maintains the position that when a business goes bankrupt the trader is to blame. The presumption in this regard recurs in different parts of the law which mainly shaped the provisions of the Code that provide for the effects of a declaration of bankruptcy.[48]

An examination of the experience in other jurisdictions in this regard reveals that while some countries have clearly banished the traditional anti-debtor sentiments from their bankruptcy law, it seems equally clear that many countries still retain a bankruptcy regime that either does not recognise any of the debtors' interests or is largely intolerant and punitive towards them.[49] Ethiopia belongs to the latter group. This necessitates the question whether the law should be revised to take into

44 *Supra* fn 25 103.
45 Professor of comparative law of the University of Paris who was tasked to draft a commercial code for Ethiopia but died before completing the work which was taken over by Prof Jauffret. See *supra* fn 25 iv.
46 *Supra* fn 25 199, 202. See documents 32 and 34 of the Background Document.
47 *Ibid* 106.
48 See section 5 below.
49 Efrat 'The Fresh-Start Policy in Bankruptcy in Modern Day Israel' *ABI LR* Vol 7P 577.

account the reality by which debt-forgiveness could be granted to those bankrupts who were fair towards creditors, cooperated in the proceedings and were not responsible for the failure. This approach is out of date as legal systems have long recognised that taking business risks should not *per se* entail punishment or condemnation. During the deliberations of the Codification Commission, Graven argued that debtors who become bankrupt often found themselves in this position without fraudulent intent.[50] Rather, if the wrong is done by the debtor or when the bankruptcy is fraudulent, the debtor should be held responsible. Otherwise there is no point in placing responsibility and restrictions on someone who had the courage to try new avenues or take risks. In this regard, the law has become too outdated to fit into the contemporary commercial realm with the increasing awareness to recognize business failure of an economy as a natural trait of an economy.[51]

It is argued that the severe treatment of the debtor is justifiable as there are no reasons for treating him or her otherwise, taking into account the economic development of the country.[52] It is submitted that making bankruptcy law applicable to non-traders creates the situation by which the relative position of the non-trader becomes weaker.[53] However, the choice to be made here is determined by the policy stance that the country takes and the principle it subscribes to rather than by mere practical considerations such as the economic development of the county or the scope of the law. Practical considerations may be one component rather than the key determinant which in any case cannot be overlooked. The law as a tool should also reflect the values of the society.[54] Considering all the social and economic factors, it can be said that Ethiopia ought to embrace this policy as it will thereby reap great benefits both socially and economically.

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50 *Supra* fn 26 109.

51 UNCITRAL *Legislative Guide on Insolvency Law* (2005) 280

52 Berhe *Composition and Scheme of Arrangement under Ethiopian Bankruptcy Law* (unpublished 1963) 58.

53 *Ibid*. Martin *supra* fn 33 43 associates the need for discharge with extensive growth in consumers.

54 In the absence of a study and given cultural diversity, it may be difficult to determine the value of the society in this respect. However, it can be seen in light of the two major religions in the country. Bridge *supra* fn 2 37 has the following to say: 'Major religions have viewed default on debt payment as seriously wrong but have enjoined creditors to treat the debtor with mercy. Psalm 37:21 of the Old Testament reads, 'The wicked borroweth, and payeth not again: but the righteous showeth mercy, and giveth'. In Chapter 5 of the Qur'an, debtors are enjoined to respect their promises in the verse 'Oh, ye who believe! Fulfil obligations', and creditors are asked to be patient and generous with creditors: 'if the debtor is in difficulty, grant him time 'til it is easy for him to repay. But if ye remit in by way of charity, that is best for you if ye only knew' (verse 2.280). Common to both Christianity and Judaism is the Jubilee year, a special year of remission of sins and pardons, where every 50th year 'ye shall return every man unto his possession, and ye shall return every man unto his family' (Leviticus 25:10).'

3 1 2 Rehabilitation Policy

A legal system has to make a choice whether priority should be given to rehabilitate a failing business. If we consider bankruptcy as a simple debt collection process, it is not worthwhile to dwell on this issue. However, it has become clear that declaring a debtor bankrupt will have far reaching consequences that affect the interests of many people other than the debtor and creditors. Therefore, a bankruptcy law should provide for both efficient liquidation of non-viable businesses and those where liquidation is likely to produce a greater return to creditors, and for rehabilitation of viable businesses. Nearly all jurisdictions have a liquidation law and an alternative procedure designed to save a business rather than terminate it. Although a variety of rescue models have been developed, efforts are constantly being made to make the rescue process more efficient and find ways to best accommodate it.[55] In fact, the composition and scheme of arrangement recognised in the Code are meant to ensure that a business continues after going through financial distress. However, it has been contended that the bankruptcy law must provide more than a choice between a strict traditional liquidation and rehabilitation which is more difficult to obtain.[56] Further, it may be questioned why these are options available to the debtor who is only allowed to initiate the proceedings for continuation of the business.[57] In both cases, the concern of the law is the interest of creditors who do have a say in the decision to give the enterprise another chance.

Regarding the question whether the choice of a proceeding which decides the fate of an enterprise in financial difficulty should be left to debtors or creditors, it can be said that a panacea acceptable to all is not offered for countries with diversified needs and economic and social ambiance in addition to their laws on security interests, property and contractual rights, remedies and enforcement procedures. In this regard it should be noted that some jurisdictions give priority to the recognition and enforcement of creditor rights whereas others prefer rehabilitation of the debtor in view of its benefits for workers and other constituencies.[58] As a corollary to this, some countries adopt a unitary approach that establishes an interim period for review of the business prospects before deciding whether to liquidate or rehabilitate the business.[59]

55 *Idem* 27.
56 *Idem* 28.
57 Some legal systems allow creditors to propose competing plans. See Gagnier 'France's New Legislation Attempts to Narrow Shareholders' Powers in a Restructuring Scenario: A First Step in Rebalancing Creditors' and Shareholders' Rights' *Insolvency and Restructuring International, The Journal of the IBA Insolvency Section* Vol 8(2) 10.
58 *Supra* fn 17 27.
59 *Idem* 28.

Rehabilitation holds several economic, social and political advantages. To begin with, it encourages entrepreneurs to take risks.[60] Rehabilitating the enterprise relies on 'the basic economic theory that greater value may be obtained from keeping the essential components of a business together, rather than breaking them up and disposing of them in fragments'.[61] Hence, the modern trend that supports rehabilitation or rescue is an extension of the goal to maximise value based on the idea that the value of the whole is greater than the value of the parts. In other words, an enterprise is more valuable as a going concern than when it is dismembered or liquidated. Further, this approach considers other interests such as preserving jobs with the ensuing social and political advantages.[62]

Advocates of rehabilitation present it as an efficient procedure that avoids many preventable liquidations and reduces the social costs of bankruptcy, while opponents consider it to be an inefficient procedure that deprives bankruptcy from its main objective, namely, the reallocation of the debtor's assets to more productive application through creditors' collective action.[63] It boils down to the goal set by the law which will determine whether the law should give priority to administer medication to the ailment or to amputate the enterprise so that the market can be relieved of it. The law as it stands now is creditor-centred and no or little attention is given to other interests. However, this approach can be challenged not only by alternative theories[64] but by the reality on the ground. As an instrument of reconciling competing and conflicting interests upon occurrence of such an incident, the law should give due attention to all interests affected and attempt to strike a balance.

It is also worth asking whether it is always in the interest of creditors to liquidate an enterprise. It is argued that it is often not worthwhile for creditors to take legal action without giving debtors some indulgence and an opportunity to pay.[65] It should be sufficient for the rescue regime to allow a result that would achieve more than if the enterprise was liquidated. Indeed, in some cases the rehabilitation may contemplate an eventual liquidation or sale of the business.[66] Hence, the law should strike a balance between short-term debt recovery through liquidation and preserving the business by rehabilitation for the benefit of all stakeholders.[67]

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60 If secured parties are given too much power over debtors, entrepreneurs may be reluctant to start new businesses and the disincentives imposed by risk-adverse secured creditors may hamper economic success. See *supra* fn 17 15.

61 *Supra* fn12.

62 *Supra* fn 17 24.

63 *Supra* fn 34 275.

64 For instance, as an alternative to the creditors bargain theory, there are other approaches such as the communitarian theory and the multiple values approach.

65 *Supra* fn 58 12.

66 *Supra* fn 17 28.

67 *Supra* fn 58 12.

3 1 3 Discharge

A trader is not relieved from responsibility unless all the debts are paid because the concept of discharge is virtually absent in the law of insolvency. A bankruptcy proceeding is closed and the debtor is restored to his full rights when he proves that all the creditors who have proved claims have been paid or that he has deposited with the trustees a sufficient amount to pay all creditors who have proved and costs.[68] Because of the presumption that the debtor is to blame, Ethiopian law does not give priority to a fresh start. In fact, it can be said that the debtor has an opportunity to avoid the consequences of bankruptcy by invoking a composition or scheme of arrangement. However, the requirements are so burdensome that it is difficult to imagine how a business entity can pass all those hurdles to survive in the market. It is therefore more important to rely on the outcome of a liquidation process which is the more likely outcome than the more difficult to achieve an arrangement with creditors either through a composition or a scheme of arrangement. So, too, it is seldom possible for an enterprise to raise the funds required to make the payment in order to take advantage of the proceedings for its survival given the fact that it is already immersed in financial distress. Under the circumstances, it is imperative to consider the fate of a trader who could not repay all his creditors' claims or strike a deal with them.

By endorsing discharge, a bankruptcy regime attempts to provide the financially troubled individual with opportunities to re-join society as a productive member of the economy, free from some or all of his burdening pre-existing debts. Although increasing numbers of countries have adopted some form of a fresh-start policy, many have not yet incorporated any such policy into their bankruptcy systems.[69] A survey of the laws of different countries reveals that there are three types of approaches. While the liberal countries are characterised by some form of automatic statutory discharge, the conservative approach is distinguished by the conspicuous absence of a debt-forgiveness provision in its bankruptcy law. We have also the middle ground which provides for debt-forgiveness pursuant to judicial discretion.[70]

It is argued that every modern society should provide an opportunity for a meaningful freshstart to financially troubled individuals who have acted responsibly and fairly towards their creditors.[71] The main concerns regarding the fresh-start policy can be categorised as economic or social although the focus of the law may be divergent in different jurisdictions.[72] Some have suggested that a central justification for the

68 Com Code art 1117.
69 *Supra* fn 47 555.
70 *Ibid* 775-776.
71 *Ibid* 556.
72 *Ibid* 558.

fresh-start policy is the promotion of moral values in society which stresses that human dignity[73] is of a higher value than the economic benefits or costs associated with achieving a desired economic result. Economic considerations of the fresh-start policy, on the other hand, focus on the efficient allocation and use of resources.[74]

The law does not appear to use the word 'discharge' as a technical term since it is used in different books of the Code.[75] By discharge a bankrupt is 'released from the obligation of all his debts which were or might be proved in the proceedings, so that they are no longer a charge upon him, and so that he may thereafter engage in business and acquire property without its being liable for the satisfaction of such former debts'.[76] The discharge of a bankrupt after liquidation is recognised in article 1107of the Code which provides for the release of the debtor upon approval of a lump sale of assets. It can be inferred from article 987/1/b of the Code that an application for discharge may be made to the court although the Code is silent on the conditions to be fulfilled and procedures to be followed. Obviously, insufficiency of assets results in the closure of the bankruptcy proceeding which enables each creditor to exercise his rights.[77] The debtor is restored to his full rights if the court establishes that there is no claim against the estate.[78] The privilege that a debtor enjoys is that he is not subject to any restriction after all creditors have been paid despite the fact that he is blameworthy.

It can be said that a debtor is released in case of the approval of a lump sale of assets and the absence of a claim against the estate. The latter is not discharge because of payment in full which leaves no outstanding claim against the debtor. Settlement of claims of creditors when a lump sale of assets is approved, is no guarantee that all the claims of creditors will be satisfied. The debtor is released from liability to pay the balance which could not be paid from the proceeds of the assets realised. This is, therefore, closer to a discharge. Otherwise, the law does not allow a fresh start once an individual finds himself in financial trouble. It is essential for the law to provide for the discharge for natural persons and set forth the conditions to be fulfilled before one can enjoy a fresh start.[79]

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73 Dignity-related objectives consider society's commitment to the individual and the debtor's commitment to society; see *supra* fn 47 569-570.

74 Economic objectives of discharge include providing an incentive to remain economically productive, minimising reliance on public support, monitoring the volitional and cognitive deficiencies of the individual, preserving the sanctity of contracts, encouraging efficient entrepreneurship and minimising the cost of credit and maximising its availability. See *supra* fn 47 567-568.

75 See art 162(3), 318(1)(d), 775(4), 776, 1093(a) and 1165(3) of the Code.

76 Black *Black's Law Dictionary* (4 ed) 626.

77 Com Code art 1114.

78 Com Code art 1117.

79 This is also recommended by the team of fourteen experts. See *Position of the Business Community on the Revision of the Commercial Code of Ethiopia*, Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectoral Associations, (2009) 107

3 1 4 Protection and Treatment of Creditors

Traditionally bankruptcy is a creditor-centred proceeding which attempts to provide for an orderly settlement of claims of creditors against a debtor who is unable to pay his debts. Being a fundamental concern of bankruptcy law, creditor rights are the driving force behind the contents of a number of provisions of the Code. Both liquidation and rehabilitation of the enterprise involve creditors who take part in the proceeding through their committee in addition to their right to initiate the process and to prove their claims. Unlike the ordinary enforcement system, in bankruptcy creditors cannot act individually and enforce their claims separately. Rather, the adjudication brings all the claims of the creditors together to form the universality of creditors.[80] All unsecured creditors bring together their claims under the universality which will be a legal entity.[81] The mandatory collective nature of the proceeding is usually identified as one of its most important attributes.[82] A declaration of bankruptcy brings about the suspension of individual suits and the formation of the universality of creditors.

Even if it is said that the proceeding focuses on the protection of the interests of creditors, these interests may be competing. To avoid competition among creditors, the law impedes individual action and the judgment in bankruptcy heralds the beginning of a collective execution. One of the principles of a bankruptcy proceeding is to treat similarly situated creditors equally. The creditors who will be affected by the judicial process will be determined based on the policy stance taken by a legal system. Generally, creditors may be classified as ordinary, preferred and secured. the bankruptcy regime of a legal system usually affects unsecured creditors while those creditors who managed to secure their claims with some kind of guarantee over the property of the debtor are not affected.

There are significant disparities regarding the way in which secured rights are treated in bankruptcy proceedings. In some countries, bankruptcy has no effect on secured creditors while in others secured creditors are prevented from enforcing their rights in bankruptcy, either through compulsory grace periods or in some cases by moratoria placed on enforcement in the event of reorganisation proceedings.[83] In countries that favour the rescue of businesses in financial difficulty, the proceeding may affect secured creditors even though the bankruptcy law recognises the priority that secured creditors enjoy as regards their collaterals. Yet, the protection of security interests and the rehabilitation

80 Com Code art 1026.
81 Com Code art 1025/2.
82 Blum *Bankruptcy and Debtor/Creditor* (2004) 98.
83 Even in such a case, it is maintained that it should be of limited specified duration, strike a proper balance between creditor protection and insolvency objectives, and provide for the possibility of orders being made on the application of affected creditors or other persons for relief from the stay. See *supra* fn 17 41-42.

of the business in distress are competing goals that are delicate to reconcile. Where the rights of secured creditors are impaired to promote a bankruptcy policy, the interests of these creditors in their collateral must be protected to avoid a loss or deterioration in the economic value of their interest.[84]

As the law now stands, bankruptcy exists mainly, if not exclusively, for the benefit of creditors as can be gathered from its various provisions. Being the main focus of the law, other policy decisions are made with a view to achieving this goal. A bankruptcy proceeding aims at collecting, preserving and conserving,[85] managing,[86] and realising[87] assets and distributing the proceeds[88] among creditors. Hence, the proceeding involves liquidation to repay creditors. Considering the above classification, it can be said that secured creditors are exempted from the effects as they are at liberty to exercise their security interests. The general trend is to keep them outside of the realm of bankruptcy except for the stay to which they may be subject during rehabilitation. Rehabilitation requires a balance to be struck between effective enforcement for secured creditors and effective protection for a rescue effort.[89] But, as can be gathered from article 1140 of the Code, scheme of arrangement, the only chance for rehabilitation before bankruptcy, does not involve secured creditors.

Secured creditors may, however, be directly affected if the law allows an automatic stay upon commencement of bankruptcy proceedings by which the enterprise will be in operation while the creditors and managers negotiate. An automatic stay allows time for the debtor to communicate with creditors before deciding whether the firm should be liquidated so as to avoid premature liquidation. Some countries may opt not to allow automatic stay even if they recognise reorganisation, thereby practically denying such enterprises the opportunity to file for reorganisation.[90] In Ethiopia we may consider the scheme of arrangement as the only possibility to rescue a going concern[91] which in

84 *Supra* fn 17 41. See also UNCITRAL Legislative Guide on Insolvency law, (2005) P. 94
85 Com Code art 1004 ff.
86 Com Code art 1035 ff.
87 Com Code art 1103 ff.
88 Com Code art 1109-1110.
89 *Supra* fn 17 15.
90 Lee, Peng and Barney 'Bankruptcy Law and Entrepreneurship Development: A Real Option Perspective' *Academy of Management Review* 262 263-264.
91 Composition is a means of avoiding the effect of bankruptcy, as until the confirmation of the proposal by the court the enterprise ceases operation. See art 1081(3) which makes it clear that the proposal for composition suspends the winding-up of the enterprise.

any case does not hinder secured creditors from realising their collaterals.[92] Hence, secured creditors cannot be prevented from realising the assets temporarily although it is absolutely essential to rescue the business and keep the security interests intact.

The conclusion that Ethiopian law excludes secured creditors from the purview of the bankruptcy regime is now impugned. Recently, the Cassation Division of the Supreme Court ruled that secured creditors are not outside of the bankruptcy proceeding. In this case, the bank pleaded to the court to lift the injunction order it gave over a mortgage, so that it could foreclose it. The court of first instance rejected the application, while the appellate court reversed this ruling. Finally, it was settled by the Cassation Division of the Federal Supreme court, casting doubt whether secured creditors are not affected by a bankruptcy proceeding. This is a binding decision, leading to confusion as to whether the law, or this decision, should be used to come to this conclusion. As we have seen above, the law is vivid in this regard: secured creditors are outside of the purview of a bankruptcy proceeding. On the other hand, a binding decision establishes that they cannot foreclose or realize a collateral, and what they can benefit from is priority from the proceeds, making the exercise of the right contingent upon the insolvency proceeding.[93]

It may further be inquired whether a distinction can be made among those creditors whose claims are not secured by collateral. The bankruptcy laws of many countries recognise, in varying degrees, the priority of certain categories of unsecured debts, such as taxes and unpaid wages.[94] The position that the law takes in this regard is a reflection of the policy decision by which the priority of the state is manifested. Countries opt to prioritise some claims over others in the distribution scheme because their policies recognise important public interests, such as preserving the state's revenue base or ensuring employee security.[95]

The proceeds of a winding-up will be distributed, after the deduction of costs and expenses, sums applied for the support of the debtor or his family, and sums paid to preferred creditors. Thereafter the net proceeds of the winding-up is distributed amongst all the creditors.[96] This distribution scheme is criticised for failing to provide a concise list of the priority framework and a lack of clarity of what 'special privileges' are, and how they affect the claims of other secured and unsecured

92 It can be inferred from art 1131(3), 1121, and 1140 of the Code that the proceeding involves only unsecured creditors. Cf art 1189 which provides that secured creditors are not affected by the process and outcome of a composition. It is submitted that encumbered assets should be included in bankrupt estate, thus limiting the enforceability of security interests by application of stay.

93 Holland Car Pvt. Ltd. Co. V Zemen Bank S.Co., Cassation Division of the Federal Supreme Court, File No. 102061 decided on 13/02/2015.

94 *Supra* fn 18 44.

95 *Ibid*.

96 Com Code art 1110.

creditors.[97] Priority is one area of controversy, which causes a delay in the distribution of proceeds and is in some cases raised against secured creditors.[98] The lack of clarity in this regard causes disputes and delays which characterise the provisions of the Commercial Code. The Banking Business Proclamation[99] sets a good example and ameliorates some of the doubts by providing for an extended list of order of priorities. Accordingly, secured claims are paid first, followed by preferred creditors in the following order: receivers, new creditors (creditors who extended new credit to the bank after the appointment of the receiver), employees, depositors and tax authorities. All other creditors are paid from the residue.

3 2 Scope of Application of the Law

The law should clearly delimit its scope and identify the subjects to which it applies, which is 'a threshold policy decision that can have enormous economic implications because entities left outside the process will not be entitled to the benefits or exposed to the discipline of the system.'[100] This is one area of incongruence across jurisdictions, as some bankruptcy laws apply to all debtors, with certain specified exceptions, while other laws draw a distinction between, and provide different legal regimes for, natural and juristic persons. Factors that are grounds for diversity in laws and approaches include the activities that the debtor is engaged in, the level of indebtedness and the type of economic sector.[101] The laws of various countries follow a certain pattern in identifying or treating separately the subjects based on the classification adopted. For instance, English insolvency law contains two separate regimes of bankruptcy for natural persons and insolvency for juristic persons or corporate entities whereas other insolvency laws are divided along 'merchant' and 'non-merchant' lines.[102]

97 USAID *Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic* (2007) 53. The priority to be established as regards preferred creditors has become debatable. See Huaiyu 'An International Comparison of Insolvency Laws' (OECD 2006) 2, available at http://www.oecd.org/daf/corporate-affairs/ accessed on 2014-08-12.

98 Banking Business Proc No 592/2008 art 45.

99 See, eg, *Abyssinia Bank SC v Abdu Ahmed et al* file no 40921, decided on 5 March 2009, regarding the issue whether employees' claims should be paid before the secured creditors' claims. Decisions of the Cassation Division of the Supreme Court Vol 8 (2010) 173.

100 *Supra* fn 18 28; see *supra* fn 51 42.

101 Some of these laws address the insolvency of 'merchants', which are defined with reference to engagement in economic activities as an ordinary occupation, or companies incorporated in accordance with commercial laws and other entities that regularly undertake economic activities. Some laws also include different procedures based on levels of indebtedness and a number of states have developed special insolvency regimes for different sectors of the economy, in particular the agricultural sector. *See supra* fn 58 42.

102 Merchants, including corporate entities and individual entrepreneurs, fall under one 'business law' insolvency regime, while non-merchants, such as consumers, fall under a separate regime. In any event, the focus on

The Code, which is still the main source of bankruptcy law, applies to natural and juristic persons alike. However, its application is limited to traders, commercial business organisations[103] and public enterprises.[104] A trader is a person who professionally, and for gain, carries on any of the activities listed in article 5 of the Code. Business organisations become commercial where their objects under the memorandum of association, or in fact, are to take part in any of the activities specified in article 5.[105] However, companies,[106] irrespective of the activities they may be engaged in, are deemed to be commercial by virtue of their form.

Since only traders and commercial business enterprises can be declared bankrupt under the Commercial Code of Ethiopia, the fulfilment of the conditions for bankruptcy is not sufficient, as the law only applies if the subject is a trader, a commercial business organisation or a public enterprise. They are singled out because they are engaged in business activities designated as such under article 5 of the Code. Hence, a business organisation or a business person is beyond the purview of the bankruptcy regime if the activity it/he/she is engaged in is not a trade activity as characterised by the law – even if the activity is commercial *par excellence*. With an exhaustive list, which entertains no exception, it might be imagined that some businesspersons are excluded – not to mention those engaged in economic activities.[107]

The borderline is permeable and sometimes it is stretched to those who are not traders by the strict application of the law. For instance, the law recognises that a deceased or a retired trader can be declared bankrupt.[108] Similarly, the application of the law is extended to a business organisation in liquidation and *de facto* business organisations.[109] Bankruptcy of the firm entails bankruptcy of partners who are jointly and severally liable, and any person who has carried out

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corporate' insolvency law varies according to the relevant economy. *Supra* fn 2 32.

103 Com Code art 979 and 1155.

104 Public Enterprise Proclamation No 25/1992 art 40. With the advent of the federal state structure, regional states may establish public enterprises that are not governed by this proclamation. It appears that state enterprises are outside of the bankruptcy system unless the governing law enacted by states contains a similar provision. Currently they appear to be excluded.

105 Com Code art 10/1.

106 Private limited companies and share companies are the two types of companies recognised in Ethiopia and they are deemed to be commercial because of their form. See Com Code art 10(2).

107 *Ibid*. In fact, in the case of public enterprises, no such classification exists, as they are made subject to the bankruptcy law incorporated in the commercial code as per article 40 of Public Enterprise Proclamation No. 25/1992.

108 Under art 979 and 980 of the Commercial Code, a trader may be declared bankrupt within one year from his death if suspension occurred before his death (art 980) while a retired trader may be declared bankrupt if the retirement occurred before his name was struck from the commercial register.

109 Com Code art 1155(3).

commercial operations on his own behalf, disposed of company funds as though they were his own, and concealed his activities under the cover of such company,[110] without expecting them to be traders.

With the goal stated above, the current arrangement leaves some enterprises outside the latitude of the bankruptcy regime. Subsequent pieces of legislation regulating commerce attempted to broaden the definition to cover those excluded by the Code. However, such an effort does not fundamentally tackle the problem as presented here because of the piecemeal approach followed. For instance, commercial registration and business licensing proclamation no 686/2010 defines a business person 'as any person who professionally and for gain carries on any of the activities specified under article 5 of the Commercial Code, or who dispenses services, or who carries on those commercial activities designated as such by law'.[111] It is obvious that this definition admits that there are commercial activities beyond the list that we have under article 5. It is, therefore, an attempt to catch those excluded. The question that follows is whether it is tenable to expose those operating in the same field to different disciplinary mechanisms.

It is not necessarily correct to assume that the scope of a bankruptcy regime is limited to those who are engaged in commercial activities. During the drafting of the Code it was suggested that the rules governing petty bankruptcy can be extended to non-traders. This was rejected by the drafter on the ground that it 'presented more difficulties than advantages'.[112] It may be asked whether a paradigm shift is called for from the current business bankruptcy to include consumer bankruptcy. It is maintained that society could adopt a largely procedural bankruptcy system that provides the posited advantages of liquidation and still offers consumers the same debt relief that they would receive under non-bankruptcy law.[113] However, such expansion is justified by the availability of credit to consumers which is literally non-existent in Ethiopia. Bankruptcy would not be possible without the existence of credit since insolvency is, by definition, the inability to pay one's debts.[114]

110 Com Code art 1163.

111 Commercial Registration and Business Licensing Proc No 686/2010, Federal Negarit Gazeta, 16th year, no 42 (2010) art 2/2.

112 *Supra* fn 26 109. Mr Roberts inquired whether the simplified procedures can be extended to non-traders.

113 Hynes 'Why (Consumer) Bankruptcy?'2004 *College of William & Mary Law School* 123, available at http://scholarship.law.wm.edu/facpubs, accessed on 2014-08-12.

114 *Supra* fn 2 30. It is proposed that the application of the Commercial Code be restricted to traders and include in the Civil procedure Code provisions for insolvency of non-traders. See Position of the Business Community on the Revision of the Commercial Code of Ethiopia, Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectoral Associations, (2009) 81.

4 Proceedings and their Commencement

4 1 Types of Proceedings

A legal system designs a system of addressing the situation of entities which are in financial difficulty. This includes the recognition of different alternatives to deal with the problem. The proceeding to be initiated and the options available are not the same in all jurisdictions.[115] Ethiopian law limits itself to liquidation and the scheme of arrangement as ways out when there is, or will be, a suspension of payment. Other legal systems have additional alternatives, such as reorganisation and negotiations with creditors entered into by the debtor on a voluntary basis and conducted essentially outside the insolvency law.[116]

A bankruptcy proceeding can be unitary or multiple, depending on the approach adopted by a country. Ethiopian law subscribes to the dual proceedings approach and the action to preserve or liquidate is initiated separately and independently. The term 'bankruptcy' does not refer to the entire situation or status arising from the inability to pay debts when they become due. Basically, two proceedings can be identified, namely bankruptcy (with its variant of petty bankruptcy) and a scheme of arrangement. The former merely refers to the liquidation process. In the case of a unitary proceeding, a single action determines whether the business should be preserved or liquidated, while in a multiple proceeding the law allows separate proceedings, which may lead to liquidation or reorganisation depending on the relief sought by the applicant. Ethiopian law does not provide for a proceeding which can have different outcomes based on the findings of the investigation by the court. Hence, there can be an application for liquidation by the debtor or creditors or an application for a scheme of arrangement lodged by the debtor.

Countries which opt for the unitary approach do so because of the difficulties in determining from the very outset whether the debtor should be liquidated rather than reorganised.[117] It is maintained that the determination of whether the business of the debtor is viable should determine, at least in theory, which proceedings will be sought[118] rather than leaving the choice to the applicant. This approach does not allow a position to be taken on the financial situation of the entity, which will be

115 A comparative overview of the proceedings of member states of the European Commission aimed at rescuing entities which are in financial difficulties revealed that different types of proceedings are adopted, including pre-insolvency proceedings (confidential and public), debtor in possession proceedings and full insolvency proceedings: Bariatti and Van Galen 'Study on a New Approach to Business Failure and Insolvency – Comparative Legal Analysis of the Member States' Relevant Provisions and Practices' (European Commission 2014) 20.

116 *Supra* fn 51 21.

117 *Ibid.*

118 *Ibid.*

determined after the observation period and the choice whether to liquidate or reorganise will be made based on the findings of the assessment made during the observation period.[119] This approach has advantages and disadvantages. Its advantages include procedural simplicity, flexibility, cost efficiency and encouraging debtors to have early recourse to the proceedings. Delay is the main disadvantage because of the additional observation period.[120]

A bankruptcy proceeding under Ethiopian law is one by which the debtor, a creditor, the court or the public prosecutor initiates the liquidation of the assets of the debtor, with a view to paying out creditors. However, after declaration of bankruptcy the debtor has one more opportunity to obtain rehabilitation through a composition. In other words, a proceeding initiated to liquidate the business may be reversed by a proposal by the bankrupt to settle it by an agreement with creditors,[121] subject to confirmation by the court.[122] Any person who has been declared bankrupt may submit a proposal of composition to the commissioner.[123] Confirmation of a composition suspends the bankruptcy proceeding.[124] In the absence of a composition, compulsory winding up[125] ensues, which is a situation where the property of the debtor is sold and the proceeds used to satisfy the claims of creditors.

The summary procedure is a liquidation proceeding, which reduces the steps to be followed to realise the bankrupt estate. It becomes operative when the assets in the bankruptcy do not exceed one thousand Ethiopian Birr,[126] or where the dividend to be distributed cannot exceed ten per cent.[127] In this procedure, seals shall not be fixed, the appointment of a creditors' committee is optional, the commissioner decides on debts in dispute unless an application is made to the court, the commissioner may authorise any negotiations, there shall be one distribution only, and differences relating to the trustee's accounts and his remuneration shall be decided by the commissioner.[128]

A scheme of arrangement is similar to a composition by which a debtor petitions to the court in order to reach a settlement with the creditors. However, there are three fundamental differences, namely, the time of the application, the amount to be offered and the majority required for approval. The debtor has to initiate the process to save the business from the ordeal of bankruptcy if he has or is about to suspend payment. A scheme of arrangement, together with a composition, are viewed as ways by which a debtor's situation may be alleviated and the

119 *Ibid*.
120 *Supra* fn 51 21.
121 Com Code art 1084.
122 Com Code art 1086.
123 Com Code art 1081.
124 Com Code art 1090.
125 Com Code art 1101
126 This is less than 50 USD.
127 Com Code art 1166.
128 Com Code art 1167.

enterprise refloated.[129] It may be asked whether rescuing the enterprise is the main concern of these mechanisms of dealing with the affairs of a bankrupt enterprise. It is admitted that here also the importance attached to the satisfaction of creditors is paramount.[130] Apart from questioning the focus of the law on liquidation, it is imperative to inquire whether the law should broaden the options available to stakeholders to resolve the financial strain of an enterprise.

4 2 Commencement Standard

One of the most important elements of a bankruptcy proceeding is the commencement of the process. Of the two widely employed commencement standards, the liquidity and balance sheet tests, Ethiopian law subscribes to the former standard. It still is the preferred[131] test for insolvency because the fact that the assets of the debtor exceed his liabilities is irrelevant as there is no reason why creditors should be expected to wait while the debtor realises assets. The legal ground for bankruptcy adjudication is that the debtor has ceased to pay his debts when they became due.[132] Accordingly, under the Code, which subscribes to the liquidity test, any trader who suspends payment[133] may be declared bankrupt by a court of law. In other words, the factual situation that must exist for declaration of bankruptcy is the suspension of payment, which stems from 'any fact, act or document showing that the debtor is no longer able to meet the commitments related to his commercial activities'.[134] The drafter of the Code believed that listing acts which constitute acts of bankruptcy does not have practical significance because of the broadness of the term 'suspension of payment' which incorporates acts of bankruptcy.[135] It may be asked whether the standard used by the Code can help to determine whether the factual situation is present so as to declare a debtor bankrupt.

The clarification in this regard is essential in order to provide guidelines to a court regarding predictability. Further, in order to ensure that the proceeding is not abused by a creditor, it is necessary to ascertain that it is more than a two-party dispute.[136] For instance, does

129 *Supra* fn 52 59.
130 *Ibid*.
131 It is submitted that the balance sheet approach can be an inaccurate measure of insolvency because domestic accounting standards and valuation techniques may give rise to distorted values that do not reflect fair market values. If domestic practices and rules do not follow international accounting principles and are not applied uniformly by qualified valuation experts, the balance sheet test as the sole measure of insolvency may invite arbitrariness, uncertainty and even corruption. See *supra* fn 18 29.
132 Kornberg *supra* fn 43 6.
133 Com Code art 969.
134 Com Code art 971.
135 *Supra* fn 26 107.
136 *Supra* fn 18 29.

it suffice if one creditor can show that he demanded payment?[137] Should action be instituted, judgment be secured and execution be initiated? Is it enough to adduce a protest issued by a bank to evidence the dishonouring of a cheque because of the insufficiency of funds? Judges are left to decide which facts, acts or documents prove that one has suspended payment and should therefore be declared bankrupt. No legislative guideline or direction is given, at least by way of illustration. The application of the law is therefore in the hands of the court, which has the latitude to determine whether one act or a series of acts is necessary for a declaration of bankruptcy.[138]

Once it is established that the term 'suspension of payment' is broad enough to include all acts of bankruptcy, the next issue is how the facts which constitute suspension of payment can be proven. When the application is filed by the debtor, his task can be easier as the law provides that it must be accompanied by the balance sheet of the firm, the profit and loss account and a list of commercial credits and debts, with the names and addresses of the creditors and debtors.[139] Creditors may not have access to these documents and even not all debtors do have the legal obligation to keep account or they may fail to keep financial records and it is proper to inquire as to what evidence they can produce to initiate the process.

The Code requires that a fact, act or document showing that the debtor is no longer able to meet the commitments related to his commercial activities be invoked to establish the suspension of payment.[140] The evidence to be produced can relate to an act, a fact or a document augmenting the option to prove suspension of payment. However, it is not a mere default or a dispute between a debtor and a creditor. The failure to pay one claim does not suffice, for the law extends the requirement to other commitments, so that it becomes clear that the debtor is indebted to such an extent that it does not have the liquidity required the perform its obligations. Further, the default must be related to the commercial activity, since it is the suspension of commercial debts that may give rise to bankruptcy. The cumulative requirements are that debtor must be a trader and that the default must be in respect of a commercial debt. If the debt is not commercial, even if it is not paid, it cannot initiate the proceeding. But what if the debt is commercial but the debtor is not a trader? This situation has arisen with the introduction of

137 A debtor's failure to pay a debt within a specified period after a written demand for payment has been made is a reasonably convenient and objective test. See *supra* fn 18 30.

138 *Supra* fn 26 107.

139 Com Code art 973(1). In fact, the law anticipated that these documents may not be present and in such case the applicant has to state the reason why they cannot be produced. See art 973(2).

140 Com Code art 971. It is argued that the standard in this provision is too broad calling for limiting its reach. See *Position of the Business Community on the Revision of the Commercial Code of Ethiopia*, Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectoral Associations, (2009) 84

income-generating activities for charities and societies.[141] The two requirements are cumulative and must be present to establish suspension of payment as required by the law.

An attempt to provide some insight regarding the commencement standard clashes with the new standard introduced by the banking proclamation. The insolvency of banks does not merely stem from the suspension of payment, but from an insufficiency of assets. As discussed below, the law deviated from the commencement standard adopted in the Commercial Code which is still applicable to non-bank enterprises including other financial institutions. The question is whether it is a departure with a view to catering for the idiosyncrasies of banks. The answer is that banks are distinctive in that the insolvency concept under general law proves somewhat dysfunctional for them. First, a bank's failure to effect payments when they fall due is not necessarily proof of bankruptcy and may be due to a temporary liquidity problem. Second, unlike other enterprises, banks can pay creditors even when experiencing financial hitches because of the continuous cash flow from depositors. Third, close monitoring is imperative for early intervention by the regulatory organ, which should be prompted by other grounds such as growing financial losses, management failures and shortcomings in internal systems and controls.[142] For the above reasons, prudential regulation demands that the standard of commencement for banks should be different from the general standard that is subscribed to by the Banking Business Proclamation.

141 Charities and Societies Proclamation No 621/2009, Federal Negarit Gazeta 15th Year, No 25, Addis Ababa, 13 February 2009, art 103.

142 Hüpkes 'Insolvency – Why a Special Regime for Banks?' 2003(3) *Current Developments in Monetary and Financial Law* 9-10, available at http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/hupkes.pdf accessed on 2013-03-28.

Examining the 'objects of property rights' – lessons from the Roman, Germanic and Dutch legal history

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OPSOMMING

Ondersoek 'n ondersoek na die "voorwerpe van eiendomsreg" – lesse uit die Romeinse, Germaanse en Nederlands regsgeskiedenis

Hierdie artikel ondersoek die geskiedenis van eiendomsreg, of, dalk beter gestel, eiendom as 'n voorwerp vir sekere regte. Die vraag word gevra of eiendomsreg slegs van toepassing is op tasbare voorwerpe, en of dit die gemeenskap is wat bepaal wat eiendom, en die reg daaromtrent, is. Die motivering vir die ondersoek is die ontstaan van 'n informasie- en kennisgedrewe samelewing. Kennis word gedeel en uitgeruil – maar is dit eiendom? Die evolusie van regte ten opsigte van eiendom in die Romeinse, Germaanse en Nederlandse regsgeskiedenis word ondersoek.

1 Introduction

Property or the objects that are or should be accorded the status of property for legal purposes seem to depend on the social circumstances of a specific society during a particular point in time. This is the position because property seems to amount to those things that a particular society during a particular period in time regards as of interest to it. Sometimes, it is even stated that the starting point is that all objects of property must or should be corporeal or tangible.[1] In other words, rights in property vest or ought to vest in those things that have a tangible existence. Tomkins and Jencken provide that rights in property exist in a subjective sense.[2] In this sense, these rights refer to 'the power or dominion which a person is entitled to exercise over an object, in which

* This contribution is based on a research done for the author's LLD thesis, entitled "E-Crimes and E Authentication – A Legal Perspective" for which the author is registered for at the University of South Africa (UNISA). The author wishes to acknowledge the financial support received from the College Research and Innovation Committee (CRIC) and absolves the College of Law, UNISA from any responsibility for any opinions or conclusions that are contained herein.

1 See CG van der Merwe *Sakereg* (2ed 1989) 24-25, PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5 ed 2006) 14-19.

2 Tomkins & Jencken *A compendium of the modern Roman law founded upon the treatises of Puchta, Von Vangerow, Arndts, Franz Moehler, and the Copus Juris Civilis* (1870) 40.

How to cite: Njotini 'Examining the 'objects of property rights' – lessons from the Roman, Germanic and Dutch legal history ' 2017 *De Jure* 136-155
http://dx.doi.org/10.17159/2225-7160/2017/v50n1a8

exercise there is involved the freedom of the will'.[3]

Given the importance of rights in determining whether an object is property in law, this article is limited to the study of property as a right or property as an object of rights. Thus, the meaning and nature of the legal entitlement which a person has or is deemed to have over or in respect of his or her object are discussed. The latter investigation looks at whether the meaning and nature of the rights in property depend on the necessities of a particular society.

The scrutiny above is motivated by the emergence of a new society, that is, an information or knowledge society. According to Soete, this is a society where high volumes of information are shared, exchanged and disseminated.[4] Specifically, information is one of the essential assets for the existence of an information society. In order to study the objects of rights within the latter society, the historical developments of property as a right are examined in this article. This investigation focuses on the evolution of the rights in property in Roman, Germanic and Dutch legal jurisprudence.

2 Roman Law

2 1 Old Roman Law (250 BC)

Principally, old Roman law recognised that a relationship exists between a person and a thing or *res*.[5] In view of this, the law of things was dealt with as the progression from the law of persons. Specifically, Table IV.V of the Law of the Twelve Tables (the Twelve Tables) regarded property as that which could be acquired by Roman citizens. Roman citizens had several actions against those who interfered with their property. The most notable actions were the *actio in rem* and *actio in personam*.[6] The *actio in rem* protected a person's use and enjoyment of his corporeal and physical *res*, and the *actio in personam* was a claim which a person had that others should acknowledge that the property is subject to his use and enjoyment.[7]

The Twelve Tables did not particularly differentiate between things as such. It was only required that a thing must be capable of being touched, that is, the so-called *quae tangi possunt* requirement. Van Warmelo supports the view regarding the tangibility of a *res*.[8] He states that 'in an

3 *Ibid*.
4 See Soete *Building the European information society for us all: final policy report of the high level expert group* (1997) 11.
5 Maine *Ancient law: its connection with the early history of society and its relation to modern ideas* (1897) 258-259.
6 Nasmith *Outline of Roman history from Romulus to Justinian (including translation of the Twelve Tables, the Institutes of Gaius, and the Institutes of Justinian), with special reference to the growth, development and decay of Roman jurisprudence* (2006) 327-328.
7 Mousourakis *Fundamentals of Roman private law* (2012) 312.

early and unsophisticated community, the interests of the person were centred on what he could see and touch and perceive with his senses'.[9] Therefore, if a person could possess a thing it was consequently concluded that such a thing served the interests of such a person.[10] Van Warmelo then submits that 'in the early Roman community possession of objects was the centre of all interests'.[11]

The term interest is significant to an examination of property as an object of rights in old Roman law. This is the position because the Twelve Tables did not explicitly refer to the notion of ownership. Specifically, the position in old Roman law regarding ownership can be summarised as follows:

> (The) technical word for ownership of things: it (ownership) was an element of the house-father's *manus*. In time, although it is impossible to say when, the word *dominium* came into use; but, so far as can be discovered, it did not occur in the Tables, and must have been of later introduction. In those days, when a man asserted ownership of a thing, he was content to say, – 'It is mine,' or 'It is mine according to the law of Quirites'.[12]

Therefore, *dominium* was only 'one manifestation of the comprehensive domestic powers which the *paterfamilias* wielded over certain persons (*patria potestas* over his children in power, *manus* over his wife) no less than over his property'.[13]

2 2 Pre-Classical Roman Law

Pre-classical Roman law was a further development of old Roman law. This law classified property into corporeal things or *res corporales* and things incorporeal or *res incoporales*.[14] Corporeal things referred to tangible objects.[15] The examples were land, a slave,[16] a garment, gold and silver. Incorporeal things were intangible objects, for example an

8 Van Warmelo *An introduction to the principles of Roman civil law* (1976) 63.
9 *Ibid*.
10 *Ibid*.
11 Johnson *Roman law in context* (1999) 53.
12 Muirhead *Historical introduction to the private law of Rome* (1998) 126. See also, Bouckaert 'What is property?' 1990 *Harvard Journal of Law and Public Policy* 781.
13 Kaser *Roman private law* (translated by Dannenbring) (1980) 115. See also, Muirhead *Historical introduction to the private law of Rome* 3rd ed (1916) 120.
14 Cairns 'The definition of slavery in eighteenth-century thinking' in J Allain (ed) *The legal understanding of slavery* (2012) 61-62.
15 Sohm *The institutes: a text-book of the history and systems of Roman private law* 2nd ed (1901) 320.
16 In relation to a slave being an object of property in pre-classical Roman law, Buckland states that a slave 'was the one human being who could be owned. There were men in many inferior positions which look almost like slavery: there were the *nexus*, the *auctoratus*, the *addictus* and others. But none of these was, like the slave, a *Res*'. See Buckland *The Roman law of slavery: the condition of the slave in private law from Augustus to Justinian* (2010) 10.

inheritance, usufruct, obligation or servitude.[17] The last-mentioned things had the quality of being rights over property.[18]

The inclusion of slaves in the definition of *res corporales* is instructive. This is the case because pre-classical Romans accepted that, by virtue of the *ius gentium*, that is, the laws common to all, certain human beings were free whereas others were not.[19] Slaves were classified as those humans that lacked freedom. Accordingly, their position in pre-Roman law was the following:

> Being endowed with reason … he (slave) was inevitably a peculiar thing and could, for example, acquire rights for his master. But he himself had no rights: he was merely an object of rights, like an animal.[20]

Given this, slaves were the property of their master and consequently subjected to the ownership of the latter.[21]

2 3 Classical Roman Law

Classical Roman law was the law which was essential to the history of the Roman law of property. Most of the legal ideas which grew from classical Roman law continue to influence the modern understanding of property. Furthermore, this law characterised a period wherein the notion of *dominium*, as opposed to the word *belonging to*, was expressly conceived.[22] On the one hand, the owner of a thing was referred to as a *dominus*, *proprietarius*, or *dominus proprietatis*.[23] In some cases, the notion of *esse alicuius* was used in order to demonstrate that a thing was owned by another person.[24] Ownership had to do with an interest which

17 Sohm *supra* n 15 at 320.
18 De Zulueta *The Institutes of Gaius: part ii commentary* (1963) 62.
19 Cairns *supra* n 14 at 61-62.
20 Nicholas *Introduction to Roman law* (1987) 69.
21 Cairns *supra* n 14 at 61.
22 Schulz *Classical Roman law* (1961) 338-339.
23 *Ibid*.
24 *Ibid*. Roman law jurists differed as to the true nature of *dominium*. There are some who argue that ownership was the most comprehensive private right to a thing which a private person could have. See Kaser *Roman private law* (translated by Dannenbring) 2nd ed (1968) 92 and Declareuil *Rome the law-giver* (1970) 158. It this sense, it amounted to a legal right over a thing which gave the holder the full power of enjoyment and use. See Sohm *supra* n 15 at 325. Accordingly, a Roman owner had unrestricted right of control over a thing, and could claim the thing he owned wherever it is and no matter who possesses it. Jolowicz & Nichols *Historical introduction to the study of Roman law* 3rd ed (1972) 140. However, there are also those who question the reality of the aforementioned viewpoint. This opposition rests on the premise that it is illogical as a 'proposition that the owner of a sword could do what he liked with it, including applying it to the neck of his neighbour's slave'. See Birks 'The Roman law concept of *dominium* and the idea of absolute ownership' 1985 *Acta Juridica* 1 and Scott 'Absolute ownership and legal pluralism in Roman law – two arguments' 2011 *Acta Juridica* 24. It is particularly submitted that the view on the absolute nature of *dominium* was inconsistent with the earlier attempts in the old and pre-classical Roman law of property in relation to the control, use and

a person possessed to use, enjoy, destroy and transfer his property subject to certain limitations.[25] These restrictions could be established by the 'rules of nuisance as well as the rules for the protection of slaves and the right to transfer limited rights to others … e.g. in the form of a user's rights or servitudes'.[26]

A comprehensive approach was generally preferred regarding the meaning of the term property.[27] Property referred to the totality of the objects that were of economic value to a person,[28] the so-called *res in commercio*.[29] The examples included a building, land, animals, slaves, gold or silver.[30] In addition, property was 'any legally guaranteed economic interest having monetary value, that a person could hold in respect thereof'.[31] In view of its monetary value, humans (Roman citizens) had an interest in property. This interest was protected by various laws, for example natural law or *iure naturali*, and civil law or *ius civile*.[32]

Lastly, classical Roman law differentiated between corporeal and incorporeal things, *res mobilis* (movable things) and *res immobilis* (immovable things), *res mancipi* and *res nec mancipi*.[33] Corporeals were the original category of things that were recognised in classical Rome.[34] They were one of the classical groups of objects that were regarded as *res in patrimonio*.[35] They included property that was perceptible through the senses.[36] Examples of corporeals were the land, house, horse, slave, garment, gold or silver.[37] Incorporeals, for example a right, servitude, inheritance, *hereditas*,[38] were traditionally not regarded as *res* in the true

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enjoyment of property. See Table VII of the Twelve Tables and Gaius 4 (limitations on the control of salves).

25 Garnsey *Thinking about property: from Antiquity to the Age of Revolution* (2007) 177, Buckland *A manual of Roman private law* (1939) 111 and Buckland *The main institutions of Roman private law* (1931) 93.

26 Roby *Roman private law in the times of Cicero and of the Antonines* (1902) 414.

27 Buckland *The main institutions of Roman private law supra* n 24 at 91.

28 Kaser *supra* n 24 at 80.

29 *Ibid*.

30 *Ibid*.

31 Moussourakis *supra* n 7 at 119.

32 Mommsen *The Digest of Justinian* (1985) 1.1.11.

33 This research does not examine the difference between *res mobilis* and *res immobilis*, *res mancipi* and *res nec mancipi*. It simply discusses the distinction between corporeals and incorporeals. Furthermore, it is acknowledged that other differences were made between property or *res*. Examples of these included *res divini iuris* or things dedicated to the gods, *res publicae* or public properties, *res omnium communes* (air, water or the sea) and *res in commercio* (*res nullius* or ownerless things, consumable things and *res fungibiles* money, wine or grain and divisible things). See Sohm *supra* n 15 at 302-305.

34 Thomas *The Institutes of Justinian: text, translation and commentary* (1975) 73.

35 Van Warmelo *supra* n 8 at 65-66.

36 Moussourakis *supra* n 7 at 121.

37 *Ibid*.

38 Sohm *supra* n 15 at 225.

legal sense. This was because these things were regarded as interests that accrue over *res corporales*. Therefore, any attempt to regard the latter things as *res* for legal purposes could denote that an interest, being the *res incoporales*, could have an interest, for example ownership, in another interest.[39] Over a passage of time, the strict meaning that was ascribed to incorporeals was discarded. Consequently, a convenient mode of expressing these things was adopted. Following that, it became common to accept that a person could also have an interest in particular abstract and non-physical entities.[40] The aforesaid interest did not necessarily amount to ownership. It was simply associated to a *res quae tangi non possunt* or an interest to or over intangible things.[41]

2 4 Post-Classical Roman Law

Post-classical Roman law was influenced by two systems of law. These were the developments of the Roman vulgar law in the West and the Roman law under Justinian in the East.

2 4 1 Roman Law in the West

Roman law in the West grew out of the practical consideration of old Roman law sources between 350 AD until 550 AD.[42] This law was 'averse to strict concepts and neither able nor inclined to live up to the standards of classical jurisprudence with regard to the artistic elaboration or logical construction'.[43] It did not differentiate between ownership and possession, that is, the factual control of a thing. In most cases, the vibrant meaning of ownership as found in classical Roman law was diluted. Because of this development, the concept of *dominium* 'once radiant with lucidity, appeared largely drained of substance and void of any precise meaning'.[44] Notions such as *possidere*, *possessio* and *possessor* were particularly applied as a replacement to ownership.[45] Accordingly, the right to possess which was referred to as the *inconcussum possessionis ius*, *ut dominus possidet* or *iure dominium possidere*, as opposed to a *dominium* over a thing gained prominence.[46]

2 4 2 Roman Law in the East

Roman law in the East distinguished between things in general. There were objects that were capable of being owned and those that could not be owned (*de iure personarum exposuimus*).[47] The objects that were capable of being owned were referred to as the *res nostro patrimonio* and

39 Van Warmelo *supra* n 8 at 66.
40 *Ibid*.
41 *Idem* 65.
42 Levy *West Roman vulgar law: the law of property* (1951) 2.
43 Berman *Law and revolution – the formation of the Western legal tradition* (1983) 53.
44 Levy *supra* n 42 at 61.
45 *Idem* 26-27.
46 *Idem* 27.
47 Institutes of Justinian 2.1.

those that were incapable of being owned were called *res extra nostrum partimonium*.[48] Other divisions of property were also made possible, for example those things that were common to all,[49] public things,[50] things belonging to the community[51] and those that belonged to no one.[52]

Furthermore, this law created a distinction between corporeal and incorporeal property.[53] Corporeals were defined as those things that, by nature, could be observed and touched.[54] The examples included the land, a slave, garment, gold and silver.[55] Incorporeals included the things that were recognised by the law despite the fact that they could not be observed and touched.[56] The examples were an inheritance, usufruct and obligation.[57]

3 Germanic Law

3 1 Old Germanic Law

In old Germanic law, property or *Sache* was regarded as the impersonal corporeal pieces of the outer world.[58] Being so, it was said that property belonged to people collectively.[59] For example, people would seize the land and this land would consequently belong to all of them as a unit. Because of this, rights in property were held by families and kinship and did not amount to absolute individual rights.[60] Words like *eigen* or *eigan* and *haben*, were frequently used in order to demonstrate who had ownership in each case.[61] These words explicitly showed the persons who possessed the rights over property in old Germanic law.

48 *Ibid*.
49 For example the air, running water, rivers, the sea and seashores. See Institutes of Justinian *supra* n 47 at 2.1.1.
50 The examples of these are the river banks, seashores, things lying under the sea, earth or sand. See Institutes of Justinian *supra* n 47 at 2.1.4-5.
51 For example cities, theatres and *stadia*. See Institutes of Justinian *supra* n 47 at 2.1.6.
52 Institutes of Justinian *supra* n 47 2.1. Things belonging to no one were sacred things, religious things or those things that were placed under divine protection. See Institutes of Justinian *supra* n 47 at 2.1.7.
53 *Idem* 2.2.
54 *Idem* 2.2.1.
55 *Ibid*.
56 *Idem* 2.2.2.
57 *Ibid*.
58 Hübner *A history of Germanic private law* (1968) 160.
59 Murray *Germanic kinship structure: studies in law and society in Antiquity and the early Middle ages* (1983) 18 and Calisse *A history of Italian law* (1969) 653.
60 Bouckaert *supra* n 12 at 780.
61 Hübner *supra* n 58 at 227.

Old Germanic law regarded ownership as the fullest right that could be possessed over things.[62] This right was in respect of property in its entirety.[63] However, there are some, for example Calisse who submit that it was not always necessary in old Germanic private law that ownership should be in respect of the whole property. Specifically, it was possible to have a situation where one person was the owner of a house and the other of the land on which a house was built.[64] With this in mind, the powers and rights to exercise ownership could be bestowed on a certain collective or landholding corporate group.[65] This collective had to use these rights for the common benefit of all the members of the community. The manner of exercising this use depended on whether the property belonged to the tribe or to the family.[66]

Despite the above-mentioned, developments in the law of property necessitated that ownership of property should also be extended to other personal things, for example carts, flocks, fruits, clothes and weapons. These modifications in the law of property were compelled by the confrontation of old Germanic law with Roman law.[67] Accordingly, the nature of property was no longer only limited to that which a tribe or family could have *dominium* over. Particularly, property could also refer to those objects that were or could be held or belonged to an individual (*allodium*).[68] This was precisely the step towards recognising the existence of the rights in (individual) things or *Sachenrechte*.[69] These rights were separated into those in respect of corporeal and incorporeal things.[70] An important point about all this is that a certain category of slaves (*servi casati*) could own certain land cultivated by them.[71] Therefore, they were allowed, within the parameters of the law, to enjoy all the fruits of their labour.

In relation to corporeals (land, animal, gold, silver and certain precious stones), it was stated that ownership was vested in these things by virtue of them being capable of being touched (*res quae tangi possunt*). However, it was argued that corporeals were not naturally property for legal purposes. They only became property in the legal sense as soon as legal rights were attached to them.[72] These rights were called *dengliche*

62 *Ibid.*
63 *Ibid.*
64 Calisse *supra* n 59 at 671.
65 Murray *supra* n 59 at 19.
66 Calisse *supra* n 59 at 657-664. See also, Vinogradoff 'The organisation of Kinship' in Krader (ed) *Anthropology and early law* (1966) 57.
67 Murray *supra* n 59 at 179-180. Vinogradoff refers to this confrontation as rather startling, in the sense that 'it seemed at the outset as if there would not be much room for Roman doctrine in a country with a German-speaking population of Germanic stock'. See Vinogradoff *Roman law in medieval Europe* 3rd ed (1929) 119.
68 Calisse *supra* n 59 at 665.
69 Hübner *supra* n 58 at 162.
70 *Ibid.*
71 Calisse *supra* n 59 at 416.
72 Hübner *supra* n 58 at 161.

or real rights. The aforesaid rights secured for the owner the direct control of a thing subject to certain legal limits.[73] Other rights (including rights in property), inheritance and usufruct were regarded as incorporeal things.

3 2 Frankish Law

Frankish law consisted of the practices which were followed by the West German tribes across the Rhine. Although Roman law had a strong influence on these usages,[74] the law that was followed was far removed from its classical Roman law formulations.[75] Specifically, the feudal system marked a shift in the manner in which the relationship between a person and a thing, that is, a fief, could be understood.[76] This system had its roots in the feudal law. It marked a regime of underdevelopment[77] and a system of exploitation.[78] It reflected the particular viewer's biases, values and orientations.[79] The feudal system represented itself in situations where a weaker person, namely the peasants or vassal, would turn to a stronger man, that is the lord, in order to derive some forms of rights in property. In this sense, the vassal became a tenant over property held by the lord.[80] For purposes of studying the law of property, the lord (the king or the church) was at the top of the property law chain while the peasants were at the bottom.[81] Accordingly, the right (*droit*)[82] to property did not bestow on the holder (peasant) ownership of the property.[83] It only amounted to that which a king or church could grant to a vassal.[84] Because of this, the vassal was prevented from transferring the rights that flowed from this property.[85]

Feudal law exasperated the proper development of the Roman law of property. It specifically treated the classical Roman law term *dominium*

73 *Idem* 162.
74 Stein *Roman law in European history* (1991) 41-42 and Wallace-Hadrill *The long-haired kings and other studies in Frankish history* (1962) 1-2.
75 Van Caenegem *An historical introduction to private law* (1992) 21-24.
76 The word feudalism can be traced to the later part of the eighteenth century. Its origin 'must be looked for in Frankish kingdom of the Merovingians, and more particularly in the heart of the kingdom between the Loire and the Rhine'. See Ganshof *Feudalism* (translated by Grierson) (1996) 3. For further interesting reading, see Davies & Fouracre (eds) *Property and power in the early middle ages* (1995) 4-15.
77 Okey *Eastern Europe 1740-1980* (1982) 21.
78 Lyon *The Middle ages in recent historical thought: selected topics* (1965) 13.
79 Brown 'The Tyranny of a construct – feudalism and historians of mediaeval Europe' 1974 *The American Historical Review* 1086.
80 Volokh 'Property rights and contract form in Medieval Europe' 2009 *American Law and Economics Review* 422.
81 Pejovich *The economics of property rights: towards a theory of comparative systems* (1990) 8-9.
82 McSweeney 'Property before property – Romanising the English law of land' 2012 *Buffalo Law Review* 1147.
83 Brissaud *A History of French public law* (as translated by Garner) (1969) 339-340.
84 Anderson *Passages from antiquity to feudalism* (1974) 147-148.
85 *Ibid.*

as denoting simply a beneficial right or *usufructus*.[86] Thus, a vassal only had *proprietas* or right of control. This *proprietas* was limited in that it did not necessarily mean that the property could be alienated or inherited.[87] It only meant that the vassal was a recipient or *bucellarius*.[88] Therefore, the right to control the property depended on the continuation of the relationship between a vassal and the *dominus*, namely the king or the church.[89]

Regardless of above-mentioned, a difference was created between corporeals or *fief corporel* and incorporeals or *fief incorporel*.[90] Land, office and animals were regarded as *fief corporel*. Household goods were excluded from the definition of *fief corporels*.[91] The reason for this was that these goods were perishable by nature.[92] *Fief incorporels* included rights, *usufructus*, inheritance and income.[93]

4 The Romanists

4 1 Glossators

The Glossators were experts of Roman law, located in Bologna, Italy between 1100 and 1250 AD.[94] Their position in relation to the law was that they 'had an unsurpassed knowledge of the Roman source materials and for them law as a concept and legal science (*scientia juris*) was equivalent to Roman law'. [95] However, this knowledge of Roman law was hampered by the fact that the 'society in which they lived was anything but Roman'.[96]

The Glossators commented on the phrases and texts that were contained in the *Corpus Iuris Civilis* by means of Glosses. However, the Glossators deviated from the old, pre-classical and classical Roman law of property in relation to the wording to be preferred when referring to the legal rights that a person had to property. In particular, they spoke about the *ius in re* as opposed to an *actio in rem*.[97] In modern English, the term *ius in re* is interpreted to mean a property right.[98] This right to property, of which *dominium* was the most important, amounted to an

86 Brissaud *supra* n 83 at 88.
87 Levy *supra* n 42 at 89-90.
88 *Ibid*.
89 *Ibid*.
90 Brissaud *supra* n 83 at 265.
91 *Ibid*.
92 *Ibid*.
93 *Ibid*.
94 Garnsey *supra* n 25 at 195.
95 Samuel 'The many dimensions of property' in J McLean (ed) *Property and the constitution* (1999) 43.
96 *Ibid*.
97 Tuck *Natural rights theories: their origin and development* (1979) 16.
98 It is accepted that Bartolus de Saxoferrato (1313-1357) mentioned a third form of *dominium*. This he referred to as *quasi dominium*. However, this form of ownership did not found favour. See Feenstra '*Dominium* and *ius in*

ius perfecte disponere.[99] This *ius pefecte disponere* granted to the owner of an object the full or complete disposal over a corporeal thing.[100] They then described these rights as either those that belong as an individual possession to each person, assigned to him by law or those over which a person had capacity and power assigned by law.[101] In more abstract terms, *ius pefecte disponere* bestowed on the *dominus* the 'claim to total control against the entire world'.[102]

Lastly, the glossators recognised that the starting point to the study of rights over property is the acceptance of the exclusive connection between a person and a thing.[103] In so doing, they recognised that a division existed between corporeals and incorporeals. The rights to corporeal and incorporeal things were referred to as the *ius reale*, that is, real rights.[104] These rights did not necessarily translate to ownership. They merely denoted that, due to the close association between a person and a thing, a person had an interest over property.[105] Provided this interest existed, a person had the necessary *ius reale* over property.[106]

4 2 Ultramontani

The Ultramontani were the French Romanists who resided in the North of Italy across the mountains.[107] They were typically French-speaking and belonged to the school of Orléans.[108] They followed the work of the Glossators of Bologna. However, the manner in which the Ultramontani viewed Roman law was greatly influenced by the domestic French and Canon laws which existed during their time. In relation to the law of property, the Ultramontani provided a much more refined approach to property.[109] The refinement of their view is particularly made explicit by Du Plessis.[110] Du Plessis states that the

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re aliena – the origins of a civil law distinction' in Birks (ed) *New perspectives in the Roman private law of property: essays for Barry Nicholas* (1989) 113.

99 Bartolus de Saxoferrato (1314-1357) spoke, for example of *quid ergo est dominium? Responde est ius de re corporali perfecte disponendi, nisi lege prohibeatur*. See Bartolus ad D 51.2.17.1.

100 Garnsey *supra* n 25 at 198 and Visser 'The 'absoluteness' of ownership – the South African common law perspective' 1985 *Acta Juridica* 39-52 43.

101 Garnsey *supra* n 25 at 202.

102 Tuck *supra* n 97 at 15.

103 Samuel *supra* n 95 at 47.

104 Pottage & Sherman 'On the prehistory of intellectual property' in Howe & Griffiths (eds) *Concepts of property in intellectual property law* (2013) 22.

105 *Ibid*.

106 *Ibid*.

107 Du Plessis *Barkowski's textbook on Roman law* 4th ed (2010) 376.

108 Knoll '*Nationes* and other bonding groups at late medieval central European universities' in Van Deusen & Koff (eds) *Mobs: an interdisciplinary inquiry* (2010) 85-86.

109 Van der Walt *Die ontwikkeling van houerskap* (1985) 183.

110 See in general, Du Plessis 'Towards the medieval law of hypothec' in Cairns & du Plessis (eds) *The creation of the ius commune: from Casus to Regula* (2010).

> scientific approach of the school of Orleans (ultramontani), which influenced legal science during the thirteenth century, was not exactly revolutionary, but their approach towards textual analysis and textual authority was novel.[111]

These French Romanists distinguished between corporeals and incorporeals. For example, Jacques de Revigny (1230-1296 AD), in his *Lectura supra Codice*, spoke about certain tangibles such as agricultural land, cattle and house.[112] In relation to incorporeal objects, especially those that are attached to land, Revigny mentioned a hypothec as an example.[113] Furthermore, usufructs, gains or profits from tangible property were the kinds of intangibles that were recognised and protected by the law of property.[114] This recognition and protection did not necessarily exist because *dominium* over these things was possible. It existed because a person had an interest in the aforementioned property.[115]

5 Canon Law

Canon law (and later, Church law) is the whole body of legal rules which was developed in order to deal with matters that fell within the domain of the Roman Catholic Church.[116] This law regulated the relationship between the Church and the secular sphere.[117] Canon law developed separately from Roman law. Besides this separation, Canon law relied heavily on certain principles of Roman law for its sustenance. One example is the principle that regulated the property of the Church. Accordingly, it is conceivable that the Roman law of property was applied by the Church – only insofar as this law was not in conflict with Canon law.[118]

The acceptance of the notion of individual rights to property by Canon law is difficult to establish with precision. For example, Canonists differentiated between the *ius* of a heavenly origin and those granted by human or positive law. In relation to the first-mentioned, reference was made to common property. This common property was regarded as the property of God. Being so, God had ascribed this property to humans for their common nourishment. This view was held because the earth belonged to the Lord.[119] Consequently, all earthly property was to be held in common in accordance with God's wishes.[120] As for the second-mentioned rights, Canonists, for example Gratian, held that *dominium*

111 *Idem* 172.
112 De Revigny *Lectura supra Codice* on C 4.65.5.
113 *Ibid.*
114 Van der Merwe & Verbeke (eds) *Time-limited interests in law* (2012) 25-26.
115 *Ibid.*
116 Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 160.
117 *Ibid.*
118 Tamm *Roman law and European legal history* (1997) 212.
119 Digest 8.C.I.
120 *Ibid.*

over these objects was ascribed to private individuals.[121] However, the manner in which this ownership was exercised was determined by the creator of this *dominium* – that is, the emperor.[122]

One of the most prominent jurists of Canon law by the name of Bonagratia of Bergamo (1265-1340 AD) deferred with the above-mentioned.[123] Bonagratia referred to the term *habere*. *Habere* meant three things.[124] Firstly, it signified the actual *dominium* of the *dominus*.[125] Secondly, it was interpreted to mean the *usus facti*, that is, the *usufructus* without a legal title to the property itself.[126] Thirdly, *habere* symbolised the modern idea of possession.[127] This view by Bonagratia's was followed by William of Ockham. Initially, Ockham defined property as a competence (*facultas*) to claim a good.[128] He then referred to this good as the *ius*. The *ius* represented the unique power to deal with the good itself, that is, the *facultas utendi*.[129] Following this, rights in property were deemed to have vested in the *dominium* of the human person[130] and the rights to the use of a thing belonging to another without prejudice to the substance of the thing itself.[131] These rights were vested in both *res corporales* and *res incorporale*.[132]

6 Sixteenth Century

6 1 *Mos Italicus*

Mos italicus was the Italian law that was followed and applied during the sixteenth century. This law relied extensively on Bartolus de Saxoferrato's (1313-1357 AD) ideas on law.[133] It is argued that the influence that Bartolus had on the *mos italicus* was by no means accidental. It existed because Bartolus was one of the most famous jurists of the Middle Ages.[134] His ideas on law were particularly authoritative in

121 Helmholz 'Human rights in the Canon law' in Witte & Alexander (eds) *Christianity and human rights: an introduction* (2010) 101.
122 *Ibid.*
123 Shogimen *Ockham and political discourse in the late Middle ages* (2007) 41-42.
124 Van der Walt *supra* n 108 at 213.
125 *Idem* at 214.
126 *Idem* at 214.
127 *Ibid.*
128 Bouckaert *supra* n 12 at 787.
129 JW Robinson *William of Ockham's early theory of property rights in context* (Leiden, 2008) at 208.
130 'Dominium est postesta human principalis rem temporalem in iudico venticandi et omni modo, qui non est a iure naturali prohibitus, pertrectandi'. See Van der Walt *supra* n 108 at 215.
131 'Usus est ius utendi rebus alienis, salva rerum substantia'. See Van der Walt *supra* n 108 at 215.
132 *Ibid.*
133 J Woollfson *Padua and the Tudors: English students in Italy, 1485-1603* (Cambridge, 1998) at 45-46 and Van der Walt *supra* n 108 at 233.
134 Tamm *supra* n 118 at 206.

Italy for a long period of time. Because of this importance, the phrase *nemo jurista nisi Bartolista* (no one is a jurist who is not a Bartolist) was commonly used.[135]

Jacobus Menochius (1532-1607 AD) held the view that property meant that which belonged to a person and is, in turn, his own object.[136] If this was established, Menochius argued that the latter could dispose freely of property.[137] However, Gomezius spoke of *dominium* as the right to a corporeal thing in terms of which a person had *libere disponendi*. To this end he accepted that only one form of *dominium* existed in law. This acceptance is made evident by the following passage:

> An sit autem duplex dominium directum et utile aut unum tantum sit, est controversum inter doctors et Batolum. Sed unicum tantum dominium esse in punto iuris posset defendi cum Duarenus. Alias dixi quod est detentatio, et illa nihil aliud est quam sole, nuda, et simplex insistetia rei quae consistit in facto, ex qua ne dominium nec possessio aliqua resultat propter qualitatem personae vel rei, vel ex ipsa natura actus: puta si traditur mihi aliqua res, vel ego eam accipio, et est actus per quem non potest causari possessio iuridica, certe tunc dico habere nudam detentationem: et illa dicitur nuda et simplex detentatio.[138]

In this passage, Gomezius acknowledged the challenges that were created by Bartolus' theory of *duplex dominium*. He stated that the basis of the law – presumably, Gomezius was referring to the classical Roman law – was that there is only one form of *dominium*.[139] Having stated all this, Gomezius distinguished between *dominium* and what he referred to as *detentatio*, that is, discretion over the object of property as guaranteed and protected by the law.[140]

6 2 *Mos Gallicus*

Mos gallicus was a humanist method of reasoning, developed in Italy and centred or based in France.[141] The contribution of this humanist model to law can be summarised as follows:

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135 *Ibid*.
136 Menochius' *Consilia*.492.12.
137 Van der Walt *supra* n 108 at 234.
138 In English, the aforementioned passage can be translated to mean that 'whether there are two kinds of ownership or there is only one is a matter that the jurists of the Bartolum theory do not have agreement. *Detentatio* I said , which is the other, and that is nothing other than the sun, on the bare, and the task, which consists of a simple fact, for the sake of the quality of the results from any person or is not to be the dominion nor the possession of the thing or by reason of the nature of the act: for example, if it is handed down to me, a real thing, or I receive it, I will, by means of which it cannot be caused, and it is an act of the inheritance of the law, indeed, we shall, I say to have a bare *detentationem*: naked and simple, and it is said *detentatio*'. (Own translation).
139 Grossi *A history of European law* (2010) 16.
140 *Ibid*.
141 Goddu *Copernicus and the Aristotelian tradition: education, reading, and philosophy in Copernicus's path to Heliocentrism* (2010) 178.

> The humanists wanted new source versions, ad fonts (back to the sources) was one of the catchphrases of the time. They read Greek – graeca leguntur – in contrast to the medieval jurists. Thus, they had a new independent access to the texts that did not require the use of a gloss as an authority. The actual teaching of law was also changed as the humanists emphasised the Institutiones as the introduction to the study of Roman law … the humanists were dissatisfied with the system of the digest and sought to resystematise it in new ways.[142]

Jacques Cuiacius (1522-1590) was one of the most prominent jurists of this law. In relation to property, Cuiacius found it difficult to define the ambit of the rights to property belonging to a vassal and those of a superior. His solution to this was simply that: 'the nature of the vassal's right to property was a usufruct with undivided *dominium* vesting in the superior'.[143] By this, he sought to align his theory of property, especially ownership, with that of the classical Romans and with feudal law.

6 3 Moral Philosophers

One of the most essential philosophers of this time is Thomas Aquinas. In his *Summa Theologica*, Aquinas differentiated between things by stating that:

> We can consider a material object in two ways. One is with regard to its nature, and that does not lie within human power, but only divine power, to which all things are obedient. The other is with regard to its use. And here man does have natural *dominium* over material things, for through his reason and will he can use material objects for his own benefit.[144]

He then referred to the first-mentioned objects as those things that God gave to mankind in common.[145] Consequently, the rights which flowed from this property were ascribed to the natural law.[146]

In relation to the second-mentioned property, Aquinas submitted that God (the creator of all property) retained the absolute *dominium* over property. This meant that a person simply had a usufruct over property. Accordingly, a person possessed only the power and privilege of making

142 Tamm *supra* n 118 at 222.

143 Cairns 'Craig, Cujas and the definition of *feudum*' in Birks (ed) *New Perspectives in the Roman law of property: essays for Barry Nicholas* (1989) 81.

144 Aquinas *Summa theologica* 2a 2ae. 66. 1.

145 *Ibid*.

146 *Ibid.* In relation to *ius naturale*, Aquinas stated that 'something can be said to according to *ius* natural in two ways. One, if nature inclines us to it: such as not to harm another human being. The other, if nature does not prescribe the opposite: so that we can say a man is naked under the *ius* natural, since he received no clothes from nature but invented them himself. In all this way the common possession of all things, and the equal liberty of all is said to be according to the *ius* natural: for distinctions between possessions and slavery were not the product of nature, but were made by human reason for the advantage of human life'. See Aquinas *supra* n 144 2ae, 94.5.)

a purposive use of things.[147] This power to use property had to be exercised within limits, as set out by natural law.[148]

Furthermore, Aquinas inquired whether the possession of exterior things is natural to man or not.[149] He also investigated whether 'it is lawful that anyone should possess anything as his own'.[150] In response to this, Aquinas argued that man had a natural *dominion* over private property. This ownership arose from human agreement, which is the domain of positive law.[151]

7 Pandectists

The Pandectists' theory of law was based on a method of reasoning which was referred to as *Private Law Dogma*. This method was drawn from an idea which Georg Friedrich Puchta (1798-1846) developed called the *Genealogy der Begriffe*, that is, the genealogy of legal concepts.[152] From this, a philosophical way of interpreting texts or documents was established. This resulted in the law which was conventionally used becoming a product of rigorous scientific deductions and being more refined.[153] In relation to ownership, Puchta referred to a thing as denoting the exclusive authority to use and dispose of a thing.[154] He talked of an easement in the sense of a property right. According to Puchta, rights either belonged to an individual or a family.[155] He then referred to these rights as the private rights. The latter rights were in Puchta's view private in nature and were separated from public rights and ecclesiastical rights.[156] They were recognised as the most important of the rights.[157] According to Heinrich Dernburg (1829-1907), they were referred as '*die wichtigste ist das Eigentumsrecht'*, that is, the most important of the rights.[158]

Furthermore, the Pandectists had a more grounded view of the notion of *dominium*. On the one hand, Thibaut developed an approach to ownership which was more aligned to that of the classical Roman law. He rejected the medieval idea of property as generating dual ownership.[159] He stated that the separation between *dominium directus*

147 O'Rahilly 'S. Thomas's theory of property' 1920 *Studies: An Irish Quarterly Review* 339.
148 Ignatieff & Hont (eds) *Wealth and virtue: the shaping of political economy in the Scottish enlightenment* (1983) 27.
149 Aquinas *supra* n 144 at 2.2, 66, 1-2.
150 *Ibid*.
151 *Ibid*.
152 Siltala *Law, truth, and reason: a treatise on legal argumentation* (2011) 188.
153 Van der Walt *supra* n 108 at 332.
154 Gordley *The Jurists: a critical history* (2013) 225.
155 Korkunov & Hastings *General theory of law* (1909) 244.
156 *Ibid*.
157 Van der Walt *supra* n 108 at 338.
158 As quoted in Van der Walt *supra* n 108 at 338.
159 Whitman *The legacy of Roman law in the German Romantic era: historical vision and legal change* (1990) 180.

and *dominium utile* had no place in the law of property.[160] This rejection resulted in the acceptance of only one form of *dominium* over property, namely, direct ownership. Van der Walt finds justification for this viewpoint by saying that property rights were seen to be part of the external sphere of the individual.[161] Bernhard Windscheid (1817-1892) also provided a useful guide illuminating the rejection of *duplex dominium*.[162] Firstly, Windscheid spoke of ownership as an exclusive or individualistic right.[163] Secondly, he talked of ownership as an absolute right.[164] Thirdly, he referred to ownership as an abstract right, in the sense that an owner possessed certain powers by virtue of having ownership of property.[165]

Having examined the above-mentioned, it would appear that the Pandectists recognised that the objects of rights are corporeal and incorporeal things.[166] These rights do not necessarily translate to ownership. Accordingly, an interest in property was enough as a justification that rights in property existed in law.[167]

8 Dutch Developments

Some of the prominent jurists of the Dutch law of property were Hugo de Groot (1583-1645)[168] and Johannes Voet. Grotius dealt with private property in *De Jure Belli ac Pacis*.[169] In this work, Grotius spoke of property that God conferred on all humans.[170] In relation to this property, he contended that humans had a general right, as opposed to a private right. This general right related only to the right to use the property.[171] Therefore, a human 'could at once take whatever he wished for his own needs, and could consume whatever was capable of being consumed'.[172] Furthermore, Grotius retained the mediaeval Roman law approach to property. He equated property with *gerechtigheid*, that is, a right.[173] Rights, in this sense, meant subjective rights. These rights came into being through a steady process of individuals dealing with each

160 As quoted in Whitman *supra* n 159 at 180.
161 Van der Walt *supra* n 108 at 333-334.
162 Windscheid *Lehrbuch des Pandektenrechts* 7th ed (1863) 490-493.
163 *Ibid*.
164 *Ibid*.
165 *Ibid*.
166 Raff *Private property and environmental responsibility: a comparative study of German real property law* (2003) 136.
167 Van der Walt *supra* n 108 333-334.
168 Hereinafter referred to as Grotius.
169 Grotius *De Jure Belli ac Pacis* (1625) II.II.II.1.
170 *Ibid*.
171 De Araujo 'Hugo Grotius, contractualism, and the concept of private property – an institutionalist interpretation' 2009 *History of Philosophy Quarterly* 356.
172 Grotius *supra* n 169 II.II.II.1.
173 Wilson *Savage Republic: De Indis of Hugo Grotius, republicanism, and Dutch hegemony within the early modern world-system* (2008) 235.

other.[174] The rights were to be exercised in a manner considerate of the property rights that other persons possessed.[175]

Furthermore, Voet stated that there were certain things over which private ownership was impossible.[176] He then followed the Roman law approach to property by calling these objects the *res nullius* and *res derelictae*.[177] The examples of these things included wild animals, birds, fish, shells, the sea, rainwater and abandoned property.[178] He also stated that some things can be owned. In this respect, they can be the object of rights.[179] The examples were corporeal and incorporeal property. In relation to incorporeals, Voet argued that these things did not possess a tangible existence.[180] However, they were still property for purposes of the law.[181] This recognition existed because incorporeal things had an inherent value to the person who had an interest in them.[182] This value was attributable to ownership and was not only equated to a monetary value.

9 Conclusion

Society determines the kind of property that should be regarded as the object of rights. This determination often depends on the prevailing needs of a particular society during a specific period in its history. For example, in old Roman law the interests in property, as opposed to rights in property, in the form of actions, that is, *actio in rem* and *actio in personam*, were vested only in corporeals. The word 'belong' was thus preferred in old Roman law in order to indicate whether a person had an interest in property. However, pre-classical and classical Roman law extended the interests in property to both corporeals and incorporeals. Importantly, the view in classical Roman law was that corporeals and incorporeals must be of economic value to a person. In other words, a person had to have an interest in property, which was calculated to be economic in nature. Objects such as the land, house, horse, slave or a usufruct were deemed to be those things over which a person could have such an interest. Specifically, classical Roman law introduced the notion of ownership to the domain of the law of property. It stated that a *dominus* or *proprietarius* could use, enjoy, destroy and transfer his property subject only to the limitations that were set out by the law.[183]

174 De Araujo *supra* n 171 at 356.
175 Grotius *supra* n 169 at I.I. and VIII.2.
176 Voet 45.1.6.
177 *Idem* 41.1.16.
178 Van der Merwe & Pope 'Property' in Du Bois (ed) *Wille's principles of South African law* 9th ed (2007) 416.
179 Voet 1.8.11.
180 *Ibid*.
181 *Ibid*.
182 *Ibid*.
183 Garnsey *supra* n 25 at 177.

The radiance and substance of the above-mentioned eloquent construction of property was shattered in post-classical Roman law. Particularly, Roman law in the West substituted *dominium* with *possessio*. Thus, the interest which a person could have in property was described as the *inconcussum possessionis ius*, *ut dominus possidet* or *iure dominium possidere*. This un-classical Roman law view was consequently altered in Germanic law. Specifically, this law recognised ownership as the fullest right that could be possessed over objects. This right was individualistic in nature, that is, the *Sachenrechte*. It was called the *deligliche*. Despite this, Germanic law deviated from the old, pre-classical, classical and post-classical Roman law by submitting that *servi casati* were not property for purposes of the law. These categories of slaves could, in the same way as any other person, also have an interest in property.

The recognition of real rights in studying property as an object of rights is essential to the history of the law of property. For example, the Glossators attempted to align their approach to property with old Roman law by invoking what they called the *ius in re*. By this, they advocated the view that rights (*ius*) in property (*in re*) could no longer be equated to the old Roman law actions, namely, *actio in rem* and *actio in personam*. Consequently, they submitted that the rights which a person had to property were *ius reale*.[184] This real right jurisprudence seems to have been followed by the Pandectists and Dutch law. On the one hand, the Pandectists, for example Puchta, argued that a person had an 'exclusive authority' to use, enjoy and dispose of the property which he or she owned.[185] Exclusive authority was a term used in order to illustrate that a person possessed 'private rights' to property, or what Dernburg referred to as '*die wichtigste ist das Eigentumsrecht*'.[186] On the other hand, the Dutch law retained the medieval Roman law view of property. It stated that property rights are subjective in nature. They arise by virtue of the fact that humans interact with each other almost daily. Accordingly, a need arises to protect the rights that humans possess over those objects that are of inherent interest to them.

Therefore, it is essential to understand that the objects of rights are a product of an evolving system of law. This system develops because the society within which it applies is not stagnant and inflexible. Given this, it becomes clear that the needs of modern societies, for example an information society, will determine or indicate the objects that are of particular interest to a person (and not necessarily ownership). For example, there is nowadays a growing increase in the use of electronic information or data[187] for electronic communication or related

184 Pottage & Sherman *supra* n 104 at 22.
185 Gordley *supra* n 154 at 225.
186 See Van der Walt *supra* n 108 at 338.
187 In terms of section 1 of the Electronic Communications Act 25 of 2002 the word 'data' refers to the electronic representation of information in any form.

purposes. The fact that this electronic information has become a 'public good' motivates this increase.[188] Specifically, the proliferation of information in an information society has resulted in governments, businesses and individual computer users developing an interest in this information or data. For legal purposes, this has meant that the rights in property should or will have to be extended, in order to regulate non-traditional forms of property, for example information.

188 Elkin-Koren and Salzberger *Law, economics and cyberspace: the effects of cyberspace on the economic analysis of law* (2004) 49-50.

The ramifications of the Appellate Body Ruling in *United States – measures affecting the production and sale of clove cigarettes* on consumer protection measures at international trade level

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OPSOMMING

Die gevolge van die Appèlligaam Beslissing in *United States – measures affecting the production and sale of clove cigarettes* op verbruikersbeskerming op internasionale handelsvlak

Die Wêreldhandelsorganisasie (WHO) is in 1995 gestig met 'n duidelike handelsgeoriënteerde filosofie. Die primêre fokus van die WHO se institusionele raamwerk is dus te verstane op produkte en dienste eerder as op verbuikers. Sonder om hierdie benadering noodwendig te bevraagteken, is dit 'n bron van kommer dat die WHO se implementering van sy mandaat en ooreenkomste tog negatief inwerk op sosiale belange wat die regte van verbruikers insluit. 'n Onlangse en historiese ondersoek na die WHO/'GATT' dispuutoplossing wys na talle besluite wat geneem is terwyl dit die verbruiker se gesondheid en veiligheid ondermyn, ten gunste van kommersiële belange. Die verwerping van die VSA se gesondheidsbeleid algemeen bekend as die 'youth anti-smoking law', gebaseer op die 'Family Smoking Prevention and Tobacco Control Act' van 2009, deur die Appelraad in 'Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R (April 4, 2012)' is maar een van baie besluite wat gedurig debatte sal ontlok of die WHO enigsins sensitief is vir verbruikersbelange, of is sulke belange net te ver verwyder van dit waarvoor hulle staan.

1 Introduction

The World Trade Organization (hereinafter WTO)'s approach to trade liberalisation is *unapologetically, and perhaps unreflectively, producer-oriented*. It prioritises ensuring that goods and services can be offered across borders with the least amount of discrimination and administrative barriers. It assumes that consumers necessarily benefit from free trade because they will have access to a greater variety of goods and services at a cheaper price. While such benefits have, indeed, materialised in a number of ways, they do not reflect the full spectrum of

How to cite: Sibanda 'The Ramifications of the Appellate Body Ruling in *United States – Measures Affecting the Production and Sale of Clove Cigarettes* on Consumer Protection Measures at International Trade Level' 2017 *De Jure* 156-174 http://dx.doi.org/10.17159/2225-7160/2017/v50n1a9

consumer interests. *Other interests … are only marginally or imperfectly addressed by the trade regime*.[1]

Upton Sinclair's 1905 novel *The Jungle,* is regarded as one of the pre-1960 game-changers for the United States consumer protection regime. Sinclair's novel sought to expose the deplorable working conditions in the meat packing industry in the United States. Sinclair's exposé was followed by a wave of investigations by many others, and eventually led to, amongst others effects, the formation of the Food and Drug Administration (hereinafter FDA) and enactment of laws designed to promote and protect consumer interests. This historical legacy of strong advocacy and jurisprudence in American consumer protection continues to resonate even today, and has the country undergoing a wide-ranging overhaul of consumer protection laws.[2] Currently, the United States Federal Trade Commission (hereinafter FTC) is the primary independent federal agency which, alongside other federal authorities, is responsible for the administration of numerous consumer protection laws.[3] Amongst this legislation is the Comprehensive Smokeless Tobacco Health Education Act of 1986,[4] which was amended by the Family Smoking Prevention, and Tobacco Control Act of 2009.[5] In general, there is a multiplicity of policies, regulations, and laws in the United States aimed at affording a variety of protections to consumers – at both Federal and State level.[6]

The issue of tobacco regulation has also been one of the contentious issues at the international level, under the auspices of the General

1 Rolland 'Are consumer-oriented rules the new frontier of trade liberalization?' 2014 *Harvard International Law Journal* 316, at 361 – 362. *My own emphasis*.

2 Cohen 'Warne Lecture: is it time for another round of consumer protection? The lessons of twentieth-century U.S. history' 2010 *Journal of Consumer Affairs* 234-246.

3 United States Federal Trade Commission (FTC). The consumer protection authority of the FTC, which is intended to protect consumers from fraudulent, deceptive, and unfair business practices, is derived from section 5(a) of the Federal Trade Commission Act (FTC Act), which prohibits 'unfair or deceptive acts or practices in or affecting commerce'. See Federal Trade Commission Act 15 U.S.C. § 5(a)(1). The FTC is assisted by several divisions of its Bureau of Consumer Protection (BCP) that include the divisions on: Advertising Practices, Consumer and Business Education, and Enforcement. Relevant to this paper is the Division of Advertising Practices that combats false advertising claims, and those advertising claims that compromise the health of consumers and others.

4 15 U.S.C. §§ 4401-4408.

5 ACT. 111 P.L. 31; 123 Stat. 1776.

6 At State level the State Attorneys General of most of the States bear the responsibility of enforcing state consumer protection laws, the responsibility which to a certain degree is facilitated by the National Association of Attorneys General (NAAG) to ensure effectiveness of their protection measures and to support amongst others consumer protection litigation initiated by the Attorneys General. See Pridgen and Alderman *Consumer Protection and the Law* (2009) for a narrative of consumer protection laws at State level.

Agreement on Tariffs and Trade 1947 (hereinafter GATT 1947),[7] the predecessor of the World Trade Organisation (hereinafter WTO), in several disputes involving the United States tobacco regulation.[8] According to Voon the tension between free trade regulation and the sovereignty of State Parties to introduce measures to regulate tobacco in the interest of the public has always existed.[9] The ramifications to members of the WTO[10] of the disputes settlement body's panels and the Appellate Body rulings in *Measures Affecting the Production and Sale of Clove Cigarettes*[11] *(*hereinafter *US – Clove Cigarettes)* on consumer protection and health issues[12] is the focus of this article. Both the Panel and the Appellate Body ruled the United States Family Smoking Prevention and Tobacco Control Act[13] (hereinafter FSPTCA) ban of the sale of flavoured cigarettes except menthol cigarettes, to be inconsistent with the WTO laws in particular the Agreement on Technical Barriers to Trade.[14]

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7 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947]. Reprinted in (1969) 44 B.I.S.D 1 [GATT 1947].

8 See for example, Panel Report, *United States–Measures Affecting the Importation, Internal Sale and Use of Tobacco*, ¶¶ 12-46, DS44/R (Aug. 12, 1994). See also Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶¶ 6, 63, DS10/R-37S/200 (Oct. 5, 1990) (GATT) [hereinafter Panel Report, *Thailand – Restrictions*]. For general discussions of the ruling see, for example, Warikandwa and Osode 'Managing the trade-public health linkage in defence of trade liberalisation and national sovereignty: an appraisal of United States – Measures Affecting the Production and Sale of Clove Cigarettes' 2014 *PELJ* 1262.

9 Voon 'Flexibilities in WTO law to support tobacco control regulation' 2013 *American Journal of Law & Medicine*, 199-217 at 199.

10 The World Trade Organisation (WTO) was established pursuant to The Marrakech Agreement Establishing the World Trade Organization, April 15, 1994: The Legal Texts – The Result of the Uruguay Round of Multilateral Trade Negotiations 4 (1999) 1867 U.N.T.S. 154, *reprinted in* (1994) 33 ILM 1144–52.

11 Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (hereinafter Appellate Body Report, *US – Clove Cigarettes*) WT/DS406/AB/R, adopted Apr. 24, 2012. See also the WTO Panel Report, *US - Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R (September 2, 2011) (hereinafter referred to as Panel Report, US – Clove Cigarettes).

12 Other cases include, for example, Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶¶ 1-6, 21-22, WT/DS302/AB/R (Apr. 25, 2005); Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶¶ 8.1-8.3 WT/DS302/R [hereinafter Panel Report, *Dominican Republic Cigarettes*]; Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R (June 17, 2011); Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R (Nov. 15, 2010).

13 Family Smoking Prevention and Tobacco Control Act § 910(a)(1), Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009) (hereinafter FSPTCA).

14 Agreement on Technical Barriers to Trade (1995) (hereinafter TBT Agreement) and the Marrakech Agreement Establishing the WTO (1994).

In a rather ironic way, smokeless cigarettes, are said to be in the class of 'toxic, carcinogenic, and addictive products'[15] and at the same time punted as 'tobacco harm-reduction strategy' due to the fact that 'these products convey a substantially lower risk from morbidity and mortality than does cigarette smoking.'[16]

This article argues in the main that both regulations and decisions of the WTO bodies must have due regard for the protection of consumer interests as far as possible, and particularly those consumer protection measures in the jurisdictions of State Parties. The article's contextualisation provides a historical account of tobacco legislation in the United States; and alludes to the fact that cigarettes smoking counts for the majority of deaths in the United States, despite the myriad of regulatory measures in place. It also discusses the factual scenario of the cloves cigarettes disputes and findings of the WTO panels and Appellate Body. The article further enquires whether the United States had a justifiable defence within WTO jurisprudence, including the possibility to have used Article XX of GATT 1947. The producer-centred bias approach of the ruling, it is argued, neglects consumer interests. However, it is appreciated that the positives of the ruling in a form of the newly created exception-like deference to regulatory sovereignty in favour of consumer interests should not be overlooked.

2 Attempts at Tobacco Industry Regulation

At the outset, it is useful and enlightening to take stock of the problem of smoking in the United States and provide a historical account of the tobacco industry laws in the United States. Tobacco products control in the United States has an interesting evolution that spans over different eras. The first notable period, as indicated above, includes the expose by Sinclair that led to the creation of the FDA. The FSPTCA was signed into law by President Obama on 22 June 2009, giving the FDA the authority to regulate tobacco products[17] – the manufacturing, marketing and sale of tobacco products, pursuant to the Federal Food, Drug, and Cosmetic

15 According to Tomar *Ibid* at 388, a study conducted in India of the health effects of smokeless tobacco pointed to these tobacco products having a substantial risk of oral cancers.

16 Tomar *Ibid* at 390. The harmful nature of tobacco has been a concern even at international level with the World Health Organisation (hereinafter WHO) introducing the *Framework Convention on Tobacco Control* (FCTC) in 2015.

17 For historical information on tobacco regulation in the United States, and more information on the FSTPTCA see generally Weiner 'The Family Smoking Prevention and Tobacco Control Act: An early evaluation (March 2010)' 2014, available from https://dash.harvard.edu/handle/1/8591097 (accessed 2014-06-22). See also Lee., Baker., Ranney., and Goldstein 'Neighborhood inequalities in retailers' compliance with the Family Smoking Prevention and Tobacco Control Act of 2009' 2015 *Prev Chronic Dis* 150 (for a study with findings that compliance is not adhered to in certain communities, and that visible inspection is necessary); Walker 'When will the Tobacco Control Act be considered a failure?' 2014 Austin *J Pulm Respir Med* 1 -2 (on the successes of the Act).

Act (hereinafter FFDCA).[18] This law became one of the important legislation in the US regime of tobacco control, and perhaps a blow to the tobacco industry[19] which tasted some victory when the Supreme Court in 2000 restricted the FDA's authority to regulate the cigarettes industry in *FDA v Brown and Williamson Tobacco Corporation*.[20] The significance of the FSPTCA was also evident from the fact that a large majority of the senators voted in favour of the Bill.[21] For the purposes of this article section 101 of the FSPTCA is important. Section 101 inserted a new provision to the FFDCA, section 907(a)(1)(A), which was described as instrumental in the United States' endeavour to protect public health, including the reduction of smoking among youths.[22]

In this respect, cigarettes that are regarded as containing characterising flavours – such as 'an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee' are considered adulterated and prohibited under section 907(a)(1)(A) of the FDC Act, as amended.[23] Stiff penalties are imposed for these cigarette products and/or sale thereof including seizure, criminal prosecutions and civil penalties.

Cigarettes smoking accounts for the majority of deaths in the United States,[24] thus the United States introduced a ban on certain classes of tobacco and other similar preventative interventions. For the purposes of this article, I would like to note the finding of the Congress in section 2(1) of the FSPTCA that '[t]he use of tobacco products by the Nation's children is a pediatric disease of considerable proportions that results in new generations of tobacco-dependent children and adults.' In fact the Congress in the FSPTCA was at pains to fully explain the effects of

18 The Federal Food, Drug, and Cosmetic Act, United States Code, Title 21 (FFDCA). See FT 101(b)(3) giving the FDA the authority to regulate the tobacco products industry.

19 This landmark law ended the special protection from regulation that the tobacco industry enjoyed for decades and represents a milestone in protecting America's children and health from the devastating consequences of tobacco use.

20 *FDA v Brown and Williamson Tobacco Corporation* 529 US 120 161 (2000). The Court held that the US Congress did not intend to allow the FDA to independently regulate tobacco products.

21 On June 11, 2009, the U.S. Senate voted 79-17 to approve the bill, H.R. 1256/S. 982.

22 See the US House Report to the WTO Panel Exhibit 67, 37, 2011.

23 The relevant part, section 907(a)(1)(A) of the FDC Act, states that: '… a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke'.

24 Tomar 'Epidemiologic perspectives on smokeless tobacco marketing and population harm' 2007 *Am J Prev Med* 387–397 at 389. See generally Proctor *Golden Holocaust: Origins of the Cigarette Catastrophe and the Case for Abolition* (2011) 553.

tobacco particularly on children as clearly illustrated in the provisions below:

(13) Tobacco use is the foremost preventable cause of premature death in America. It causes over 400,000 deaths in the United States each year, and approximately 8,600,000 Americans have chronic illnesses related to smoking.

(14) Reducing the use of tobacco by minors by 50 percent would prevent well over 10,000,000 of today's children from becoming regular, daily smokers, saving over 3,000,000 of them from premature death due to tobacco-induced disease. Such a reduction in youth smoking would also result in approximately $75,000,000,000 in savings attributable to reduced health care costs.

(15) Advertising, marketing, and promotion of tobacco products have been especially directed to attract young persons to use tobacco products, and these efforts have resulted in increased use of such products by youths. Past efforts to oversee these activities have not been successful in adequately preventing such increased use.

(16) In 2005, the cigarette manufacturers spent more than $ 13,000,000,000 to attract new users, retain current users, increase current consumption, and generate favorable long-term attitudes toward smoking and tobacco use.

(17) Tobacco product advertising often misleadingly portrays the use of tobacco as socially acceptable and healthful to minors.

(18) Tobacco product advertising is regularly seen by persons under the age of 18, and persons under the age of 18 are regularly exposed to tobacco product promotional efforts.

…

(23) Children are more influenced by tobacco marketing than adults: more than 80 percent of youth smoke three heavily marketed brands, while only 54 percent of adults, 26 and older, smoke these same brands.

…

(26) Restrictions on advertising are necessary to prevent unrestricted tobacco advertising from undermining legislation prohibiting access to young people and providing for education about tobacco use.

3 Precis of the *US – Clove Cigarettes* Dispute

3 1 Key Facts in Brief

The *United States – Clove Cigarettes* dispute involved a complaint by Indonesia challenging section 907(a)(1)(A) of the FFDCA that had the effect of banning the importation and marketing of clove cigarettes from Indonesia. The formal request for consultation with the United States was made by Indonesia on 7 April 2010.[25] The US imposed a ban on the importation and sale of flavoured cigarettes in the aftermath of the

25 See Request for Consultations by Indonesia, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/1

promulgation of the FSPTCA, and argued that the measures were introduced to protect the youth from the harmful effects of tobacco. Indonesia reacted by requesting the establishment of a WTO Panel to determine whether or not the ban imposed by the US was inconsistent with its obligations as contained in the TBT Agreement. According to Indonesia the ban discriminated against clove cigarettes that are primarily produced in Indonesia, which was also the largest exporter of clove cigarettes into the United States,[26] in favour of menthol cigarettes which are 'primarily produced in the United States'.[27] The crux of Indonesia's argument was that the ban violated both Articles 2.1 and 2.2 of the TBT Agreement and GATT Article III: 4 in that imported clove cigarettes were treated less favourably than domestic menthol cigarettes.

Article 2.1 states:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

In essence Article 2.1 has elements of both the principles of Most-Favoured-Nation as well as National Treatment which are the equality clauses and fundamental principles of the WTO.

Article 2.2 reads in part:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection *of human health or safety*,[28] animal or plant life or health, or the environment.

Before the Panel, the United States argued that banning menthol cigarettes was not favoured, as it would, among other things, create a

(Apr. 14, 2010). (Hereinafter Panel Request, *US – Clove Cigarettes)*. For more on the complaint see Ballet 'Losing flavour: Indonesia's WTO complaint against the U.S. ban on clove cigarettes' 2011 *American University International Law Review* 515-541.

26 Indonesia claimed loss due to the complete cessation of imports into the United States of kretek (clove) cigarettes amounting to $15.2 million in value in 2008 with 99% of the imports originating from Indonesia.

27 See Mitchell and Voon 'Regulating tobacco flavours: implications of WTO Law' 2011 *Boston University International Law Journal* 383 at 387 (Alluding to the fact that there are other countries having flavouring measures, and referring in particular to Austria, Canada, France; and that both the 'United States and Canadian measures typically exclude menthol (as well as tobacco) from the restrictions, as well as other specific additives in some instances').

28 Own emphasis.

black market for menthol cigarettes.[29] However, the United States conceded that the said risks had not been 'sufficiently evaluated'.[30]

The reaction in the United States against the Appellate Body ruling was that the WTO is over-reaching its judicial power, and also for undermining the legitimacy of the multilateral trading system in general.[31] Warikandwa and Osode criticised the ruling as a lost opportunity for the Panel and Appellate Body 'to address the special development needs of developing Member States'; and to 'develop a credible reputation as a forum for effective dispute resolution in matters where trade inter-connects with non-trade matters'.[32] I will not delve into this criticism, as it is not an important discussion point of this article.[33]

3 2 Findings of the Panel and the Appellate Body

In *US – Clove Cigarettes,* the Panel found the United States measure consistent with Article 2.2 of the TBT Agreement.[34] Indonesia did not appeal this finding, however. Both the Panel and the Appellate Body found the United States' flavoured cigarette ban is a technical regulation contrary to Article 2.1 of the TBT Agreement, although the reasons of the Appellate Body were different from those proffered by the Panel.[35] It is important to note that this was the first time that a case dealt specifically with Article 2.1.[36]

The Appellate Body observed that 'the design, architecture, revealing structure, operation, and application of Section 907(a) (1) (A) impacted negatively on the competition and discriminated against like cigarettes from Indonesia'.[37] Both the Panel and the Appellate Body observed that the United States law in question expressly identified the products it covered, 'cigarettes and any of their component parts;' it identifies

29 Panel Report, *US – Clove Cigarettes*, *supra* n11, ¶ 7.57.
30 Panel Report, *US – Clove Cigarettes*, *idem*.
31 See generally Shlomo-Agon 'Clearing the smoke: the legitimation of judicial power at the WTO' 1 at 2fn7 available at http://law.huji.ac.il/upload/ClearingtheSmoke.pdf (accessed on 2016-10-27), making reference to the US's statement pending the adoption of the AB report in *US-Clove Cigarettes*, Minutes of DSB Meeting, WT/DSB/M/315, 24 April 2012, para. 75.
32 Warikanwa and Osode, *supra* n8 at 1281.
33 However, I disagree with the argument of Warikandwa and Osode that the ruling should have been made in such a way as to allow a special and differential treatment of developing countries in the tobacco industry. This was more about health issues, which the developing countries are struggling with.
34 Panel Report, *US – Clove Cigarettes*, *supra* n11 ¶ 7.3.2.
35 See Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 234.
36 See Panel Report, *US – Clove Cigarettes*, *supra* n11 ¶ 7.80.
37 Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 224.

product characteristics in the negative form: 'a cigarette … shall not contain;' and it was mandatory.[38] The choice of words by the Panel immediately points to the Appellate Body's decision in *EC – Asbestos,*[39] particularly the phrase 'objectively definable features'. The Appellate Body was critical of the claim made before the Panel by the United States that banning menthol cigarettes will encourage a black market for menthol cigarettes, with consequent risks. According to the Appellate Body the risk argument was unclear and unconvincing.[40] Hence, the Appellate Body rejected the argument that the Panel 'erred in ultimately finding that Section 907(a)(1)(A) is inconsistent with Article 2.1.'[41]

3 3 Key Aspects of the Clove Cigarettes Rulings

3 3 1 Was the Measure a Legitimate Regulatory Purpose?

In cases like this, the legitimacy of the purpose of the regulatory measure in question is important to determine whether the like products have been treated fairly and even-handedly. Also relevant is the regulatory purpose of a measure in question in determining whether similar imported products have been treated less favourably. Article 2.2 of the TBT Agreement refers to both the 'legitimate objectives' and the legitimate objective of 'protection of human health'. In this case, the regulatory purpose of the tobacco control measure instituted by the United States was to protect human life and health. It was thus not a difficult task for both the Panel and the Appellate Body to find the United States flavoured cigarette ban consistent with Article 2.2 in *U.S. – Clove Cigarettes,* even though it was found inconsistent with Article 2.1.

3 3 2 Non-Discrimination, Balance, and Even-Handedness

As noted in 3.2 above, the United States cigarettes ban was found to be inconsistent and in violation of Article 2.1 of the TBT Agreement, despite the intended regulatory purpose of the measure in question being found to be consistent with Article 2.2. Paragraph 6 of the TBT Agreement's preamble is important in interpreting and applying the provisions of Article 2.1. Therefore, the Appellate Body noted that members

38 See Panel Report, *US–Clove Cigarettes*, *supra* n11 ¶¶ 7.27–.28, 7.31–.32, 7.39–.41; Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶¶224.

39 Appellate Body Report, *EC – Asbestos* WT/DS135/AB/R (adopted 5 April 2001). The Appellate Body in *EC – Asbestos* set out three requirements for a measure to be a technical regulation for the purposes of the provisions of TBT Article 2. The measure must apply to identifiable products; it must, in the words of TBT Annex 1.1 'lay down product characteristics or their related processes and production methods, including the applicable administrative provisions' (or else it must be about labeling and identification); and compliance with the measure must be mandatory.

40 Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 225.

41 Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 222. According to Cohen, *US – Clove Cigarettes* marked the first time in the history of the WTO that the Panel invalidated a technical regulation under Article 2.1 of the TBT Agreement. See Cohen *supra* n2 at 115.

committed in Paragraph 6 that '… no country should be prevented from taking measures necessary ... for the protection of human, animal or plant life or health ... at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of [TBT Agreement].'[42]

This, in my view, is a small victory for WTO members intending to introduce measures such as tobacco control for consumer or human protection objectives that the Appellate Body viewed Paragraph 6 as 'counterbalancing the trade-liberalization objective'[43] in Paragraph 5 of the preamble. Most important is the description of Paragraph 6 of the Preamble, as expressing the members' 'right to regulate' which must not be 'constrained', even if it is a 'technical regulation in pursuit of legitimate objectives'.[44] The only proviso issued by the Appellate Body is that such technical regulation must be implemented in an 'even-handed manner'[45] The Appellate Body ruling points to concerns of lack of balance and uneven-handedness of the ban, which one must admit were patently there for everyone to see, and which tipped the scales in favour of the conclusion that the clove cigarettes ban amounted to an unfair discrimination of imported cigarettes – contrary to the provisions of Article 2.1 of the TBT Agreement.

The legality of the measure was not an issue, as far as Article 2.2 of the TBT Agreement is concerned, but the ban itself was discriminatory and not applied even-handedly. This should have been a winnable case from the perspective of a public health proponent, in my view. The United States should in part have itself to blame in the manner the case was defended and the presence of other factual circumstances that did not speak in favour of the ban. First, there seemed to be an internal conflict between the FFDCA and the FSPTCA. The FDDCA does not exempt menthol cigarettes from any new regulations. However, section 907(e) of the FFDCA requires the US Scientific Advisory Committee[46] to issue a report on the impact of menthol cigarettes on public health. On the other hand, section 907(a)(1)(A) of the FSPTCA exempts menthol cigarettes from the ban imposed on the sale of cigarettes that contain an herb or spice that is a 'characterizing flavour of the tobacco product'. Inherently contradictory in the FSPTCA itself is that the exemption goes against the very objective of the FSPTCA to provide '… the Secretary with proper

42 Appellate Body Report, *US – Clove Cigarettes*, *supra* n11, ¶ 94.
43 Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 95.
44 Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 95.
45 Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 95.
46 The US Scientific Advisory Committee was established in 1951 by President Harry S. Truman of the United States. The Committee reviews and evaluates safety, dependence, and health issues relating to tobacco products and provides appropriate advice, information and recommendations to the Commissioner of Food and Drugs.

authority over tobacco products in order to protect the public health and to reduce the number of individuals under 18 years of age who use tobacco products'. Interestingly bizarre was the argument of the United States before the Panel intended to justify the exclusion of menthol cigarettes from the ban. The United States, as referred to in the Appellate Body report, argued that:

> the exemption of menthol cigarettes from the ban on flavoured cigarettes is unrelated to the origin of the products, because it addresses two distinct objectives: one relates to the potential impact on the US health care system associated with the need to treat 'millions' of menthol cigarette addicts with withdrawal symptoms; and the other relates to the risk of development of a black market and smuggling to supply the needs of menthol cigarette smokers.[47]

According to the Appellate Body, the reason for excluding menthol cigarettes is rather strange if the purpose is to dissuade youths from smoking, and reduce smoking as stated in the objective of Section 907(a)(1)(A). The Appellate Body particularly highlighted the fact that menthol cigarettes, like clove cigarettes, has flavouring characteristics that are appealing to young smokers, making tobacco more pleasant, and masking the harshness of tobacco.[48] Thus, the ground for the justification of the ban on clove cigarettes are equally applicable to menthol cigarettes.[49]

Secondly, the United States' admission that no sufficient or substantive assessment of associated risks for banning menthol cigarettes was undertaken did not do its case any favour either.[50] The United States may have probably satisfied the provisions of Article 2.1, or rather not readily have been found to have acted inconsistently with the provisions of Article 2.1 of the TBT Agreement had it secured sufficient evidence supporting the justifiable discrimination between clove and menthol cigarettes, based on public health considerations. More evidence was needed to justify these regulatory distinctions.[51]

Of concern, in my view, is the tendency of the Appellate Body to introduce unexplained concepts. For example, the Appellate Body has not applied itself to the meaning of 'even-handedness'. To understand this concept better one will have to look to other decisions for guidance. In *US – Tuna II*, for example, it was observed that even-handedness

47 See Appellate Body Report, US – *Clove Cigarettes*, *ibid* ¶ 216.
48 See Appellate Body Report, US – *Clove Cigarettes*, *ibid* ¶ 225.
49 See Appellate Body Report, US – *Clove Cigarettes*, *ibid* ¶ 225.
50 More information on the risks in general could have been obtained from the submissions by the World Health Organisation (WHO), but the Panel was of the view that such submission was unnecessary because of 'the fact that the parties had placed a considerable amount of materials regarding WHO legal instruments and the WHO's work in the area of tobacco control on the Panel record'. See Appellate Body Report, *Clove Cigarettes*, *ibid* ¶ 11.
51 In fact the United States was found in many respects not to have provided adequate evidence to convince the Panel otherwise. See Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 200 for example.

involves addressing the question whether the measure is 'calibrated', 'fair' and 'non-discriminatory'.[52]

3 3 3 The New Exception-like Deference to Regulatory Sovereignty

Numerous issues may be raised against the direction of the WTO's implementation of the TBT Agreement, and in particular against the *US – Clove Cigarette*s ruling itself. It is not controverted that the violation of Article 2.1 of the TBT Agreement does not necessarily implicate Article 2.2. Does the United States really need to bother itself with compliance with the ruling? Unfortunately, the answer is yes. Failing to comply may expose the United States to retaliatory trade actions from Indonesia. Inescapably, such a retaliatory action may also hurt the same consumers that the United States wanted to protect in the first place. It is a catch-22-situation. One can find solace in the fact that the WTO in *US – Clove Cigarettes* adopted an exception-like deference to national regulatory sovereignty instead of casting in stone a ready approach to the finding of discrimination by adding a necessity test to Article 2.1 of the TBT Agreement.[53] In laying out this test, the Appellate Body stated:

> [T]he existence of a detrimental impact on competitive opportunities in the relevant market for the group of imported products vis-à-vis the group of domestic like products is not sufficient to establish a violation of the national treatment obligation contained in Article 2.1 of the *TBT Agreement*. Where the technical regulation at issue does not *de jure* discriminate against imports, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflects discrimination against the group of imported products.[54]

One other important pronouncement from the Appellate Body is that showing the detrimental impact of the measure on imports alone is not sufficient to establish a violation of Article 2.1 of the TBT Agreement.[55] The *US – Clove Cigarettes* ruling 'reflect[s] a step toward practical reconciliation between market efficiency and regulatory autonomy', argued Gaul.[56] In my view, the new jurisprudence of deference is not something to celebrate as a victory for consumer protection jurisprudence. It is a win and lose regime.

The Appellate Body's exception-like deference has difficulties in its application, and the following are serious points of consideration, if not

52 *US – Tuna II*, see ¶ 285-286.
53 See generally Cohen, s*upra* n2 above.
54 Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 215.
55 Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 208.
56 Gaul 'The Technical Barriers to Trade Agreement: A reconciliation of divergent values in the global trading system' 2016 *Chi.-Kent. L. Rev.* 267 – 294, at 268.

contention. First, there is nowhere in the Appellate Body Report where it is clear as to what is meant by the phrase 'legitimate regulatory distinction' in the light of reference to the phrase 'legitimate objectives' in Article 2.2. In the case under discussion, the Appellate Body agreed with the Panel that the United States failed to show that the reasons for the distinction between clove and menthol cigarettes are based on 'legitimate regulatory distinctions'.[57] Second, the Appellate body does not give directions as to what is meant by the requirement that the detrimental impacts on imports stem '*exclusively*' from a legitimate regulatory distinction. It is submitted that it becomes a much simpler test or rather stricter, though complicated, requirement, if what is intended by the use of the word 'exclusively' is that the measure must be the whole or rather the one and only reason for the detriment. In the ordinary cause of events, it must then mean that any technical regulation that discriminates between like products with consequent detrimental impacts on the said like product, may not be in violation of the TBT Agreement if it is not the one and only cause of such detrimental impact. Lastly, the Appellate Body read into the TBT Agreement the requirement of necessity thus making it more difficult to make a case that the measure is justifiable. Following this, WTO members will have to make a very difficult and calculated decision whether their claims must be based on necessity pursuant to Article 2.2 or on discrimination pursuant to Article 2.1.[58]

3 3 4 Further Clarification on Application of the Concept of Non-Discrimination

Commendable of the *US – Clove Cigarettes* ruling is the clarification of the application of the requirement of discrimination under the TBT. The position now is that a regulation that seeks to change or modify the terms and conditions of competition unfavourably for the imported goods may not readily be regarded as discriminatory the unfavourable consequences on imported goods results wholly from such a legitimate regulatory distinction.' This new development opens up a window of opportunity for incremental regulation. For example, the ban on flavoured tobacco may start with clove cigarettes and then later on extend to menthol cigarettes. Unfortunately, the idea of incremental regulation was not favourably received by both the Panel and the Appellate Body in the clove cigarettes dispute.

4 Recourse to GATT Article XX

The Indonesian claim based on Article III: 4 of the GATT 1994 and its

57 Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 225.
58 Cohen, *supra* n2 at 138.

opposition to the United States' defence under Article XX (b) of the GATT 1994 were declined by the Panel.[59] On appeal, the United States argued against the Panel using as authority the jurisprudence developed under Article XX (b) of the GATT 1994 to assess Indonesia's claims under Article 2.2 of the TBT Agreement.[60] As part of its complaint, Indonesia had argued that the United States failed to make a case for the measure to be allowed on an exceptional basis pursuant to GATT Article XX.[61] In my view, the United States' objection makes sense, particularly since the Panel denied the United States reliance on Article XX as a defence. The Appellate Body conceded that the TBT Agreement does not have a provision equivalent to Article XX of GATT. [62] It did, however, express the view that there is functional equivalency between the relevant provisions of the TBT Agreement and GATT Article XX in respect of the members' rights to regulate.[63]

Although the defence based on Article XX of GATT was declined by the Panel and only addressed in passing by the Appellate Body, it is, in my view, important for the purposes of this article to also discuss the application of GATT Article XX to the dispute in question, albeit briefly. It is also useful to highlight other relevant provisions of the GATT to enable one properly contextualise discussions around article XX. GATT Article III:4, for instance, prohibits WTO members from treating imports 'less favorably' than domestic like products after passage through customs as regards 'regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products …' so as to protect domestic products.[64]

Article XX[65] of the GATT 1994 states in part:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) …;
> (b) Necessary to protect human, animal or plant life or health; ...

59 *Panel Report, US – US – Clove Cigarettes, supra* n11. See also, Appellate Body Report, *Clove Cigarettes*, *supra* n11 ¶ 3.
60 See Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 9.
61 See Ballet, *supra* n25 at 517.
62 See Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 101.
63 See Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 109.
64 See General Agreement on Tariffs and Trade 1994 art. III: 1, (2), (4), Apr 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 190.
65 See Harris and Moon '*GATT* Article XX and human rights: what do we know from the first 20 years?' 2015 *Melbourne Law Review* 1; and Sibanda 'Human rights approach to WTO trade policy: another medium for the protection of human rights in Africa, and elsewhere' 2005 African *Journal of Human Rights* 387 – 405 (for a general discussion of GATT Article XX and human rights).

The TBT Agreement has no 'general exceptions' clause corresponding to Article XX of the GATT 1994.[66] The listed exceptions, according to the Appellate Body Report in the U*nited States – Import Prohibition of Certain Shrimp and Shrimp Products*,[67] embody domestic policies that are proven to be 'important and legitimate in character'. A member invoking GATT Article XX does not have to justify itself to the WTO unless other members challenge a measure taken pursuant to Article XX. It is only once the measure is challenged that the burden of proof will fall on the member invoking GATT Article XX.[68] To this end, GATT Article XX can be said to represent an important 'soft law' approach in favour of human rights.

For the purposes of this article, the relevant part is Article XX(b), which allows for an exceptional application of a discriminatory measure when such measures are 'necessary to protect human, animal or plant life or health.' Indonesia was very quick to point out that Article XX(b) is not applicable in favour of the United States, arguing that the measure is arbitrary and unjustifiably discriminates against imported products.[69]

The United States had argued that the ban on clove cigarettes was designed to protect the country's children from the effects of smoking, as opposed to menthol which was allegedly used primarily by adults.[70] The ban *prima facie* was designed to protect human health. Thus, it may be argued at face value that GATT Article XX may be used as an exception to an obligation not to discriminate against imported products. The point of departure may be reference to the Panel ruling in *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*[71] [hereinafter, Panel Report, Thailand – Cigarettes] that smoking is risky and dangerous to human life and health, and that policies aimed at reducing smoking will fall under the scope of Article XX(b).[72] Ballet

66 See Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 101.

67 *Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 121, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter U.S. – Shrimp].

68 See, for example, *Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline,* 20-21, WT/DS2/9 (May 20, 1996) [hereinafter Appellate Body Report , U.S – Reformulated Gasoline]. In this dispute the burden of proof was placed on the United States to show justification of discrimination against imported gasoline based on Article XX.

69 But the United States rejected this assertion as amongst others premature at the time it was raised. See Press Release, World Trade Org. [WTO], *U.S. Blocks Indonesian Request for Panel on Clove Cigarettes* (June 22, 2010) [hereinafter U.S. Blocks Indonesian Request], available at http://www.wto.org/english/news_e/news10_e/ dsb_22jun10_e.htm (accessed 2016-01-12).

70 See First Written Submission of the United States, *United States–Measures Affecting the Production and Sale of Clove Cigarettes*, 148–150, WT/DS406 (Nov. 16, 2010).

71 Panel, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R – 37S/200 (Nov. 7, 1990) [Panel Report, Thailand – Cigarettes].

72 Panel Report, *Thailand – Cigarettes ibid* ¶¶ 73-74.

argues in an article[73] which thoroughly traversed the Article XX exception defence, however, that the United States' measure in respect of clove cigarettes cannot pass muster in terms of the required standards, test and requirements of Article XX,[74] particularly the requirements of Article XX's chapeau. [75] Of concern is that the measure, although based on policy as required by Article XX is not the only exclusive measure that could have been used, nor can it be said that it was the most 'necessary' measure to meet the balancing test of Article XX when considering other possible measures;[76] and that the ban is merely an arbitrary and unjustifiable discrimination against imported clove cigarettes when the 'same conditions prevail' between countries, contrary to the provisions of the chapeau.[77]

I support the sentiments of Ballet, in part, regarding the difficulty of the United States meeting the requirements of GATT Article XX. But, a case may still be made to rely on Article XX as part of the arguments provided that the United States can sufficiently discharge the requirements.[78] *In Korea – Various Import Measures on Fresh, Chilled and Frozen Beef*, (Korea-Beef) held that a not 'indispensable' measure may be 'necessary. Apart from failing to meet the requirements of the chapeau, the United States would have found it difficult to show that it could not reasonably be expected to have employed an alternative measure that is WTO/GATT consistent or less inconsistent with WTO/GATT law. At best the United States may have been found to be engaging in 'disguised restriction' or 'disguised discrimination' that does not comply with the requirements of Article XX. Or, put differently, that the discrimination between clove and menthol cigarettes amounted to 'arbitrary or unjustifiable discrimination'.[79]

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73 Ballet, *supra* n25 at 515-541.
74 Ballet, *ibid* at 529.
75 Ballet, *ibid* at 530. For more on this argument see Ballet at 530- 538.
76 Ballet, *ibid* at 532 - 35. The word 'necessary' entails that the measure must be essential, but not 'indispensable' or 'inevitable'. See generally *Korea – Various Import Measures on Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan 10, 2001), ¶¶ 161 – 164 (holding that a not 'indispensable' measure may be 'necessary').
77 Ballet, *ibid* at 535, 538 & 541.
78 That (a) *necessity of the measure,* which requires that the measure must be essential, but not 'indispensable' or 'inevitable'. The measure must 'entail the least degree of inconsistency' with core obligations in WTO agreements. See *Korea – Various Import Measures on Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan 10, 2001), paras 161 - 164 held that a not 'indispensable' measure may be 'necessary' - the implementation of which must be reasonable and proportional. Thus the members having recourse to GATT Article XX must weigh and balance factors that give content to the requirement of necessity.
79 See *Appellate Body Report, US – Reformulated Gasoline, supra* n68 ¶ 629.

5 The WTO and the Bad Boy Image Regarding Public Interests and Consumer Protection Issues

The *US- Clove Cigarettes* dispute is one of the three 2012 cases in which the WTO ruled against a United States' regulation designed with well-intended objectives of protecting consumers as inconsistent with Article 2.1 of the TBT Agreement. The other two rulings are the Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereinafter '*US – Tuna II (Mexico)*[80] – dealing with the regulation protecting dolphins, and the *Appellate Body Report, United States – Certain Country of Origin Labelling (COOL) requirements*[81] – dealing with providing consumers with national origin information for meat products.[82]

I will not address in-depth the other two cases here, as they are extensively discussed elsewhere,[83] except to mention that the rulings are, in part, indicative of the rigid nature of the implementation of WTO agreements, and the fact that consumer protection is still taking the backseat at the WTO, and, likewise, so also is the continuation of 'the disjuncture between the legal protections given to consumers and trade liberalism'.[84] Jonathan Carlone takes a different view by hailing these three cases as most welcome 'because together they provide needed context for interpreting the TBT Agreement'[85] and attempted to address some ambiguities in the TBT Agreement jurisprudence.

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80 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereinafter '*US – Tuna II (Mexico)*'), WT/DS381/AB/R, adopted June 13, 2012. The Appellate Body ruled in favour of Mexico stating that the United States labeling scheme was trade-restrictive because it structurally prevented Mexican fisheries from gaining access to the label.

81 Appellate Body Report, U*nited States – Certain Country of Origin Labelling (COOL) requirements*, WT/DS384/AB/R, WT/DS386/AB/R (29 June 2012).

82 See generally Carlone '*An Added Exception to the TBT Agreement after Clove, Tuna II, and Cool*' 2014 B.C. *Int'l & Comp. L. Rev.* 103.

83 On COOL see generally Sibanda 'WTO Appellate Body ruling in United States - Certain Country of Origin Labeling Requirements: trading away consumer rights and protections, or striking a balance between competition-based approach in trade and consumer interests?' 2015 *De Jure* 136-148. For further discussion of both *United States – COOL* and *United States – Tuna* see Lowe 'Technical regulations to prevent deceptive practices: can WTO Members protect consumers from [UN] fair-trade coffee and [less-than] free-range chicken?' 2014 *Journal of World Trade* 593, at 609 – 616. See also Silveira and Obersteiner 'The scope of the TBT Agreement in light of recent WTO case law' 2013 *Global Trade and Customs Journal* 112-120; Partiti 'The Appellate Body Report in *US – Tuna II* and Its impact on eco-labeling and standardization' 2013 *Legal Issues of Economic Integration* 73–94; McGivern 'The TBT Agreement meets the GATT: the Appellate Body decision in *US – Tuna II*' 2012 *Global Trade and Customs Journal* 350-354.

84 Sibanda *ibid* at 138.

85 Carlone *supra* n23 at 104.

While I agree with the observation of Carlone that the Appellate Body rulings provide clarity and context for interpreting the TBT Agreement, as did the *Appellate Body Report, US -Clove Cigarettes*, I take issue with any simplistic acceptance of the rulings of the Appellate Body. My main problem is that the WTO, in particular the Appellate Body, sometimes takes a rather detached approach when it considers consumer and public interest issues.[86] The previous decisions of the Appellate Body acknowledged the importance of due regard to public health issues and the fact that trade matters may not be considered in clinical isolation from other matters. Consumer interests have, however, not always been fully appreciated in cases like *US – COOL*. The wanton disregard of consumer interests by the Appellate Body remains a matter of concern. Interestingly, in *U.S. – Clove Cigarettes* the Panel acknowledged that '[c]igarettes are inherently harmful to human health, as recognized by the WHO, the scientific community and both parties to this dispute.'[87] The Panel went on to state that it was aware, as a result of the risks associated with smoking, of the 'important international efforts to curb smoking'.[88] The Appellate Body also 'recognize[s] the importance of Members' efforts in the World Health Organization on tobacco control.' But, is this enough to change the character of the WTO as an institution that is too steeped in protecting trade interests over and above consumer interest?

6 Conclusion

Lester correctly observes that the TBT Agreement is one of the WTO agreements that put a strain on the ability of members to regulate tobacco.[89] In light of the preceding discussion, it could be said that the TBT curtails the ability of members to reconcile their trade related measures with the protection of other interests such as those of consumers. The WTO has tried its best to address the difficulty as evident in the Appellate Body's ruling in the clove dispute. Some of the highlights of the Appellate Body's report is the adoption of the new test of *legitimate regulatory distinction,* according to which any detrimental impact arising exclusively from a legitimate regulatory distinction will be accepted as not in violation of the TBT Agreement. The exception-like deference created in the *United States – Clove Cigarettes* may provide a glimmer of hope to consumers.

86 On the longstanding debate about the relationship between international trade law and consumer protection law, in particular the argument of the State and/or producer-centred WTO Law; and the possible gradual improvement of this state of affairs, see generally Rolland, footnote 1 above.

87 Panel Report, *US – Clove Cigarettes*, *supra* n11 ¶ 7.1.

88 Panel Report, *US – Clove Cigarettes*, *supra* n11 ¶ 7.5.

89 Lester 'Domestic tobacco regulation and international law: the interaction of trade agreements and the Framework Convention on Tobacco Control' 2015 *Journal of World Trade* 19 – 47, at 23.

However, in my view and in agreement with an observation by Rolland, trade has serious 'negative spill-over effects on consumers', which can only be remedied through expansive interpretations by the Panel and Appellate Body.[90] Alternatively, there must be a general overhaul of the WTO to include as one of the main elements of the entire edifice of the WTO consumer protection and related issues or a clear articulation of consumer interests. To this end Rolland makes a comparison with the European international trade framework, which originally did not include consumer protection issues in the European Economic Community ('EEC') until after 1992 when the Treaty on European Union (Maastricht Treaty) made consumer protection part of the founding treaties of both the EEC and the European Union (EU).[91] Rolland's work titled *Are Consumer-Oriented Rules the New Frontier of Trade Liberalization?* is to date one of the most poignant discussions of consumer protection within the framework of international trade through a comparative analysis of EU Law and WTO Law.[92] The complementarity of consumer protection and trade liberalisation is not a far-fetched dream. If the 31 GATT panels and the 157 panel and Appellate Body reports that peripherally mentioned consumers are anything to go by, it should not be an insurmountable task to bring consumer protection issues into the manifold at the WTO as the foundation is already laid.[93]

90 Rolland, footnote n1 above, at 362. Rolland, at 365, aptly labeled this 'the producer-centric quality of the WTO system'.

91 Rolland, *supra* n1 at 367. See also Rolland at 374 – 376.

92 For other studies see, Coglianese., Finkel., and Zaring 'Import safety: Consumer protection in the global marketplace' 2010 *Admin. & Regulatory L. News* 5; Muchmore 'Private regulation and foreign conduct' 2010 *San Diego L. Rev.* 371; Trujillo and de Lisle 'Consumer protection in transnational contexts' 2010 *Am. J.Comp.* L. 135.

93 See Rolland, *supra* n1 at 377.

Aantekeninge/Notes

Recognition of the concept of Contempt of 'Determination' of the Pension Fund Adjudicator's Determination: A missed opportunity – with particular reference to *Mantsho v Managing Director of the Municipal Employee Pension Fund and Others* (37226/14) [2015] ZAGPPHC 408 (26 June 2015)

1 Introduction

In order to ensure that the determinations issued by the Pension Funds Adjudicator are enforced, such determinations are deemed to be judgments of courts of law thus regarding such matters as having been heard by courts. Should those affected by the determination fail to act in accordance thereto within six weeks of the issuing of the determination, the person or institution in whose favour the determination has been issued can approach the clerk or registrar of the civil court to issue a writ of execution in order for such determination to be executed by the sheriff of the court. The execution of such a determination would be ordinarily possible where the Adjudicator has ordered among others that any person or institution should pay a sum of money or has ordered the fund to compute and determine the amount payable and provide the employer with same to pay to the member. This is because, there would be a determinable amount which would allow the sheriff to attach property if needs be to satisfy the debt. However, it remains unclear as to how the determination which merely orders the fund and/or the employer to provide certain documentation to the member, such as the latest benefits statements, withdrawal claim, or detailed breakdown of withdrawal benefits would be enforced.

A number of questions which will be engaged in this paper arise as far as the effective enforcement of the Adjudicator's determination is concerned. (1) Is it not necessary in instances where the Adjudicator's determination is not complied with and the sheriff cannot enforce such orders, to introduce the criminal law remedy of 'contempt' in order to ensure compliance with the Adjudicator's determination? (2) Would interpreting such a remedy as the exclusive reserve of 'courts' not prejudice members of pension funds who would be in desperate need for the enforcement of the Adjudicator's determination? (3) Should failure to adhere to the Adjudicator's determination be deemed as contempt of the

How to cite: Marumoagae 'Recognition of the concept of contempt of 'determination' of the Pension Fund Adjudicator's determination: A missed opportunity – with particular reference to *Mantsho v Managing Director of the Municipal Employee Pension Fund and Others* (37226/14) [2015] ZAGPPHC 408 (26 June 2015)' 2017 *De Jure* 175-185
http://dx.doi.org/10.17159/2225-7160/2017/v50n1a10

order of a civil court, since such a determination is already deemed an order of such a court? This paper through the assistance of the facts of *Mantsho v Managing Director of the Municipal Employee Pension Fund and Others* (37226/14) [2015] ZAGPPHC 408 (*Mantsho* case), explores the possibility of introducing the concept of contempt of the Adjudicator's determinations, with a view to examine whether such a criminal law remedy can be justified as an attempt to ensure all the Adjudicator's determinations are enforceable. In this note, I recommend that the PFA should be amended to provide for deeming provisions which would allow civil courts to hold those who fail to obey Adjudicator's orders in contempt of court. First, I will start by outlining the general principles relating to civil contempt of court in South Africa. Secondly, I will look at the establishment of the office of the Pension Fund Adjudicator. Thirdly, I will outline the brief facts of *Mantsho* case with a view to discuss and illustrate the necessity of deeming failure to comply with the Adjudicator's determination in instances where execution by the sheriff is virtually impossible as contempt of court.

2 Relevant Legal Principles

2 1 Contempt of Court of Civil Judgments

The crime of contempt of court, as it exists in South Africa today, is directly derived from English law (Jordaan 'The 'gagging writ' and contempt of court – the correct means to the correct end? A comparative analysis of South African and English law' 1990 *CILSA* 220). It has been held that

> The institution of contempt of court has an ancient and honourable, if at times abused, history. If we are truly dealing with contempt of court, then the need to keep the committal proceedings alive would be strong because the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained. ... In respect of contempt of court, the common law drew a sharp distinction between orders *ad solvendam pecuniam*, which related to the payment of money, and orders *ad factum praestandum*, which called upon a person to perform a certain act or refrain from specified action. Failure to comply with the order to pay money was not regarded as contempt of court, whereas disobedience of the latter order was (*Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 60).

Generally, court orders that will attract committal for contempt are those instructing persons against whom they are made to perform certain acts or refrain from performing certain acts (*Lujabe v Maruatona* (35730/2012) [2013] ZAGPJHC 66 (15 April 2013) para 9). This is due to the fact that in terms of section 106 of the Magistrate's Court Act No 32 of 1944 a wilful failure to comply with an order of the Magistrate's Court is a criminal offence punishable by a fine, or imprisonment, or both. Snyman defines contempt of court as a crime which 'consists in unlawful and intentionally (a) violating the dignity, repute or authority of a judicial body or a judicial officer in his judicial capacity [...]' (*Criminal Law* 6ed

(2014) 315). In other words, contempt of court can be seen as a deliberate effort of making a mockery of the judicial officer's efforts in ensuring that justice is served as well as the total disregard of the administration of justice when court orders are not complied with. It is worth noting that contempt of court can appear in a variety of forms, the discussion of which is beyond the scope of this paper. It suffices nonetheless; to highlight that South African criminal law recognises both civil law and criminal law contempt of court. There has been a debate regarding the distinction drawn between criminal and civil claims for contempt of court. Such a discussion is centred on the onus which a private individual or entity which an order has been granted in his, her or its favour has to discharge when seeking to commit another for contempt of court. The discussion sought to clarify whether the appropriate onus to be discharged in civil proceedings is the same as that of the state in criminal proceedings, that of proof beyond a reasonable doubt or the onus of an ordinary civil matter, that of balance of probabilities should be followed. In this note, I am dealing with failure to comply with determinations (orders) of the Pension Funds Adjudicator, particularly where execution by a sheriff of court of such determinations in terms of civil law is virtually impossible. As such, I will rely solely on principles relating to contempt of court in terms of failure to comply with civil orders of court.

It is worth noting that a thorough discussion relating to the onus of proof is beyond the scope of this paper. It suffices however, to mention that over the years there has been recognisable controversy on this issue:

> It appeared, as regards the applicable standard of proof in civil contempt proceedings, that it had been held in some reported cases that guilt had to be established beyond reasonable doubt, whilst others had expressed reservations about the correctness of that approach' (see the headnote of *Laubscher v Laubscher* 2004 (4) SA 350 (T)).
>
> [In that] once a failure to comply with a court order that was within the personal knowledge of the respondent has been established, the wilfulness and *mala fide* character of the conduct of the respondent will be inferred and the *onus* will then rest on the respondent to rebut the inference of wilfulness on a balance of probabilities (*Laubscher* para 11).

However, in *Citibank NA v Van Zyl and Another* (3805/2004) [2004] ZAFSHC 131 (9 December 2004), the court rejected the interpretation in *Laubscher* and held that '[i]t is in conflict with section 35(3)(h) of the [1996] Constitution to convict a person upon a mere balance of probabilities and to place a so-called reverse onus on that person'. The Court was virtually of the view that if there is a threat of imprisonment, then the onus of proof has to be that of beyond a reasonable doubt. Nonetheless:

> [it] is now settled that in an application for committal to prison for contempt of court, an applicant must, in order to be successful, prove the contempt beyond reasonable doubt, that there is an underlying court order and that the respondent with the knowledge of the order acted in a manner which is in

> conflict with the terms of that order (*Dezius v Dezius* (37655/05) [2006] ZAGPHC 77 (21 August 2006) para 16).

Furthermore, the issue relating to the constitutionality of civil contempt of court orders will not be discussed in this paper. It suffices however; to acknowledge a convincing account of Pickering J in *Uncedo Taxi Service Association v Maninjwa and Others* 1998 (3) SA 417 (E) in this regard. Pickering J held that the common law civil committal for contempt procedure was in conflict with the Constitution insofar as an *onus* was placed on the offender and proof of guilt was required only on a balance of probabilities (at 428A-B). However, he was of the view that civil contempt proceedings for committal are competent provided that the proceedings are conducted fairly in accordance with the principles of fundamental justice measured against the yardstick of the provisions of section 35 (3) of the Constitution (429C-D and 429 F-J). In *S v Mamabolo (E TV and Others intervening)* 2001 (3) SA 409 (CC), the Constitutional Court upheld the constitutionality of the crime of contempt of court, in the form of scandalising the court, in the face of a strong freedom of expression challenge to its existence. Contempt of court has in general terms received a constitutional 'stamp of approval, since the rule of law 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained' (*Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 61).

In *Burchell v Burchell* (ECJ 010/2006) [2005] ZAECHC 35 (3 November 2005) para 13, the court held that 'committal for civil contempt of court orders remains a particular form of the crime of contempt of court under the new constitutional order, and that a respondent brought before court for committal in civil contempt proceedings is an "accused person" under s. 35 (3) of the Constitution'. However, the Supreme Court of Appeal has rejected this view, and thus emphasised that the person or institution against which contempt of court proceedings have been brought is not an 'accused person' but is entitled to analogous protections as are appropriate in motion proceedings (*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 42). In fact, the SCA laid down the bases for a conviction of contempt of court as follows:

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.

(d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to

wilfulness and *mala fides*: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities (*Fakie* para 42).

The SCA held that the civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements (para 42). This means that a person in whose favour an order of court has been granted has an option to institute contempt proceeding by launching motion proceedings against a person who failed to comply with such an order. This was confirmed in *Laubscher v Laubscher* 2004 (4) SA 350 (T) para 10, where the court held that '[c]ontempt procedure is usually initiated by way of notice of motion. The applicant must prove that the order of court with which the respondent has failed to comply came to the respondent's personal notice. The applicant must obviously also prove that the respondent thereupon failed to comply with the court order'.

In the contempt of court application, all the elements of such contempt must be proved. The essential elements of contempt of court are: unlawful; contempt; judicial body; and fault (Burchell *Principles of Criminal Law* 4ed (2014) 840). The crime of contempt of court arises from unlawful and intentionally disobeying an order of court (*S v Beyers*1968 (3) SA 70 (A)). This crime enables the person or institution which has obtained an order against another who has failed to comply with such an order to again approach the court for a further order declaring such a party to be in contempt of court and thus impose a criminal sanction. In order to determine whether there was a failure to comply with the civil judgment, it must be established whether the disobedience was deliberate and in bad faith (*Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 602 (SCA) paras 18 and 19). The Supreme Court of Appeal has held that failure or refusal to obey the court order should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt. ... [T]he offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces' (*Fakie v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 10). Sustained disobedience of a civil order could lead to a public prosecution because it is calculated to injure and diminish the authority and status of the court (*S v Beyers* 1968 (3) SA 70 (A) at 80C-H). According to Snyman:

> There are cases where there has been non-compliance with a court order in a civil case, and where the litigant in whose favour the court has made the order seeks to implement it by requesting the court to punish the defaulting party for contempt of court if the order is not complied with. It has now been settled, however, that these so-called cases of 'civil contempt' also constitute

> the crime of contempt of court: the Director of Public Prosecutions is free to charge a person with contempt of court in these cases too (Snyman 316).

It is not clear how effective civil contempt of court proceedings are as far as providing the person or entity instituting them the desired relief is concerned, which is ultimately that the order which was not complied with be complied with. Nonetheless, the SCA has held that '[a]lthough some punitive element is involved, the main objectives of contempt proceedings are to vindicate the authority of court and coerce litigants into complying with court orders' (*Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* 2015 (2) SA 413 (SCA) para 16). It appears however, that in civil contempt of court proceedings, while courts would convict those who failed to comply with court orders to prison, they are nonetheless generally reluctant to commit such persons to prisons. This they do by passing suspended sentences. In criminal proceedings, a suspended sentence is generally 'used as a weapon of deterrence against the reasonable possibility that a convicted person may again fall into the same error (or at least one substantially similar)' *(S v Gardener & Another* 2011 (1) SACR 570 (SCA) para 75). However, it seems like in civil proceedings, suspended sentences are used to ensure compliance with court orders, in that should the person ordered to comply with a court order again fail to comply thereto, he or she would be committed to prison. I submit therefore that in actual fact, civil contempt of court proceedings are threats orientated, in that they are instituted to force the defaulter to comply with the order failing which there will be a threat of facing jail sentence. In other words, it seems like the idea behind civil contempt of court proceedings is comply or go to jail. Indeed, such a remedy would not be effective if the defaulter chooses to go to jail rather than complying with the order. Such can be a case in matrimonial and maintenance disputes. In *Dezius* (para 8), the court held that:

> [c]ivil contempt of court provides the ultimate sanction against the defaulter who refuses to comply with an order of court. The form of committal is to imprisonment or a fine. Such punitive coercion is intended to assist the complainant to enforce his or her remedy. This objective is very rarely attained in matrimonial cases. It is unlawful to intentionally disobey an order of court since it savours of criminality.

I am of the view that the above principles properly constructed may assist in the context of non-compliance with determinations issued by the Pension Funds Adjudicator in instances where execution by the sheriff would be impossible, as it would be argued below.

2 2 Office of the Pension Funds Adjudicator

It is worth noting that there is a fundamental difference between a court of law and a tribunal which has been created to deal with disputes arising from a particular industry. While all courts are generally viewed as tribunals, specialised tribunals are generally not regarded as courts. In terms of section 166 of the 1996 Constitution, the recognised courts in

South Africa are the Constitutional Court, Supreme Court of Appeal, various divisions of the High Courts or any High Court of Appeal which may be established by statute, Magistrates' courts or any courts established by statute which has a similar status as either the High Court or Magistrate court. In terms of section 165 (1) of the 1996 Constitution, judicial authority in South Africa is generally vested in the courts. This means that specialised tribunals are not vested with judicial authority even though they are quasi-judicial in nature and to some extent function like courts.

The Adjudicator's office is one such tribunal, and it is has been established to deal with disputes arising from pension funds regulated by the PFA. This office has been established in terms of section 30B of the PFA, to dispose of complaints in a procedurally fair, economically and expeditious manner (section 30D of the PFA). This office is presided over by the Adjudicator, who is empowered to make the order which any court of law may make (section 30E (1)(a)). However, because this office is not a court of law, it does not have the power to hold entities and persons in contempt of its determinations if they fail to comply with them. Nonetheless, the PFA empowers those in whose favour the determinations have been granted to execute the Adjudicator' determinations in civil courts. This is because the Adjudicator's determination is deemed to be a civil judgment of any court of law had the matter in question been heard by such a court, which should be noted by the clerk or the registrar of the court if the need arise for execution purposes (section 30O (1) of the PFA). This simply means that once the determination has been noted in a specific court, it can be enforced through execution processes by the sheriff of court. This would work well when the Adjudicator in the determination has ordered, for instance payment of money, because the sheriff may be able to attach property to satisfy the debt. But such procedure becomes virtually useless if the Adjudicator merely ordered one of the parties to release a certain item or provide certain documents to the other party, and such a party fails to do so. In such cases, clearly the sheriff would not be able to assist, more particularly if the whereabouts of such items or documents is unknown. As such, it is not clear how such an order can practically be carried out if the party against whom it has been granted fails to comply with it.

The PFA does not address how the issue of 'contempt of a determination' should be resolved. Due to the fact that the Adjudicator's office is not a court of law, then principles relating to contempt of court discussed above are not applicable in the context of determinations issued by this office, which might be prejudicial to those such determinations have been granted in favour of. As such, the question is: in order to ensure that those in whose favour determinations are granted are able to ensure compliance with such orders, more particularly, in circumstances where execution is virtually impossible, should there be a procedure similar to contempt of court proceedings of civil court which they can utilise to ensure that such determinations are complied with? While the court in the *Mantsho case* was not directly confronted by this

question, nonetheless, the facts of this case necessitate that this question should be investigated, as it will be done below.

2 3 Facts of *Mantsho* Case

In this case, a member of a pension fund requested a benefit statement from her pension fund to which she was contributing. This was after the member realised in her record card that there was a withdrawal claim made in 2007, which she did not have knowledge of, but it was later cancelled. She approached the Adjudicator's office seeking an order to compel the fund to provide her with her benefit statements from 2005 to 2013 as well as information regarding the withdrawal claim made in 2007 (para 2).

The Adjudicator forwarded the complaint to the fund administrator and the employer, with a view to afford the fund an opportunity to respond to the complaint. Only the employer submitted its response. Notwithstanding the fact that the fund failed to respond to the complaint, the Adjudicator issued her determination on the matter. The Adjudicator ordered: the fund to provide the member with her latest benefit statement and information regarding a withdrawal claim that the member submitted was made in 2007; the employer to notify the fund about the employee's termination of employment and to forward all the necessary claim documentation to the fund and; that the fund should pay the member her withdrawal benefits and also to provide the member and the Adjudicator's office with the total breakdown of the withdrawal benefit within two weeks of the determination (para 5).

It is unfortunate that the judgment is not a model of clarity, as it does not really indicate how the respondents failed to comply with the Adjudicator's determination in this case. All that is provided in the judgment is that 'the applicant seeks orders holding the third to eleventh respondents … in contempt of a determination made by the Pension Funds Adjudicator on 19 March 2015 …; that the respondents be sentenced to pay a fine in the amount of R250 000.00 within 30 (thirty) days of the order, failing which the respondents were sentenced to a period not exceeding 6 (six) months …' (para 1). It does not even outline the arguments raised to support the allegation that the respondents were in contempt of the Adjudicator's determination. It seems however, from the conclusion of the court that the member (applicant) argued that the respondents were in contempt of the High Court rather than the Adjudicator's determination. The court held that '[a]ccordingly, I am of the view that the Pension Funds Adjudicator is not a public judicial officer and his determination is not an order of court. Therefore there can be no contempt of this court' (para 26).

3 Discussion

Even though it is not entirely clear from the judgment, if the fund failed to provide the member with the benefit statement as well as the total

breakdown of the benefits, the member would have not been able to use execution proceedings to force the fund to release such information. The court dismissed the application on the basis that the Adjudicator's office is not a court of law, as such, it remains unclear what other legal avenue is available to the member in this regard. This is unfortunate, because it effectively means that the fund would get away with its non-compliance of the Adjudicator's determination, which would be a complete disregard of the administration of justice. The court choose to focus on the distinction between courts and tribunals, leading to an interpretation which seems to suggest that only orders of courts are worthy of being respected and carried out, failing which they can be enforced through contempt of court proceedings. This is clear from the court's contention that '[i]t is a crime to unlawfully and intentionally disobey a court order. Contempt of court may be adequately defined as an injury committed against the person or body occupying public judicial office, by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated' (para 7). The court was of the view that '[i]n order to establish whether there was indeed contempt of court, it is important to establish whether the Pension Fund Adjudicator can be accorded the status of a court' (para 10). The court relying on section 166 of the 1996 Constitution confirmed that the Adjudicator's office is not a court of law. I submit that while this view is correct as the law stands, it is nonetheless narrow and too restrictive and thus not in the interest of justice. It has the effect of encouraging noncompliance with orders of tribunals in South Africa such as the Adjudicator's office. I submit further that the court missed a golden opportunity to reflect on this possibility, and should at the very least made an obiter remark relating to the potential prejudicial effect of its order. Such a remark would have encouraged discussions in this area of law which hopefully would have led to law reform.

I am of the view that guidance can be obtained from section 30O of the PFA on how to deal with non-compliance with the Adjudicator's determinations. This section provides that '[a]ny determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be'. It is submitted that if the Adjudicator's determination can be deemed to be a civil judgment, then any person or entity which fails to comply with such an order should be deemed to be in contempt of a judgment of a court of law. Perhaps it may be ideal that the PFA be amended to ensure that such enforcement mechanism is included in the Act. With the deeming analogy, the person in whose favour the determination has been granted would be able to approach a civil court through the 'deemed' contempt proceeding in order to ensure compliance with the Adjudicator's determination. This will enable the civil courts to use legal principles applicable to civil contempt of court proceedings discussed above to ensure compliance with the Adjudicator's determination. It is worth noting that this recommendation relates only to circumstances where the

Adjudicator's determination cannot be enforced through execution proceedings provided for in section 30O (1) of the PFA, as was the case in *Montsho* case. In this case, the fund was ordered to provide withdrawal statements as well as the breakdown of the withdrawal benefit, and surely obtaining a writ of execution to enable the sheriff to execute would not have assisted the member of the pension fund to obtain such information. In such circumstances, 'deemed' civil contempt of court proceedings would be more appropriate, in a sense that the member would have launched motion proceedings for contempt of court in the High Court in order to ensure compliance with the Adjudicator's determination. Should such procedure be made available, it would induce those determinations have been granted against to ensure that they comply with such orders, knowing that if they fail to do so they would expose themselves to first a criminal conviction and secondly, committal to prison.

The approach recommended in this note would ensure that the dignity of the Adjudicator's office is preserved and further that no one would be allowed to make a mockery of the Adjudicator's determinations, especially when they are aware that execution of such orders would be virtually impossible. The deeming provisions would allow civil courts to punish summarily anyone who commits contempt of the Adjudicator's orders, which office does not have the power to deal summarily therewith. The deeming provisions would ensure that civil courts impose penalties which would assist in vindicating the honour of the Adjudicator's office upon the disregard of its order (*Protea Holdings (Pty) Ltd v Wriwt and Another* 1978 (3) SA 865 (W) 868B).

It cannot be disputed that, while tribunals are not courts of law, the mere fact that they have been established means that they play a pivotal role in the resolution of disputes within the South African retirement industry. As such, it is a constitutional imperative that their orders are obeyed, and those who are dissatisfied with such orders take them either on review (section 30P of the PFA). Accordingly, disobeying such orders cannot be a viable option for those who were subjected to the jurisdiction of the Adjudicator's office. In a constitutional state such as South Africa, it is crucial that the rule of law is observed and orders of courts as well as those of specialised tribunals are respected and carried out. In terms of section 34 of the 1996 Constitution '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. It cannot be then that priority is provided to ensuring that only decisions by recognised courts are enforced through contempt of court proceedings. Hence, there is a need that a mechanism be created that decisions made by tribunals are also carried out. Section 34 of the 1996 Constitution guarantees the protection of the judicial process to persons who have disputes that can be resolved by law and that the right of access to court is foundational to the stability of an orderly society (*Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) para 13). Equally so, the right to

have access to tribunals which have been established to resolve disputes in dedicated industries should be respected, and the efforts of such tribunals should not be frustrated. As such, it is clear that there is a public interest in enforcement of Adjudicator's decisions, in that 'whenever a litigant fails or refuses to obey a court order, he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest' (*Victoria Park Ratepayers' Association v Greyvenouw CC and Others* (511/03) [2003] ZAECHC 19 (11 April 2003) para 23). Failure to enforce Adjudicator's orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and thus may impact negatively on the rule of law (See *Kies v Strydom and Other* (25846/2014) [2014] ZAGPPHC 396 (19 June 2014)). It is submitted, further, that the deeming provisions would enable civil courts to not only act as vigilant sentinels of the orders they make, but also those made by the Adjudicator. It is in the interest of the community at large for courts to also guard jealously orders made by the Adjudicator. I submit that failure to comply with the Adjudicator's determination constitutes the unlawful and intentional violation of the dignity, repute and/or authority of the Adjudicator and her office. Non-compliance with such determinations should be seen as a deliberate effort of making a mockery of the Adjudicator's efforts in ensuring that justice within the retirement industry is achieved.

5 Conclusion

It is hoped that this note would spark debate around this issue, which would induce the legislature to respond by creating a mechanism to ensure that Adjudicator's determinations, in instances where execution is not competent, are enforced. With the recommended deeming provisions, the applicant in his or her application for committal to prison for deemed contempt of court must also in order to be successful, prove the contempt beyond reasonable doubt, that there is an underlying determination issued by the Adjudicator and that the respondent with the knowledge of the order nonetheless deliberately failed to comply with it.

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Onlangse regspraak/Recent case law

Minister of Police v M 2017 38 IJL 402 (LC)

Hearsay evidence and the testimony of child witnesses.

1 Introduction

Children are often the victims of acts of physical or sexual violence, or bear witness to criminal acts. Consequently, these children may be called upon to testify to these acts of violence in a court of law. While the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) addresses procedural issues relating to a child witness, for example that the child does not have to be in the same room as the accused when testifying (see s 170A of the Criminal Procedure Act), the evidential rules applicable to the evaluation of the child's testimony remain the same, irrespective of the age of the witness. A child who is unable to give evidence due to the child, for example, not meeting the competency test, will not be able to rely on someone to tell his or her story to the court, as hearsay is not allowed. A report made to a mother, guardian, social worker or police officer identifying the perpetrator and depicting the event may, hence, be inadmissible as evidence, as this will amount to hearsay, unless the court finds it to be in the interest of justice to admit it. (Zeffert & Paizes *Essential Evidence* (2010) 139).

The purpose of this discussion is to investigate the application of the hearsay-rule to children's evidence not given in testimony during court procedures. A recent decision in a Labour Court dispute, *Minister of Police v M* (2017 38 IJL 402 (LC) *(Minister of Police v M*)), shed valuable light on the applicability of the hearsay rule to a child's evidence. Though this case was decided in the Labour court, the discussion will not *per se* focus on the decision to admit the hearsay evidence, but on the way in which the hearsay evidence was evaluated, as well as the court's finding with regard to the application of the hearsay rule to child witnesses.

2 The Hearsay Rule in Evidence

The term 'hearsay' refers to the situation where a witness reports, during the course of court proceedings, what he or she has heard (from another person) or read. According to section 3(4) of the South African Law of Evidence Amendment Act 45 of 1988 (the Law of Evidence Amendment Act) hearsay is defined as 'evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence'. Various reasons have been

How to cite: Bekink '*Minister of Police v M* 2017 38 IJL 402 (LC)' 2017 *De Jure* 186-194
http://dx.doi.org/10.17159/2225-7160/2017/v50n1a11

advanced for the exclusion of hearsay evidence, the most compelling being that it is unreliable evidence and may, therefore, mislead the court. It is deemed to be unreliable because the person who witnessed the facts is not present to tell the court under oath what he or she observed. The absence of the original observer prevents the evidence from being subjected to cross-examination (Schmidt & Rademeyer *Law of Evidence* (2013) para 18 1).

The hearsay rule originates from the English common-law and was incorporated as part of the South African law of evidence through legislation. In terms of the English common law evidence so labelled should be excluded uncompromisingly unless it can be accommodated within a recognised exception (Schmidt & Rademeyer para 18 1. See also *Vulcan Rubber Works (Pty) Ltd v SAR & H* 1958 3 SA 285 (A); S *v Mpofu* 1993 3 SA 864 (N)). This remained the position until 1988, when the Law of Evidence Amendment Act brought about some changes, replacing the system with a more flexible approach. Although there is still a general rule against hearsay, the new approach gives courts the power to admit hearsay evidence in cases where the traditional hearsay dangers are either satisfactorily accounted for, or are insufficiently significant (Zeffert & Paizes 135).

Section 3 of the Law of Evidence Amendment Act has introduced three main exceptions to the rule against hearsay. In terms of this section, hearsay may be admitted by agreement; where the person upon whose credibility the probative value of the evidence depends himself or herself testifies at such proceedings; or where the court, having regard to seven listed factors, is of the opinion that such evidence should be admitted in the interests of justice (see s 3 (1)(*a*)-(*c*)).

These exceptions are of significant importance to child witnesses and may prove to be of assistance in instances where a child is unable to give evidence at a trial. In terms of the three exceptions, a report made to a third party (such as a mother, guardian, social worker or police officer) may be admissible if the opposing party agrees to its admission, the child himself or herself testifies at the trial, or the court allows it in terms of its general discretion to admit hearsay evidence when the interests of justice demand it. It is doubtful whether any opposing party in a criminal proceeding would consent to the admission of such evidence. The second category is not applicable as the child does not want to testify or is not allowed to do so, for example where a child does not meet the competency test. The third category may hence prove to be the only means through which to submit children's hearsay evidence (Zeiff 'The child victim as witness in sexual abuse cases-a comparative analysis of the law of evidence and procedure' 1991 *SACJ* 21 31).

Section 3(1)(*c*) affords the court with the right to admit hearsay evidence if, according to the court's discretion, this is in the interests of justice. In considering the interests of justice and in deciding how much weight should be afforded to the hearsay evidence, certain factors must

be taken into account by the courts. These factors include the nature of the proceedings; the nature of the evidence; the purpose for which the evidence is tendered; the probative value of the evidence; the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; any prejudice to a party which the admission of such evidence might entail; and any other factor which should in the opinion of the court be taken into account (see s 3(1)*(c)*). The court therefore has to weigh up all the factors in exercising its discretion to admit the hearsay evidence. This provision is the most far-reaching of the three exceptions and has revolutionised the approach to hearsay evidence (Zeffert & Paizes 139). According to Zeffert and Paizes this all depends however, on how far the courts will be prepared to go in exercising the powers given to them in terms of section 3(1)*(c)*. Valuable guidance with regard to the interpretation of section 3(1)*(c)* was provided in the case of *Minister of Police v M*.

3 *Minister of Police v M*

The case concerns a young girl, K, who was sexually abused and raped by her father; RM. The abuse lasted over a period of four years, starting when she was fourteen years old. During this time, RM was employed as a police officer in the VIP protection unit of the South African Police Service (SAPS) (par 8-17). At the age of eighteen K finally reported the matter to a social worker. This resulted in RM being arrested (par 17). After RM's arrest in 2009 he faced both a criminal trial and a disciplinary hearing in which it was alleged that by violating his minor child he had contravened the SAPS code of conduct (par 1-2).

K testified against her father at the internal disciplinary hearing. Her testimony was corroborated by two other witnesses who were present in the house where some of the sexual assaults/rape allegedly occurred. RM was represented by a union representative at the disciplinary hearing. The witnesses were cross-examined by the representative. RM also testified in his own defence and was cross-examined (par 3-4). The presiding officer of the disciplinary hearing, who ran the hearing in a 'tight, fair and professional manner' (par 24), found RM guilty on the charges and he was discharged (par 24). The entire disciplinary hearing was electronically recorded and transcribed by a professional transcription service (par 27).

RM lodged an internal appeal, but was unsuccessful. He then referred an unfair dismissal dispute to the Safety and Security Sectoral Bargaining Council (SSSBC) for arbitration (par 5). As the arbitration constituted a new hearing, the evidence had to be introduced *de novo*. At this point the victim, K, informed SAPS telephonically that, due to the trauma experienced during the disciplinary hearing and the fact that she was in therapy, she refused to testify again. Despite the employer requesting subpoenas for K and the other two witnesses to attend the arbitration, these could not be served due to the fact that insufficient information as to their whereabouts were available (par 5). Consequently, the employer,

SAPS, had to rely on the transcripts of the internal disciplinary hearing to prove the substantive fairness of RM's dismissal. SAPS applied to have the transcripts admitted as hearsay in terms of section 3(1)*(c)* of the Law of Evidence Amendment Act, namely that it was in the interests of justice (par 6). The commissioner agreed to admit the transcripts as hearsay, but found the weight of the evidence derived from the transcripts against RM 'minimal without additional testimony or documents substantiating the allegations'. The commissioner consequently found RM's dismissal substantively unfair and reinstated him. The Minister of Police challenged this decision in the Labour Court before Whitcher J (par 7).

In evaluating the matter, Whitcher J highlighted that the commissioner correctly admitted the transcripts as hearsay evidence, since they were plainly relevant to the issue in dispute, and SAPS had a good reason for the absence of its main original witness (par 34). The matter however, rested on the question of what *weight* this hearsay evidence should be afforded (par 35). The judge underscored the difficulty in deciding on this matter. She stated that she had some sympathy for the approach adopted by the commissioner in not readily being prepared to ascribe significant weight to the transcripts, unless they were corroborated by other evidence (par 35). Nonetheless, she pointed out, while it may be an error or irregularity to attach too much weight to hearsay evidence, the opposite may be equally true. Not giving hearsay evidence sufficient weight may also constitute a material error or irregularity (par 35-37).

According to Whitcher J, the present case represented an example of a case in which the hearsay evidence was not afforded sufficient weight, in that the commissioner did not seem to realise that the transcripts were no ordinary hearsay, but were 'hearsay of a special type' (par 37). This distinctiveness could be attributed to the fact that the transcripts comprised a bilateral and comprehensive record of earlier proceedings in which the child victim's evidence was corroborated by at least two other witnesses, with the evidence withstanding rigorous cross-examination and in which RM's own defence was 'ventilated and exposed as being implausible' (par 37). Transcripts such as the ones in the present case, Whitcher J stated, must be afforded greater intrinsic weight than simple hearsay (such as a witness statement handed up during the course of a hearing), because they constitute a comprehensive and reliable record of a prior quasi-judicial encounter between the parties (par 40).

Whitcher J concluded that 'in appropriate factual circumstances' hearsay, such as a transcript of a properly run internal hearing, might carry enough weight to require of the accused employee to rebut the allegations contained in the hearsay. According to the judge, a reasonable decision-maker would have appreciated that the transcripts did not contain mere allegations, but rather tested allegations and a contested denial. As such, the transcripts constituted *prima facie* evidence of RM's wrong-doing (par 43). A number of guidelines for what would constitute appropriate factual circumstances to depart from the

norm, as in this case, were set out by the court. In terms of these guidelines, the hearsay should: be contained in a record which is reliable accurate and complete; be tendered on the same factual dispute; be bilateral in nature; be in respect of the allegations; demonstrate internal consistency and some corroboration at the time the hearsay record was created; show that the various allegations were adequately tested in cross-examination; and have been generated in procedurally proper and fair circumstances (par 45). Whitcher J subsequently ordered that the arbitration be set aside and that the matter be heard again before a new commissioner (par 52).

4 Analysis and Comments

It is submitted that the decision and conclusions in *Minister of Police v M* are correct and should be supported for the following reasons:

Firstly, Whitcher J highlighted the difficulty experienced by presiding officers in evaluating hearsay evidence once they have exercised their discretion to introduce hearsay evidence in a given situation. She underlined the importance of striking a balance between giving hearsay evidence too much or too little weight (par 36). This becomes even more difficult when the hearsay is admitted in terms of the sec 3(1)*(c)*. When hearsay is admitted in the interest of justice, the general rules of evidence should be applied in deciding how much weight to afford to the hearsay evidence. These factors include the nature of the proceedings; the nature of the evidence; the purpose for which the evidence is tendered; the reason why the evidence is not being given by the person upon whose credibility the probative value of such evidence depends; any prejudice to a party which the admission of such evidence might entail and any other factor which should in the opinion of the court be taken into account (see s 3(1)*(c)* of the Law of Evidence Amendment Act). Three of these factors received specific attention in the evaluation of K's account of the case, namely the nature of the evidence; the prejudice to the party which the admission of such evidence might entail and the reason why the evidence was not being given by the person upon whose credibility the probative value of such evidence depended.

With regard to, *inter alia,* the nature of the evidence Whitcher J pointed out that the specific hearsay evidence was 'of a special type' in that it comprised a bilateral and comprehensive record of earlier proceedings. This evidence was furthermore corroborated and survived competent testing by way of cross-examination (par 37). The court stressed that the main argument against affording any weight to hearsay evidence is the fact that it cannot be subjected to cross-examination as the source of the evidence is not present and is it thus prejudicial to the party against whom the hearsay evidence should be tendered (par 41). However, in the scenario under discussion the hearsay evidence was a record of the *source* actually being cross-examined in quasi-judicial proceedings (par 41). The main argument against affording weight to the evidence was thus addressed by the fact that the hearsay evidence was subjected to

cross examination and that the cross examination was also recorded. Also, the prejudice to the party against whom the hearsay record was to be tendered was reduced, in that the party was not deprived of an opportunity to cross-examine the witness but of a *second* opportunity to cross-examine the witness (par 42). The contention by Whitcher J that such evidence should in appropriate circumstances be afforded greater intrinsic weight than simple hearsay evidence (such as a witness statement) is supported.

The second consideration in determining the weight to be afforded to hearsay evidence is the absence of the person at the hearing, upon whose credibility the probative value of such evidence depended. Whitcher J held that, the fact that the child victim was 'not prepared to go through this trauma any longer' and was receiving therapy which would be compromised if she had to testify again, as cogent reasons not to testify (par 48). The acceptance of K's evidence based on the aforementioned reasons is welcomed but the value of this judgment lies in the weight the Court afforded the hearsay evidence. The implication of this finding is that vulnerable victims do not have to give evidence more than once in circumstances where a formal hearing took place and the victim's evidence as well as the cross-examination of the evidence is properly recorded.

Whitcher J confirms this viewpoint when she states that the system (in instances such as these) envisages that a class of vulnerable victims, such as children, would have to testify at least twice before an offending employee could be removed from service (par 49). However, this state of affairs is not restricted to labour disputes. Although not specifically addressed in the case of *Minister of Police v M* the fact that RM was charged of raping his daughter presupposes a separate criminal prosecution (par 1). In order to succeed with a criminal conviction of rape and sexual assault against RM, K would in all probability have to testify in a criminal court to the acts of violence.

It is widely accepted that children experience secondary traumatisation when having to testify (secondary victimisation has been defined by the United Nations in its United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse, 1985 (GA/RES/40/30) as 'the victimisation that occurs not as a direct result of a criminal act, but through responses of institutions and individuals to the victim'). In *Director of Public Prosecution, Transvaal v Minister of Justice and Constitutional Development* (2009 2 SACR 130 (CC) at par [28]) the Constitutional Court highlighted this difficulty by stating that the court experience can often be as traumatic and as damaging to the emotional well-being of the child witness as the original abusive acts. This secondary traumatisation may increase with numerous court appearances. It is thus understandable that child witnesses may be reluctant to testify the first time let alone for a second or a third time.

Whitcher J points out that one way of avoiding multiple court appearances and of minimising the secondary traumatisation suffered by vulnerable witnesses, such as children, is to ensure that a complete record of a procedurally fair enquiry is recorded. Presiding officers overseeing such matters should thus take particular care to ensure that the record is accurate and complete and conducted with fairness to all the parties involved in order to safeguard its future use. The transcript of the initial internal hearing can then in appropriate factual circumstances be relied upon should the original witness not be in a position to testify again (par 49-50).

The criminal prosecution of RM will, similar to the arbitration, amount to a new hearing and the evidence will have to be presented *de novo*. Transcripts from the original disciplinary hearing will amount to hearsay evidence and the criminal court will have to exercise its discretion in terms of section 3(1)*(c)* of the Law of Evidence Amendment Act in deciding whether it will be admitted and once it has admitted the evidence, what probative value to ascribe to it.

This judgment provides guidelines not only on the admittance of hearsay evidence in the interest of justice but also on the weight to afford such evidence. The acceptance of hearsay-evidence based on a discretion (that is whether it is in the interest of justice) has been met with reluctance, especially in criminal cases (Zeffert & Paizes 139; see for example also *S v Cekiso* 1990 4 SA 20 (E) at 22A, where hearsay evidence on 'controversial issues upon which conflicting evidence has already been given' was disallowed).

In *S v Ramavhale* (1996 1 SACR 639 (A) at 647-648) the court stated that it has an 'intuitive reluctance to permit untested evidence to be used against an accused' in a criminal case as an accused person 'usually has enough to contend with without expecting him to engage in mortal combat with an absent witness'. It also emphasised that 'a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there is compelling justification for doing so' (1996 1 SACR 639 (A) at 649*d-e*). The importance of this caution was emphasised in *S v Ndlovu* (2002 2 SACR 325 (SCA) at 337-338) where Cameron JA held that a trial court, in applying the hearsay exceptions, must be scrupulous in ensuring respect for the fundamental right of the accused to a fair trial. Cameron JA concluded, however, that where the interests of justice require the admission of hearsay, the provision 'does not require the absence of all prejudice' (at 348). In *S v Shaik*, (2007 1 SA 240 (SCA)) a case where the conviction of the appellants on some of the charges depended heavily on hearsay evidence, the Supreme Court of Appeal received the evidence, stating that 'sight should not be lost of the true test for the evidence to be admitted, and that is whether the interest of justice demands its reception' (at par [171]). The aforementioned case law clearly illustrates the difficulty faced by courts of law in striking a balance between the need to protect the interests of the victim and of that of preserving the

rights of an accused. The guidelines provided in *Minister of Police v M* should assist courts in addressing the concerns expressed with regard to not only the admittance of hearsay evidence in the interest of justice but also the subsequent weight such evidence should be afforded. The application of these guidelines to criminal cases is supported by the statutory exception against the hearsay rule set out in section 214 of the Criminal Procedure Act.

In terms of section 214(a)(ii) of the Criminal Procedure Act the evidence of any witness recorded at a preparatory examination, shall be admissible in evidence on the trial of the accused following upon such preparatory examination if it is proved to the satisfaction of the court that:

- the witness is incapable of giving evidence;
- that the accused, or as the case may be, the state had a full opportunity of cross-examining of such witness;
- and the evidence tendered is the evidence recorded before the magistrate, or as the case may be, the regional magistrate.

Such evidence may also be admissible in terms of section 214(b) of the Criminal Procedure Act, if such witness cannot, after a diligent search, be found for purposes of the trial of the accused following upon such preparatory examination or cannot, in the discretion of the court, be compelled to attend such trial (see for example also *R v Matyeni* 1958 (2) SA 573 (EC); *R v Malan* 1948 (2) SA 327 (T)).

Section 235(1) of the Criminal Procedure Act sets out how the evidence in such previous proceedings may be proved in criminal proceedings. In terms of section 235(1) it constitutes sufficient proof of the original record of judicial proceedings if a copy of such record is certified as true, or purports to be certified by the registrar or clerk of the court or by someone who transcribed the proceedings or by other specified officials. Such a copy is deemed as *prima facie* proof that its contents were correctly recorded. It does not prove that the accused actually committed the act, but proves that the witness said what the record portrays. Whether the court made the correct finding has to be decided afresh (Hiemstra *Suid Afrikaanse Strafproses* 4 ed (1987) 473-474).

It is submitted that although, the use of preparatory examination have virtually disappeared in practice, the aforementioned two sections provides solid evidential rules for allowing hearsay evidence in circumstances as described in *Minister of Police v M,* in criminal cases, thereby safeguarding the rights of the accused.

5 Conclusion

The case of *Minister of Police v M* illustrates the importance of allowing hearsay evidence of children in appropriate circumstances and affording it the weight it deserves. Valuable guidance is provided by the Court in as

far as the evaluation of the probative value of hearsay evidence 'of a special type' is concerned. Constructive guidelines are furthermore provided to minimise the trauma of numerous court appearances for child witnesses which includes thorough and proper recording of procedurally fair enquiries. By applying these guidelines it is envisaged that a balance will be struck between the best interest of the child witnesses and the right to a fair trial of the accused in criminal cases.

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* I wish to express my sincere gratitude to Professor Sunette Lötter and the anonymous reviewers for commenting on a draft of this case comment. Any remaining errors are mine.

Reconsidering 'emotionally transmitted debt' in Zimbabwe and proposals for the reform of surety law based on English and South African experiences

1 Introduction

Since the dawn of history, commerce and, especially, the existence of credit have been linked with the need to indemnify the creditor or guarantee recovery of the borrowed amount (see Morgan 'History and economics of suretyship' 1927 *Cornell L. Rev*. 12 153; Russell *Surety Bonds for Construction Contracts* (2000) 9; Arnold 'The compensated surety' 1926 *Col. L. Rev*. 26 171). As an instrument of minimising loss exposure, the contract of suretyship – both in the corporate and personal contexts – has gained increased importance in modern times (see generally Forsyth and Pretorius *Caney's the Law of Suretyship in South Africa* (2002); Gallagher *The Law of Suretyship* (2000)). Underlying its economic function is an acknowledgment that security is critical for the consummation of business activities; the availability of credit plays a facilitative role in boosting the economy through for instance, the creation of investment and employment (see Pretorius 'Unlimited suretyships' 2012 *Journal of Contemporary Roman-Dutch Law* 75 189; Madhuku 'Protection of the surety under Zimbabwean law'1997 *Journal of African Law* 41 1 68). In fact, '… the provision of credit for trade and industry stimulates production and encourages enterprise as well as helping individuals and businesses over difficult economic times' (Cork 'Report of the Review Committee: Insolvency Law and Practice' (1982) 12 para 20. See also Gallagher *The Law of Suretyship* ((2000) 3-41).

How to cite: Kawadza 'Reconsidering 'emotionally transmitted debt' in Zimbabwe and proposals for the reform of surety law based on English and South African experiences' 2017 *De Jure* 194-201
http://dx.doi.org/10.17159/2225-7160/2017/v50n1a12

Regrettably, despite the obvious beneficial outcomes, the growth of suretyship has also been linked to characteristic social and economic risks, especially to the surety. One such risk pertains to the emergence of the so-called 'emotionally transmitted debt' problem; a situation where one's decision to execute the deed of suretyship is swayed more by emotional ties or relational influences than by an awareness of the financial risks or the existence of economic benefits associated with the transaction. It is the recriminations and prejudicial consequences of such transactions that have led to the categorisation of some of these contracts as 'unfair suretyships' (see for instance Ciacchi and Weatherill (eds) *Regulating Unfair Banking Practices in Europe: the Case of Personal Suretyships*' (2010) 3; Kenny 'Standing surety in Europe: Common core or Tower of Babel? 2007 *Modern Law Review* 70 2 175). These are encapsulated roughly as 'suretyships entered into by consumers for the benefit of close relations or employers, whereby the surety has nothing to gain financially and faces the risk of lifelong indebtedness or severe financial loss, i.e. the loss of the matrimonial home' (Heine and Janal 'Suretyships and consumer protection in the European Union through the glasses of law and economics' in Ciacchi and Weatherill (eds) *Regulating Unfair Banking Practices in Europe: The Case of Personal Suretyships*' ((2010) 5; Pretorius 'Unlimited suretyships' (*supra*)). The consequence has been calls for the exercise of caution in cases where there is evidence of a relational connection. Primarily, this has been the case, due to the fear that consent to suretyship might be connected to, or involves, deferential trust. Such trust is said to be deferential:

> in the sense that the trusting person will defer to the judgment of the trusted person. The deference may be total, or it may only be partial or situational. It is accompanied, in some cases, by elements of necessity, dependence or submission. In other cases there is no demonstrated vulnerability. But the trusted person knows that his or her judgment is being relied on in the circumstances (Flanigan 'The fiduciary obligation' 1989 *Oxford Journal of Legal Studies* 285, 286. See also *Johnson v Buttress* (1936) 56 CLR 113; Bigwood *Exploitative Contracts* (2003) 411).

It is, therefore, the potential for unfairness to arise which has justified the reconsideration, renegotiation and redefinition of the boundaries, and, indeed, the nature, form and principles that underpin the contract of suretyship in most European countries (see Ciacchi and Weatherill (eds) *Regulating Unfair Banking Practices in Europe: the Case of Personal Suretyships*' (*supra*) 3; Kenny 'Standing surety in Europe: Common core or Tower of Babel?' (*supra*)). It is the purpose of this note to propose, or, at the very least, to increase the likelihood of a paradigm shift in the current Zimbabwean approach to the law of suretyship in light of the recent case of *FBC Bank Ltd v Dunleth Enterprises (Pvt) Ltd,* and to suggest alternatives based on exemplary approaches from a growing body of scholarship and jurisprudence. In particular, this note seeks to highlight England's approach to this issue. England and South Africa have been chosen for a simple reason, namely that they have managed to come up with strategies that are more effective aimed at addressing this subject.

As such, South Africa and England present models that Zimbabwe could embrace with a view to crafting a regulatory approach that aligns suretyship with both economic and public policy principles.

2 The Facts

The principal debtor and the fifth defendant (hereafter 'the surety'), who were related, had executed an unlimited guarantee in favour of the plaintiff, FBC Bank Limited, a Zimbabwean commercial bank (hereafter 'FBC'). The surety accomplished this by availing her immovable property to FBC by way of a deed of hypothecation and guarantee. When the principal debtor defaulted, FBC instituted a claim against the defendants for the payment of USD 685 442.42, being the amount lent out, plus interest and costs associated with the subsequent litigation. Although she admitted that she signed the deed of suretyship, the surety argued that she was not liable for the whole amount borrowed by the principal debtor. In her submission, the surety argued that she had been approached by her relative (the principal debtor) who requested to use her property as security for the loan he intended to acquire from FBC. Further, she contended that he had assured her that the total loan amount would be USD 150 000.

Although she never met any of FBC's officials, the surety nonetheless signed the deed of suretyship delivered to her by an employee of the principal debtor. She argued that said document had blank spaces, which were filled in after she had signed the form. She also averred that it was never brought to her attention that the principal debtor would make further borrowing on top of the USD 150 000 which she had been assured was the limit of that facility. As such, she maintained that her liability only extended to that amount and not anything in excess. It was also her contention that by virtue of this limit, she was released from liability when the principal debtor made payments in excess of the USD 150 000, a claim which the court dismissed. She also stated that the principal debtor had guaranteed that he would repay the debt within three months which would culminate into her property being released.

To the extent that she was misled, the surety placed the blame squarely and solely at the doors of her relative, the principal debtor. In its judgment, the Zimbabwean High Court stated that by signing the deed of suretyship, she had assumed liability by operation of the *caveat subscriptor* doctrine. Judgment was accordingly given in favour of FBC.

3 Evaluation and Proposals for Reform

FBC Bank Ltd v Dunleth Enterprises (Pvt) Ltd serves to establish two elements of the Zimbabwean approach to suretyship. Firstly, it proves that the concept of suretyship does not classify or differentiate such transactions in terms of 'unfairness' and, secondly, it manifests a regime that is indifferent as to whether the contract was a culmination, or not, of an underlying relational proximity between the principal debtor and

the surety. As such, cases like *FBC Bank Ltd v Dunleth Enterprises (Pvt) Ltd* are not uncommon (see for instance *Vito v Vito* [2008] ZWHHC 73; Madhuku 'Protection of the surety under Zimbabwean law'(*supra*)). In other jurisdictions, comparable cases to *FBC Bank Ltd v Dunleth Enterprises (Pvt) Ltd* have prompted a rethink in the enforcement of contracts of suretyships. It is those jurisdictions' experiences and the subsequent academic discussions that emerged, as well as the persuasive judicial responses that were triggered, that reasonably engender expectancy for a rethink of the current Zimbabwean approach with the objective of making it responsive to the potential prejudices embedded in such tripartite transactions.

As alluded to above, other regimes demonstrate a growing consciousness of the possibility that, depending on the proximity of the relationship between the debtor and surety, the surety might be persuaded to conclude economically unfair contracts (see Devenney, Fox and Kenny 'Standing surety in England and Wales: The sphinx of procedural protection' 2008 *Lloyd's Maritime and Commercial Law Quarterly* 394). However, the settled law in Zimbabwe – as exemplified by *FBC Bank Ltd v Dunleth Enterprises (Pvt) Ltd* – has not given any attention to the concept of 'unfair suretyship'. Neither does it seek to investigate the clarity or the contractual terms' fairness. This is lamentable, especially considering that

> [t]he printed documentation used by banks is of such length, complexity and obscurity that is unlikely to be read let alone understood by private guarantors who lack training or appropriate business experience. They are treated by banks as contracts of adhesion discouraging any attempt to modify any of their terms. *They are often unduly favourable to the bank and excessively onerous to the surety'* (Lord Woodhouse in *Royal Bank of Scotland plc v Etridge* (No 2) [2001] UKHL 44 at 111)(*My emphasis*).

As such, the Zimbabwean position is still captive to general legal doctrine and rigid common law principles which hold that, in the absence of duress or undue influence (see e.g. *Muza v Agricultural Bank of Zimbabwe Ltd*. (22/02) ((22/02)) [2004] ZWSC 138 (05 October 2004); *Johnson v AFC* 1995 (1) ZLR 65), the surety is deemed to have acted consistently with her liberty, as long as it can be shown that her will was not 'subordinated', 'surrendered', 'dominated', 'controlled', 'subverted' or 'overcome' (Bigwood *Exploitative Contracts* (2003) 374; Madhuku 'Protection of the surety under Zimbabwean law' (*supra*)).

What needs to be understood is the fact that '[i]t is not a matter of mental power, forcefulness, or weakness that is at issue, or mere forcefulness versus weakness of mind' (Bigwood *Exploitative Contracts* (*supra*) 375). Therefore, the Zimbabwean approach needs to take cognisance of facts besides domination and control as factors indicating lack of consent,

> [t]here may have been misplaced trust or reliance, but the victim still acts 'intentionally', perhaps even acceding to the transaction euphorically … what

> the ascendant party does in the undue influence context … is wrongfully make the option put to the subservient party (ie, of entering into the transaction in question) appear to be a reasonable thing to do in the circumstances (Bigwood 'Undue influence: 'Impaired consent' or 'Wicked exploitation'?' 1996 *Oxford J Legal Stud* 16 503 p 511. See also Birks and Chin 'On the nature of undue influence' in Beatson and Friedmann (ed), *Good Faith and Fault in Commercial Law* (1995) 76).

In a contextual exemplification of said misplaced trust or reliance, the court *in casu* indicated that 'the fifth defendant [surety] stated that she was *assured* by the second defendant (the debtor) that he would repay the loan to the plaintiff within three months and that her security was required just for that period [my emphasis]', an averment which the principal debtor refuted in court. The court further noted that, in the case of FBC, neither the bank, nor its employees assured the surety of a limit to her liability in terms of the suretyship. Thus while her transactional assent was not as a result of force, it nonetheless may have been wrongful in that it might have been a culmination of undue influence and, thus, an exploitative use of special trust. Clearly, in the absence of any direct communication between the creditor and surety, it is reasonable to speculate that there might have been an error in judgment, arising out informational asymmetry created by the principal debtor's influence.

While correctly noting that the contract of suretyship was between the FBC and the surety, the court nevertheless did not closely examine this risk, and, instead, relied on the *caveat subcriptor* doctrine to rule in favour of the bank. Furthermore, having noted that the surety and principal debtor were related, the High Court nonetheless did not concern itself with the factors that gave rise to the surety's assent.

It is, therefore, clear that there is currently no tool at the Zimbabwean court's disposal to judge the suretyship contract on the basis of any influence that the principal debtor might have had on the surety. It is on this basis that Zhou J disregarded the fact that

> any close relationship implies a certain amount of influence of one person upon the other party. In asking a relation to act as surety, the principal debtor may be exerting undue influence, either in terms of excessive pressure, emotional blackmail, or by abusing the trust and confidence the prospective surety has reposed in the principal debtor … Second, even if the prospective surety is fully informed about the risks of the transaction and the principal debtor does not overbear his or her will, the desire to assist the close relation in his or her ventures may lead this person to act 'irrationally' in assuming the risk …' (Heine and Janal 'Suretyship and consumer protection in the EU' in Ciacchi and Weatherill *Regulating Unfair Banking Practice in Europe. The Case of Personal Suretyships* (*supra*) 13.

Perhaps it would be helpful if a rule could be developed to place the onus on the creditor to ensure that the suretyship is fair.

Understandably, ascertaining the absence of fair dealing affecting transactional consent is by no means an easy feat to achieve (JT Pretorius 'Unlimited suretyships' (*supra*) 195). The practical hindrances stem from the reality that '[t]he limits of persuasion are in general more difficult to discern than the limits of coercion … since the latter are generally linked to a background scheme of rights…' (Bigwood *Exploitative Contracts* (*supra*) 374. Thus, 'influence' is an abstract concept, which encapsulates not only coercion but also any form of 'fiduciary influence', which may be manifested in *inter alia,* reckless and misleading statements. The underlying factor is that

> regardless of how the influence is exercised … (for example, pressure, flattery, advice, argument, pleading, intercession, non-disclosure, and the like), the fact that such influence is successfully employed at all … affords a sufficient exculpatory reason (again, all things being equal) to reverse the impugned transaction …' (Bigwood *Exploitative Contracts* (*supra*) 380).

In view of the challenge that the surety faces to exculpate themselves, it has been argued that on public policy grounds, the onus should be on the creditor to show firstly, that the suretyship was the culmination of an independent act and further, that the surety exercised free judgement on the basis of full information that was the debtor was privy to. More specifically, the presumption should be whether at the time of transactional assent the parties were in a special relationship that gave the creditor some capacity to influence or control the decision making of the surety (*Barclays Bank v O'Brien* [1994] 1AC 180; Bigwood *Exploitative Contracts* (*supra*) 425).

It has been suggested that this could be accomplished, *inter alia,* by doing away with the terminological rigidity – especially as it is impossible to capture the qualities of a special relationship in a precise label or phrase. This is one area where section 64 of the South African National Credit Act (Act No. 34 of 2005) may be commended. It requires that documents to be drafted in plain language that a person of average literacy skills would understand. Unfortunately, Zimbabwe is yet to enshrine similar protection.

Needless to say, that the proximity should be contextually and loosely interpreted to include trust and confidence (*Etridge* (*supra*) 1030, para 11 per Lord Nicholls; Bigwood *Exploitative Contracts* (*supra*) 427). Furthermore, although closeness giving rise to relational influence has customarily been branded as covering cases such as parent-child and guardian-ward (e.g. *Hatch v Hatch* (1804) 9 Ves Jun 292; *Bullock v Lloyds Bank* [1955] I Ch 317), medical adviser-patient (*Mitchell v Homfrey* [1881] 8 QB 587; *Dent v Bennet* (1839) 4 My & Cr 269; 41 ER 105), it is argued that these should not be the only overriding associations. In fact

> [i]nferences should flow from a careful examination of the particular facts rather than from a formal relationship *per se*, although the existence of such a relationship will of course be a vital fact from which inferences of special influence may quite readily be drawn (Bigwood 434).

This laudable approach seems to be premised on the perceived exigencies and practical necessity to reconcile the social and economic implications arising from suretyships. That approach is, therefore, an intersection of commerce and public policy and at the heart of the issue is a need to ensure that certain precautionary steps are implemented. More specifically it would be helpful if Zimbabwean law could require that any creditor who fails to put in place necessary safeguards to satisfy himself that the surety has been sufficiently protected from the potential prejudice arising from her connection with the principal debtor in the surety transaction, and who fails to ensure that the surety has understood the nature and effect of the proposed surety contract, would himself be liable for transactional neglect. There is merit in such proposals. For instance, the inequality inherent in contracts involving financial institutions in particular has led some to observe that,

It is an economic reality today that the terms of the vast majority of deeds of suretyship are dictated to sureties by large financial institutions. These deeds of suretyship are drafted with all the skilled legal advice available and, inevitably, favour the creditor in almost every aspect. In light of the inherent potential inequities and the devastating consequences that may flow from standing surety for somebody else's debt, it is hardly surprising to find that throughout the ages there have been many attempts to lighten the burden of the surety' (JT Pretorius 'Unlimited suretyships' (*supra*) 196. See also for instance *Davids v ABSA Bank Bpk* 2005 (3) SA 361)

Furthermore, there is need to devise mechanisms that might minimise the manifest prejudicial contracts arising from relational factors or influence. One way that Zimbabwe could accomplish this is by way of judicial policy that built around vigilance. Similarly, due diligence on the part of the creditor must include, for instance, a condition that the individual intending to stand as surety be required to attend a meeting with the creditor where the nature and consequences of the contract can be explained. In addition, the potential surety must be required to nominate a legal representative for the purpose of the transaction. That legal representative must provide written confirmation proving that the intricacies of the transaction were explained to the surety. Likewise, a rebuttable presumption of causative and inherent undue influence in suretyships that involve relational proximity in non-commercial suretyships could help.

5 Conclusion

FBC Bank Ltd v Dunleth Enterprises (Pvt) Ltd is salutary because it shines the spotlight on the current approach to suretyships in Zimbabwe. Moreover, it provides a crucial platform upon which the prevailing regime can be analysed. Having done do so, this note argues that *FBC Bank Ltd v Dunleth Enterprises (Pvt) Ltd* translates to a missed opportunity to grapple with the perturbing issue of 'emotionally transmitted debt' in Zimbabwe.

This is not to say that the notion of suretyship in Zimbabwe should be revisited to rescue people from their poor judgment and recklessness, among other follies. Rather, this note entreats for an environment which acknowledges not only the onerous and risky nature of the current law, but also the recognition of the existence of 'unfair suretyships' arising from the possible relational influences in the consummation of such onerous transactions in Zimbabwe. This note, therefore, seeks to provide conceptual proposals for a more equitable approach to the law governing suretyship in Zimbabwe.

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